**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

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| **J2 CLOUD SERVICES, INC. (F/K/A J2 GLOBAL, INC.**  **AND J2 GLOBAL COMMUNICATIONS, INC.)** | **v.** | **COMMISSIONER OF REVENUE** |
| Docket No. C325426 |  | Promulgated:  February 27, 2019 |
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This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39, from the refusal of the Commissioner of Revenue (“Commissioner”) to abate sales tax, interest, and penalties assessed to j2 Cloud Services, Inc. (f/k/a j2 Global, Inc. and j2 Global Communications, Inc.) (“appellant” or “j2”) on the gross receipts from its electronic facsimile (“facsimile” or “fax”) service (“eFax service” or “service at issue”) for the monthly periods ending July 31, 2003 through December 31, 2011 (“tax periods at issue”).

Commissioner Scharaffa heard the appeal and was joined by Chairman Hammond and by Commissioners Rose, Chmielinski, and Good in the decision for the appellee.

These findings of fact and report are made pursuant to requests by both the appellant and the Commissioner under G.L. c. 58A, § 13 and 831 CMR 1.32.

*R. Gregory Roberts*, Esq. and *Maxwell D. Solet*, Esq. for the appellant.

*Marikae Grace Toye*, Esq. and *Joseph J. Tierney*, Esq. for the Commissioner.

**FINDINGS OF FACT AND REPORT**

On the basis of the record in its entirety, including a Statement of Agreed Facts with accompanying exhibits, trial testimony, and trial exhibits, the Appellate Tax Board (“Board”) made the following findings of fact:

**I. Introduction and Issues**

The appellant is a Delaware corporation headquartered in California. The parties stipulated that during the tax periods at issue the appellant employed a sales engineer in Massachusetts and owned personal property located in Massachusetts. The parties also stipulated that the appellant’s contacts with Massachusetts were sufficient to create taxable nexus and filing requirements for sales tax purposes.

This matter primarily concerns whether the appellant’s eFax service is a telecommunications service, defined in G.L. c. 64H, § 1 as “any transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiberoptics, laser, microwave, radio, satellite or similar facilities but not including cable television,” and consequently whether sales of the eFax service are subject to sales tax under G.L. c. 64H, § 2 (“Telecommunications Issue”). As discussed further below, the appellant converts a facsimile transmission sent[[1]](#footnote-1) by a third party (“sender”) to one of the appellant’s customers into a portable document file (“PDF”) or other supported file format. The transmission is generally delivered to a customer as an attachment to an email message received by the customer at a designated email account. The appellant contended that its receipts from providing the eFax service are not taxable because the eFax service is not a telecommunications service as defined in G.L. c. 64H, § 1.

The appellant also contended that the eFax service is protected from state taxation under the federal Internet Tax Freedom Act (“ITFA”), codified as a note to 47 U.S.C. § 151, because the eFax service involves the resale of Internet access and because the eFax service includes a hosted email service, personal electronic storage capacity, and is a service offered over the Internet (“ITFA Issue”). Additionally, the appellant challenged the calculation of the Commissioner’s assessments, specifically whether receipts from the eFax service were properly sourced to Massachusetts (“Receipts Issue”), as well as the propriety of penalties assessed by the Commissioner pursuant to G.L. c. 62C, § 33(a) and § 35A (“Penalties Issue”).

**II. Procedural History**

By letter dated July 7, 2010, the Commissioner notified the appellant that the service at issue was a taxable telecommunications service, that sales of the service at issue were therefore subject to sales tax, and that the appellant needed to file seven years of delinquent returns within thirty days from the date of the letter.

The Commissioner issued a Notice of Failure to Register and File Return dated March 10, 2011, which concerned the appellant’s failure to register for sales and use tax on services pursuant to G.L. c. 62C, § 67 and its failure to file appropriate returns. The notice directed the appellant to file appropriate returns within thirty days and to pay any tax due. The appellant did not file any returns or pay any tax within thirty days of the notice.

On various dates from May 19, 2011 through January 27, 2012, the appellant filed a Monthly Sales/Use Tax on Services Return (“Sales Tax Return”) for each of the tax periods at issue. Attached to each Sales Tax Return was a statement from the appellant maintaining that sales of the eFax service were not subject to Massachusetts sales tax for several reasons: the “true object” of the eFax service was to receive an email with digital contents and consequently, as an email service constituting Internet access, the ITFA prohibits taxation of the eFax service; the eFax service is not a telecommunications service under Massachusetts law because it does not provide transmission but instead uses the transmission services of third parties; and the eFax service is exempt as a data-processing service.

On each Sales Tax Return filed for the tax periods at issue, the appellant reported its Massachusetts gross sales pursuant to a formula proposed in an email from Maggie Murillo, an audit manager with the Department of Revenue involved in the audit of the appellant, to the appellant’s representative. As stated in the email, Ms. Murillo suggested the formula if the appellant was “unable to determine the service address, or the location of where the fax originated or where it was received.”

In the statement attached to each Sales Tax Return, the appellant explained that

[f]or the purpose of filing this return, as instructed by the auditor, j2 Global has estimated its Massachusetts gross sales pursuant to a formula, *i.e.* j2 Global’s nationwide revenue as reported on its Federal [F]orm 1120 multiplied by the percentage of the total U.S. population attributable to Massachusetts (2.1207%). . . . j2 Global estimated its monthly Massachusetts gross sales by dividing the annual revenue reported on the Federal Form 1120 by twelve.

The appellant, however, reported that no Massachusetts sales were subject to Massachusetts sales tax.

The Commissioner conducted an audit of the Sales Tax Returns filed by the appellant for the tax periods at issue. On June 30, 2012, the Commissioner issued a Notice of Intent to Assess, notifying the appellant of the Commissioner’s intent to assess $1,849,771 in sales tax, interest, and penalties for the tax periods ending July 31, 2003 through December 31, 2009. Also on June 30, 2012, the Commissioner issued a Notice of Intent to Assess, notifying the appellant of the Commissioner’s intent to assess $630,634.40 in sales tax, interest, and penalties for the tax periods ending January 31, 2010 through December 31, 2011.

The appellant filed a Form DR-1: Appeals Form on July 25, 2012, requesting a pre-assessment conference pursuant to G.L. c. 62C, § 26(b). It also filed a Form B-37: Special Consent Extending the Time for Assessment of Taxes. The Commissioner’s Office of Appeals conducted the pre-assessment conference on November 6, 2012, subsequently notifying the appellant by letter dated January 10, 2013 of its conclusion that the Commissioner’s proposed assessment was proper. On January 17, 2013, the Commissioner issued a Notice of Assessment, assessing $2,530,014 in sales tax, interest, and penalties for the tax periods at issue.

