**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**JORDAN’S FURNITURE, INC. v. COMMISSIONER OF REVENUE**

Docket No. C325420 Promulgated:

 September 27, 2018

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 Jordan’s Furniture, Inc. (“appellant”) for the monthly periods ending August 31, 2010, August 31, 2011, and August 31, 2012 (“periods at issue”).

Commissioner Scharaffa heard the appeal and was joined by Chairman Hammond and Commissioners Rose and Chmielinski in the decision for the appellant, granting an abatement of sales tax in the amount of $2,306,806, plus penalties pursuant to G.L. c. 62C, § 35A, and statutory interest under G.L. c. 62C, § 40.

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.

 *John S. Brown*,Esq., *George P. Mair*, Esq., *Donald-Bruce Abrams*, Esq., and *Darcy A. Ryding*, Esq. for the appellant.

*Marikae Grace Toye*,Esq., *Michael P. Clifford*,Esq., *and Frances Donovan*,Esq. for the Commissioner.

**FINDINGS OF FACT AND REPORT**

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

**I. Introduction**

During the periods at issue, the appellant was a large furniture retailer based in New England. At all material times, it was registered with the Department of Revenue as a vendor of tangible personal property and was required to collect and remit sales tax to the Commonwealth on its sales of tangible personal property subject to sales tax and to file monthly sales tax returns.

Also during the periods at issue, the Massachusetts Legislature passed legislation (“Sales Tax Holiday Legislation”) mandating that vendors “not add to the sales price or collect from a nonbusiness purchaser an excise upon sales at retail of tangible personal property” made on certain specified dates (“Sales Tax Holidays”). *See* St. 2012, c. 238, § 80; St. 2011, c. 86; St. 2010, c. 240, §§ 174–79.[[1]](#footnote-1) The Sales Tax Holidays took place on August 14-15, 2010, August 13-14, 2011, and August 11-12, 2012.

The primary issue in this matter is whether certain orders for merchandise that were subsequently cancelled and rewritten on Sales Tax Holidays qualified as exempt sales contemplated by the Sales Tax Holiday Legislation (“sales at issue”). For the monthly periods ending August 31, 2010 and August 31, 2011, the appellant neither collected nor remitted sales tax on the sales at issue. While it did not collect sales tax on the sales at issue for the monthly period ending August 31, 2012, it self-assessed and remitted sales tax in an amount that it believed would be due on these sales for that period under the language included in the Commissioner’s Technical Information Release 12-5: The 2012 Massachusetts Sales Tax Holiday Weekend (“TIR 12-5”).[[2]](#footnote-2) Upon audit, the Commissioner made an additional assessment of $83,850 in sales tax for the monthly period ending August 31, 2012, based upon the inclusion of additional sales that he deemed to be subject to tax. The Board also considered the secondary issue of whether penalties imposed by the Commissioner pursuant to G.L. c. 62C, § 35A for the monthly periods ending August 31, 2010, August 31, 2011, and August 31, 2012 were proper.

**II. Jurisdiction**

The appellant filed Massachusetts sales and use tax returns on a monthly basis for the periods at issue and timely paid the tax shown to be due. After the parties entered into a series of consents extending the statute of limitations for assessments, the Commissioner issued a Notice of Intent to Assess dated December 6, 2013, in the amount of $2,292,803 for the periods at issue, as well as other monthly periods not at issue, inclusive of penalties under G.L. c. 62C, § 35A and applicable interest. The Commissioner then issued a Notice of Assessment, dated January 14, 2014, in the amount of $2,303,477 for the periods at issue, as well as other monthly periods not at issue,[[3]](#footnote-3) inclusive of penalties under G.L. c. 62C, § 35A and applicable interest.

