COMMONWEALTH OF MASSACHUSETTS

Appeals Court

SUFFOLK, SS. NO. 2020-P-0369

ORACLE USA, INC., ORACLE AMERICA, INC. AND MICROSOFT LICENSING GP,
Plaintiff-Appellees,

v.

COMMISSIONER OF REVENUE,
Defendant-Appellant.

ON APPEAL FROM A DECISION OF THE APPELLATE TAX BOARD

BRIEF OF THE DEFENDANT-APPELLANT COMMISSIONER OF REVENUE

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This is an appeal under G.L. c. 58A, § 13 by the Massachusetts Commissioner of Revenue ("Commissioner") from a decision of the Appellate Tax Board ("Board") overturning the Commissioner's denial of abatement applications filed by plaintiff-appellees Oracle USA, Inc. ("Oracle USA"), Oracle America, Inc. ("Oracle America"), and Microsoft Licensing, GP ("Microsoft") (collectively, "Taxpayers").

Under Massachusetts law, sales tax is imposed on all property sold in the Commonwealth, including software. However, the Legislature has granted to the Commissioner the authority to make rules for a multi-state "apportionment" of sales tax in those instances where software is sold in-state for use in other states. Beginning in 2009, the Taxpayers sold software in Massachusetts and collected and remitted sales tax on such sales. Years later, and without attempting to comply with the Commissioner's rules for apportionment, they applied for an abatement (and refund) of sales tax based on the purchaser's out-of-state usage of the software. The Commissioner denied their application for abatement, and Taxpayers appealed to the Board. After initially ruling in favor of the Commissioner, the Board – two years later – reversed itself *sua sponte* and concluded that Taxpayers were entitled to an apportionment (and therefore in-state reduction) of sales tax stemming

from the purchaser's usage of the software in other states, despite finding that Taxpayers "did not satisfy" the requirements for apportionment that the Commissioner had set forth in his duly promulgated rules on this specific topic. The Board's ruling is in error and should be reversed.

STATEMENT OF ISSUES

1. Did Taxpayers have a freestanding, "statutory" right to apportion sales tax on sales of standardized computer software based on out-of-state usage of such software where the operative statutory language in G.L. c. 64H, § 1, does not state that such an entitlement exists, but instead provides only that the Commissioner "*may*, by regulation, provide rules for apportioning tax in those instances in which software is transferred for use in more than one state"?

2. Even assuming *arguendo* that the Legislature provided that taxpayers purchasing standardized computer software in in-state transactions are entitled to apportion sales tax based on out-of-state usage, does this mean that Taxpayers are free to disregard the Commissioner's duly promulgated regulations prescribing *how and when* a taxpayer may apportion sales tax and instead secure apportionment through a post hoc abatement application, even though the Legislature granted to the Commissioner the

authority to set the "*rules* for apportioning tax" where the software is purchased for use in more than one state?

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

Massachusetts law imposes a 6.25% tax "upon sales at retail in the commonwealth, by any vendor, of tangible personal property". G.L. c. § 64H, § 2. In 2005, the Massachusetts Legislature amended the definition of "tangible personal property" to specifically address the topic of standardized computer software (the "2005 Amendments"). The 2005 Amendments consisted of two sentences. The first sentence stated:

> A transfer of standardized computer software including but not limited to electronic, telephonic or similar transfer, shall also be considered a transfer of tangible personal property.

St. 2005, c. 163, § 34; G.L. c. 64H, § 1. This addition marked a change in how software transactions would be treated for sales and use tax purposes: "Prior to this statutory change, sales or use tax was imposed on sales of prewritten software delivered in tangible form such as a disk, but not on prewritten software delivered electronically . . . .'" *See* DOR Technical Information Release 05-15, § I; Addendum ("Add.") at 83-85. The new language negated this "tangible versus electronic" delivery distinction.

In the second sentence of the 2005 Amendments, the Legislature granted to the Commissioner the discretionary authority to establish rules for apportioning sales and use tax on computer software in situations where the software is to be transferred for use in multiple states. The statute stated:

> The Commissioner *may*, by regulation, provide rules for apportioning tax in those instances in which software is transferred for use in more than one state.

St. 2005, c. 163, § 34; G.L. c. 64H, § 1 (emphasis added). The effective date of these changes was April 1, 2006. St. 2005, c. 163, § 61.

On February 10, 2006, within weeks of the passage of the 2005 Amendments, the Commissioner issued Technical Information Release ("TIR") 05-15 ("Transfers of Prewritten Computer Software"), providing interim rules for taxpayers to follow until the Commissioner could promulgate final regulations in response to the 2005 Amendments. Add. at 83-85. The interim rules included a section pertaining to multi-state apportionment of sales tax on software transactions.[1] The interim rules advised that, in

[1] A section in TIR 05-15 entitled "Multiple Points of Use – Exemption Certificate" set forth the acceptable process by which taxpayers could achieve sales tax apportionment based on out-of-state usage of purchased software by having a purchaser present an exemption certificate (Form ST-12) to the seller at the time of the transaction in which Multiple Points of Use (footnote continued)

accordance with the authority granted by the 2005 Amendments, the Commissioner intended to "promulgate regulations on [MPU] certificates and apportionment of sales or use tax to other jurisdictions." Add. at 85.

In October 2006, the Commissioner promulgated such regulations at 830 C.M.R. § 64H.1.3(15) (the "Regulations"), thereby exercising his statutorily granted discretion to establish "rules for apportioning tax in those instances in which software is transferred for use in more than one state." G.L. c. 64H, § 1. The Regulations prescribe three separate options by which taxpayers could achieve sales tax apportionment, all of which involved taking steps to apportion at the time the sales tax becomes due and payable. The Regulations first state a "General Rule" for apportionment, which allows a business purchaser of software to provide an "exemption certificate" to the seller at or near the time of sale, setting forth information concerning out-of-state usage. 830 C.M.R. § 64H.1.3(15)(a) (hereafter "Subsection 15(a)"). Upon delivery of the certificate, the duty to pay sales tax is transferred from the seller to the purchaser. *Id*. The pertinent language of Subsection 15(a) is as follows:

("MPU") treatment could be elected. Add. at 84. Around this time, the Form ST-12 was specifically revised to include an option for a purchaser to elect MPU treatment. Add. at 86.

> (a) General Rule. A business purchaser that is not a holder of a direct pay permit that knows at the time of its purchase of prewritten computer software that the software will be concurrently available for use in more than one jurisdiction shall deliver to the seller in conjunction with its purchase an exemption certificate claiming multiple points of use, Form ST-12 . . .
> 1. Upon receipt of an exemption certificate claiming multiple points of use, the seller is relieved of all obligation to collect, pay or remit the applicable tax and the purchaser shall be obligated to collect, pay or remit the applicable tax on a direct pay basis. Except as provided in 830 C.M.R. § 64H.1.3(15)(a)(7), a certificate claiming multiple points of use must be received by the seller no later than the time the transaction is reported for sales or use tax purposes.
> 2. A purchaser delivering an exemption certificate claiming multiple points of use may use any reasonable, but consistent and uniform, method of apportionment that is supported by the purchaser's books and records as they exist at the time the transaction is reported for sales or use tax purposes.
> . . . .
> 4. A purchaser delivering an exemption certificate claiming multiple points of use shall report and pay the appropriate tax to each jurisdiction where concurrent use occurs.
> . . . .

Id.

Next, the Regulations prescribe a second method for achieving apportionment in those cases where the purchaser does not provide the exemption certificate specified in Subsection 15(a). In 830 C.M.R. § 64H.1.3(15)(b) (hereafter, "Subsection 15(b)"), the

Regulations describe a process by which the seller and purchaser can work together to arrive at a reasonable apportionment based on multiple points of use, which is then memorialized in a "certification" provided by the purchaser to the seller. Thus, Subsection 15(b) states, in pertinent part:

> (b) Seller remittance of Apportioned Tax. Notwithstanding [Subsection 15(a)], when the seller knows that the prewritten software will be concurrently available for use in more than one jurisdiction, but the purchaser does not provide an exemption certificate [under Subsection 15(a)] claiming multiple points of use, the seller may work with the purchaser to produce the correct apportionment. The purchaser and seller may use any reasonable, but consistent and uniform, method of apportionment that is supported by the seller's and purchaser's business records as they exist at the time the transaction is reported for sales or use tax purposes. If the purchaser certifies to the accuracy of the apportionment and the seller accepts the certification, the seller shall collect and remit the tax to the appropriate jurisdictions as provided in 830 CMR 64H1.3(15)(a)(4). In the absence of bad faith, the seller is relieved of any further obligation to collect tax on any transaction where the seller has collected and remitted tax pursuant to the information certified by the purchaser, provided that the seller retains records of the methodology used to apportion the tax in addition to the purchaser's written certification.

830 C.M.R. § 64H.1.3(15)(b). As Subsection 15(b) makes clear, once the certification requirements are complied with, the seller is relieved from its typical

Massachusetts collection and remittance requirements on the full amount of the transaction and instead is permitted to "collect and remit the [apportioned] tax to the appropriate jurisdictions as provided in 830 C.M.R. § 64H.1.3(15)(a)4." *Id*.

The Regulations go on to provide a third method for securing apportionment in transactions where, unlike the transactions covered by Subsection 15(a), the purchaser in fact is an 830 C.M.R. § 64H.3.1 "direct pay permit holder."[2] . *See* 830 C.M.R. § 64H.1.3(15)(d) (hereafter "Subsection 15(d)"). Such direct-pay-permit holders must follow the same methodological requirements for apportionment set forth in Subsection 15(a)2 when they remit apportioned sales tax directly to the Commonwealth, but are not required to present any certificates to the seller at the time of purchase. *Id*.

Finally, the Regulations make clear that, in those situations where the seller and purchaser do not pursue any of the three apportionment options described above (*i.e*., "the purchaser does not have a direct pay permit and does not provide the seller with

[2] The Commissioner's Direct Payment Permit Program is geared toward larger businesses that have computerized record-keeping and that can expect to remit sales taxes under a Direct Pay Permit in the range of $50,000 or greater on an annual basis, allowing businesses to self-accrue more of their tax liability and reduce paperwork and bookkeeping. *See* 830 C.M.R. § 64H.3.1.

