

AN ALERT FROM THE BDO STATE AND LOCAL TAX PRACTICE

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►SUBJECT

THE OHIO BOARD OF TAX APPEALS AFFIRMED THE TAX COMMISSIONER'S COMMERCIAL ACTIVITY TAX FINAL DETERMINATION ISSUED TO A TAXPAYER WITH TAXABLE RECEIPTS EXCEEDING THE \$500,000 "BRIGHT-LINE PRESENCE" STANDARD.

►SUMMARY

On March 6, 2014, the Ohio Board of Tax Appeals issued its decision in *L.L. Bean, Inc. v. Levin, Tax Commissioner* (No. 2010-2853), in which it affirmed the Tax Commissioner's Commercial Activity Tax ("CAT") final determination issued to a taxpayer on the basis that the taxpayer had a substantial nexus with the state solely because its taxable receipts exceeded the \$500,000 "bright-line presence" standard. The matter is presently on appeal to the Ohio Supreme Court.

►DETAILS

Background

L.L. Bean is a Maine headquartered national retailer that sells to Ohio customers via catalogs sent from outside Ohio, an Internet Web site on L.L. Bean servers located in Maine, e-mails sent from locations outside Ohio, and/or telephone orders taken from call centers located in Maine. L.L. Bean ships product to its Ohio customers via common carrier from locations outside Ohio. L.L. Bean had no direct physical contact with Ohio.

The Issue

Under Ohio's statutes, a CAT taxpayer may have a substantial nexus with the state for a reporting period if it has Ohio taxable gross receipts of \$500,000 or more during the calendar year.¹ L.L. Bean appealed to the Board of Tax Appeals

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¹ Ohio Rev. Code § 5751.01(H) and (I).

from an August 10, 2010, final determination of the Tax Commissioner related to L.L. Bean's quarterly tax periods July 1, 2005, through March 31, 2008. In its appeal, L.L. Bean argued that application of the CAT to the company violated the United States Constitution's Commerce Clause because L.L. Bean lacked a substantial nexus with the state, notwithstanding the fact that L.L. Bean's Ohio taxable receipts exceeded the statutory \$500,000 threshold for each of the tax periods under review.

The Holding and Rationale

The Board of Tax Appeals held that, based upon a plain reading of the statute, L.L. Bean had a substantial nexus with Ohio and affirmed the Tax Commissioner's final determination. The Board of Tax Appeals did not opine with respect to L.L. Bean's constitutional claim because the Board of Tax Appeals lacks jurisdiction to decide a constitutional issue and, as such, was limited to receiving evidence and hearing arguments on L.L. Bean's constitutional claim without deciding the issue.

► BDO INSIGHTS

- *L.L. Bean, Inc.* is the "test case" that will help to determine the constitutionality of Ohio's bright-line receipts nexus standard. However, L.L. Bean only recently appealed the decision to the Supreme Court of Ohio, which means it may be awhile before a final decision is issued.
- The losing party in the Ohio Supreme Court would have to file a petition for writ of certiorari with the United States Supreme Court in order to subject the decision to further review. However, since its decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Court has denied every petition related to a state tax nexus case. As such, while it is often perilous to predict the actions of the Court, it is likely that the Court would deny a petition in this case as well and, thus, it is also likely that a decision issued by the Supreme Court of Ohio will be the final say on the issue under review in *L.L. Bean, Inc.*
- An Ohio Supreme Court decision in this case could have an impact beyond Ohio's borders. More and more states are enacting laws with bright-line receipts nexus standards (*e.g.*, California, Michigan and New York). A taxpayer-favorable decision in *L.L. Bean, Inc.* could be used to support a constitutional challenge to another state's bright-line receipts nexus standard. Conversely, a decision favorable to the Tax Commissioner could be used by another state to support the constitutionality of its bright-line receipts nexus standard.
- The general four-year refund statute applies to CAT refund claims.² Any taxpayer contemplating filing a claim to protect its refund rights in the event of a taxpayer-favorable decision in *L.L. Bean, Inc.* should be mindful of the four-year refund statute. A taxpayer should also consider its classification as a CAT combined or consolidated taxpayer, which may affect the focus of the nexus analysis.

² Ohio Rev. Code § 5751.08(A).

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