IN THE SUPREME COURT OF OHIO

DOLLAR BANK, FSB, Appellant,	:	Case No. __________________
v.	:	Appeal from the Ohio Board of Tax Appeals
PATRICIA HARRIS, TAX COMMISSIONER OF OHIO, Appellee.	:	Case No. 2022-1361

NOTICE OF APPEAL

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Patricia Harris, Tax Commissioner

IN THE SUPREME COURT OF OHIO

DOLLAR BANK, FSB,	:	
	:	Case No. _________________
Appellant,	:	
	:	Appeal from the Ohio Board of Tax Appeals
v.	:	
	:	Case No. 2022-1361
PATRICIA HARRIS,	:	
TAX COMMISSIONER OF OHIO,	:	
	:	
Appellee.	:	

NOTICE OF APPEAL

Appellant, Dollar Bank, FSB ("Dollar"), by and through counsel, hereby gives notice of its appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio from the final Decision and Order of the Board of Tax Appeals (the "Board") dated February 20, 2025 in Case No. 2022-1361. A true and correct copy of the final Decision and Order ("Decision") being appealed is attached hereto as Exhibit A and incorporated herein by reference.

INTRODUCTION

In this case, Appellant Dollar challenges the constitutionally of Ohio's Financial Institutions Tax ("FIT") and requests a refund of its FIT paid during Tax Years 2016 through 2020. This is because, as applied to Dollar, the FIT's regressive tax rate structure violates the Commerce Clause of the United States Constitution.

In 2012 the Ohio General Assembly enacted the FIT on banks doing business in the state. R.C. 5726.02, 5726.04. The FIT is not imposed on income, but instead is a function of a bank's "equity capital," which is essentially the net worth of the bank. R.C. 5726.01(S) ("total equity capital"). The FIT is imposed using a variable tax-rate structure. That is, the tax rate varies depending on the amount of the bank's equity capital. Specifically, the FIT is computed using a regressive rate formula where the first $200 million of equity capital is taxed at 0.8%, then 0.4%

for equity capital up to $1.3 billion, and then 0.25% for equity capital over $1.3 billion. R.C. 5726.04(A)(1)(b).

Ohio imposes the FIT not only on Ohio banks, but also on any banks engaged in interstate commerce. R.C. 5726.01 (defining bank organization to include national banks and out-of-state banks). Accordingly, for a bank engaged in interstate commerce, the FIT provides an apportionment formula to determine what portion of a bank's total equity capital is subject to the tax. R.C. 5726.05. Under the statutory apportionment method, the apportionment percentage is applied to the tax base *before* the variable tax bracket is determined. The tax bracket, therefore, is determined based on the amount of tax base apportioned to Ohio. This method of apportionment is problematic because it fails the internal consistency test for determining whether apportionment is fair.

In order for a state tax to be fairly apportioned to both in-state and out-of-state actors, the tax must satisfy the internal consistency test. *Armco v. Hardesty*, 467 U.S. 638, 645–46 (1984); *Cooper Tire & Rubber Co. v. Limbach*, 70 Ohio St. 3d 347, 350 (1994). To determine whether a tax passes the internal consistency test, the following hypothetical question must be addressed: If every state enacted a tax identical to the tax at issue, would an entity doing business in multiple states pay more, in the aggregate, than an otherwise identical entity conducting the same business entirely within a single state? *See Comptroller of the Treasury v. Wynne*, 575 U.S. 542, 562–63 (2015). If the multistate business would pay more than the wholly in-state business, the tax fails internal consistency and is not fairly apportioned. *See id*. at 562–65.

Dollar has consistently asserted that, as applied to Dollar, the FIT fails the internal consistency test because Dollar (a multistate business) would pay more tax than a wholly in-state business if Dollar were subject to a tax identical to the FIT in all states it conducted business. In fact, Dollar presented facts at the Board which showed that it is a multistate bank conducting business in six states. [Decision at 3 ("Dollar Bank is a financial institution headquartered in Pittsburgh, Pennsylvania. It conducts business in Delaware, Florida, Maryland, Ohio, Pennsylvania, and Virginia.").] Dollar also demonstrated that, because of the FIT's structure, Dollar's hypothetical aggregate tax liability under the FIT as a multistate taxpayer exceeds the hypothetical FIT liability of a wholly in-state taxpayer of the same size as Dollar. Specifically, Dollar showed that during the 2017 Tax Year, Dollar had total equity capital of approximately $853 million, and an apportionment percentage of about 19.4%. As a result, Dollar had Ohio equity capital of about $166 million ($853 million x 19.4%), and total FIT liability of $1.3 million.

