

BRANN & ISAACSON
ATTORNEYS AND COUNSELORS AT LAW

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June 8, 2016

Via UPS Overnight Delivery
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Alabama Tax Tribunal
2 North Jackson Street, Suite 301
Montgomery, AL 36104



RE: NEWEGG INC. NOTICE OF APPEAL
Type of Tax: Sellers Use Tax
Tax ID: 20-3225548
Tax Periods: 1/2016, 2/2016

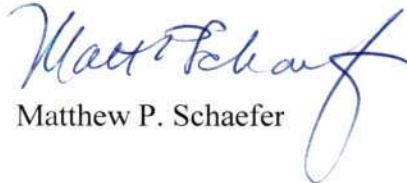
Dear Sir/Madam:

Enclosed please find Newegg Inc.'s Notice of Appeal of the Alabama Department of Revenue's Final Assessment of Sellers Use Tax issued May 12, 2016. I also enclose a Power of Attorney.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

BRANN & ISAACSON


Matthew P. Schaefer

MPS/jl
Enclosures
cc: Matt Strathman (w/encl.)

Alabama Tax Tribunal (w/encl.)
PO Box 327130
Montgomery, AL 36132-7130



ALABAMA TAX TRIBUNAL
Notice of Appeal –
Revenue Department Disputes

www.taxtribunal.alabama.gov

FORM
ATT-1
01/2016

Room 301 • 2 North Jackson Street • Montgomery, AL 36104 • (334) 954-7195

(1) TAXPAYER NAME
NEWEGG INC.

SSN OR FEIN
20-3225548

(2) TAXPAYER MAILING ADDRESS
17560 Rowland Street, City of Industry, CA 91745-1816

(3) TELEPHONE NUMBER
(626) 271-9700

E-MAIL ADDRESS

(4) TAXPAYER'S AUTHORIZED REPRESENTATIVE (IF APPLICABLE)
Martin I. Eisenstein, Esq. and Matthew P. Schaefer, Esq., Brann & Isaacson

(5) AUTHORIZED REPRESENTATIVE'S MAILING ADDRESS
184 Main Street, PO Box 3070, Lewiston, ME 04243-3070

(6) TELEPHONE NUMBER
(207) 786-3566

E-MAIL ADDRESS
meisenstein@brannlaw.com; mschaefer@brannlaw.com

(7) Check the appropriate box below identifying the type of tax you are appealing:

☐ Individual Income Tax ☒ Sales or Use Tax ☐ Withholding Tax ☐ Corporate Income Tax
☐ Business Privilege Tax ☐ IFTA Fuel Tax ☐ Other (please specify) _____

(8) Check the appropriate box below identifying what you are appealing:

☒ Disputed final assessment ☐ Denied refund ☐ Other (please specify) _____

(9) Generally state the facts relevant to your appeal, and why you dispute or disagree with the Revenue Department's action. Attach additional pages if necessary.

Please see attached statement.

(10) Please attach or enclose a copy of the Department's final assessment or notice of refund denial from which you are appealing. You may also submit copies of all records, correspondence, etc. that are relevant to your appeal.

Taxpayer(s) Signature(s) **Matt Strathman, General Counsel**

Authorized Representative (if applicable complete and attach Power of Attorney form 2848A)

Date

Date

Please Complete and Mail To: Alabama Tax Tribunal
2 North Jackson Street, Suite 301
Montgomery, AL 36104

Statement of Newegg Inc.
In Support of Its Notice of Appeal
to the Alabama Tax Tribunal

Newegg Inc. (“Newegg”) submits this statement of the grounds on which it disputes and disagrees with the Notice of Final Assessment of Seller’s Use Tax entered by the Alabama Department of Revenue (“Department”) on May 12, 2016, in the amount of \$186,791.45 (“Final Assessment”). The Final Assessment concerns the months of January and February 2016 (“Assessment Period”) and includes \$154,824.50 in tax, \$1,002.05 in interest, a late filing penalty of \$15,482.45, and a late payment penalty of \$15,482.45. A true and accurate copy of the Final Assessment is attached hereto as Exhibit A.