On March 21, 2013, the appellant timely filed a Form CA-6: Application for Abatement/Amended Return (“Form CA-6”) for the tax periods at issue. The Commissioner denied the appellant’s Form CA-6 on July 22, 2014. The appellant timely filed a petition under formal procedure with this Board on September 10, 2014, appealing the Commissioner’s denial of its Form CA-6.

Based upon the above, the Board found that it had jurisdiction over this appeal.

**III. The Service at Issue**

The appellant’s eFax service commences when a sender sends a facsimile to a direct inward dial number (“DID”) assigned to a customer of the appellant and associated with the customer’s email address. DIDs, ten-digit telephone numbers used only for incoming calls, provide locators that identify the switch where a communication should be routed. Susan Isherwood, the senior project manager for the appellant’s telecom department since 2006 and the person responsible for obtaining DIDs on behalf of the appellant, testified that the appellant has “about 15 million of these DIDs.”

Customers generally select the area codes of the DIDs and it is not uncommon for customers to select or be assigned DIDs with an area code associated with a location in which neither the customer nor the appellant has a presence. The appellant offers its customers DIDs for more than 2,800 area codes, including Massachusetts. During the tax periods at issue, the majority of Massachusetts DIDs were provided by XO Communications, Inc., Choice One Communications, Inc., and Global NAPS, Inc.

Ms. Isherwood testified that each customer is assigned at least one DID. Large corporate customers are provided a block of DIDs for allocation to their employees. Customers have no ownership or other interest in the DIDs. If a customer no longer subscribes to the eFax service, it can no longer use the DID that it had been assigned.

The facsimile sent by the sender travels over the public switched telephone network (“PSTN”) to a particular DID using the sender’s own equipment and telecommunications carrier. Telecommunications carriers, but not the appellant, provide all transmissions over the PSTN for the inbound eFax service. DIDs can be associated with switches anywhere that the telecommunications carrier supplying the DIDs maintains a point of presence. DIDs acquired by the appellant are loaded onto servers owned by the appellant and located at a colocation facility within the service area of the telecommunications carrier supplying the DIDs. At various times during the tax periods at issue, the appellant maintained approximately fifty colocation facilities in the United States, with three facilities located in Massachusetts: one in Cambridge, one in Quincy, and one in Springfield. In connection with supplying DIDs, telecommunications carriers also provide circuits connecting the telecommunications carrier switch to the colocation facility where the appellant’s servers are located. Telecommunications carriers charge the appellant a monthly recurring charge for use of the DIDs and any circuits provided to a colocation facility. Ms. Isherwood stated that the appellant “receive[s] monthly bills” from telecommunications carriers for the DIDs and that “[t]he DIDs are not expensive in our case. They’re less than a penny [apiece], fractions less.” The appellant generally pays federal, state, and local taxes on these services.

When the DID of a j2 customer is entered into the sender’s equipment, the sender’s telecommunications carrier identifies the telecommunications carrier for a particular DID and routes the facsimile to that telecommunications carrier (such as Choice One Communications, Inc. for certain Massachusetts DIDs) over the PSTN. After the telecommunications carrier for the DID picks up the transmission, the DID is identified as a j2 number and the document is routed to the colocation facility associated with the particular DID.

Transmission over the PSTN ends when the facsimile arrives at a switch at the colocation facility associated with the DID. Up until this point, the sender, not j2 or its customer, incurs all charges. From this point forward, a circuit connects the telecommunications carrier switch to a j2 server at the colocation facility. Ms. Isherwood explained that “[i]t’s basically like you have your cable box at home, and then you need to connect it to your TV. . . . [T]hink about your cable box as being the carrier side of it, and then the TV as being our equipment side. And then you just bridge one to the other.” Ms. Isherwood testified that the appellant’s “equipment is located in third-party neutral facilities” — the colocation facilities — and that the appellant essentially rents space from the owners of the buildings.

The appellant generally maintains four types of servers at each colocation facility: a DID server, a local database server, a media server, and an email server. The servers are owned by j2 and connected via an Internet protocol network. The DID server receives the facsimile as a phone signal, interprets it as a facsimile, and outputs a corresponding image file. Kyle Flowers, the general manager and director of marketing during the tax periods at issue, explained that “[t]he DID server by way of the circuit connects to our carrier switch and accepts incoming calls and receives incoming faxes.”

The DID server then accesses the local database server to retrieve the email address of the customer associated with the particular DID. Mr. Flowers testified that the local database server “primarily houses an association between DIDs, email addresses and file formats” and “[s]o when a fax arrives for a particular DID, we look up in the database server the customer’s preferred file format and likewise their email address.”

Mr. Flowers testified that after the DID server the document is “deposited with the media server, where the function of the media server is to convert the image file format into the customer’s preferred file format based on the DID — the database server lookup.” Mr. Flowers testified that the appellant offers PDF, “a widely accepted file format that was created by Adobe. We also offer TIF [or tagged image format] and a proprietary format called EFX.” Most customers — “90-plus percent” — selected the PDF file format during the tax periods at issue according to Mr. Flowers. Depending on the customer’s specifications, the resulting file could be enhanced with additional features and functionality such as optical character recognition or encryption for security. Mr. Flowers added that an additional security element of the eFax service is that there is no physical fax machine “available to anybody that happens by. Rather, faxes are delivered by email to the specified email address for a customer. So only that customer or anyone that they actively choose to give access to their email would have access to the document.”

After the media server, the email server creates an email message containing the file and delivers the message to the Internet. Once the message is delivered to the Internet, the email is transmitted by an Internet service provider to j2’s customer. The email server connects to a domain name server to request the Internet protocol address of the customer’s mail delivery agent. The email message is then transferred to the customer’s mail delivery agent and delivered to the customer’s inbox. According to a copy of the appellant’s Standard Corporate Terms and Conditions included in the record, the “[c]ustomer is responsible for providing all equipment necessary for it to use the Services, including its own desktop computer equipment, Internet access and email service.”

Mr. Flowers explained that during the tax periods at issue customers could also access the file by logging onto the appellant’s website “where we make available their stored faxes and any faxes or documents received” with “unlimited storage capacity” and where customers could also use features to annotate or mark up the fax.[[2]](#footnote-2) However, Mr. Flowers admitted that email was the most prevalent method of delivery used by customers. Mr. Flowers testified that the eFax service is “largely administered through email, so our customers receive emails with documents. They can also forward their documents as emails. Email is a critical component of what we provide.” He stressed the portable nature of the eFax service, stating that “the service is available worldwide, so they can cho[o]se to make use of it from anywhere.”