[either] an exemption certificate [under Subsection 15(a)] or the certification required by [Subsection 15(b)]"), then no apportionment is available. 830 C.M.R. § 64H.1.3(15)(c). Rather, the "seller shall collect and remit the tax as provided by 830 C.M.R. § 64H.6.7," which is a set of general sales tax principles governing situations where sales transactions touch other states. 830 C.M.R. § 64H.1.3(15)(c); *see* 830 C.M.R. § 64H.6.7(3). Among these incorporated general principles is the default rule, applicable here, that "[i]f the purchaser . . . takes possession of the property within Massachusetts, whether or not for redelivery or use outside Massachusetts, the sale is taxable." 830 C.M.R. § 64H.6.7(3)(a)1.

II. Factual and Procedural History

The proceedings in this case followed a long and unusual path. They involved an initial decision by the Board in favor of the Commissioner, then a reversal of such decision almost two years later by the Board on "its own motion," then an interim order agreeing with the Commissioner that Taxpayers had not satisfied the requirements of the Regulations, and then ultimately a "Revised Decision" – again, on the Board's "own motion" - in favor of the Taxpayers. The full history is set forth immediately below.

The Taxpayers in this case collected and paid sales tax on software that they sold or licensed to Hologic, Inc. (a Massachusetts-headquartered company) during various taxable periods from May 31, 2009 to January 31, 2010 (in the case of Oracle USA); from March 31, 2010 to February 29, 2012 (in the case of Oracle America); and from December 31, 2009 to December 31, 2011 (in the case of Microsoft). A.I.44.[3]

Years after the initial purchases of software by Hologic, and the initial sales tax remittances by the Taxpayers, the Taxpayers in 2012 filed applications for abatement with the Commissioner under G.L. c. 62C, § 37, seeking refunds of taxes paid with respect to software that Taxpayers claim was used by Hologic employees outside of Massachusetts. A.I.44-47. Prior to their filings, however, Taxpayers had not followed the rules for apportionment established by the Commissioner in 830 C.M.R. § 64H.1.3(15) and detailed *supra*, pp. 12-15. Accordingly, the Commissioner denied Oracle USA and Oracle America's request for abatement by way of a Notice of Abatement Determination dated October 17, 2012. A.I.45-46; A.I.62-63; A.I.72-73. Microsoft's abatement application was similarly denied on June 13, 2015. A.I.47; A.I.87-88.

[3] The two-volume Record Appendix in this case will be cited as "A.[Volume I or II].[page number]".

Oracle USA and Oracle America appealed the Commissioner's denial of their abatement applications to the Board on December 14, 2012. A.I.15-26. Microsoft likewise appealed to the Board on June 29, 2015. A.I.28-32. The parties to both cases agreed to submit them jointly to the Board for resolution pursuant to a Statement of Agreed Facts dated September 1, 2016. A.I.43-51. On appeal, the basic position of the Taxpayers was that they "should not have collected sales tax from Hologic" on the percentage of the sales proceeds attributable to use by Hologic employees outside of Massachusetts and that they should therefore be entitled to an abatement and refund of such taxes. A.I.48-49. The Commissioner's position, in turn, was that he was specifically authorized by the Legislature to establish "rules" for apportioning software sales tax based on out-of-state usage; that such rules had, in fact, been established by the Regulations; and that the Taxpayers entirely failed to follow them. A.I.49. Accordingly, Taxpayers did not avail themselves of the benefit of apportionment, and they had no right to a refund of the sales tax paid, whether through abatement or any other process that went beyond the Regulations. *Id*. The Taxpayers countered that the Regulations, and specifically Subsection 15(a), "attempt[] to impose a requirement not contemplated by the definition of

tangible personal property in G.L. c. 64H, § 1." *Id*. They also contended that "even if the regulation[s] were valid," Hologic nonetheless had an inherent "ability to claim an exemption under [the] statutory language" in G.L. c. 64H, §1, regardless of what the Regulations said. A.I.50.

Following the submission of initial briefs, Taxpayers submitted a reply brief in which they raised for the first time, more than four and a half years after the latest transaction at issue in these appeals, the notion that they were "eligible to use the alternative procedure in [Subsection 15(b)] in this case." A.I.256. They argued that, "[u]nder [the Subsection 15(b)] method, so long as the Appellants' and Hologic's contemporaneous business records are sufficient to demonstrate the place of use, the Appellants may apportion the sales tax on their sales and licenses of software to Hologic even without delivery of MPU certificates." *Id*.

On May 22, 2017, the Board issued a decision in favor of the Commissioner. A.I.273. Both parties then made requests for Findings of Fact and Report, which were not ultimately issued. A.I.7, 10, 13. The cases then lay dormant for almost two years (while the requests for Findings of Fact and Report were pending) until the Board issued an order on March 25, 2019, stating that, on its "own motion," it had reconsidered

its May 22, 2017 decision in favor of the Commissioner and was now vacating such decision. A.I.274-78. Ruling in favor of the Taxpayers, the Board noted that "there is nothing in the statute or Regulation that states that the customer-payment method of [Subsection 15(a)] is the exclusive method of obtaining the right to apportion sales tax." A.I.276-77. It went on to discuss the fact that Subsection 15(b) provides an alternative method for apportionment – seemingly suggesting that Taxpayers had properly availed themselves of that latter subsection, even though Taxpayers did not provide any evidence that they had met the certification requirements of Subsection 15(b). A.I.277. Omitting discussion of the key timing and certification requirements for complying with Subsection 15(b), the Board concluded that "the appellants may apportion the tax among the states in which Hologic uses the software so long as the contemporaneous business records of the appellants and Hologic demonstrate the place of use," and that they could achieve such apportionment through the abatement process set forth in G.L. c. 62C, § 37. *Id*. Accordingly, the Board ordered the parties to compute the amount of tax to be abated pursuant to Rule 1:33 of the Rules of Practice and Procedure of the Board ("Rule 33 Order"). A.I.278.

On April 4, 2019, the Commissioner moved for reconsideration of the Board's March 25, 2019 order. Following a motion hearing on April 11, 2019, the Board issued an interim order on May 20, 2019 that (a) called for additional briefing and (b) set forth two "specific findings and rulings" that the parties "may rely on" going forward in the proceedings. The findings and rulings were:

> 1. The appellants *did not satisfy* the requirements of either [Subsection 15(a)] or [Subsection 15(b)]; and
> 2. The tax at issue in these appeals was imposed on sales of software that was transferred for use in more than one state within the meaning of G.L. c. 64H, § 1.

A.II.282 (emphasis added). Thus, the Board, in its evolving analysis, effectively reversed what appeared to be its earlier and most recent conclusion that Taxpayers *had* complied with Subsection 15(b).

Nevertheless, on July 9, 2019, the Board denied the Commissioner's motion for reconsideration and renewed its Rule 33 Order. A.II.329. Following Rule 33 submissions by the parties, the Board issued a final "Revised Decision" on November 27, 2019, that granted abatement to Oracle USA in the amount of $59,099, to Oracle America in the amount of $185,323, and to Microsoft in the amount of $119,306.78.[4] Add. at

[4] The Board's November 27, 2019 Revised Decision is contained in the Addendum to this Brief and is also in the Record Appendix. References to the Revised

(footnote continued)

62-82; A.II.340-60. In its Revised Decision, the Board first concluded that G.L. c. 64H, § 1 "itself grants taxpayers the right to apportion sales tax on a sale of taxable software that is 'transferred for use in more than one state.'" Add. at 75; A.II.353. Taking the analysis a step further, the Board then decided that this statutory "right" means that Taxpayers were not required "to comply with the terms of [Subsection 15(a)] or [Subsection 15(b)]" to achieve apportionment. *Id*. Rather, it was enough that the Taxpayers had "adher[ed] to the Regulation's *substantive* guidance regarding appropriate apportionment methodologies." Add. at 76; A.II.354. (emphasis added). In the Board's view, this was all that was required for Taxpayers to seek "apportionment through the abatement process". Add. at 77; A.II.355.

The Commissioner now appeals from the Board's Revised Decision.

STATEMENT OF FACTS

The facts germane to this appeal are not in dispute. Hologic is a developer, manufacturer, and supplier of medical diagnostic equipment, medical imaging equipment, and surgical products. A.I.48. During the relevant period, Hologic's headquarters were located in Bedford, Massachusetts and it had

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Decision herein will be to page numbers in both the Addendum and in the Record Appendix.

employees and offices located both in Massachusetts and outside of Massachusetts. *Id*. Hologic's procurement function relating to information technology was located in Massachusetts. *Id*.

During the taxable periods at issue in this case, ranging from May 2009 to February 2012 (A.I.44), Hologic purchased or licensed software from the Taxpayers and installed this software on servers located in Massachusetts. A.I.48. Hologic's employees accessed the software from their work locations both in Massachusetts and outside of Massachusetts. *Id*.

At the time of the software sales at issue, Hologic did not present Taxpayers with exemption certificates claiming multiple points of use, pursuant to the Regulations. A.I.48. In fact, Hologic has never presented such a certificate to the Taxpayers for any of the tax periods at issue. *Id*. Rather, the Taxpayers collected sales tax from Hologic on the full amounts that Hologic paid for the software and timely remitted such full amounts to the Department of Revenue through the filing of monthly Massachusetts sales and use tax returns. A.I.44-48.

As described *supra*, p. 17, the Taxpayers in 2012 filed abatement applications with the Commissioner, requesting an apportionment (and thus a partial refund) of the sales tax remitted years earlier on the Hologic sales. A.I.44-47. The abatement requests

totaled $59,098.27, $185,323.34, and $119,306.74 for Oracle USA, Oracle America, and Microsoft, respectively. *Id*. The Commissioner subsequently denied Taxpayers' abatement requests. A.I.45-47.

SUMMARY OF THE ARGUMENT

The Board concluded that the 2005 amendments to G.L. c. 64H, § 1, granted to Taxpayers a self-executing "statutory" right to apportion sales tax with respect to in-state sales of standardized computer software when there is out-of-state usage of such software, and that this right could be wielded by Taxpayers at any time within the three-year abatement statute window, irrespective of -- indeed, in contravention of -- the timing and certification requirements specifically set forth in the Commissioner's duly promulgated regulations governing apportionment.

