



Bailey Cavalieri LLC
ATTORNEYS AT LAW

CLIENT ALERT

September 2010

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Ohio Commercial Activity Tax Decision: Bad News for Out-of-State Retailers September 2010

On August 10, 2010, the Ohio Department of Taxation issued a final determination finding L.L. Bean subject to the commercial activity tax (CAT) based on the statutory bright-line presence test, even though L.L. Bean has no physical presence in Ohio.

L.L. Bean sells and ships goods from outside Ohio to customers in Ohio. Based on that, L.L. Bean argued that these activities by themselves do not allow Ohio to constitutionally impose the CAT. However, the Department of Taxation found that L.L. Bean had sufficient nexus because it met the bright-line presence test.

Bright-line presence is defined to mean a taxpayer that meets any of the following:

- Having at least \$50,000 of property in Ohio;
- Having at least \$50,000 of payroll in Ohio;
- Having at least \$500,000 of gross receipts in Ohio;
- Having at least 25% of its total property, payroll and sales in Ohio; or
- Is domiciled in Ohio.

L.L. Bean met the gross receipts bright-line test above, because it had more than \$500,000 of gross receipts in Ohio during the year.

Relying on the U.S. Supreme Court case, *Quill Corp. v. North Dakota*, the retailer argued that applying the CAT to an entity lacking a physical presence in the state was a violation of the substantial nexus requirement under the Commerce Clause of the U.S. Constitution. However, the Department contends that the holding in *Quill* only applies to sales tax. The Department then rejected L.L. Bean's contention that the CAT is essentially a sales tax because the Ohio Supreme Court last year ruled in *Ohio Grocers Association v. Levin* that the CAT is not a sales tax.

L.L. Bean can appeal this final determination to the Ohio Board of Tax Appeals.

Please contact us for more detailed legal advice regarding how your business will properly address the new tax determination described above.

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