BACKGROUND

Newegg is an Internet seller with no physical presence in the State of Alabama. It does not own or lease any property in the state, permanently or temporarily, nor does it make any sales within the state. All of Newegg’s sales are interstate sales with orders received, processed, and filled from locations outside the State of Alabama. It does not use independent contractors, brokers, employees, or agents in Alabama to conduct its affairs.

DEPARTMENT’S EXPLANATION OF LEGAL BASIS FOR ASSESSMENT

The Department has asserted a single basis for Newegg’s alleged liability for its failure to collect and remit seller’s use tax during the Assessment Period. Specifically, the Department contends that under Sales and Use Tax Rule Number 810-6-2-.90.03, entitled *Requirements for Certain Out-of-State Sellers Making Significant Sales into Alabama*, Newegg has a “substantial economic presence” in Alabama. The Department has offered no basis for its determination that Newegg satisfied the requirements of Rule Number 810-6-2-.90.03 during the Assessment Period. Its conclusion appears to be based solely upon the fact that Newegg had “significant

sales into Alabama,” *i.e.*, more than \$250,000 of retail sales to Alabama customers. *See* Rule Number 810-6-2-.90.03(1)(a).

NEWEGG’S GROUNDS FOR APPEAL

Newegg disputes the Final Assessment on the following grounds:

(1) Newegg did not (and does not) have the necessary physical presence in Alabama required to satisfy the “substantial nexus” standard for state sales and use taxes under the Commerce Clause of the United States Constitution. *See, e.g., Quill Corp. v. North Dakota*, 504 U.S. 298, 313-19 (1992) (a state lacks the authority to require sales/use tax collection and reporting by a seller whose only connection with the state is via the instrumentalities of interstate commerce); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (an interstate business “must have a substantial nexus with the State before *any* tax may be levied on it”) (italics in original), *citing National Bellas Hess, Inc. v. Illinois Dep’t of Revenue*, 386 U.S. 753 (1967). The lack of the required physical presence in the state by Newegg renders the Final Assessment, and the Department’s attempt to apply Rule Number 810-6-2-.90.03 against Newegg, unconstitutional.

(2) Rule Number 810-6-2-.90.03 is premised upon the application of the Rule to retailers that “*lack an Alabama physical presence.*” *See* Rule Number 810-6-2-.90.03(1) (italics added). The Rule is, therefore, without force or effect because it conflicts with both (a) Alabama’s sales and use tax statutes, including Section 40-23-68, and (b) the requirements of the United States Constitution, each of which requires a physical presence in the state by, or on behalf of, the taxpayer. The Final Assessment entered against Newegg on the basis of Rule Number 810-6-2-.90.03 is, therefore, invalid.

(3) Even assuming that Rule Number 810-6-2-.90.03 has any force or effect, the Department's application of Rule Number 810-6-2-.90.03 to Newegg, an online retailer whose sales are made solely via its Internet website, is inconsistent with Alabama's sales and use tax statutes, including Section 40-23-68, rendering the Final Assessment unauthorized and invalid. None of the provisions of Section 40-23-68, or any other section of the Alabama Code, authorize the Department to impose a seller's use tax collection obligation upon a retailer that makes sales solely via an Internet website and has no physical presence in the state.

(4) The imposition of penalties against Newegg is improper, because the Final Assessment is invalid and because Newegg's position is based upon a good faith understanding of its rights under the U.S. Constitution.

CONCLUSION

For reasons stated above, the proposed assessment should be cancelled in its entirety. Newegg reserves the right to supplement its Notice of Appeal either before or during any hearing held hereon. Newegg respectfully requests that the Tax Tribunal enter the following relief:

- A. Cancel the Final Assessment issued to Newegg;
- B. Award Newegg its attorneys' fees and costs, to the extent permissible by law;
- and**
- C. Award Newegg such further relief as the Tax Tribunal deems just and equitable.