This holding first fails as a matter of law because the 2005 amendments to G.L. c. 64H, § 1, actually granted no such statutory right. The only sentence in the statute even referencing apportionment states that "[t]he commissioner *may*, by regulation, provide rules for apportioning tax in those instances in which software is transferred for use in more than one state." G.L. c. 64H, § 1. By its plain terms, this is a *discretionary* grant of regulatory authority *to the Commissioner* – not a grant of statutory right

to *taxpayers*. The Legislature's use of the term "may" here is of utmost importance when considering the meaning of the statutory language, but the Board inexplicably failed to even quote that part of the statute when it conducted its statutory analysis. (pp. 29-35)

Even if one were to assume that the Legislature intended that taxpayers would have a right to apportion sales tax with respect to out-of-state usage of computer software, this "right" was specifically expressed in the context of the Commissioner's authority "by regulation, [to] provide *rules* for apportioning tax" in such situations. It would make no sense for the Legislature to grant the Commissioner the power to establish "rules" for apportioning sales tax, but then simultaneously to grant taxpayers the ability to eschew such rules when they so choose. But this is exactly what the Board has sanctioned here. Despite making a specific finding that the Taxpayers "did not satisfy" the timing and certification requirements of the Commissioner's rules for apportioning sales tax, as set forth in 830 C.M.R. § 64H.1.3(15), the Board nonetheless concluded that the Taxpayers were entitled to apportionment years later through the abatement process because their professed "methodologies" of apportionment were "consistent" with one particular portion of the

regulations. Add. at 81; A.II.359. This reasoning is both unsound and unworkable. Since the Board did not find that the regulations were invalid or otherwise unenforceable (and, indeed, there would have been no basis for such a finding), it should have required Taxpayers to comply with the Commissioner's rules as written, instead of effectively fashioning its own rule for what is an acceptable approach to apportionment. Otherwise, the statutorily granted power of the Commissioner to establish "rules for apportioning tax" means nothing. (pp. 35-40)

In addition, the Board's ruling – that taxpayers can achieve apportionment "through the abatement process" years after the software sale occurs - is irreconcilable with the purposely designed timing features of the Commissioner's Regulations. Consistent with the transaction-based nature of sales tax, the Regulations logically require that apportionment of the sales tax occur on or before the tax is due to be paid. By allowing taxpayers, as a matter of course, to pay an unapportioned sales tax on software sales (and then seek refunds of up to 100% three years later via abatement), the Board's ruling knocks the legs out from under this temporal structure, while frustrating the Commissioner's interest in furthering the orderly and predictable collection of sales tax revenues. (pp. 40-44).

Finally, the Board's efforts to bolster its conclusion by drawing false analogies to statutory and regulatory provisions in unrelated areas of the tax code should be rejected. Likewise, there is no merit to the Board's argument that the (a) retroactive effective date and (b) treatment of direct pay permit holders in the Commissioner's apportionment Regulations undermine the "timing" aspects of the Commissioner's position. The retroactivity date poses no issue because the Commissioner bridged the gap between the statutory effective date and the date of his regulations by issuing an interim Technical Information Release prescribing rules for apportionment within weeks of the statute's enactment and before its effective date. And the treatment of direct pay permit holders in the apportionment Regulations is entirely consistent with the Commissioner's "timing" position because such permit holders are required – by virtue of a separate set of regulations - to remit sales tax within a month of the transaction, which is exactly the timing called for in the apportionment Regulations themselves. (pp. 44-57)

ARGUMENT

I. THE BOARD'S CONCLUSION THAT TAXPAYERS WERE ENTITLED TO AN APPORTIONMENT OF SALES TAX EVEN THOUGH THEY ENTIRELY FAILED TO COMPLY WITH THE COMMISSIONER'S REGULATIONS GOVERNING SUCH APPORTIONMENT IS CLEARLY WRONG.

The Board in this case determined that G.L. c. 64H, § 1, on its face, grants taxpayers a "statutory" right to apportion sales tax where software is transferred for use outside Massachusetts, contrary to the general rule that sales tax is due on in-state sales – i.e., the transfer of title or possession - of property in Massachusetts regardless of where such property will later be used. The Board nevertheless then concluded that taxpayers armed with this right have free rein to circumvent the rules for apportionment in the Commissioner's Regulations by simply making an after-the-fact plea for a tax refund under the general abatement statute, G.L. c. 62C, § 37. Both of these conclusions fly in the face of the language of G.L. c. 64H, § 1, and should be rejected.

Authority to interpret the statute in question ultimately rests with the Court. While "deference to the expertise of the [Board] in tax matters" is appropriate, *Northeast Petroleum Corp. v. Comm'r of Rev.*, 395 Mass. 207, 213 (1985), it is also true that "principles of deference . . . are not principles of abdication, and an incorrect interpretation of a statute by an administrative agency is entitled to no

deference." *Town Fair Tire Centers, Inc. v. Comm'r of Rev.*, 454 Mass. 601, 605 (2009) (internal citations omitted). Ultimately, "the proper interpretation of a statute is a question of law for [the Court] to resolve." *Bell Atl. Mobile of Mass. Corp., Ltd. v. Comm'r of Rev.*, 451 Mass. 280, 283 (2008). *See also Koch v. Comm'r of Rev.*, 416 Mass. 540, 555 (1993) (Board's decision must be based on "a correct application of the law.").

A. The Taxpayers Do Not Have a Freestanding "Right" to Apportion Sales Tax That Exists Outside and Independent of the Commissioner's Regulations.

The Board's decision first revolves around the notion that the Taxpayers were not required to comply with the apportionment rules set forth in the Commissioner's regulations because the right to apportion on the basis of out-of-state software usage is a *statutorily* granted right that cannot be limited by the Commissioner's regulations. Thus, the Board concluded that "[G.L. c. 64H,] § 1 itself grants taxpayers the right to apportion sales tax on a sale of taxable software that is 'transferred for use in more than one state.'" Add. at 75; A.II.353. The Board reasoned that because "Hologic purchased or licensed taxable software from the appellants, intending to use the software in multiple jurisdictions," then Taxpayers are statutorily

entitled to pay an apportioned sales tax – regardless of their compliance with the Commissioner's regulations -- because "these are precisely the circumstances under which [G.L. c. 64H, § 1] contemplates apportionment of the sales tax." Add. at 76; A.II.354. This conclusion is simply wrong, as can readily be seen from the statutory text itself.

"The language of the statute is the starting point for all questions of statutory interpretation." *Retirement Bd. of Stoneham v. Contributory Retirement Appeal Bd.*, 476 Mass. 130, 135 (2016). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Here, as noted above, the 2005 Amendments to the definition of "tangible personal property" consisted of two sentences. Thus, the statutory "right" found by the Board must exist in at least one of these two sentences. But it clearly does not.

The first sentence sets forth the basic definitional change that the Legislature accomplished with the 2005 Amendments. It states: "A transfer of standardized computer software, including but not limited to electronic, telephonic, or similar transfer, shall also be considered a transfer of tangible personal property." G.L. c. 64H, § 1. This sentence says nothing about apportioning software

sales tax based upon usage in multiple jurisdictions. Rather, it sets forth the principle that sales of software will be taxed regardless of the method of delivery.

The second sentence of the 2005 Amendments, in turn, states: "The commissioner *may*, by regulation, provide rules for apportioning tax in those instances in which software is transferred for use in more than one state." G.L. c. 64H, § 1. This sentence does not state that taxpayers have an inherent "right" in all circumstances to apportion based on out-of-state usage, without regard to whether the Commissioner promulgates regulations on this subject and what those regulations say. Rather, the existence of any right is conditioned on the Commissioner choosing to exercise his express statutory discretion to set forth rules for apportionment. This interpretation is incontrovertibly established by the fact that the Legislature uses the word "may" – the Commissioner "may, by regulation, provide rules for apportioning tax . . ." As has been repeatedly held, "[t]he use of the word 'may' denotes a discretionary power." *Provencal v. Com. Health Ins. Connector Auth.,* 456 Mass. 506, 513 (2010). It is "a word of permission and not of command", and "throughout our statutes, the distinction between words of permission or discretion and words of command, including the distinction

between 'may' and 'shall,' has been carefully observed." *Cline v. Cline*, 329 Mass. 649, 652 (1953). Specifically in the context of agency rulemaking, where a statute states that an agency "may issue regulations", "the statute plainly vests broad discretion in the [agency] to act through regulations . . . *or not to act at all* – as the [agency] sees fit." *Town of Boxford v. Mass. Highway Dept*., 458 Mass. 596, 606 (2010) (emphasis added). Here, it makes no sense to conclude that a grant of discretionary regulatory power to the Commissioner is tantamount to granting a mandatory statutory right to taxpayers.

Strikingly, when the Board quoted this second sentence in G.L. c. 64H, § 1, in its Revised Decision, *it omitted the word "may"*, and instead started its quotation with "provide rules for apportioning tax. . .." Add. at 72; A.II.350. In doing so, the Board failed to acknowledge a pivotal word in the statute – indeed, *the* critical word - thereby entirely glossing over the discretionary nature of the Legislature's authorization. This was a critical, reversible error.

It should be emphasized that the Commissioner's interpretation of G.L. c. 64H, § 1, as stated herein, is entirely consistent with, and supported by, the nature of Massachusetts sales tax in general. The baseline rule in Massachusetts is that sales tax is

due on sales of property occurring in-state, regardless of whether the property is purchased for subsequent use in another jurisdiction. *See* G.L. c. 64H, § 2. Apportionment is not typically allowed in the context of such in-state sales.[5] For instance, Massachusetts businesses regularly make in-state purchases of supplies, furniture, and other goods that will subsequently be used by employees out of state, but that subsequent use is not relevant to and does not otherwise impact the application of the sales tax at the time of the transactions. However, in this unique instance concerning the taxation of software, which was deemed tangible even when provided electronically to the purchaser, the Legislature acted to grant the Commissioner the discretion to provide rules for apportionment. But the Legislature notably stopped short of granting an unconditional *exemption* from tax for all in-state sales of software where the

[5] Thus, if a taxpayer purchases a boat in Massachusetts, knowing that it will be sailed and docked for exclusive use in Delaware, he or she is not relieved of the duty to pay the full amount of Massachusetts sales tax on his new boat. *See* 830 C.M.R. §64H.6.7(3) (Example 1). Similarly, if a customer buys a personal computer at a store in Massachusetts, but then takes it to her home in Maine, the full amount of sales tax is still due in Massachusetts. *Id.* (Example 2). *See also Circuit City Stores, Inc. v. Comm'r. of Rev.*, 439 Mass. 629, 639-640 (2003) (full sales tax due on merchandise purchased at Massachusetts store even when property picked up in New Hampshire).

software will be used out-of-state, something it could have easily done by including such transactions in the long list of "Exemptions" from sales/use tax contained in G.L. c. 64H, § 6, or by articulating a clear exemption in the language of G.L. c. 64H, § 1 itself. The fact that the Legislature did not set forth such an exemption in clear and express terms must be "deemed deliberate when the Legislature included such omitted language in related or similar statutes." *Fernandes v. Attleboro Hous. Auth.,* 470 Mass. 117, 129 (2014). *See also Stearns v. Metro. Life Ins. Co.*, 481 Mass. 529, 536 (2019) ("[H]ad the Legislature wanted to exempt [certain claims from a statute of limitations], it has demonstrated that it knows how to do so"). But it also has particular significance in the context of interpreting tax statutes because an "exemption from taxation . . . [is] to be recognized only where the property falls clearly within the express words of a legislative command." *State Tax Comm'n. v. Blinder*, 336 Mass. 698, 703 (1958). *See also New Habitat, Inc. v. Tax Collector of Cambridge*, 451 Mass. 729, 731 (2008) ("Exemption from taxation is to be strictly construed and must be made to appear clearly before it can be allowed.") (*quoting Springfield Y.M.C.A. v. Bd. of Assessors of City of Springfield*, 284 Mass. 1, 5 (1933). Here, there is no clear-cut exemptive language in G.L. c. 64H, § 1 –

only a grant of regulatory authority to the Commissioner.