Mr. Flowers testified that “[w]hen a customer signs up for our service, they give us the email address that they already have prior to signing up for our service. In addition to that, we assign them an email address associated with the email service which we provide, together with the eFax product.” But he noted that it is “entirely our customer’s option which email address they would like for us to send those emails to” and that “most of the time customers would use the email address that they signed up with, that they brought.”

Mr. Flowers characterized the eFax service as a “document management service” giving customers the ability to receive, manage, interact with, and forward documents to other people. He explained that “we don’t provide any type of à la carte options with our service. Our service is offered as a complete package that our customers can enjoy.” He stressed the digital nature of the eFax service, stating that it “is exclusively intended to be used as a digital product where document interface and document viewing . . . is all done electronically through a computer or similar device.”

According to a copy of a Service Order Form, “j2 Global is providing Customer with a capability to . . . receive faxes using electronic mail.” A copy of the appellant’s 2008 Form 10-K in the record states that “eFax offers desktop faxing services.” Marketing materials in the record state that “eFax runs the world’s largest online fax network,” with approximately 11 million eFax customers during the tax periods at issue according to Mr. Flowers. The appellant’s revenue for the eFax service is derived from (i) fees for account setup and activation; (ii) monthly subscription fees for a specified allotment of pages; and (iii) usage fees for each page that exceeds the subscription allotment. Mr. Flowers explained that the “activation fee is a fee that’s charged at the time of their initial sign-up, and is a one-time fee for activation.” He stated that the subscription fee is “typically a monthly recurring fee. It can be annual, but it’s a recurring fee to enjoy the service.” He described usage fees as applying only if a “customer has overage or usage in [excess] of the volume of pages we include with the monthly subscription.” Customers are billed by invoice or the fees are charged to a credit card, according to Mr. Flowers.

**IV. Expert Testimony**

The appellant presented the testimony and report of Professor Richard Pomp, whom the Board qualified as an expert in policy matters regarding state sales tax and the considerations forming Congress’s adoption of the ITFA. He was not asked to opine on Massachusetts law specifically. In his report, he expressed the goal of “provid[ing] a context in which to enhance this court’s decision making.”

Professor Pomp, who indicated that he is not a customer of j2, testified that “the customer doesn’t want the old fashioned piece of paper. The customer wants that digital document” and in his opinion that is the primary purpose for which customers retain the eFax service.

Professor Pomp distinguished the eFax service from what he described as “traditional” fax services, “sort of your grandfather’s fax where one could go to Kinko’s and say, ‘Here, I’d like this fax’d to a particular phone number,’ and at the other end someone would show up at Kinko’s and pick up the fax.” When asked whether these fax services were of the type that states historically subjected to tax as telecommunications services, he indicated that they were and that “I think the rationale was . . . you’re going to Kinko’s, you’re using their telephone line, and you’re sort of renting the use of their telephone line, and therefore that is all part of telecommunications, just the way Kinko’s would pay under the telecommunications category a tax on the provision of that line. That is essentially what I am paying Kinko’s to do on my behalf.”[[3]](#footnote-3)

Professor Pomp testified that he acted as a consultant to the U.S. Treasury Department from 1997 to 2000 on “the issue of electronic commerce and the Internet Tax Freedom Act.” He admitted, however, that his “official work ended in 2000,” and that he was not involved in any of the subsequent amendments to the ITFA.

Professor Pomp relied upon ITFA § 1105(5)(A)-(E) for his conclusion that the ITFA precluded state taxation of the eFax service. In his opinion, the home page, electronic mail, and personal electronic storage capacity referenced in ITFA § 1105(5)(E) applied to the eFax service because j2 “provide[s] access to their home page, and that access allows someone to check their emails. They provide storage capacity . . . [a]nd they provide electronic mail.”

Further, though ITFA § 1105(5)(A) states that “Internet access” includes “a service that enables users to connect to the internet to access content, information, or other services over the Internet,” Professor Pomp testified that he “would read it as [users] who connect to the Internet to access content, information or other services offered over the Internet.”[[4]](#footnote-4)

**V. The Board’s Conclusions**

Based upon the above and all the evidence in the record, the Board found that the appellant failed to meet its burden of proof on the Telecommunications Issue, the ITFA Issue, the Receipts Issue, and the Penalties Issue.

***A. Telecommunications Issue***

The Board found that the eFax service is a telecommunications service under the broad definition of that term in G.L. c. 64H, § 1. Consequently, sales of the eFax service were subject to Massachusetts sales tax under G.L. c. 64H, § 2 for the tax periods at issue. The very nature of the eFax service comprises the transmission of messages or information between points as contemplated under G.L. c. 64H, § 1. The eFax service facilitates transmission of a facsimile from a sender to a j2 customer by means of (1) the PSTN using a customer’s assigned DID; (2) the appellant’s servers at the colocation facilities; and (3) the Internet to the customer’s email address, which was the predominant form of final transmission to customers.

The Board found that the appellant’s own materials, including a Service Order Form, marketing materials, and a Form 10-K, emphasized the fundamental nature of the eFax service as a fax service first and foremost and that the digital nature of the eFax service was inconsequential, as was the fact that the sender incurs charges over the PSTN until the facsimile arrives at a switch at one of the appellant’s colocation facilities. The Board found that the critical component of the eFax service was transmission of messages or information – the facsimile – between points, not the incidental features included with the service at issue, such as the ability to store, edit, forward, and otherwise transform the digital document received by a customer, as well as the inclusion of a hosted email address that the appellant conceded was not the prevalent email address used by customers for the eFax service. Without the transmission, these features were either rendered useless or were features that could be accomplished or obtained irrespective of the eFax service. For instance, optical character recognition and converting a document to PDF are not proprietary eFax features. PDF was the format selected by more than 90 percent of customers over EFX, the appellant’s proprietary computer readable format. Further, the appellant’s invoices did not itemize charges for these various features or the hosted email address. Notably, however, the Board found that the fee structure for the eFax service focused on transmission. As testified to by Mr. Flowers, the monthly subscription fee allowed a specific number of pages, with an overage due if a customer exceeded the maximum number of pages.

The central issue in this matter is whether the eFax service is a telecommunications service under G.L. c. 64H, § 1 and not whether it is specifically a facsimile service. Regardless, the Board found that the appellant’s attempt to distinguish between what it terms as “traditional” facsimile services and the service at issue, including Professor Pomp’s testimony to that effect, was baseless, as was the appellant’s manipulation of the Commissioner’s regulation at 830 CMR 64H.1.6 in the process, claiming that it is a consumer rather than a reseller of telecommunications services. Neither the statute nor regulation nor any of the Commissioner’s public written statements make a distinction between a traditional or non-traditional facsimile service, nor do they state that facsimile service providers are subject to taxation only if they are resellers of telecommunications services.