State of Alabama Department of Revenue

(www.revenue.alabama.gov)

50 North Ripley Street
Montgomery, Alabama 36132

Letter Id: L1172608960

MAY 16 2016

NOTICE OF FINAL ASSESSMENT OF SELLERS USE TAX

Mailing Address:

MARTIN I. EISENSTEIN
PO BOX 3070
LEWISTON, ME 04243-3070

Billing ID: 4062015368R



STATE OF ALABAMA
-VS-
NEWEGG INC.
16839 GALE AVE
CITY OF INDUSTRY, CA 91745-1816

Type of Tax: Sellers Use Tax
Taxpayer Identification #: 002062884
Collection Case: 3276189

Account # SLU-R009503075
Form(s): 2620

Under the provisions of § 40-2A-7(b), Code of Alabama 1975, the Alabama Department of Revenue hereby enters a final assessment against the taxpayer named above for the following period(s):
1/2016, 2/2016

Tax	\$154,824.50
Interest	\$1,002.05
Late File Penalty	\$15,482.45
Late Payment Penalty	\$15,482.45
BALANCE NOW DUE	\$186,791.45

You have the right to appeal this final assessment to either the Alabama Tax Tribunal or to circuit court. The appeal must be made within thirty days from the date of mailing or personal service, whichever occurred earlier, and in strict compliance with the procedures located on the reverse of this notice. Failure to pay or appeal this assessment may result in the recording of a tax lien and initiation of collection procedures.

STATE OF ALABAMA
DEPARTMENT OF REVENUE

Entered: May 12, 2016

By: Michael E. Mason
Assistant Commissioner of Revenue

ALABAMA DEPARTMENT OF REVENUE
**Power of Attorney
and Declaration of Representative**



NOTE: If you have questions concerning the completion of this form, please refer to the instructions for Federal Form 2848 (revised March 2012). Alabama Form 2848A is very similar to the federal form.

CAUTION: A separate Form 2848A should be completed for each taxpayer.

PART I – POWER OF ATTORNEY

1 TAXPAYER INFORMATION

TAXPAYER NAME AND ADDRESS (Please Type or Print)

Newegg, Inc.
17560 Rowland Street
City of Industry, CA 91748

SOCIAL SECURITY NUMBER

EMPLOYER IDENTIFICATION NUMBER
20-3225548

DAYTIME TELEPHONE NUMBER
626,271.9700 x22010

I hereby appoint(s) the following representative(s) as attorney(s)-in-fact:

2 REPRESENTATIVE(S) (Please Type or Print) Must sign and date this form on page 2, part II.

NAME AND ADDRESS

Martin I. Eisenstein, Brann & Isaacson
P.O. Box 3070, Lewiston, ME 04243
meisenstein@brannlaw.com

Check if to be sent notices and communications: ☒

TELEPHONE NUMBER (207) 786-3566

FAX NUMBER (207) 783-9325

NAME AND ADDRESS

Matthew P. Schaefer, Brann & Isaacson
P.O. Box 3070, Lewiston, ME 04243
mschaefer@brannlaw.com

Check if to be sent notices and communications: ☐

TELEPHONE NUMBER (207) 786-3566

FAX NUMBER (207) 783-9325

NAME AND ADDRESS

Larry B. Childs, Waller
1901 Sixth Avenue N., Suite 1400, Birmingham, AL 35203-2623
larry.childs@wallerlaw.com

Check if to be sent notices and communications: ☐

TELEPHONE NUMBER (205) 226-5701

FAX NUMBER (205) 214-8787

To represent the taxpayer before the Alabama Department of Revenue for the following tax matters:

3 TAX MATTERS

TYPE OF TAX (Individual, Corporate, Sales, etc.)	TAX FORM NUMBER (40, 20C, 41, 65, etc.)	YEAR(S) or PERIOD(S)
Sellers Use Tax		January, 2016 - Present

4 ACTS AUTHORIZED

Unless otherwise provided below, the representatives generally are authorized to receive and inspect confidential tax information and to perform any and all acts that I can perform with respect to the tax matters described on line 3, for example, the authority to sign any agreements, consents, or other documents. The representative(s), however, is (are) not authorized to receive or negotiate any amounts paid to the client in connection with this representation (including refunds by either electronic means or paper checks). Additionally, unless the appropriate box(es) below are checked, the representative(s) is (are) not authorized to execute a request for disclosure of tax returns or return information to a third party, substitute another representative or add additional representatives, or sign certain tax returns.