Dollar also showed that of the remaining 80.6% of its business done outside Ohio, about 74.2% was done in Pennsylvania and about 6.4% was done in other states. By applying a straightforward exercise, Dollar proved that if Pennsylvania had imposed a tax identical to the Ohio FIT, Dollar would have had Pennsylvania tax liability of about $3.3 million for the 2017 Tax Year. And in the other states where Dollar does business (about 6.4% of its business), Dollar would have paid about $0.4 million in tax. Thus, through this example, Dollar showed that if every state imposed a tax identical to the FIT, Dollar would have faced tax liability, in the aggregate, of about $5.1 million. (See Table A below).

Table A

	Ohio		**Pennsylvania**		**Other States**		**Total Tax**
	Equity Computation	Tax Computation	Equity Computation	Tax Computation	Equity Computation	Tax Computation	
Total Equity Capital	$853,794,000		$853,794,000		$853,794,000		
Total In-State Gross Receipts	$53,567,681		$204,496,456		$17,445,140		
Total Everywhere Gross Receipts	$275,509,277		$275,509,277		$275,509,277		
In-State Apportionment	19.4431%		74.2249%		6.3320%		
In-State Equity Capital	$166,004,021		$633,727,652		$54,061,903		
In-State Equity Taxed at 0.8%	$166,004,021	$1,328,032	$200,000,000	$1,600,000	$54,061,903	$432,495	
In-State Equity Taxed at 0.4%	$0	$0	$433,727,652	$1,734,911	$0	$0	
Total Tax		**$1,328,032**		**$3,334,911**		**$432,495**	**$5,095,438**

Meanwhile, Dollar also proved that if Dollar had the same $853 million of total equity capital but had conducted its business entirely within Ohio, its Ohio FIT liability would have been approximately $4.2 million. (See Table B below). That is because a wholly in-state taxpayer would have a large portion of its equity capital taxed at the much lower 0.4% rate; meanwhile, because Dollar is a multistate taxpayer, none of its equity capital is taxed at the lower rate. Rather, as shown by Table A, all of Dollar's equity capital is subject to tax at the highest rate of 0.8%.

Table B

	Ohio	
	Equity Computation	Tax Computation
Total Equity Capital	$853,794,000	
Total In-State Gross Receipts	$275,509,277	
Total Everywhere Gross Receipts	$275,509,277	
In-State Apportionment	100.0000%	
In-State Equity Capital	$853,794,000	
In-State Equity Taxed at 0.8%	$200,000,000	$1,600,000
In-State Equity Taxed at 0.4%	$653,794,000	$2,615,176
Total Tax		**$4,215,176**

These figures, which were provided to the Board, demonstrate that Dollar's aggregate tax liability as a multi-state taxpayer would have been $5.1 million, which is greater than the $4.2 million of the Ohio FIT liability that Dollar would have faced if it had conducted its business entirely within Ohio. Since Dollar's hypothetical multistate tax liability would be greater than its hypothetical wholly intrastate tax liability, Dollar proved that the Ohio FIT fails internal consistency as applied to Dollar. As a matter of law, this failure of internal consistency proves that the FIT is not fairly apportioned as applied to Dollar. *See Wynne,* 575 U.S. at 561–562; *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995).

In addition to proving that the FIT is internally inconsistent under this hypothetical, Dollar also presented evidence of actual harm to Dollar that results from the FIT's regressive tax-rate structure. Specifically, Dollar provided testimony regarding Dollar's business activity and documentation showing the effective tax rate of other taxpayers paying the FIT. Together, this evidence proved that average effective tax rate for other taxpayers was significantly less than Dollar's effective tax rate in Ohio. This results in a competitive disadvantage for Dollar.