At the end of the day, if the Board's interpretation of G.L. c. 64H, § 1 were correct – and there were an independent statutory "right" to apportion - then presumably anyone could buy standardized computer software at a Massachusetts store and decline to remit the sales tax to the cashier because they intend to use the software outside of Massachusetts. But the 2005 Amendments have never been interpreted to mandate such a (likely unworkable) result, and, indeed, the Commissioner's apportionment Regulations expressly exclude computer software purchased at a retail business location. *See* 830 C.M.R. §64H.1.3(15)(a). Accordingly, it has long been accepted that apportionment is not available for retail sales of software. This further undercuts Taxpayers' argument that apportionment is a matter of statutory *right*, untethered to the Commissioner's regulations.

B. Even if the Legislature Contemplated That A Right to Apportionment Would Exist in G.L. c. 64, § 1, It Clearly Vested in the Commissioner the Authority to Establish the Ground Rules for Availment of That Right.

Even if this Court were to accept the conceptual argument that the Legislature intended, through the enactment of G.L. c. 64H, § 1, that there be a "right" to apportion sales tax for out-of-state usage of

computer software, this conclusion does not get the Taxpayers very far. Rather, in order to prevail, Taxpayers must – and do – take their argument one step further. Taxpayers argue that this "right" to apportionment means that they are permitted to simply disregard the Commissioner's rules governing apportionment and make a post hoc plea for apportionment years later through the abatement process. Thus, Taxpayers asserted during the Board proceedings that:

> A seller's failure or inability to avail itself of the [rules for apportionment set forth in 830 C.M.R. § 64H.1.3(15)] does not mean that, contrary to the legislative intent to limit the sales tax to software used in Massachusetts, the tax becomes due on an unapportioned basis or that the seller has no other remedy to avoid that result. As the Board correctly recognized, the 'general abatement procedures' continue to apply.

A.II.241. The Board ultimately accepted this argument. Despite specifically finding that Taxpayers "did not satisfy the requirements of either [Subsection 15(a)] or [Subsection 15(b)]", A.II.282, the Board nonetheless concluded that apportionment was available "through the abatement process." Add. at 77; A.II.355. But this is surely a bridge too far. Not only does this argument run directly contrary to the language in G.L. c. 64H, § 1, but it would, if accepted, completely frustrate the Legislature's

purpose in authorizing the Commissioner to promulgate apportionment "rules" in the first place.

Again, the starting point is with the statutory language. The definition of "tangible property" in G.L. c. 64H, § 1, states that "[t]he Commissioner may, by regulation, provide *rules* for apportioning tax in those instances in which software is transferred for use in more than one state." (emphasis added). The standard definition of a "rule" is an "accepted principle or instruction that states the way things are or should be done, and tells you what you are allowed or are not allowed to do." Rule. *Cambridge Dictionary*. Retrieved March 18, 2020, from https://dictionary.cambridge.org. A "rule" is thus a "prescribed guide for conduct or action" and "a regulation or bylaw governing procedure or controlling conduct." Rule. *Merriam-Webster Dictionary.* Retrieved March 18, 2020, from https://www.merriam-webster.com. It is therefore self-evident that when the Legislature authorized the Commissioner to provide "rules" for apportioning tax, it also expected taxpayers to *follow* such rules if they wish to gain the benefits of apportionment. This is especially true when the Legislature authorizes the Commissioner to set out such rules in regulations, which, of course, "have the force of law." *Purity Supreme, Inc. v. Attorney General*, 380 Mass. 762, 768 (1980). In other words,

even if the Legislature intended that there be a "right" to apportion, it did not grant this "right" in a vacuum. Rather, the Legislature clearly contemplated that exercise of this right would be in accordance with the "rules" promulgated by the Commissioner. Any other interpretation would read the operative sentence regarding apportionment ("[t]he Commissioner may, by regulation, provide *rules* for apportioning tax") right out of the statute. And it would have the practical effect of defanging the Commissioner's ability to enforce his own "rules."[6]

[6] Notwithstanding the Commissioner's rules governing apportionment, the Board places weight on the idea that the Taxpayers have some independent right to relief by seeking "apportionment via the abatement process." Add. at 77; A.II.355. This point seems to confuse concepts. While any taxpayer can avail itself of the abatement *process* (as Taxpayers did here) by claiming that they have paid a tax that is "excessive in amount or illegal," G.L. c. 62C, § 37, the abatement statute itself does not provide substantive grounds for tax relief. Rather, the "[t]he taxpayer has the burden of proving as a matter of law [its] right to an abatement of the tax" by showing that the original tax paid is "excessive in amount or illegal." *Boston Professional Hockey Ass'n., Inc. v. Comm'r. of Rev.*, 443 Mass. 276, 285 (2005); G.L. c. 62C, § 37. Here, Taxpayers cannot make this showing because the original tax they paid was actually correct and appropriate, as they failed to comply with the apportionment Regulations and had no "inherent" right to apportion outside such Regulations.

C. The Board Improperly Crafted and Applied Its Own Rule for Apportionment Without Finding That the Commissioner's Rules Were Invalid or Unreasonable.

The ultimate import of the Board's Decision is that it substituted its own conception of how apportionment should work for the Commissioner's duly promulgated and entirely valid regulations on this subject. As described *supra*, p. 22, the Board effectively applied a new rule for apportionment that held that compliance with the procedural, certification and timing aspects of the Regulations is not required as long as Taxpayers "adher[ed] to the Regulation's *substantive* guidance regarding appropriate apportionment methodologies." Add. at 76; A.II.354. This was an impermissible usurpation of the Commissioner's regulatory authority, in an area where the Legislature – by virtue of the 2005 Amendments - has granted the Commissioner specific authority to establish its own rules for apportionment.

On this point, it is important to recognize that the Board made no finding in its Revised Decision that the Commissioner's regulations were somehow invalid or outside the Legislature's grant of regulatory authority. Add. at 66-82; A.II.344-60. While the Taxpayers touched upon such an argument at various points during the underlying proceeding, A.I.223-24, 259, it was not accepted by the Board and it has no legal merit. It is well-established that "[d]uly

promulgated regulations of an administrative agency are presumptively valid and must be accorded all the deference due to a statute." *Craft Beer Guild, LLC v. ABCC*, 481 Mass. 506, 520 (2019). Regulations should not be invalidated "unless their provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate." *Taylor v. Hous. Appeals Comm.*, 451 Mass. 149, 154 (2008). Here, the Legislature gave the Commissioner broad discretionary authority to establish rules for apportioning tax on the sale of computer software, and it has done so by carefully prescribing three different options for achieving apportionment. *See* discussion *supra*, pp. 12-15. These requirements were clear and precise and did not pose an unreasonable burden on taxpayers. Indeed, the Board made no finding that Taxpayers here were *unable* to comply with these Regulations at the time of the transactions. For all of these reasons, there was no justification or need for the Board to fashion its own apportionment rule to govern this case.

D. Allowing Apportionment to Occur "Through the Abatement Process" Would Undermine the Important Timing Elements of the Commissioner's Regulations.

Finally, the Board's Decision cannot be reconciled with the timing features of the Regulations, which are derived from the transaction-based nature of sales tax and serve important

practical aims. The Decision, if upheld, would effectively give taxpayers the option of either apportioning sales tax at or near the time of sale in accordance with the Regulations or, alternatively, eschewing the Regulations and seeking apportionment years later "through the abatement process," in the words of the Board.[7] Add. at 77; A.II.355. Such a result would undercut both (a) the purposeful timing requirements of the Regulations, and (b) the Commissioner's ability to implement a rational and orderly apportionment system, which the Legislature authorized it to do.

On the first point, the Regulations are designed to impose requirements for apportionment on taxpayers that are consistent with the nature of sales tax in general. Sales tax is a transaction-based tax imposed at the time of sale, and vendors are required to report such sales for tax purposes before the twentieth day following the expiration of the month in which the sale was made. *See* G.L. c. 62C, § 16(h). Because of this, the Regulations require taxpayers to document their intended use of computer software (by way of MPU certificates) prior to this reporting date,

[7] It is notable that there are other cases pending before the Board that involve this same (or a very similar) issue. Accordingly, the prospect of taxpayers using the abatement process as a matter of course to achieve apportionment is not a one-off scenario confined to the facts of this case.

and not at some later date. *See* Subsection 15(a) (certificate "must be received no later than the time the transaction is reported for sales or use tax purposes"); Subsection 15(b) (certification to be provided before the seller "collect[s] and remit[s] the tax" and is based on records existing "at the time the transaction is reported for sales or use tax purposes"). The point of this structure – quite rationally - is to have taxpayers pay the apportioned amount of sales tax *at the time that such tax is actually due*. *See Taylor*, 451 Mass. at 155-56 (agency may include timing constraints in regulations as long as reconcilable with language of statute and not "irrational"). The Board's "apportionment via abatement" approach, on the other hand, would allow taxpayers to sever the connection between the date that the sales tax is due and the date that the apportioned sales tax is paid. This is neither a sensible legal result nor a reasonable construction of the Commissioner's Regulations. *See AA Transportation Co., Inc. v. Comm'r. of Rev.,* 454 Mass. 114, 114, 119-21 (2009) (bus company could not use the abatement process to achieve an exemption from sales tax paid on purchase of buses where it "did not possess [the required DTE] certificate at the time the buses were purchased" and the tax was due even though certificate was later obtained during abatement period).