On March 14, 2014, the appellant timely filed a Form CA-6: Application for Abatement/Amended Return (“abatement application”), seeking an abatement of sales tax and penalties for the periods at issue. The Commissioner issued two Notices of Abatement Determination dated July 22, 2014, denying the abatement application in full for the periods at issue. On September 15, 2014, the appellant timely filed a petition under formal procedure with the Board for the periods at issue. Based on the foregoing, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

The appellant and the Commissioner stipulated that if the appellant prevailed on all issues in this appeal, it would be entitled to an abatement of tax in the amount of $847,370 for the monthly period ending August 31, 2010, $752,890 for the monthly period ending August 31, 2011, and $706,546 for the monthly period ending August 31, 2012 (consisting of $83,850 in tax assessments made by the Commissioner and $622,696 in self-assessments made by the appellant), for a total tax abatement of $2,306,806, plus penalties imposed pursuant to G.L. c. 62C, § 35A.

**III. Facts Concerning the Sales at Issue**

The appellant sells items such as mattresses, sofas, dining room sets, bedroom sets, lamps, pillows, and other accessories, which it buys from manufacturers all over the world. While a customer could purchase items such as lamps and pillows in-store, most items were not available for same-day pickup or delivery and could take weeks or months to become available. Salespeople would assist customers in selecting items, ordering the items, and arranging for pickup or delivery. According to Scott Wantman, the store manager of the appellant’s Reading, Massachusetts location during the periods at issue, customers received order receipts upon placing orders. The order receipts detailed the items, an order number, amounts paid by the customers, remaining amounts left to be paid by the customers, anticipated dates when the items would come in, and the appellant’s policies and procedures relative to orders.

If a customer was taking an item home on the same day, noted Mr. Wantman, the customer would pay for the item in full at that time. Similarly, if the customer was scheduling a delivery or a pickup at the time of placing the order, the customer would pay in full at that time. Otherwise, a customer would typically place only a 30 percent deposit at the time of placing the order while waiting for the items to come in, explained Mr. Wantman.[[4]](#footnote-4) After the items came in, the appellant would collect any remaining payment balance prior to scheduling the delivery to the customer or arranging for pickup by the customer.

Prior to and during the periods at issue, the appellant offered a generous cancellation policy, according to Mr. Wantman, allowing customers to cancel or change any order prior to pickup or delivery. Customers could either select different merchandise and use their credit towards a new order, or receive a refund. Mr. Wantman noted that in most cases, the deposit was refunded in full. For special orders, the appellant tried to discourage cancellation by stating that the deposit was nonrefundable, but did not consistently enforce that policy. He noted that these open orders were cancelled for various reasons, including to permit customers to qualify for internal promotions that had begun during the time since they placed their orders. Before an order was rewritten, the original order was cancelled and voided. A new order was then placed with a new order number for the same type of item, and reflected any changes to the terms of the order. Mr. Wantman testified that on average, approximately 10 to 20 percent of orders were cancelled for various reasons.

During the first of the Sales Tax Holidays in 2004, Mr. Wantman described the scene in the appellant’s stores as “complete chaos” due to customers coming in and wanting to cancel orders to take advantage of the tax exemption. The appellant allowed this because “[i]t’s our stated policy,” testified Mr. Wantman. “If they have an order they don’t take delivery of yet, they can cancel it**.”** He further explained that “[t]he sales tax holiday isn’t our promotion. We can’t tell customers we’re not going to do it.”

To avoid the influx of customers coming into the stores,during subsequent Sales Tax Holidays in 2005, 2006, and 2007, Mr. Wantman explained that the appellant permitted customers who wished to cancel orders to call and speak to an employee on the designated Sales Tax Holidays instead of physically coming into a store. The employee in turn would cancel the existing order and generate a new order from a computer terminal.

The appellant subsequently modified this procedure because “[e]ssentially 10,000 phone calls would come in over the course of a day,” testified Mr. Wantman. He further explained that “[w]e don’t really have people in that capacity to answer the phones.” In 2008, for customers who had visited stores prior to the designated dates but who wanted to take advantage of the Sales Tax Holidays, the appellant placed identifying codes on the orders and employees cancelled and rewrote the orders on the designated dates. During the periods at issue, the appellant further modified its procedure by implementing software to cancel and rewrite orders for customers who had indicated they wished to take advantage of the Sales Tax Holidays. Mr. Wantman stressed that only customers with open orders could cancel and take advantage of the Sales Tax Holidays: “Any customer who had the merchandise already there was nothing we could do to help them.”[[5]](#footnote-5)