Accordingly, the Board found and ruled that the appellant had not met its burden of proof and was not entitled to an abatement on the Telecommunications Issue.

***B. ITFA Issue***

As discussed further in the Opinion, the Board found that the eFax service did not constitute the resale of Internet access and the appellant’s provision of a hosted email address and personal electronic storage capacity did not place the eFax service within the ITFA definition of Internet access, as contended by the appellant.

The Board found Professor Pomp’s testimony to be irrelevant on the ITFA Issue. It was unclear what impact or influence, if any, he had on the drafting of the ITFA as originally enacted and he had no formal involvement in any subsequent amendments. Ultimately, any impact or influence was immaterial. Statutory interpretation is in the province of the Board and not an expert witness. *See* ***Commissioner of Revenue v. Wells Yachts South, Inc.***, 406 Mass. 661, 664 (1990) (“It is well established that ‘[t]he duty of statutory interpretation is for the courts.’”). Further, the Board found that Professor Pomp’s interpretation of the ITFA took liberties beyond the plain wording of the statute.

Accordingly, the Board found and ruled that the appellant had not met its burden of proof and was not entitled to an abatement on the ITFA Issue.

***C. Receipts Issue***

The appellant contended that even if the eFax service is a taxable telecommunications service, any receipts from the eFax service should not be sourced to Massachusetts because j2 does not know where customers receive documents or where customers primarily use the eFax service, which can be anywhere that an Internet connection is established by a customer. The appellant claimed that it only knows its customers’ billing addresses or addresses associated with credit cards, but that those addresses do not necessarily reflect where customers use the service. The appellant also noted that customers can select or be assigned a DID with an area code that corresponds to a location where the customer has no presence. The Board was not persuaded by these contentions and found that the Commissioner’s suggested method of calculating Massachusetts gross sales — taking j2’s nationwide revenue as reported on its Federal Form 1120s, multiplied by a percentage of the total U.S. population attributable to Massachusetts — was a reasonable alternative method in light of the appellant’s failure to keep or provide adequate records as required by G.L. c. 62C, § 25 and the corresponding regulation at 830 CMR 62C.25.1.

Accordingly, the Board found and ruled that the appellant had not met its burden of proof and was not entitled to an abatement on the Receipts Issue.

***D. Penalties Issue***

The Board found that the record was devoid of the requisite evidence to establish reasonable cause and lack of willful neglect to abate penalties imposed under G.L. c. 62C, § 33(a). Similarly, there was an absence of evidence to support abatement of penalties imposed under G.L. c. 62C, § 35A. The record did not establish: a lack of negligence or a lack of disregard of the Commonwealth’s tax laws or the Commissioner’s public written statements; substantial authority; adequate disclosure with reasonable basis; or a showing of reasonable cause and good faith.

The appellant admitted to a presence in the Commonwealth by employing a sales engineer and owning personal property, and it stipulated that it had the requisite contacts with the Commonwealth to create taxable nexus and filing requirements for sales tax purposes. Despite this, the appellant did not file any Sales Tax Returns on its own accord pursuant to filing requirements under Massachusetts law; moreover, the appellant did not file returns in response to the Commissioner’s letter dated July 7, 2010, in which he notified the appellant that the service at issue was subject to sales tax and that the appellant needed to file seven years of delinquent returns within thirty days from the date of the letter. Only after the Commissioner issued a Notice of Failure to Register and File Return dated March 10, 2011 did the appellant commence filing Sales Tax Returns for each of the tax periods at issue. Still, although the Notice of Failure to Register and File Return mandated that the appellant file and pay within thirty days after the date of notification, the appellant did not even commence filing until May 19, 2011 and reported no sales tax due to the Commonwealth.

The appellant provided no evidence that it either consulted with a competent tax expert during the eight-year delinquency before the Board or requested a letter ruling from the Commissioner if it was uncertain as to its filing position. Further, the Commissioner’s public written statements, specifically TIR 99-2: Taxation of the Internet, Electronic Commerce and Telecommunications Services: Recent Federal and Massachusetts Legislation (“TIR 99-2”) and its successor, TIR 05-8: Taxation of Internet Commerce and Telecommunications Services: Recent Federal Legislation (“TIR 05-8”), both explicitly list facsimile transmission services as examples of taxable telecommunications services. The appellant’s own Service Order Form, marketing materials, and Form 10-K describe the service at issue as a fax service. No distinction is made in the TIRs as to whether the facsimile transmission results in a piece of paper or a digital product and the Board declined to find one based on the facts in evidence.

Accordingly, the Board found and ruled that the appellant had not met its burden of proof and was not entitled to an abatement on the Penalties Issue for penalties imposed under both G.L. c. 62C, § 33(a) and penalties under G.L. c. 62C, § 35A.

**OPINION**

**I. The Service at Issue Is a Taxable Telecommunications Service Under Massachusetts Law.**

Massachusetts law imposes “[a]n excise . . . upon sales at retail in the commonwealth, by any vendor, of tangible personal property or of services performed in the commonwealth at the rate of 6.25 per cent of the gross receipts of the vendor from all such sales of such property or services.” G.L. c. 64H, § 2.[[5]](#footnote-5) The primary question in this matter is whether the service at issue is a taxable telecommunications service under the provisions of G.L. c. 64H, § 1.

General Laws c. 64H, § 1 defines a service as “a commodity consisting of activities engaged in by a person for another person for a consideration” and “that the term services shall be limited to the following item: telecommunications services.” Accordingly, the only services subject to Massachusetts sales tax are telecommunications services. Telecommunications services are defined as “any transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiberoptics, laser, microwave, radio, satellite or similar facilities but not including cable television. Telecommunications services shall be deemed to be services for purposes of this chapter and chapter sixty-four I.” G.L. c. 64H, § 1.

As the Board concluded in its findings, the eFax service involves transmission of a message or information – the facsimile – between points “by electronic or similar means” that fit within the broad confines of telecommunications services as that term is defined in G.L. c. 64H, § 1. The electronic or similar transmission in this appeal involved: (1) the PSTN using a customer’s assigned DID; (2) the appellant’s servers at the colocation facilities; and (3) the Internet to the customer’s email address, which was the predominant form of final transmission to customers.