Throughout the proceedings below, Dollar has requested that the Department utilize their alternative apportionment authority to remedy to the FIT's internal consistency problem; rather than striking the tax entirely. (R.C. 5726.05(G) authorizes the Tax Commissioner to allow taxpayers to use an alternative apportionment method if the statutory apportionment method does not "fairly represent the extent of taxpayer's business activity in" Ohio). Specifically, Dollar proposed a remedy by which the only adjustment to the FIT is to change the order of operations of the apportionment calculation so that the tax rate is determined *before* the apportionment percentage is applied. This proposed reasonable alternative apportionment method would allow taxpayers to recompute their FIT liability by determining the tax bracket first, and then multiplying the resulting tax by the apportionment percentage. This approach is how almost every other variable rate tax works (including Ohio's personal income tax). The following Table C demonstrates this method and shows the simple recalculation of Dollar's tax after apportionment for the 2017 tax year:

Table C

	As Filed	**Alternative Apportionment**
Total Equity Capital	$853,794,000	$853,794,000
Total Ohio Gross Receipts	$53,567,681	$53,567,681
Total Gross Receipts	$275,509,277	$275,509,277
Apportionment Factor	0.194431	-
Total Ohio Equity Capital	$166,004,021	$853,794,000
Tax on first $200 million at 0.8%	$1,328,032	$1,600,000
Tax on $200 million to $1.3 billion at 0.4%	$0	$2,615,176
Tax on > $1.3 billion at .25%	$0	$0
Tax on Equity Capital	$1,328,032	$4,215,176
Apportionment Factor	-	0.194431
Total Tax Liability	$1,328,032	$819,561
Effective Tax Rate	0.8000%	0.4937%

As shown above, with this alternative apportionment method, Dollar's effective tax rate (its tax of $819,561 divided by its tax base of $853 million of Ohio equity capital) is 0.494%. Not coincidentally, using this method, Dollar pays at the exact same tax rate (0.494%) that would apply if it conducted all of its activity in Ohio. (See Table D below). Using this method, Dollar's tax rate is entirely independent of the degree to which it decides to concentrate its business in Ohio, and thus the tax passes the internal consistency test. Thus, this proposed method fixes all of the discrimination issues caused by the FIT's peculiar method of determining the tax rate based on post-apportionment equity capital.

Table D

	Ohio	
	Equity Computation	Tax Computation
Total Equity Capital	$853,794,000	
Total In-State Gross Receipts	$275,509,277	
Total Everywhere Gross Receipts	$275,509,277	
In-State Apportionment	100.0000%	
In-State Equity Capital	$853,794,000	
In-State Equity Taxed at 0.8%	$200,000,000	$1,600,000
In-State Equity Taxed at 0.4%	$653,794,000	$2,615,176
Total Tax		**$4,215,176**
Effective Tax Rate		0.4937%

Despite the fact that the FIT discriminates against Dollar, the Board concluded that it could not grant relief to Dollar because it lacks jurisdiction to decide constitutional questions. [Decision at 5 ("Notwithstanding, we agree with the Commissioner that the Board cannot grant relief to Dollar Bank due to the constitutional questions involved.").] Thus, the Board determined that it "must leave the constitutionality of the FIT's rate structure to any reviewing court." [Decision at 2.] Accordingly, this case is being appealed to this Court with an evidentiary record from the Board on the constitutionality of the FIT as applied to Dollar. This Court has proper jurisdiction to decide the legal issues presented by Dollar's appeal, including any constitutional questions.

ERRORS TO BE REVIEWED

Appellant requests that the Supreme Court of Ohio reverse, vacate, and/or modify the final Decision and Order of the Ohio Board of Tax Appeals entered on February 20, 2025, based upon one or more of the following errors:

1. The Ohio Board of Tax Appeals decision was unreasonable and unlawful.
2. The Ohio Board of Tax Appeals erred in failing to reverse the Tax Commissioner's Final Determination.
3. The Ohio Board of Tax Appeals erred in failing to grant Dollar's refund request of FIT for Tax Years 2016 through 2020.
4. The Ohio Board of Tax Appeals erred in failing to grant Dollar's request for alternative apportionment.
5. The Ohio Board of Tax Appeals erred in determining that Dollar was requesting an alternative rate structure as opposed to alternative apportionment.
6. The Ohio Board of Tax Appeals erred in failing to grant Dollar's relief sought under the proposed alternative apportionment methodology.
7. The Ohio Board of Tax Appeals erred in determining that Dollar's alternative apportionment argument is constitutional in nature and thus outside the Board's scope for granting relief.
8. The Ohio Board of Tax Appeals erred in failing to examine the statute using the doctrine of constitutional avoidance.
9. The Ohio Board of Tax Appeals erred by failing to determine that the Tax Commissioner may use an "alternative method" of apportionment when a taxpayer (1) timely requests alternative apportionment and (2) establishes that "the

apportionment provisions" of the FIT do not fairly apportion the taxpayer's equity under R.C. 5726.05(G).

10. The Ohio Board of Tax Appeals erred in determining that R.C. 5726.05(G) does not allow for the alternative apportionment Dollar sought.