☐ Disclosure to third parties; ☐ Substitute or add representative(s); ☐ Sign a return;

EXCEPTIONS

An unenrolled return preparer cannot sign any document for a taxpayer and may only represent taxpayers in limited situations. An enrolled actuary may only represent taxpayers to the extent provided in section 10.3(d) of Treasury Department Circular No. 230 (Circular 230). An enrolled retirement plan agent may only represent taxpayers to the extent provided in section 10.3(e) of Circular 230. A registered tax return preparer may only represent taxpayers to the extent provided in section 10.3(f) of Circular 230. In most cases, the student practitioner's authority is limited.

List any specific deletions to the acts otherwise authorized in this power of attorney: _____

5 RETENTION / REVOCATION OF PRIOR POWER(S) OF ATTORNEY

The filing of this power of attorney automatically revokes all earlier power(s) of attorney on file with the Alabama Department of Revenue for the **same** tax matters and years or periods covered by this document. If you do not want to revoke a prior power of attorney, check here. ☐

YOU MUST ATTACH A COPY OF ANY POWER OF ATTORNEY YOU WANT TO REMAIN IN EFFECT.

6 SIGNATURE OF TAXPAYER

If a tax matter concerns a year in which a joint return was filed, the husband and wife must each file a separate power of attorney even if the same representative(s) is (are) being appointed. If signed by a corporate officer, partner, guardian, tax matters partner, executor, receiver, administrator, or trustee on behalf of the taxpayer, I certify that I have the authority to execute this form on behalf of the taxpayer.

► If this power of attorney is not signed and dated, it will be returned to the taxpayer.



SIGNATURE

4-4-16

DATE

General Counsel

TITLE (if Applicable)

Matt Strathman

PRINT NAME




PART II – DECLARATION OF REPRESENTATIVE

Under penalties of perjury, I declare that:

- I am not currently under suspension or disbarment from practice before the Internal Revenue Service;
- I am aware of regulations contained in Treasury Department Circular No. 230 (31 CFR, Part 10), as amended, concerning the practice of attorneys, certified public accountants, enrolled agents, enrolled actuaries, and others;
- I am authorized to represent the taxpayer identified in Part I for the tax matter(s) specified there; and
- I am one of the following:
 - a. Attorney – a member in good standing of the bar of the highest court of the jurisdiction shown below.
 - b. Certified Public Accountant – duly qualified to practice as a certified public accountant in the jurisdiction shown below.
 - c. Enrolled Agent – enrolled as an agent under the requirements of Treasury Department Circular No. 230.
 - d. Officer – a bona fide officer of the taxpayer's organization.
 - e. Full-Time Employee – a full-time employee of the taxpayer.
 - f. Family Member – a member of the taxpayer's immediate family (i.e., spouse, parent, child, brother, or sister).
 - g. Enrolled Actuary – enrolled as an actuary by the Joint Board for the Enrollment of Actuaries under 29 U.S.C. 1242 (the authority to practice before the Service is limited by section 10.3(d)(1) of Treasury Department Circular No. 230).
 - h. Unenrolled Return Preparer – an unenrolled return preparer under section 10.7(c)(1)(viii) of Treasury Department Circular No. 230.
 - i. Registered Tax Return Preparer – registered as a tax return preparer under the requirements of section 10.4 of Circular 230. Your authority to practice before the Internal Revenue Service is limited. You must have been eligible to sign the return under examination and have signed the return. See Notice 2011-6 and Special rules for registered tax return preparers and unenrolled and return preparers in the instructions.
 - j. Student Attorney or CPA – receives permission to practice before the IRS by virtue of his/her status as a law, business, or accounting student working in LITC or STCP under section 10.7(d) of Circular 230. See instructions for Part II for additional information and requirements.
 - k. Enrolled Retirement Plan Agent – enrolled as a retirement plan agent under the requirements of Circular 230 (the authority to practice before the Internal Revenue Service is limited by section 10.3(e)).

► If this declaration of representative is not signed and dated, the power of attorney will be returned.

Note: For designations d-f, enter your title, position, or relationship to the taxpayer in the "jurisdiction" column.

DESIGNATION – INSERT ABOVE LETTER (a-k)	JURISDICTION (State) or ENROLLMENT CARD NO.	SIGNATURE	DATE
a	Maine		4-5-16
a	Maine		4-5-16
a	Alabama		6-8-16