Though ***Verizon New England, Inc. v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2011-457, involved voice mail services rather than facsimile services, the Board found the analysis analogous to the present matter. In ***Verizon***, the taxpayer contended that “charges made by Verizon for its voice mail services were not charges for the transmission of messages or information, but rather, were charges for the recording and storage of messages on Verizon’s voice mail system.” ***Id***. at 2011-473. The taxpayer reasoned that “a person leaving a message on or retrieving a message from the voice mail system makes a phone call for which they incur charges separate and apart from the voice mail charges” and that any transmission “occurred only at such time as an individual made the phone call for which they were separately charged.” ***Id***. at 2011-473-74. The Board disagreed, finding that

[t]he evidence indicated that a message was transmitted from one point, a caller, to another point, the voice mail system, when a caller recorded the message on the voice mail system. The message was then stored on the voice mail system, and later, transmitted from the voice mail system to a party retrieving the message. Although there were separate charges associated with calling into the voice mail system to record or retrieve messages, that fact in no way altered the reality that voice mail served to transmit messages from one point to another. The mere ability to store messages without the ability to retransmit and retrieve them would be valueless, and the Board therefore rejected the appellant’s arguments that voice mail charges were solely charges for the storage, not transmittal, of messages.

***Id.*** at 2011-474-75. Similarly here, the eFax service transmits a message from one point, the sender, to the appellant’s servers and then to the eFax customer. Though the sender incurs charges for the initial transmission to the appellant’s servers, the eFax service facilitates the transmission of the message between points to its customer. Further, the storage and various other features included with the eFax service would be valueless but for the ability of the customer to receive the message in the first instance. Accordingly, the Board’s analysis in ***Verizon*** is equally applicable in the present appeal.

The appellant relied upon ***Houghton Mifflin Co. v. State Tax Commission***, 373 Mass. 772, 772-73 (1977), for its contention that the object of the transaction in this matter was a document management platform rather than a fax transmission service and thus sales of the eFax service should not be subject to tax under G.L. c. 64H, § 2. ***Houghton Mifflin Co.*** concerned the question of whether the taxpayer’s “purchases of type composition from typesetters and type composers should not be subject to sales and use tax on the basis that the purchases constituted personal service transactions exempted from taxation under G.L. c. 64H, § 1.” ***Id***. at 774. The Supreme Judicial Court noted that “[b]oth parties argue, and we agree, that *where the services and the property are inseparable*, because of the integrated nature of the transaction, the character of the transaction must be analyzed to ascertain whether the buyer’s basic purpose was to acquire the property which was sold to it, or to obtain the services.” ***Id***. at 774 (emphasis added). The Court found that “[t]he test is the object of the transaction. If the buyer’s fundamental object is to obtain the item of personal property transferred to it, the sale of that property cannot reasonably be considered ‘inconsequential’ and the transaction cannot reasonably be considered one for personal service.” ***Id***. Because the appellant’s own materials characterize its product as a fax service that the Board has found to be a telecommunications service under G.L. c. 64H, § 1 and there is no inseparable (or separable) tangible property at issue, the Board found application of ***Houghton Mifflin Co***. to be misplaced.

The Board, however, did find application of the Commissioner’s regulation at 830 CMR 64H.1.6(7) to be on point here. The regulation states in pertinent part that

any amount paid for services that are part of a sale of telecommunications services are included in the sales price subject to tax. M.G.L. c. 64H, §1. Thus, where telecommunications services are purchased in conjunction with other services, the entire sales price is taxable as a sale or use of telecommunications services, unless the sales price of the telecommunications portion of the services is separately stated from the sales price of the other services being provided on the invoice or other evidence of the sale.

830 CMR 64H.1.6(7). The appellant admittedly does not sell the eFax service as an à la carte option but as a package with various features included along with the facsimile service. Therefore, the entire sales price is taxable as a sale of telecommunications services. ***Id***. *See also* TIR 05-8 (stating that “[c]harges for the right to use any telecommunications service . . . include, but are not limited to, fees structured as recurring monthly billing charges for telephone service, set-up or activation charges, access charges, and member fees”). *Cf*. 830 CMR 64H.1.3: Computer Industry Services and Codes (“Changes to the format, code or protocol of the subscriber’s content or information solely for the purposes of transmission are not a data processing service.”).

The Board also dismissed the appellant’s reliance on the Commissioner’s regulation at 830 CMR 64H.1.6(6) for the proposition that it is a purchaser rather than a reseller or provider of telecommunications services. The regulation at 830 CMR 64H.1.6(6) states that “[i]n general, a purchaser of telecommunications services purchases the services for resale only if both of the following criteria are met: 1. The purchaser does not itself use or consume the telecommunications services; and 2. The purchaser sells such telecommunications services in the regular course of business.” The regulation then sets forth several “instances where purchasers may be in the business of reselling telecommunications services,” including the following example:

Now U See It, Inc. is a commercial facsimile transmission service that handles a large volume of facsimile transmission for its customers. Now U See It is a purchaser of telecommunications services for resale, since it does not itself consume the telecommunications services and because it regularly resells telecommunications services to its customers as part of its business.

830 CMR 64H.1.6(6)(b).

The appellant contended that under the regulation and example it is a purchaser of telecommunications services rather than a reseller or provider of telecommunications services. Initially, as discussed above, the Board found that the eFax service is a telecommunications service under the broad terms of G.L. c. 64H, § 1, the controlling statute. Regardless, the regulation at 830 CMR 64H.1.6(6) merely illustrates a scenario where a commercial facsimile transmission service has made a purchase that could be treated as a purchase for resale. *See* 830 CMR 64H.1.6 (“Any vendor that purchases telecommunications services for resale must provide its wholesale vendor with a resale certificate (Form ST‑4) and must collect tax from its retail customers on the sales price that it charges those retail customers for the telecommunications services.”).[[6]](#footnote-6) The example does not dictate the tax treatment of transactions between a commercial facsimile transmission service and its customers, and it makes no mention of a “traditional” versus any other type of facsimile service, as the appellant unilaterally reads into the regulation. *See* 830 CMR 64H.1.6. Further, the Board rejected the appellant’s notion that it is a consumer and participant in the transmission rather than a provider. A sender initiates the facsimile transmission to a particular DID assigned to a customer by the appellant; the sender’s purpose and the purpose of the eFax service is to transmit a facsimile to a customer, not to the appellant.

Despite the efforts of the appellant to make the issue seem complicated, the plain words of the statute mandate the result that the appellant’s eFax service constitutes a telecommunications service. It is a “transmission of messages or information by electronic or similar means, between or among points” by use of the statutorily recognized means. Accordingly, the Board found and ruled that the eFax service is a telecommunications service under G.L. c. 64H, § 1 and that any sales of the eFax service were subject to tax under G.L. c. 64H, § 2 for the tax periods at issue.