Mr. Wantman also discussed a printed guide in the record that the appellant created in 2010 called “Tax Holiday Procedure for Right Now & Friday August 13, 2010” (“2010 guide”). The 2010 guide detailed the appellant’s policy that employees were not to initiate any conversation regarding cancelling and reordering. Customers placing orders ahead of the Sales Tax Holidays had to broach the subject of the Sales Tax Holidays themselves in order to exercise their right to cancel an open order during the Sales Tax Holidays. The policy contained in the 2010 guide provided that the salespersons could not “guarantee eligibility” because the Sales Tax Holidays had not yet been established and that deliveries on the Sales Tax Holidays would not be eligible. The record also contained back office procedural documents for each of the periods at issue detailing implementation procedures for the Sales Tax Holidays. Both the 2010 guide and the back office procedural documents stated that customers wishing to have orders cancelled and rewritten on the Sales Tax Holidays had to have paid in full for the order, exclusive of the Massachusetts sales tax, and that customers could not have deliveries scheduled for the Sales Tax Holidays.[[6]](#footnote-6)

On the basis of the above, the evidence of record, and the Statement of Agreed Facts, and as discussed further in the opinion, the Board found that the sales at issue qualified as exempt sales contemplated by the Sales Tax Holiday Legislation. The sales at issue qualified as sales made during the Sales Tax Holidays, not prior sales or layaway sales, and payment in full occurred through the appellant’s process of cancelling and rewriting the sales at issue during the Sales Tax Holidays. The Board found that the appellant’s policy of permitting customers to cancel open orders anytime prior to taking receipt of the items was a longstanding general company policy upon which customers relied.

The Board further found that the appellant took an excess of caution in trying to adhere to the Sales Tax Holiday Legislation, going so far as forbidding employees to initiate discussions about the Sales Tax Holidays or telling customers who wished to cancel and have their orders rewritten that pickup or delivery could not occur on the Sales Tax Holidays, neither of which is forbidden by the Sales Tax Holiday Legislation.

Accordingly, the Board found that the appellant was entitled to abatements for the monthly periods ending August 31, 2010, August 31, 2011, and August 31, 2012, on the basis that the sales at issue were not subject to sales tax. Further, the Board found that the appellant was entitled to an abatement of any corresponding penalties imposed by the Commissioner pursuant to G.L. c. 62C, § 35A since the underlying tax upon which the penalties were imposed was improperly assessed.

**OPINION**

**I.** **The Sales at Issue Met the Requisites of the Sales Tax Holiday Legislation**.

Under G.L. c. 64H, § 2, vendors making retail sales in Massachusetts of tangible personal property must pay an excise equal to 6.25 percent of all such sales and file returns as prescribed in G.L. c. 62C, § 16. The excise is paid by the purchaser to the vendor, which is obligated to remit the excise to Massachusetts. *See* G.L. c. 64H, § 3. The Sales Tax Holiday Legislation for the monthly periods ending August 31, 2010, August 31, 2011, and August 31, 2012 provided an exception to this standard rule, stating in pertinent part that

[f]or the [days identified as Sales Tax Holidays], an excise shall not be imposed upon nonbusiness sales at retail of tangible personal property . . . . [A] vendor shall not add to the sales price or collect from a nonbusiness purchaser an excise upon sales at retail of tangible personal property . . . . The commissioner of revenue shall not require a vendor to collect and pay excise upon sales at retail of tangible personal property purchased on [the Sales Tax Holidays].

St. 2012, c. 238, § 80; St. 2011, c. 86; St. 2010, c. 240, §§ 174–79. The Sales Tax Holiday Legislation further required that “eligible sales” were “restricted to those transactions occurring on [the Sales Tax Holidays]” and that “[t]ransfer of possession of or payment in full for the property shall occur on 1 of those days [of the Sales Tax Holidays] and prior sales or layaway sales shall be ineligible.” *Id*.

 As described below, the Board determined that “payment in full” occurred on the sales at issue through the appellant’s cancellation and rewrite process and that the sales at issue were neither prior sales nor layaway sales that were forbidden by the Sales Tax Holiday Legislation. St. 2012, c. 238, § 80; St. 2011, c. 86; St. 2010, c. 240, §§ 174–79.