11. The Ohio Board of Tax Appeals erred in not ordering the Tax Commissioner to grant alternative apportionment that allows Dollar to compute its FIT by first calculating the total tax that would be due on Dollar's total equity capital without apportionment and then multiplying that tax amount by Dollar's Ohio apportionment factor.

12. The Ohio Board of Tax Appeals erred in failing to find that the FIT violates the Commerce Clause because the FIT is not fairly apportioned and fails the internal consistency test. *See Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1802–03 (2015).

13. The FIT violates the Commerce Clause of the United States Constitution because it is imposed: (1) on activity without a substantial nexus to Ohio; (2) in a manner that is not fairly apportioned; (3) in a manner that discriminates against interstate commerce; and (4) in a manner that is not fairly related to services provided by Ohio. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Thus, the tax is invalid and must be stricken, and Dollar is entitled to a full refund of tax paid (or in the alternative, another remedy, such as the alternative apportionment remedy provided above, that renders the FIT constitutional as applied to Dollar).

14. The FIT violates the Due Process Clause, and Equal Protection Clause of the United States Constitution because it subjects Dollar to taxes not imposed on other

taxpayers of the same class. *See Booth Financial Corp. v. Lindley*, 452 N.E.2d 1295 (Ohio 1983). Thus, the tax is invalid and must be stricken, and Dollar is entitled to a full refund of tax paid.

15. The FIT is preempted by federal law because it is a discriminatory tax as imposed on Dollar, as a federal savings association, as compared to the FIT imposed on other similar local institutions. *See* 12 U.S.C. § 1464(h). Thus, the tax is invalid and must be stricken, and Dollar is entitled to a full refund of tax paid.

WHEREFORE, Appellant respectfully requests that the Supreme Court of Ohio reverse, vacate, and/or modify the final Decision and Order of Ohio Board of Tax Appeals, dated February 20, 2025, under R.C. 5717.04. Dollar respectfully requests that final judgment be entered in its favor granting its entire refund of FIT paid during Tax Years 2016 through 2020, or the refund due to Dollar under a remedy which renders the FIT constitutional as applied to Dollar. Appellant further requests that the Court grant any additional relief that may be just or appropriate under the circumstances.

Respectfully submitted,

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IN THE SUPREME COURT OF OHIO

DOLLAR BANK, FSB,	:	
	:	Case No. _________________
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	:	Appeal from the Ohio Board of Tax Appeals
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	:	Case No. 2022-1361
PATRICIA HARRIS, TAX COMMISSIONER OF OHIO,	:	
	:	
Appellee.	:	

PRAECIPE

TO THE OHIO BOARD OF TAX APPEALS

Pursuant to R.C. 5717.04, Appellant, Dollar Bank, FSB, requests that the Ohio Board of Tax Appeals ("BTA") prepare, transmit, and file with the Supreme Court of Ohio, 65 South Front Street, 8th Floor, Columbus, Ohio 43215, a certified transcript of the record of the BTA's proceedings in the above-captioned matter, including any evidence considered by the BTA in rendering its decision in that matter.

Respectfully submitted,

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Counsel for Appellant,
Dollar Bank, FSB.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Notice of Appeal,* with the attached Exhibit A, and Praecipe was served on March 21, 2025 upon the following:

Via Electronic E-Filing and Certified U.S. Mail

Ohio Board of Tax Appeals
30 East Broad Street, 24th Floor
Columbus, Ohio 43215

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Respectfully submitted,

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Dollar Bank, FSB

Exhibit A

OHIO BOARD OF TAX APPEALS

DOLLAR BANK, FSB, (et. al.), Appellant(s), vs. PATRICIA HARRIS, TAX COMMISSIONER OF OHIO, (et. al.), Appellee(s).	))))))))))	CASE NO(S). 2022-1361 (FINANCIAL INSTITUTIONS TAX) DECISION AND ORDER

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Represented by:
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Entered Thursday, February 20, 2025

Ms. Clements and Ms. Allison concur.

Ohio's financial institutions tax ("FIT") is levied on banks and similar entities for the privilege of doing business in this state. Dollar Bank FSB is a financial institution headquartered in Pittsburgh. It seeks an alternative apportionment method primarily because it claims the FIT's rate structure fails the internal consistency test established by the United States Supreme Court for use in certain Commerce Clause cases. *See generally Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542 (2015). The parties agree we lack jurisdiction to adjudicate constitutional questions, but Dollar Bank argues the Board could still proceed to grant an alternative apportionment method without officially deciding any constitutional questions. The Commissioner sternly believes the remedy sought cannot be uncoupled from the constitutional question, leaving the remedy sought by Dollar Bank out of reach in this proceeding.