**II. The ITFA Does Not Preclude Taxation of the Service at Issue Under Massachusetts Law.**

As stated in its post-hearing brief, the appellant contended that the eFax service was protected from taxation under the ITFA because “j2 is deemed to purchase and resell Internet access in order to deliver the Service and such purchase and resale is exempt from taxation as the purchase of Internet access” and “the Service itself is exempt from state taxation under the ITFA as (i) an electronic mail service, (ii) a service that provides personal electronic storage capacity, and/or (iii) a service that is offered over the Internet.” Neither argument persuaded the Board that the eFax service was exempt under the ITFA.

The ITFA generally precludes the taxing of Internet access by any state or political subdivision unless such tax falls within a grandfather clause or upon the failure to meet certain requisites, such as the accounting rule and screening software provisions of the ITFA. *See* ITFA §§ 1101 and 1106. *See also* ***New Cingular Wireless PCS LLC v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2018-257, 305 (“[I]n the absence of exemption by the ITFA, a taxpayer can properly be subject to Massachusetts sales tax on Internet access.”).

***A. The Service at Issue Is Not Exempt Under the ITFA as a Purchase and Resale of Internet Access.***

Relying upon its construction of the Commissioner’s regulation at 830 CMR 64H.1.6(6), as was discussed and rejected by the Board above, the appellant alternatively claimed that it must be purchasing and reselling Internet access in order to deliver the eFax service as opposed to a “traditional” facsimile service provider purchasing and reselling telephone lines. Since the ITFA precludes taxation of Internet access, the eFax service must also be precluded from taxation in the appellant’s view.

The appellant’s argument fails because, as detailed above, the Board ruled that the eFax service is a telecommunications service under the broad definition of that term in G.L. c. 64H, § 1. *See* ***Commissioner of Revenue v. Cargill, Inc.***, 429 Mass. 79, 82 (1999) (ruling that the language of the statute governs statutory interpretation when its “language is plain and unambiguous,” and when its application would not lead to an absurd result or contravene clear intent of the Legislature). Further, according to the appellant’s own Standard Corporate Terms and Conditions, customers are responsible for providing their own “Internet access and email service,” which negates any contention that the eFax service involves the purchase and resale of Internet access.

***B. The Service at Issue Is Not Exempt Under the ITFA as an Email Service, Personal Electronic Storage Capacity Service, or a Service Offered Over the Internet.***

The appellant contended that the eFax service was exempt under the ITFA as either an email service, a service providing personal electronic storage capacity, or a service offered over the Internet. ITFA § 1105(5). The Board disagreed and found the reasoning of the California Court of Appeal useful in a similar matter involving the appellant. At issue in ***j2 Global Communications, Inc. v. City of Los Angeles***, 218 Cal. App. 4th 328, 335 (Court of Appeal, Second District, Division Four 2013), was the communications users tax (“CUT”) imposed by the City of Los Angeles on charges for communications services. ***Id***. at 330. The CUT was charged on the DIDs obtained by j2 for purposes of its eFax service and paid by j2. A claim for abatement was filed by j2 with the City of Los Angeles on the basis that the CUT was “‘incorrectly imposed on telecommunications service used for exempt Internet access.’” ***Id***. at 330-31. The City of Los Angeles argued that “j2’s purchase of telecommunications services was not exempt from taxation under ITFA because j2 did not provide ‘Internet access’ as defined in ITFA.” ***Id***. at 331. j2 contended that its services qualified as Internet access under ITFA § 1105(5). ***Id***. at 333. Regarding ITFA § 1105(5)(A), the court found that

j2 appears to ignore crucial language . . . and instead reads that provision to say that Internet access ‘means a service that enables users . . . to access content, information, or other services offered over the Internet.’ The fact that j2’s customers must connect to the Internet through the eFax service to access content, information, or other services does not show that j2 enables users ‘*to connect* *to the Internet*’ to access that content, information, or other services, as section 1105(5)(A) requires. . . . Indeed, the undisputed facts show that j2 requires its customers to obtain services from a third party to enable them to connect to the Internet. Thus, j2 cannot establish that its eFax service qualifies as Internet access under section 1105(5)(A).

***Id***. at 334. The court added that

[f]or the same reason, j2 cannot establish that its eFax service qualifies as Internet access under section 1105(5)(C) of ITFA. Under that provision, Internet access ‘includes services that are incidental to the provision of the service described in subparagraph (A) when furnished to users as part of such service . . . . Because the undisputed facts establish that j2 does not provide the service described in section 1105(5)(A), its eFax service necessarily does not provide services incidental to that service.

***Id***. at 334. Regarding ITFA § 1105(5)(E), the court found that

sending an e-mail to an eFax customer through that customer’s independently obtained e-mail service, and allowing customers to access their accounts through eFax’s home page do not constitute providing a homepage or electronic mail service to the customers. If it did, virtually all business conducted over the Internet would be exempt from taxation. We decline to interpret section 1105(5)(E) in such a way as to render ITFA’s definition of Internet access essentially meaningless.

***Id***. at 335. *See also* TSB-A-16(30)S - Advisory Opinion – Petition No. S130506B, State of New York – Department of Taxation and Finance, November 18, 2016 (“[T]he fax service does not qualify as email service for purposes of ITFA because its purpose is to allow a subscriber to communicate with a party that lacks an email service, such that at least part of every communication using the service goes by fax, rather than email.”) (citing ***j2 Global Communications, Inc.***, 218 Cal. App. 4th at 335).

Similarly here, the evidence established that the appellant required customers to provide their own Internet access and email service to use the eFax service. The appellant admitted that the hosted email service included with the eFax service was not even the prevalent email address used by customers. The eFax service itself did not enable customers “to access content, information, electronic mail, or other services offered over the Internet,” within the meaning of the ITFA version in effect until 2007, or enable customers “to connect to the Internet to access content, information, or other services offered over the Internet,” within the meaning of the ITFA version as amended in 2007. ITFA § 1105(5)(A). Consequently, under ITFA § 1105(5)(C), the appellant did not offer services “incidental to the provision of the service described in” ITFA § 1105(5)(A), such as electronic mail and personal electronic storage capacity, since it did not actually provide the service enumerated in ITFA § 1105(5)(A).

The appellant’s contention regarding electronic mail and personal electronic storage capacity likewise fails under ITFA § 1105(5)(E), as well as ITFA § 1106, because these services are not provided independently and certainly not accounted for independently, but rather packaged as an additional feature to the eFax service.

Accordingly, the Board found and ruled that the ITFA did not prohibit taxation of sales deriving from the eFax service.