Moreover, as a practical matter, the "abatement via apportionment" approach would frustrate the Commissioner's legitimate interest in administering an apportionment program that maximizes the orderly and predictable collection of sales tax revenues. The Legislature here delegated to the Commissioner the authority to set up a rational apportionment program. In exercising this discretion, the Commissioner has established timing requirements sensitive to the "practicalities of tax administration", *AA Transportation Co.,* 454 Mass. at 119, by promoting certainty and reliability of tax payments at the time the sales tax is due. The Board's ruling, however, takes things in the opposite direction by allowing taxpayers to initially pay a sales tax that may bear no resemblance to the amount that is actually deemed to be "due" after abatement. For example, sales tax payments in Year 1 could be routinely subject to 80%, 90% or even 100% refunds in Year 4. The Commissioner and the Commonwealth have a legitimate interest in avoiding this rather haphazard system of sales tax collection. *See Rucker v. Sec'y of Treasury of U.S.*, 751 F.2d 351, 356 (10th Cir. 1984) (governments at all levels have a "need for steady and predictable tax revenues") (emphasis added); *Aronson v. Com.*, 401 Mass. 244, 255 (1987) ("[t]ax collectors and other public officials are entitled to know what portion of

collected revenues is subject to challenge", while avoiding "open-ended contingent liabilit[ies]").

II. THE BOARD'S SUBSIDIARY POINTS DO NOT SUPPORT ITS CENTRAL, ERRONEOUS LEGAL CONCLUSION.

A. The Fact That 830 C.M.R. §64H.1.3(15) Does Not Specifically Mention Abatement is Not Meaningful.

The Board makes much of the fact that "[t]here is no language in [the Regulations] that limits the application of the abatement process in the context of apportionment". Add. at 77; A.II.355. But, for all of the reasons described above, the absence of such language is neither surprising nor "telling," as the Board puts it. *Id*. The language of G.L. c. 64H, § 1 makes clear that there is no freestanding "right" to apportion that exists outside of the Commissioner's regulations, and it is equally clear that the Commissioner has the power to set, by regulation, the "rules" for apportionment. The Regulations, in turn, describe how apportionment can be achieved through the purchaser presenting to the seller one of the requisite certificates in Subsections 15(a) or 15(b). The Regulations then state that, if the purchaser and seller do not comply with 15(a) or 15(b) (and the purchaser does not have a direct pay permit), then the vendor shall collect and remit the sales tax as it would with any other sale of property. 830 C.M.R. § 64H.1.3(15)(c). In these circumstances, the sum and

substance of the Regulations is crystal clear, and there is no reason why the Commissioner would include superfluous language in the Regulations to the effect that: "Also, bear in mind that vendors are not allowed to ignore the foregoing rules and achieve apportionment through the abatement process."

It also bears emphasizing that the point here is not really whether the "abatement *process*" is available to Taxpayers. *See* discussion, *supra*, p. 38 n.6. The point is that Taxpayers are not *entitled* to an abatement because, having entirely failed to comply with the Commissioner's rules for achieving apportionment at the time of sale and having no independent statutory right to apportionment, they cannot demonstrate that the original sales tax paid was "excessive in amount or illegal" under G.L. c. 62C, § 37. Thus, the absence of language in the regulations as to whether the "abatement process" is available to taxpayers on the topic of apportionment is of no legal significance in this case.

1. The Board's Reference to Corporate Income Tax Regulation is Inapposite.

The Board concluded that the Commissioner's omission of "limiting language" on the subject of abatement is "telling" because certain other regulations in the *corporate income tax* context – by comparison - have made explicit that taxpayers cannot seek to modify particular aspects of their tax returns

through the abatement process. Add. at 77-78; A.II.355-56. The two specific regulations cited by the Board that actually mention abatement are 830 C.M.R. § 63.38.1(9)(d)1.g.i (discussing methodologies for a corporation to use in determining when sales of intangible personal property take place in Massachusetts) and 830 C.M.R. § 63.38M.1(5)(d)3.c (allowing for a corporation to compute "gross receipts" using only receipts attributable to Massachusetts sales in the context of calculating the Massachusetts Research Tax Credit). As discussed below, the Board makes far too much out of these other regulations.

First, these regulations reside in an entirely separate area of Massachusetts tax law, and consist of snippets of regulatory text pertaining to technical corporate income-related tax calculations that have no connection to sales tax apportionment. Thus, the notion that these regulations have something important to say about the *absence* of language in a sales tax regulation enacted under a different Chapter of the General Laws is inherently dubious. Second, the content of the specific provisions cited by the Board are not actually informative or on-point. The two regulations merely specify that a taxpayer cannot start with one approved calculation methodology in its filed return and then seek to change to another

approved methodology after the fact, through the abatement process or otherwise. 830 C.M.R. § 63.38.1(9)(d)1.g.i; 830 C.M.R. § 63.38M.1(5)(d)3.c. Such limitations have no relevance to the present case -- the Taxpayers here are not using the abatement process to switch from one regulatorily prescribed method of apportionment in 830 C.M.R. § 64H.1.3(15) to another. On the contrary, they have failed to comply with *any* of the approved methodologies set forth in 830 C.M.R. § 64H.1.3(15), claiming instead that they have an inherent statutory right to apportionment through abatement.

This leads to the third problem with the Board's invocation of these corporate-tax-related regulations. In the corporate income-tax context, the right to apportion tax where the corporation is doing business outside of Massachusetts is firmly grounded in statute. *See* G.L. c. 63, § 38 (directing the Commissioner to "determine the part of the net income of a business corporation derived from business carried on within the commonwealth" while excluding "income from business activity which is taxable in another state"). As a result, in the corporate income tax context it makes more sense that a taxpayer would take advantage of the abatement process to enforce its statutory apportionment rights, and one might expect that the Commissioner's regulations would be more

explicit as to abatement in its regulations. This dynamic does not exist in the present case with respect to 830 C.M.R. § 64H.1.3(15), as there is no underlying statutory right to apportionment for sales of computer software.

2. The Board Makes a False Comparison to G.L. c. 64H, § 8, In Supporting Its Position.

In concluding that Taxpayers can disregard the rules for apportionment set forth in the Commissioner's regulations and still achieve an abatement through G.L. c. 62C, § 37, the Board further attempts to bolster its interpretation by comparing the situation to a taxpayer's rights under G.L. c. 64H, § 8, pertaining to "resale" and "exempt use" certificates. Add. at 80-81; A.II.358-59. The Board notes that under G.L. c. 64H, § 8, a vendor can avoid the payment of sales tax by obtaining one of these certificates from the purchaser, but that the vendor's failure to do so does not foreclose its ability to seek tax relief through the abatement process. Add. at 80; A.II.358 (citing *D&H Distrib. Co. v. Comm'r. of Rev.*, 477 Mass. 538, 546 (2017)). While that is true, it glosses over the glaring statutory differences between G.L. c. 64H, § 8 and c. 64H, § 1.

Section 8 of chapter 64H sets forth a presumption that "all gross receipts of a vendor from the sale of services or tangible personal property are subject to

tax until the contrary is established." G.L. c. 64H, § 8(a). It then creates a burden-shifting framework for situations where a vendor seeks to demonstrate that a transaction is not subject to sales tax either because it is "not a sale at retail" as defined in G.L c. 64H, § 1 or is subject to a statutory exemption under G.L. c. 64H, § 6. In these situations, the statute states the baseline rule that the vendor has the "burden of proving" that a sale otherwise subject to taxation "is not a sale at retail" or is otherwise "exempt." G.L. c. 64H, § 8(a), (e). Section 8 provides, however, that if the vendor obtains a resale certificate or exempt use certificate from a purchaser with regard to a specific transaction, then the burden of proving the taxability of a sale shifts to the Commissioner. The whole point of the statute – and of its burden-shifting language – is that obtainment of the certificates is indeed *optional*. If a vendor does not obtain the certificates, then it can still attempt to gain tax relief, but the vendor remains saddled with the burden of proof in these circumstances. *See D&H Distrib. Co.*, 477 Mass. at 542, 544-46.

This optional regime established by G.L. c. 64H, § 8, bears no resemblance to the apportionment regime established by the Regulations, as authorized by G.L. c. 64H, §1. As an initial matter, Section 1 of chapter 64H merely accords the Commissioner the

discretion to establish rules for software sales tax apportionment through regulations; it does not create a program of discretionary certificate-taking and burden-shifting like the one carefully laid out in Section 8 for sales for resale and exempt sales. Indeed, as referenced *supra*, p. 33-34, the Legislature very well *could have* included an exemption in G.L. c. 64H, § 6 for sales of software occurring in-state where the software will be used out-of-state, which would have made the certificate program at issue in this case automatically subject to G.L. c. 64H, § 8. *See* G.L. c. 64H, § 8(e). But, tellingly, it did not do so. Consistent with the Legislature's mandate, the Regulations specify the manner in which sellers and purchasers can apportion sales tax if the certificates referenced in Subsections 15(a) or 15(b) are provided, but there is no suggestion that apportionment is still available if such certificates are not provided. *See* 830 C.M.R. 64H.1.3(15)(c). As such, the Board's attempt to leverage the discretionary certificate program in G.L. c. 64H, § 8, as a model for interpreting G.L. c. 64H, § 1 and the Regulations is absolutely off-base.[8]

[8] It is also worth noting that the ability of taxpayers to seek relief through the abatement process with regard to sales for "resale" and for "exempt" sales is grounded on clear statutory directives that these sales are not taxable. *See* G.L. c. 64H, §§ 1 (definition of "retail sale"), 6 (exemptions). As (footnote continued)

B. There Are No "Timing" Inconsistencies in the Commissioner's Regulations That Would Support the Board's Conclusions.

The Board further contends that the Commissioner's interpretation of 830 C.M.R. § 64H.1.3(15) – that apportionment must occur at the time that the sale is reported for sales tax purposes and not years later under the abatement statute – is "undermined" by certain features of the Regulations that suggest that there are no such "temporal limits." Add. at 78-80; A.II.356-58. Upon examination, however, these points quickly fall apart.