**A. Payment in Full Occurred on the Sales Tax Holidays**.

The Commissioner argued in his brief that for the sales at issue, customers did not take possession during the Sales Tax Holidays and that “in fact, it was the ability of customers to cancel their orders before taking possession of the furniture that caused problems for Jordan’s in the first place.” The Commissioner also contended that the appellant did not refund payments and recharge credit cards when rewriting orders, so the sales at issue were not paid in full during the Sales Tax Holidays.

While the Board agreed that possession did not occur during the Sales Tax Holidays, it found no basis in the Sales Tax Holiday Legislation to support the Commissioner’s reading of “payment in full.” The Sales Tax Holiday Legislation does not dictate any particular method by which “payment in full for the property” must occur. General Laws c. 64H, § 1, in defining the “sales price” for a retail sale, states that it is “the total amount paid by a purchaser to a vendor as consideration for a retail sale, valued in money or otherwise” and that “there shall be included . . . any amount for which credit is given to the purchaser by the vendor.” Here, the sales at issue were cancelled, providing customers with a credit towards their new rewritten orders. Customers who expressed an interest in cancelling and rewriting their orders to take advantage of the Sales Tax Holidays were required to fully pay the price of their open order, exclusive of the Massachusetts sales tax, prior to the start of the Sales Tax Holidays. The cancellation and rewrite process then occurred during the Sales Tax Holidays and the amount credited toward the new order constituted “payment in full” on the Sales Tax Holidays.

The Board also did not find the lack of a refund and subsequent recharging of a credit card to be unseemly as implied by the Commissioner in his brief, but rather a process implemented by the appellant to more smoothly comply with the mandated Sales Tax Holidays while honoring its longstanding policy of permitting customers to cancel orders anytime prior to delivery or pickup.[[7]](#footnote-7) *See* St. 2012, c. 238, § 80; St. 2011, c. 86; St. 2010, c. 240, §§ 174–79; TIR 12-5 (“All Massachusetts businesses normally making taxable sales of tangible personal property that are open on [the Sales Tax Holidays] must participate in this sales tax holiday.”). In light of the appellant’s testimony about its experience and complications with in-person and phone re-orders on Sales Tax Holidays in prior years, the Board found the procedures at issue in this appeal were reasonable and consistent with the Sales Tax Holiday Legislation.

**B. The Sales at Issue Were Not Prior Sales**.

Prior sales are excluded from the Sales Tax Holidays. With respect to the sales at issue in this appeal, a “sale” under G.L. c. 64H, § 1 requires either a “transfer of title or possession.” As noted above, the Commissioner contended in his brief that possession did not occur during the Sales Tax Holidays. The Board agreed. Neither title nor possession was transferred prior to the Sales Tax Holidays. The appellant’s policy of allowing customers to cancel open orders anytime prior to pickup or delivery was an explicit agreement between the appellant and customers that title would not pass until physical possession was transferred. *See* G.L. c. 106, § 2-401 (“Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods.”). Consequently, no transfer of title or possession passed with the sales at issue and they did not constitute prior sales prohibited by the Sales Tax Holiday Legislation.

**C. The Sales at Issue Were Not Layaway Sales**.

The Board determined that the sales at issue were not “layaway sales” excluded from the exemption under the Sales Tax Holiday Legislation. According to TIR 12-5, “[a] layaway sale is a transaction in which property is set aside for future delivery to a customer who makes a deposit, agrees to pay the balance of the purchase price over a period of time and receives the property when the last payment is made.” *See also* Technical Information Release 10-10: The 2010 Massachusetts Sales Tax Holiday Weekend and Technical Information Release 11-7: The 2011 Massachusetts Sales Tax Holiday Weekend.

The record here did not support a finding that the appellant set aside specific merchandise for customers and that customers made payments over a period of time. Conversely, most items needed to be ordered and could take weeks or months to become available. The appellant generally took a deposit of approximately 30 percent at the time of placing an order for a customer and it collected the balance prior to delivery or pickup, not over an agreed period of time.