We affirm for two reasons. First, we agree with the Commissioner that constitutional questions permeate all of Dollar Bank's arguments. We can confirm this simple fact by examining Dollar Bank's notice of appeal. It lists four specifications of error, and *every single* specification contains a constitutional argument. We must leave the constitutionality of the FIT's rate structure to any reviewing court. Second, even if Dollar Bank's arguments were statutory, R.C. 5726.05(G) permits a taxpayer to seek an alternative *apportionment* method but not a complete rewrite of the *rate* structure.

THE FIT

The FIT is a privilege of doing business tax imposed on certain financial institutions "that conduct[] business as a financial institution in this state or otherwise has nexus in or with this state under the Constitution of the United States . . . ." R.C. 5726.02. Subject to certain exceptions, a "financial institution" is a "bank organization, a holding company of a bank organization, or a nonprofit financial organization . . . ." *See* R.C. 5726.01(H). The tax is based on the institution's total equity capital apportioned by a gross receipts factor. R.C. 5726.01(S)-(T) (defining "total equity capital" and "total Ohio equity capital"). "Total equity capital" as defined by R.C. 5726.01(S) means:

> [T]he sum of the common stock at par value, perpetual preferred stock and related surplus, other surplus not related to perpetual preferred stock, retained earnings, accumulated other comprehensive income, treasury stock, unearned employee stock ownership plan shares, and other equity components of a financial institution. "Total equity capital" does not include noncontrolling (minority) interests as

reported on an FR Y-9 or call report, unless such interests are in a bank organization or a bank holding company.

The referenced FY Y-9 forms are filed with the Federal Reserve Board, and the call reports are statements filed with the institution's federal regulator, e.g., the Comptroller of the Currency. The FIT statutes use an apportionment factor to calculate total Ohio equity capital. Total gross receipts sitused to Ohio are placed in the numerator, and total gross receipts everywhere are placed in the denominator. A regressive rate structure is then applied. The first $200 million of Ohio equity capital is taxed at .8%. Then, total Ohio equity capital between $200 million and $1.3 billion is taxed at .4%. Ohio equity capital over $1.3 billion is taxed at .25%. R.C. 5726.04.

FACTS AND PROCEDURAL HISTORY

Dollar Bank is a financial institution headquartered in Pittsburgh, Pennsylvania. It conducts business in Delaware, Florida, Maryland, Ohio, Pennsylvania, and Virginia. It filed FIT returns during the refund period (2016-2020) and was taxed at .8% for the entire period because its total Ohio equity capital never exceeded $200 million. In 2020, Dollar Bank filed refund applications asking the Commissioner to return all of the FIT paid by Dollar Bank over those four years. Dollar Bank articulated several constitutional and non-constitutional bases for the application. Dollar Bank claimed the FIT violated several federal and Ohio constitutional provisions. Dollar Bank alleged violations of the Commerce Clause, Supremacy Clause (preemption), Equal Protection Clause, and the Due Process Clause. It also cited violations of certain provisions of the Ohio Constitution contained in Article VIII, the Equal Protection Clause, and the Due Process Clause. Several bases clearly implicated constitutional issues related to preemption, although constitutional provisions were not directly cited. Dollar Bank's non-constitutional arguments were focused mainly on situsing and exclusion of certain equity from its total equity capital.

All refund claims were summarily denied by letter dated November 17, 2020. Dollar Bank then presented the Commissioner with an appeal restating its arguments and providing supporting documents. The record shows some discussions between Dollar Bank's counsel and the Commissioner's counsel, resulting in a series of emails between the Commissioner's counsel and Dollar Bank's counsel. The emails show that the Commissioner would expedite the case review "confined to the issues related to the FIT rate issue and its constitutionality." S.T., Email dated February 25, 2022. The Commissioner denied the refunds, citing her lack of authority to adjudicate constitutional questions.