1. The Regulations' Retroactive Effective Date Does Not Undermine the Commissioner's Interpretation.

The Board first points to the fact that the Commissioner's regulations (on the subject of computer software sales generally) state that they will be "effective October 20, 2006", but that they also "appl[y] to transactions on or after April 1, 2006" (which is the effective date of the underlying 2005 Amendments to G.L. c. 64H, § 1 that the Regulations implement). 830 C.M.R. § 64H.1.3(1)(b); Add. at 78; A.II.356. The Board then jumps to the conclusion that "[t]his retroactivity allowed taxpayers to seek

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discussed, *supra*, pp. 29-35, there is no corresponding statutory right to apportion sales tax on computer software based on out-of-state usage. This is another reason why comparing treatment of resale and exempt use certificates with treatment of the apportionment certificates in Subsections 15(a) and 15(b) is inapt.

apportionment of the sales tax through the abatement process with respect to transactions that occurred well before the effective date of the Regulation[s]" and that the Commissioner's interpretation of the Regulations, if accepted, would mean that "numerous transactions" (to wit, those occurring between April 1, 2006 and October 20, 2006) would not have been entitled to apportionment despite the Regulations' explicit language regarding that time period. *See* Add at 78-79; A.II.356-57.

This argument first fails as a factual matter. In actuality, the Commissioner carefully bridged the gap between the retroactive and effective dates of the Regulations when he issued TIR 05-15 within weeks of the passage of the amendments to G.L. c. 64H, § 1, and *before* the April 1, 2006 retroactive date referenced in the Regulations. Add. at 83-85. In particular, TIR 05-15, as issued on February 10, 2006, contained a section entitled "Multiple Points of Use – Exemption Certificate" that dictated the acceptable process by which taxpayers could achieve sales tax apportionment based on out-of-state usage by having a purchaser present a Multiple Points of Use exemption certificate to the vendor at the time of the transaction. Add. at 84-85. The Release thus stated:

> Business and commercial purchasers of prewritten computer software that will be concurrently available for use in multiple

> tax jurisdictions *must* present to the vendor an exemption certificate, Form ST-12, to elect Multiple Points of Use (MPU) treatment.[9] Upon receipt of the MPU Exemption Certificate, the vendor is relieved of all obligation to collect, pay or remit the applicable tax and the purchaser shall be obligated to report and remit the applicable sales or use tax on its sales/use tax return.

Add. at 84 (emphasis added). Importantly, this process (a) is expressed in mandatory terms (through use of the word "must") and (b) is essentially identical to the exemption certificate regime that the Commissioner would eventually codify in Subsection 15(a) of the Regulations. As such, there was no "timing" incongruity when the Commissioner ultimately made his Regulations retroactive to April 1, 2006. By April 1, 2006, there were already Commissioner-prescribed rules in place that required taxpayers seeking to apportion sales tax to do so at the time of the transaction through the usage of MPU certificates.

This said, the Board's invocation of the Regulations' retroactive date also does nothing to remedy its fundamental errors of *statutory* construction in this case. As discussed, *supra*, pp. 29-35, the plainly permissive language of the statute

[9] As previously noted, the Department of Revenue amended the Form ST-12 around this time to specifically allow purchasers to elect MPU treatment. This also happened before the April 1, 2006 retroactivity date. *See* Add. at 86 (showing "Rev. 3/06" date).

here, G.L. c. 64H, § 1, makes clear that the Commissioner has the discretion to establish the "rules" by which taxpayers can achieve apportionment, and that taxpayers do not have a freestanding right to apportion sales tax that exists outside of the Commissioner's regulations. The fact that the Regulations identify an "as applied" date (April 2, 2006) that logically and unremarkably coincides with the effective date of the statute neither contradicts nor says anything meaningful about the Commissioner's fundamental reading of the statute in this case. On the contrary, this reference in the Regulations merely represents an instance of the Commissioner exercising the very discretion that the statute grants to him with respect to establishing "rules" for how apportionment will work in the context of software sales. It can hardly be viewed as a license to disregard these very same rules, which is the import of the Board's ruling.

2. The Regulations' Treatment of Direct Pay Permit Holders is Fully Consistent with the Commissioner's Positions in This Case.

The Board also points to the Regulations' treatment of direct pay permit holders as purportedly supporting the notion that there are no timing restrictions on when a taxpayer may seek sales tax apportionment for out-of-state usage of computer

software. Add. at 79-80; A.II.357-58. The Board specifically contends that the direct pay permit references in the Regulation "do not state that apportionment [for such holders] must be sought by the time the transaction is reported for sales tax purposes, or at any particular time for that matter," thus allegedly bolstering the idea that apportionment can be gained after-the-fact via abatement. Add. at 79; A.II.357. This argument fails, however, because it completely overlooks the timing requirements that are already baked into the direct pay permit program itself, under separate regulations for that program at 830 C.M.R. § 64H.3.1.

By way of context, "[t]he direct payment program is intended to allow certain large volume purchasers to purchase items without paying sales or use tax to the vendor at the point of sale and instead allowing them] to pay the sales/use tax directly to the Department of Revenue on a monthly basis for all purchases made within that month." 830 C.M.R. § 64H.3.1(1)(a). A purchaser must apply to the Commissioner for a direct payment permit to avail itself of this program. 830 C.M.R. § 64H.3.1(4). The Commissioner's computer software apportionment Regulations, in Subsection 15(d), briefly address the program, as follows:

> A holder of a direct pay permit shall not be required to deliver an exemption certificate

> claiming multiple points of use to the seller. A direct pay permit holder shall follow the provisions of [Subsection 15(a)2], in apportioning the tax due on prewritten computer software that will be concurrently available for use in more than one jurisdiction.

830 C.M.R. § 64H.1.3(15)(d). Thus, the Regulation effectively states that direct pay permit holders can handle their own apportionment, but that the apportionment methodology used by such holders must be consistent with the standards set forth in 830 C.M.R. § 64H.1.3(15)(a)2.

While it is true that Section 15(d) does not specifically broach the subject of timing in the context of direct pay permit holders, there is an obvious reason why: the direct pay permit program has its own set of timing requirements that are already defined in its governing regulation, 830 C.M.R. § 64H.3.1, and these regulations make clear that direct pay permit holders also must report and remit sales tax near the time of the transaction. Thus, the regulations for the direct pay program provide that "[o]n each and every occasion when a qualified purchaser purchases tangible personal property . . . the qualified purchaser must present its [direct payment] certificate to the vendor," who is thereby relieved of its usual obligation to collect and remit sales tax. 830 C.M.R. § 64H.3.1(6). The direct pay permit holders are then required to file their own

"monthly sales and use tax return[s]" for all taxable sales occurring during the preceding month, in accordance with the standard reporting rules stated in 830 C.M.R. § 62C.16.2. *See* 830 C.M.R. § 64H.3.1(7). As such, the Board is flatly wrong when it states that "there are no constraints, temporal or otherwise, that prevent direct pay permit holders from seeking apportionment through the abatement process." Rev. Dec. at 617. In fact, the direct payment regulations impose precisely such a constraint -- they mandate that permit holders report and remit all sales tax due within a tightly circumscribed "monthly" time frame. As a result, the direct payment program supports, rather than "undermines", the Commissioner's temporal arguments in this case.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Appellate Tax Board and uphold the Commissioner's original denial of the Taxpayers' abatement applications.

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL

/s/ Richard S. Weitzel
Richard S. Weitzel, BBO # 630303
Assistant Attorney General
Nathan Y. Pak, BBO # 705738
Special Assistant Attorney General
Government Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 963-2022
Richard.Weitzel@mass.gov

Date: May 28, 2020

CERTIFICATE OF COMPLIANCE

I, Richard S. Weitzel, hereby certify that the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure. The brief complies with the applicable length limit in Rule 20 because it is 50 pages long (not including the portions of the brief excluded under Rule 20) in 12-point Courier New font, which prints approximately 10 characters per inch.

/s/ Richard S. Weitzel_____
BBO No. 630303
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2020, I filed with the Appeals Court and served the attached Brief of the Defendant-Appellant Commissioner of Revenue in *Oracle USA, Inc. et al v. Commissioner of Revenue*, No. 2020-P-0369, through the electronic means provided by the clerk and by electronic mail on the following registered users:

John S. Brown, Esq.
Morgan Lewis & Bockius LLP
One Federal Street
Boston, MA 02110

/s/ Richard S. Weitzel____
Richard S. Weitzel
Assistant Attorney General
One Ashburton Place
Boston, MA 02108
(617) 963-2022

ADDENDUM

COMMONWEALTH OF MASSACHUSETTS
Appellate Tax Board
100 Cambridge Street, Suite 200
Boston, MA 02114

(617) 727-3100
(617) 727-6234 FAX

NOV 2 7 2019

John S. Brown
Morgan Lewis& Bockius LLP
One Federal Street
Boston, MA 02110

Re: Oracle USA, Inc.
Oracle America, Inc.
Microsoft Licensing, GP
v. Commissioner of Revenue
Docket Nos. C318441, C318442 & C327798

Dear Sir/Madam,

Enclosed please find copy of the Revised Decision promulgated by the Board this day in the above appeal.

Very truly yours,

Clerk of the Board

Copy to: Marikae Grace Toye
Counsel for the Commissioner
Litigation Bureau, 7th Floor
Boston, MA 02114

/lm
Encl.

THE COMMONWEALTH OF MASSACHUSETTS
Appellate Tax Board
100 Cambridge Street
Suite 200
Boston, Massachusetts 02114

(617) 727-3100
(617) 727-6234 FAX

Docket No. C318441

ORACLE USA, INC.
Appellant.

COMMISSIONER OF REVENUE
Appellee.

REVISED DECISION

The decision is for the appellant. Abatement is granted in the amount of $59,099.00. The basis of this Revised Decision is detailed in the accompanying Findings of Fact and Report.

APPELLATE TAX BOARD

_____ Chairman

_____ Commissioner

_____ Commissioner

_____ Commissioner

_____ Commissioner

Attest: _____
Clerk of the Board

Date: NOV 27 2019
(Seal)

NOTE: An appeal may be taken to the Massachusetts Appeals Court by either party to these proceedings. Any claim of appeal must be filed with this Board in accordance with the Massachusetts Rules of Appellate Procedure.