**III. The Gross Receipts from the Sales of the Service at Issue Were Properly Allocated to Massachusetts.**

General Laws c. 64H, § 1 provides that the sale of interstate telecommunications services “shall be deemed a sale within the commonwealth if the telecommunication is either originated or received at a location in the commonwealth and the services are either paid for in the commonwealth or charged to a service address located in the commonwealth.” *See also* 830 CMR 64H.1.6. The appellant contended that no receipts from sales of the eFax service should be sourced to Massachusetts because it does not know where customers receive documents or where customers primarily use the eFax service due to the ability of customers to access the eFax service anywhere with an Internet connection. The appellant also claimed that it knows billing addresses, but that billing addresses do not necessarily reflect where customers use the service at issue.[[7]](#footnote-7)

Pursuant to G.L. c. 62C, § 25, a vendor required to register under chapter 64H “shall keep and preserve suitable records of taxable charges and such other books, papers, records and data as the commissioner may require to determine the amount of the tax due” and “[s]uch records shall be open to inspection and examination at any reasonable time by the commissioner or his duly authorized representative.” The Commissioner’s regulation at 830 CMR 62C.25.1 expands upon this requirement to maintain adequate records, stating that a taxpayer “must preserve and maintain permanent books of account or records, sufficiently accurate and complete to establish the amount of gross income, deductions, credits or other matters required to be shown by such person in any return of such tax or information” and that “[t]he Commissioner may require any person to keep such specific records as he deems necessary to determine the amount of such person’s tax liability.” 830 CMR 62C.25.1. If a taxpayer has not maintained such records, “the Commissioner may use any reasonable alternative method of determining the amount due.” ***Id***.

Here, the appellant was required to keep adequate records to determine the amount of tax due. ***Id***. In the absence of such records, the Commissioner proposed a reasonable alternative method - taking j2’s nationwide revenue as reported on its Federal Form 1120s, multiplied by a percentage of the total U.S. population attributable to Massachusetts. ***Id***. Accordingly, receipts from the appellant’s sales of the eFax service were properly sourced to Massachusetts for purposes of calculating the sales tax under G.L. c. 64H, § 2.

**IV. The Appellant Is Not Entitled to an Abatement of Penalties.**

The Commissioner imposed penalties pursuant to both G.L. c. 62C, § 33(a) and G.L. c. 62C, § 35A. The Board found and ruled that the appellant was not entitled to an abatement of penalties imposed under either statute.

***A. Penalties Imposed Under G.L. c. 62C, § 33(a)***

When a tax return is not timely filed, G.L. c. 62C, § 33(a) provides for a penalty of 1 percent of the amount required to be shown as the tax on such return for each month that the failure continues, not exceeding 25 percent of said amount. G.L. c. 62C, § 33(a). *See also* 830 CMR 62C.33.1 (“The amount required to be shown consists of both unreported tax determined by the Commissioner to have been due, as well as the tax that is properly reported by the taxpayer as having been due.”). General Laws c. 62C, § 33(f) permits the Commissioner discretion in abating these penalties, provided that the failure to timely file a return or pay a tax in a timely manner is due to reasonable cause and not willful neglect. G.L. c. 62C, § 33(f).

“Reasonable cause will be established where, at a minimum, a taxpayer has demonstrated that it ‘exercised the degree of care that an ordinary taxpayer in [its] position would have exercised.’” ***Geoffrey, Inc. v. Commissioner of Revenue***, 453 Mass. 17, 25-26 (2009) (quoting ***Commissioner of Revenue* v. Wells Yachts South, Inc.**, 406 Mass. 661, 665 (1990)). “A taxpayer seeking an abatement of the penalty must present specific facts establishing that its failure to file timely was due to reasonable cause. A mere assertion, by affidavit or otherwise, that the failure to file was reasonable or excusable due to oversight or inadvertence is not sufficient to establish reasonable cause.” 830 CMR 62C.33.1. *See also* TIR 11-1: Limitations Period for Taxpayers Failing to File Tax Returns (“A factor in the Guidelines that will bear directly on a non-filer penalty waiver decision is whether the taxpayer voluntarily disclosed the delinquency and cooperated with any subsequent (or ensuing) DOR investigation.”).

The provisions of G.L. c. 64H, § 1 concerning the taxation of telecommunications services are broad and clearly drafted to encompass a wide range of transmissions. The Commissioner’s public written statements do not limit facsimile transmissions to the “traditional” facsimile transmissions that the appellant attempts to distinguish from its eFax service, and an ordinary taxpayer in the same position as the appellant – one that describes its own service as a facsimile service - would have exercised the care to file returns accordingly. *See* TIR 99-2 and TIR 05-8 (both explicitly listing facsimile transmission services as an example of taxable telecommunications services). *See also* ***Geoffrey, Inc.***, 453 Mass. at 26 n.11 (“A directive ‘states the official position of the Department,’ and it will be used ‘as precedent in the disposition of cases unless and until it is revoked or modified.’”) (citation omitted). *See* AP 633: Guidelines for the Waiver and Abatement of Penalties (“AP 633”) (“The proper treatment of an item or transaction will not be considered unclear when DOR has issued a written policy statement that addresses the issue in a clear and direct manner.”).

The appellant, a corporation with more than 11 million customers during the tax periods at issue that admitted to a presence in the Commonwealth sufficient to create taxable nexus and filing requirements, evidenced no reasonable steps to become familiar with its sales tax obligations over a span of more than eight years. *See* ***Commissioner of Revenue v. Wells Yachts South, Inc.***, 406 Mass. at 664 (“Whether the taxpayer’s tardiness is due to reasonable cause is a test to be passed or failed as of the time that the taxpayer was obligated to act.”). *See* *also* AP 633 (“[A] taxpayer must establish that care was exercised to the same degree that an ordinary taxpayer in the same position would have exercised.”). The appellant filed no Sales Tax Returns on its own accord and failed to respond to the Commissioner’s letter dated July 7, 2010, in which he notified the appellant that the service at issue was subject to sales tax and that the appellant needed to file seven years of delinquent Sales Tax Returns within thirty days from the date of the letter. The appellant commenced filing Sales Tax Returns after the Commissioner issued a Notice of Failure to Register and File Return and it attached a statement to each untimely filed Sales Tax Return, but the statement’s superficial recitation of facts and law provided no sound basis for the appellant’s position. Consequently, the Board determined that the appellant was not entitled to an abatement of penalties imposed under G.L. c. 62C, § 33(a).