**II.** **The G.L. c. 62C, § 35A Penalties Were Improperly Imposed**.

The penalty under G.L. c. 62C, § 35A applies “to the portion of any underpayment which is attributable to 1 or more of the following: (1) negligence or disregard of the tax laws of the commonwealth or of public written statements issued by the commissioner; (2) any substantial understatement of liability for a tax referred to in section 2.” Here, the Board determined that the sales at issue met the requisites of the Sales Tax Holiday Legislation and were not subject to sales tax for the monthly periods ending August 31, 2010, August 31, 2011, and August 31, 2012. Consequently, there can be no underpayment or triggering of G.L. c. 62C, § 35A with respect to sales tax on the sales at issue and the appellant is entitled to an abatement of the associated penalties imposed pursuant to G.L. c. 62C, § 35A.

**CONCLUSION**

Based upon the above, the Board found that the sales at issue met the requisites of the Sales Tax Holiday Legislation and consequently the sales at issue were not subject to sales tax for the monthly periods ending August 31, 2010, August 31, 2011, and August 31, 2012. Further, the Board found that any associated penalties imposed by the Commissioner pursuant to G.L. c. 62C, § 35A were improper on the basis that the underlying tax was found to be improperly assessed. Accordingly, the Board issued a decision for the appellant and ordered an abatement in the amount of $2,306,806, plus penalties pursuant to G.L. c. 62C, § 35A, and statutory interest under G.L. c. 62C, § 40 for the monthly periods ending August 31, 2010, August 31, 2011, and August 31, 2012.

  **THE APPELLATE TAX BOARD**

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

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

 **A true copy,**

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

 **Clerk of the Board**

1. Since 2004, similar Sales Tax Holidays have occurred prior to and subsequent to the periods at issue, with few exceptions. *See, e.g.*, St. 2003, c. 141, §§ 55-59; St. 2005, c. 52. [↑](#footnote-ref-1)
2. The language in TIR 12-5 that prompted the appellant to self-assess and later file for a refund of the self-assessed amounts was located in Section IV.E entitled “Penalties,” stating in pertinent part that “[a] vendor may not void and rewrite a sale that has taken place before August 11, 2012 for the purpose of bringing the transaction under the sales tax holiday rules.” [↑](#footnote-ref-2)
3. For purposes of this appeal, the appellant and the Commissioner stipulated that the appellant would contest only the tax assessments for the monthly periods ending August 31, 2010, August 31, 2011, and August 31, 2012, the periods at issue. [↑](#footnote-ref-3)
4. Numerous order receipts were entered into evidence. [↑](#footnote-ref-4)
5. Starting in 2013, the appellant decided to offer customers a greater discount in advance of the Sales Tax Holidays “to prevent the mass hysteria in the stores on Saturday and Sunday,” according to Mr. Wantman. “The discount was 12.5 percent,” he explained, “so you’d save a little bit more money buying before the sales holiday.” [↑](#footnote-ref-5)
6. The 2010 guide stated that deliveries could not occur on either the Saturday or the Sunday of the Sales Tax Holidays. Similarly, the back office procedural document for 2010 stated the same, but that customers who were “distressed” would be given “a miscellaneous credit” of 6.25 percent to use towards a future purchase. The back office procedural documents for 2011 and 2012 only disallowed deliveries on the Saturdays of the Sales Tax Holidays, with similar 6.25 percent credits offered to customers who felt entitled to the benefit of the Sales Tax Holidays. The back office procedural documents for each of the periods at issue also stated that customers scheduled to pick up orders on either the Saturday or Sunday of the Sales Tax Holidays would be ineligible for the Sales Tax Holidays, but that if customers objected to this, the appellant would cancel and rewrite the order. The record was not clear as to why the appellant implemented this policy regarding deliveries and pickups on the Sales Tax Holidays. [↑](#footnote-ref-6)
7. The Board was also not constrained to follow the language in the Commissioner’s TIR 12-5, that “[a] vendor may not void and rewrite a sale that has taken place before August 11, 2012 for the purpose of bringing the transaction under the sales tax holiday rules,” since the sales at issue were not prior sales, as discussed further below. [↑](#footnote-ref-7)