THE COMMONWEALTH OF MASSACHUSETTS
Appellate Tax Board
100 Cambridge Street
Suite 200
Boston, Massachusetts 02114

(617) 727-3100
(617) 727-6234 FAX

Docket No. C318442

ORACLE AMERICA, INC.
Appellant.

COMMISSIONER OF REVENUE
Appellee.

REVISED DECISION

The decision is for the appellant. Abatement is granted in the amount of $185,323.00. The basis of this Revised Decision is detailed in the accompanying Findings of Fact and Report.

APPELLATE TAX BOARD

_____ Chairman
_____ Commissioner
_____ Commissioner
_____ Commissioner
_____ Commissioner

Attest: _____
Clerk of the Board

Date: NOV 2 7 2019
(Seal)

NOTE: An appeal may be taken to the Massachusetts Appeals Court by either party to these proceedings. Any claim of appeal must be filed with this Board in accordance with the Massachusetts Rules of Appellate Procedure.

THE COMMONWEALTH OF MASSACHUSETTS
Appellate Tax Board
100 Cambridge Street
Suite 200
Boston, Massachusetts 02114

(617) 727-3100
(617) 727-6234 FAX

Docket No. C327798

MICROSOFT LICENSING, GP
Appellant.

COMMISSIONER OF REVENUE
Appellee.

REVISED DECISION

The decision is for the appellant. Abatement is granted in the amount of $119,306.78. The basis of this Revised Decision is detailed in the accompanying Findings of Fact and Report.

APPELLATE TAX BOARD

_____ Chairman

_____ Commissioner

_____ Commissioner

_____ Commissioner

_____ Commissioner

Attest: _____
Clerk of the Board

Date: NOV 27 2019
(Seal)

NOTE: An appeal may be taken to the Massachusetts Appeals Court by either party to these proceedings. Any claim of appeal must be filed with this Board in accordance with the Massachusetts Rules of Appellate Procedure.

COMMONWEALTH OF MASSACHUSETTS
Appellate Tax Board
100 Cambridge Street, Suite 200
Boston, MA 02114

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NOV 27 2019

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LITIGATION BUREAU

John S. Brown
Morgan Lewis& Bockius LLP
One Federal Street
Boston, MA 02110

FINDINGS OF FACT NOTICE

Re: Oracle USA, Inc.
Oracle America, Inc.
Microsoft Licensing, GP
v. Commissioner of Revenue
Docket Nos. C318441, C318442 & C327798

Dear Sir/Madam

Enclosed, please see copy of Findings of Fact and Report promulgated by the Appellate Tax Board in the above-entitled appeals.

Very truly yours,

Clerk of the Board

Copy to: Marikae Grace Toye
Counsel for the Commissioner
Litigation Bureau, 7th Floor
Boston, MA 02114

/lm
Encl.

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

ORACLE USA, INC.

Docket No. C318441

ORACLE AMERICA, INC.

DOCKET NO. C318442

MICROSOFT LICENSING, GP

DOCKET NO. C327798

v.

COMMISSIONER OF REVENUE

Promulgated:
November 27, 2019

These are appeals 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" or "appellee") to abate sales tax on the sale or licensing of computer software ("sales at issue") to Hologic, Inc. ("Hologic") by Oracle USA, Inc., Oracle America, Inc., and Microsoft Licensing, GP ("appellants") for various monthly tax periods (collectively, the "tax periods at issue").[1]

The Appellate Tax Board ("Board"), on its own motion, promulgated these findings of fact and report contemporaneously

[1] The applicable tax periods for each of the appellants are: Oracle USA, Inc.- May 2009 and August 2009 through and including January 2010; Oracle America, Inc. - March 2010, May 2010, August 2010, October 2010 through and including February 2011, May 2011, June 2011, and August 2011 through and including February 2012; and Microsoft Licensing, GP - December 2009, October 2010, December 2010, January 2011, and December 2011.

with a revised decision for the appellants, in which Chairman Hammond, and Commissioners Rose, Good, Elliott, and Metzer joined.

John S. Brown, Esq., *George P. Mair*, Esq., *Donald-Bruce Abrams*, Esq., and *Adam M. Holmes*, Esq. for the appellants.

Marikae Grace Toye, Esq. and *Timothy R. Stille*, Esq. for the Commissioner.

FINDINGS OF FACT AND REPORT

I. BOARD PROCEEDINGS

The parties waived a hearing on these matters and proceeded based on a Statement of Agreed Facts, Exhibits, and briefs. The Board initially issued a decision for the appellee ("Initial Decision"). After further consideration, on March 25, 2019, the Board issued an Order Under Rule 33 of its Rules of Practice and Procedure ("Rule 33 Order") vacating the Initial Decision. The Rule 33 Order also incorporated rulings and findings that supported a decision for the appellants and ordered the parties to perform a Rule 33 calculation of abatements consistent with the Board's rulings and findings.

On April 4, 2019, the Commissioner filed a Motion for Reconsideration, which was heard on April 11, 2019. By Order dated May 20, 2019, the Board issued supplemental findings and directed the parties to file additional written arguments in support of their positions as they deemed necessary. Both parties submitted

arguments, and on July 9, 2019, the Board denied the Commissioner's Motion for Reconsideration and renewed the Rule 33 Order, giving the parties thirty days to comply.

In response, the appellants submitted a Rule 33 calculation consistent with the amounts at issue detailed in the Statement of Agreed Facts and other submissions, which were based on apportionment percentages specific to each of the appellants. For his part, the Commissioner submitted a calculation asserting an abatement of $0.00 founded on his conclusion that Hologic was not entitled to apportion the sales tax at issue and, alternatively, argued that a calculation was not yet possible because the Commissioner lacked relevant information.

For the reasons described below, the Board adopted the appellants' Rule 33 calculations and granted abatements to the appellants in those amounts.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Hologic develops, manufactures, and supplies medical diagnostic equipment. During the tax periods at issue, Hologic's headquarters was located in Bedford, Massachusetts and the company had employees and offices both inside and outside of Massachusetts. Hologic's information technology procurement function, which was located in Massachusetts, served all of Hologic's locations and its various business functions, including its research and

development, manufacturing, financial, sales, and administrative functions.

Also during the tax periods at issue, Hologic purchased or licensed software from the appellants and installed the software on servers located in Massachusetts for use by employees inside Massachusetts and at Hologic's offices around the country and internationally. Hologic's employees accessed the software from their various local work locations. The appellants each collected sales tax from Hologic on the amounts that Hologic paid for the software during the tax periods at issue, timely remitted the sales tax to Massachusetts, and timely reported the tax on Forms ST-9: Sales and Use Tax Returns ("Forms ST-9").[2]

Subsequently, Hologic informed the appellants of its intended and actual use of the software in multiple locations and provided data to the appellants that showed the percentage of use outside of Massachusetts. The appellants each filed Forms CA-6: Applications for Abatement/Amended Returns ("Forms CA-6" or "abatement applications") for the tax periods at issue, seeking abatements and refunds of sales tax consistent with the usage data and consequent apportionment percentages provided by Hologic.[3] The

---

[2] Hologic, not a holder of a direct pay permit under G.L. c. 64H, § 3, did not provide the appellants with either a Form ST-12 ("Form ST-12" or "exempt use certificate") or certify the accuracy of an apportionment as provided for in the Commissioner's regulation, 830 CMR 64H.1.3(15).

[3] On the Forms CA-6, the appellants sought abatement and refund of sales tax in the following amounts: Oracle USA, Inc. - $59,098.27; Oracle America, Inc. - $185,323.34; and Microsoft Licensing, GP - $119,306.74.

appellants also provided the Commissioner with sales tax claim waivers and refund assignments, acknowledging that any refunds received would be refunded to Hologic pursuant to G.L. c. 62C, § 37. Oracle USA, Inc. and Oracle America, Inc. provided Hologic with provisional credits for any refunds, and Microsoft Licensing, GP agreed to credit Hologic's account for any refund. The Commissioner denied the appellants' abatement applications.

Jurisdictional documentation in the record for each of the appellants and the respective tax periods at issue established that all Forms ST-9, Forms CA-6, and petitions before the Board were timely filed, and so the Board found and ruled that it had jurisdiction over these appeals.

III. CONCLUSION

Based on the record in its entirety, which included submissions from the parties received throughout the Board proceedings as well as transcripts of oral arguments, the Board found and ruled that the appellants properly sought apportionment of the sales tax at issue in these appeals for the reasons discussed in the Opinion below. With this conclusion in mind, final disposition of the appeals depended on correct calculation of the abatements due to the appellants.

In his Rule 33 calculation, the Commissioner cited only legal impediments to an appropriate calculation, taking no issue with relevant totals claimed on the appellants' Forms CA-6 or those in

the Statement of Agreed Facts, which were stipulated as abatements due should the appellants prevail on relevant legal issues and a Rule 33 calculation. The Commissioner also explicitly stated that he did not intend to challenge the appellants' claimed apportionment percentages. Further, the Commissioner did not dispute stated amounts of tax collected and remitted by the appellants, which were also supported by stipulated copies of invoices rendered by the appellants to Hologic. Applying the apportionment percentages to the tax totals produced a result consistent with the abatement amounts claimed by the appellants.[4]

In sum, having resolved the legal issue presented in favor of the appellants and applied uncontested apportionment percentages to undisputed amounts of sales tax, the Board issued a decision for the appellants and ordered abatements of $59,099, $185,323, and $119,306.78, respectively, for Oracle USA, Inc., Oracle America, Inc., and Microsoft Licensing, GP, plus associated interest under G.L. c. 62C, § 40.

[4] The Board noted a minor discrepancy of $1.04 among the amounts requested on the appellants' Forms CA-6, the appellants' Rule 33 calculation, and the stipulated sums at issue in the Statement of Agreed Facts. Totaling available figures, the Board determined that the amounts in the appellants' Rule 33 calculation were correct.

OPINION

I. THE GOVERNING STATUTE

Massachusetts law imposes a tax on sales of tangible personal property in the Commonwealth. G.L. c. 64H, §§ 1 and 2. General Laws c. 64H, § 1 ("§ 1"), in pertinent part, defines tangible personal property as:

> personal property of any nature consisting of any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured or being within the commonwealth . . . ***A transfer of standardized computer software, including but not limited to electronic, telephonic, or similar transfer, shall also be considered a transfer of tangible personal property.***

(emphasis added).