***B. Penalties Imposed Under G.L. c. 62C, § 35A***

The provisions of G.L. c. 62C, § 35A mandate penalties calculated at 20 percent of a taxpayer’s underpayment - “the amount by which any tax exceeds the amount shown as the tax due by the taxpayer on the return” – attributable to (1) negligence or disregard of the tax laws of the Commonwealth or the Commissioner’s public written statements and/or (2) a substantial understatement of a tax liability. G.L. c. 62C, § 35A.

The statute defines “negligence” to include any failure to make a reasonable attempt to comply with the laws or the Commissioner’s public written statements and “disregard” as including “any careless, reckless, or intentional disregard.” ***Id***. An understatement of liability is “substantial” if the amount of the understatement for that period exceeds the greater of 10 percent of the tax required to be shown on the return for the period or $1,000. ***Id***. The term “understatement” is defined as the excess of the amount of the tax that is required to be shown on the return over the amount of the tax which is shown on the return. ***Id***.

The understatement can be reduced if a taxpayer establishes “substantial authority for the [tax] treatment” of an item or “if the relevant facts affecting the tax treatment of the item are adequately disclosed in the return or in a statement attached to the return, and there is a reasonable basis for the tax treatment of the item by the taxpayer.” ***Id***.

The Commissioner’s Directive 12-7: Section 35A Penalty for Underpayment of Tax Required to be Shown on Return (“Directive 12-7”) provides additional guidance on imposition of the penalty under G.L. c. 62C, § 35A, stating that “[n]egligence would include, but is not limited to, the failure to exercise ordinary business care in the preparation of a tax return and failure to keep adequate books and records to substantiate items claimed on tax returns.” Additionally, “[t]he term ‘disregard’ includes any careless, reckless, or intentional disregard of the Department’s rules, regulations or other public written statements” and “may be evidenced by, among other things, knowingly taking a position that is incorrect or taking a position on a return with little to no effort to determine if the return position is correct.” Directive 12-7. The Commissioner’s guidance considers authority to be substantial “if the weight of the authorities supporting the treatment is substantial in relation to the weight of authorities supporting contrary treatment.” Directive 12-7. “Adequate disclosure pertains to the relevant facts affecting the tax treatment of an item and requires that such facts be adequately disclosed in the return or in a statement submitted with the return” and “[t]he reasonable basis standard is not satisfied by a return position that is merely arguable or that is merely a colorable claim.” Directive 12-7.

A taxpayer may avoid a G.L. c. 62C, § 35A penalty on any portion of the underpayment “if it is shown that there was reasonable cause for such portion and that the taxpayer acted in good faith with respect to such portion.” G.L. c. 62C, § 35B.In Directive 12-7, the Commissioner provides examples of factors that could be pertinent to a determination of reasonable cause and good faith, such as whether a taxpayer relied upon certain erroneous information, whether the taxpayer reasonably relied upon professional tax advice, and inadvertent errors.

Here there is both substantial understatement – with the appellant reporting that no tax was due for the tax periods at issue – and negligence and disregard of the Commonwealth’s tax laws and the Commissioner’s public written statements. The appellant admitted that it had the requisite contacts with the Commonwealth to create taxable nexus and filing requirements for sales tax purposes. It neglected to file Sales Tax Returns on its own accord despite providing a service that fits within the Commissioner’s public written statements at TIR 99-2 and TIR 05-8, and it continued to disregard its filing requirements even after notification by the Commissioner. There was no evidence that it sought guidance from the Commissioner if it was uncertain of its filing position. The appellant provided no substantial authority for its position and the statement attached to its Sales Tax Returns was merely a recitation of its position. Further, there is no evidence of inadvertent errors; no evidence that the appellant relied upon erroneous information; and no evidence that the appellant sought the advice of a competent tax professional throughout the eight years of tax delinquency before the Board. Conversely, the Commissioner sent a letter to the appellant on July 7, 2010, informing the appellant that sales of the service at issue were subject to sales tax, but the appellant did not commence filing until May 19, 2011, after receipt of a Notice of Failure to Register and File dated March 10, 2011, and it reported that no tax was due to the Commonwealth. The Board concluded that these facts were not indicative of the reasonable cause and good faith required under G.L. c. 62C, § 35B.

Accordingly, the Board found and ruled that the appellant was not entitled to an abatement of penalties imposed under G.L. c. 62C, § 35A.

**CONCLUSION**

Based upon the record in its entirety, the Board found and ruled that the appellant did not meet its burden of proof in establishing that it was entitled to an abatement for the tax periods at issue on the Telecommunications Issue, the ITFA Issue, the Receipts Issue, and the Penalties Issue. Consequently, the Board issued a decision for the Commissioner in this appeal.

**THE APPELLATE TAX BOARD**

**By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Thomas W. Hammond, Jr., Chairman**

**A true copy,**

**Attest: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Clerk of the Board**

1. This appeal only concerns inbound faxes received by the appellant’s customers, not outbound faxes sent by the appellant’s customers. [↑](#footnote-ref-1)
2. Mr. Flowers noted that a mobile app was available to customers as of 2010 through which they also could access files. [↑](#footnote-ref-2)
3. Professor Pomp failed to acknowledge that the DIDs in this matter function the same way as the telephone line at a Kinko’s location, except that each eFax customer is assigned a dedicated DID rather than use of a common line. The eFax service then requires additional levels of transmission by means of the appellant’s servers at the colocation facilities and the Internet to a customer’s email address. [↑](#footnote-ref-3)
4. In its reply brief, the appellant stressed that Professor Pomp’s testimony concerning interpretation of the ITFA was elicited by the Commissioner on cross-examination. [↑](#footnote-ref-4)
5. Previously, the rate imposed was 5 percent of gross receipts. By St. 2009, c. 27, § 53, approved June 29, 2009 and effective August 1, 2009, the rate was changed to 6.25 percent. [↑](#footnote-ref-5)
6. As the Commissioner noted in his reply brief, the appellant “could have claimed a resale exemption based on Massachusetts law” for the DIDs, but instead chose to pay sales tax itself on the DIDs for which they admittedly paid “less than a penny [apiece].” [↑](#footnote-ref-6)
7. It is unclear why billing addresses were not used to determine sourcing of receipts to Massachusetts when the regulation clearly provides for this treatment. *See* 830 CMR 64H.1.6 (“In general, a telecommunication is paid for in the Commonwealth if it is billed to an address within the Commonwealth.”). However, a document in the record dated August 19, 2011, from Morrison & Foerster LLP to Ms. Murillo concerning “Request for Confirmation of Facts” indicated that the appellant “does not require customers to maintain and keep [a] billing address current as long as the monthly service charge is honored.” [↑](#footnote-ref-7)