Dollar Bank appealed to this Board, citing four specifications of error. All involve at least one constitutional question. Specification one states, in part, that the Commissioner's final determination was incompatible with *Wynne*, the most recent case analyzing the internal consistency test. Specification two alleges the FIT violates the Commerce Clause test established by the Supreme Court of the United States in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Specification three states that the FIT violates the Due Process Clause and Equal Protection Clause of the United States and Ohio Constitutions. Specification four states the FIT is preempted by federal law, specifically 12 U.S.C. 1464(h). That statute prohibits discriminatory state and local taxes on "Federal savings associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions." *Id.*; *Kansas v. Garcia*, 589 U.S. 191, 202 (explaining that preemption is rooted in the Supremacy Clause). This Board held a hearing, and the parties filed post-hearing briefs. At this Board's hearing, Dollar Bank called a witness to confirm that if the alternative apportionment method it sought was granted, then its figures were correct.

LAW AND ANALYSIS

This Board reviews the Commissioner's findings de novo, and those findings are presumptively valid, subject to rebuttal. *Accel, Inc. v. Testa*, 2017-Ohio-8798, ¶ 14 (finding the taxpayer's burden for rebutting findings "is simply to prove that the findings were incorrect."). As we consider the law, our role is "to provide a fair reading of what the legislature has enacted: one that is based on the plain language of the enactment and not slanted toward one side or the other." *Stingray Pressure Pumping, L.L.C. v. Harris*, 2023-Ohio-2598, ¶ 22. The parties agree with the general proposition that this Board lacks authority to adjudicate constitutional questions. Dollar Bank Br. at 9; TC Br. at 5. The Ohio Supreme Court has made it clear that the Board's role is to develop a record when a party raises constitutional questions, but we may not opine on the constitutional questions. *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229 (1988).

As a general rule, a party must raise relevant legal issues in a timely manner so that the issues can be addressed in a timely manner. *Ohio Bell Tel. Co. v. Levin*, 2009-Ohio-6189; *CNG Dev. Co. v. Limbach*, 63 Ohio St.3d 28 (1992); *Obetz v. McClain*, 2021-Ohio-1706 (finding an appellant's notice of appeal placed all parties on "fair notice" of an issue). Parties are also free to expressly waive arguments. *See, e.g., Design Molded Plastics, Inc. v. McClain*, BTA No. 2021-183, 2022 Ohio Tax LEXIS 2279 (Oct. 11, 2022). The record shows that Dollar Bank waived all arguments except those tied to the constitutionality of the FIT's rate structure. Reply at 12, fn. 36, 38.

The Commissioner concludes that Dollar Bank waived its request for an alternative apportionment method. The record does not support a finding that Dollar Bank waived the relief it seeks, i.e., an alternative apportionment method. We disagree that Dollar Bank waived that issue. The alternative method is the remedy it seeks and has always sought due to the constitutional question. Notwithstanding, we agree with the Commissioner that the Board cannot grant relief to Dollar Bank due to the constitutional questions involved. Even though Dollar Bank concedes we cannot decide constitutional questions, Dollar Bank invites us to examine the statute using the doctrine of constitutional avoidance. We agree with the Commissioner that the remedy sought cannot be separated from the harm alleged. Because the harm alleged is a constitutional violation, we decline to implicitly opine on a constitutional question by using the cannon of constitutional avoidance. The situation may be different if Dollar Bank had not waived non-constitutional claims that could serve as an independent basis for an alternative method.

The cases cited by Dollar Bank do not change our analysis. Dollar Bank cites *L.L. Bean, Inc. v. Levin*, BTA No. 2010-2853, 2014 Ohio Tax LEXIS 1539 (Mar. 6, 2014) for the idea that this Board can interpret terms used both in the statute and the constitutional case law. R.C. 5726.05(G) does not expressly contain the internal consistency test. *L.L. Bean* was different. It involved a situation where a party sought an alternative method on constitutional and non-constitutional grounds. Further, that case called for us to interpret terms with specific meanings in the statutes that were not necessarily synonymous with the constitutional case law.

As we already stated, it is unclear to this Board that the statute permits the Commissioner or this Board to permit an alternative rate structure. The statute provides for an alternative *apportionment*, not an alternative rate structure, which Dollar Bank desires. R.C. 5726.05(G) provides that "[i]f the apportionment provisions *of this section* do not fairly represent the extent of the taxpayer's business activity in this state," then an alternative method could be sought. The rate structure is an entirely different section, R.C. 5726.04; R.C. 1.01 (explaining that the Revised Code is arranged by general provisions, titles, chapters, and sections). It is not clear from the statute or the cases cited by Dollar Bank that this Board could wholly rewrite the rate structure for Dollar Bank.

CONCLUSION

For these reasons, we affirm.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Ms. Clements		
Ms. Allison		

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

____
Kathleen M. Crowley, Board Secretary