Effective April 1, 2006, the definition of tangible personal property was amended, in part to incorporate the language emphasized above. St. 2005, c. 163, §§ 34 and 61, approved December 8, 2005. The change was intended, in large measure, to create uniform sales and use tax treatment for all sales of standardized software, whether the software is delivered via tangible media, such as a CD-ROM, electronically, or by means such as "load and leave."

The amendment also authorized the Commissioner to promulgate regulations to "provide rules for apportioning tax in those instances in which software is transferred for use in more than one state." St. 2005, c. 163, §§ 34 and 61. Subsequently, the

Commissioner promulgated a new version of 830 CMR 64H.1.3 ("Regulation") that included provisions discussing apportionment of sales of standardized software. *See* 830 CMR 64H.1.3(15). By the Regulation's terms, its provisions were effective October 20, 2006, and applied retroactively to transactions on and after April 1, 2006.

II. THE REGULATION

The Regulation contains two primary apportionment provisions, both of which, through their application, relieve vendors of specific liabilities: 830 CMR 64H.1.3(15)(a) transfers reporting liability from a vendor to a purchaser; and 830 CMR 64H.1.3(15)(b) relieves vendors of "any further obligation" after collecting and remitting tax pursuant to its terms. *See* 830 CMR 64H.1.3(15)(a) and (15)(b) ("¶ (15)(a)" and "¶ (15)(b)," respectively).

Paragraph (15)(a) requires that a purchaser who "knows at the time of its purchase of prewritten computer software that the software will be concurrently available for use in more than one jurisdiction" provide a Form ST-12 to the vendor "no later than the time the transaction is reported for sales or use tax purposes."[5]

[5] Paragraph 15(a) also exempts holders of a direct pay permit from these requirements, although permit holders must follow its guidance relating to apportionment methodologies. A direct pay permit, pursuant to G.L. c. 64H, § 3, transfers liability for reporting and remitting sales tax from a vendor to the holder of the permit.

The provisions of ¶ (15)(b) involve a seller that "knows that the prewritten software will be concurrently available for use in more than one jurisdiction" but has not been provided an exempt use certificate by the purchaser. In these circumstances, ¶ (15)(b) provides that the seller "may work with the purchaser to produce the correct apportionment," to which the purchaser must certify, and which certification the seller must accept. The seller then collects and remits the tax to the appropriate jurisdictions. Although ¶ (15)(b) does not explicitly state when the apportionment determination and certification must be completed, the Commissioner argued that the language of ¶ (15)(b) unequivocally implies that both must occur, like ¶ (15)(a), by the time a transaction must be reported to the Commissioner

Paragraphs (15)(a) and (15)(b) also provide substantive guidance for how to apportion. Both allow use of "any reasonable, but consistent and uniform, method of apportionment that is supported by . . . records as they exist at the time the transaction is reported for sales or use tax purposes."[6] Paragraph (15)(a) further explains that

> [a] reasonable, but consistent and uniform, method of apportionment includes, but is not limited to, methods based on number of computer terminals or licensed users in each jurisdiction where the software will be used. A reasonable, but consistent and uniform method of

[6] Paragraphs (15)(a) and (15)(b) have slightly different requirements regarding use and retention of books and records, none of which are dispositive in the instant appeals.

apportionment may not be based on the location of the servers where the software is installed.

III. THE COMMISSIONER'S POSITION

The Commissioner posited that § 1, by itself, does not afford the right to apportion sales of standardized software. In the Commissioner's view, absent his action by regulation, no such right would exist. The Commissioner then effectively rested his case on the argument that the sole means by which Hologic could apportion the sales at issue was to comply with the terms of either ¶ 15(a) or ¶ 15(b).[7] Given that Hologic did not provide the appellants with Forms ST-12 or apportionment certifications, the Commissioner argued that apportionment was foreclosed and the requested abatements should be denied. The Board disagreed with the Commissioner's reasoning and conclusions.

IV. THE BOARD'S RULINGS

As a threshold matter, the Board ruled that § 1 itself grants taxpayers the right to apportion sales tax on a sale of taxable software that is "transferred for use in more than one state." Pursuant to § 1, the Commissioner's role is to prescribe rules for that apportionment by regulation. To conclude that apportionment is not a right granted by § 1 would require acceptance of the proposition that the Commissioner may determine the contours of a

[7] For reasons that remain unclear, in his brief preceding the issuance of the Board's Initial Decision, the Commissioner claimed that provision of a Form ST-12 under ¶ 15(a) was the exclusive means for apportionment.

process for which there is no underlying right. The Board found this proposition illogical and inconsistent with the plain language of the statute. This having been said, the central question of these appeals remains, which is whether and how the Regulation affects the right of the appellants to request apportionment via the abatement process under G.L. c. 62C, § 37.

Hologic purchased or licensed taxable software from the appellants, intending to use the software in multiple jurisdictions. These are precisely the circumstances under which § 1 contemplates apportionment of the sales tax. Hologic paid sales tax on the entire purchase price, and sometime later informed the appellants of its intended and actual use of the software in multiple locations. Hologic also provided data that showed the percentage of use outside of Massachusetts, thereby adhering to the Regulation's substantive guidance regarding appropriate apportionment methodologies. The appellants then timely sought apportionment through the abatement process under G.L. c. 62C, § 37.

The provisions of G.L. c. 62C, § 37 state, in relevant part, that "[a]ny person aggrieved by the assessment of a tax, other than a tax assessed under chapter 65 or 65A, may apply in writing to the commissioner, on a form approved by the commissioner, for an abatement thereof," within specified time limitations. Here, the appellants timely filed Forms CA-6, claiming to be aggrieved

by the self-assessment of unapportioned sales tax on the sales at issue. On its face, § 1 does not - explicitly or implicitly - prohibit seeking apportionment via the abatement process subsequent to collecting, remitting, and reporting sales tax.

Similarly, while the provisions of the Regulation set out methodologies for apportionment and relief of vendor liabilities, they do not prohibit apportionment through the abatement process and the Board found that they should not be construed otherwise. There is no language in the Regulation that limits the application of the abatement process in the context of apportionment. The absence of such limiting language is telling because the Commissioner has, on numerous occasions, incorporated such limitations in his regulations. For instance, 830 CMR 63.38.1(9)(d)1.g.i, which involves assignment of sales for apportionment purposes, states that when a taxpayer employs a method to properly assign sales on an original return:

> the application of such method of assignment shall be deemed to be a correct determination by the taxpayer of the state or states of assignment to which the method is properly applied. In such cases, ***neither the Commissioner nor the taxpayer (through the form of an audit adjustment, amended return, abatement application or otherwise) may modify the taxpayer's methodology as applied for assigning such sales for such taxable year.***

(emphasis added). *See also* 830 CMR 63.38M.1(5)(d)3.c (Corporate elections to change research credit computation methods "must be made on the return for the taxable year in which the change will

take effect and may not be revoked or retroactively altered by filing an amended return or claim for abatement."); 830 CMR 63.32B.2(5)(c)3 (Revocation of a worldwide combined reporting election cannot be made "until after it has been effective for ten taxable years. . . . The revocation or renewal of an election shall be made on an original, timely filed return by the combined group's principal reporting corporation or as otherwise required in writing by the Commissioner."). Similarly, 830 CMR 63.42.1(3), which relates to applications for alternative apportionment of income subject to the corporate excise tax, provides that "[a]n application will not be considered if it is received by the Commissioner after the due date or, where applicable, the due date as validly extended, for the applicant's corporation excise return."

The Board also found that the timing constraints that are integral to the Commissioner's construction of the Regulation undermine his arguments. More specifically, the Regulation explicitly provides that it is effective October 20, 2006, but applies retroactively to transactions on and after April 1, 2006. 830 CMR 64H.1.3(1)(b). This retroactivity allowed taxpayers to seek apportionment of sales tax through the abatement process with respect to transactions that occurred well before the effective date of the Regulation. However, applying the Commissioner's view that all submissions of Forms ST-12 and certifications under

¶¶ (15)(a) and (15)(b) must be received by the due date of the applicable sales tax return, numerous transactions to which the abatement process was explicitly made available by the Regulation's retroactivity would have been excluded from that process. In other words, the temporal limits that the Commissioner has employed in his construction of the Regulation for purposes of this appeal, and which form part of the basis for the denial of the appellants' request for relief, directly contradict the plain terms of the Regulation.

The Regulation's treatment of direct pay permit holders is also instructive. As previously noted, the holder of a direct pay permit need not submit a Form ST-12. Rather, a holder must simply follow the provisions relating to apportionment methodologies found in 830 CMR 64H.1.3(15)(a)2 "in apportioning the tax due on prewritten computer software that will be concurrently available for use in more than one jurisdiction." 830 CMR 64H.1.3(15)(d). However, these provisions do not state that apportionment must be sought by the time the transaction is reported for sales tax purposes, or at any particular time for that matter. Rather, they simply mandate use of "any reasonable, but consistent and uniform, method of apportionment." 830 CMR 64H.1.3(15)(a)2. Thus there are no constraints, temporal or otherwise, that prevent direct pay permit holders from seeking apportionment through the abatement process under G.L. c. 62C, § 37. The Regulation's substantive

apportionment guidance can readily be applied to the facts of the instant appeals and the Board found no legal basis as to why direct pay permit holders could seek apportionment through the abatement process, but not vendors such as the appellants.

Finally, under G.L. c. 64H, § 8, purchasers may provide a Form ST-4: Resale Certificate or a Form ST-12 to inform vendors that purchases are not retail purchases, or that they are exempt from tax. This statutory scheme is construed in the Commissioner's regulations at 830 CMR 64H.8.1. In the absence of a certificate, the ongoing burden of proving that a transaction is not taxable is on the vendor, whereas a certificate relieves the vendor of that burden. However, neither the statute nor the regulations provide that delivery of a certificate is the only means by which an exemption may be obtained. *See* G.L. c. 64H, § 8. In fact, the abatement process is fully available to taxpayers for that purpose. *See, e.g.,* ***D&H Distributing Company v. Commissioner of Revenue,*** 477 Mass. 538, 546 (2017). The procedure applicable to G.L. c. 64H, § 8 in large measure parallels the use of direct pay permits, exempt use certificates, and certifications discussed in ¶¶ (15)(a) and (15)(b), all of which serve to shift burdens in specified ways but preserve the right of vendors to seek an abatement in the absence of certificates or permits. Like G.L. c. 64H, § 8, there is no language in § 1 or the Regulation that abrogates the right of a vendor to seek an abatement under § 37,

and the Board ruled that, as with G.L. c. 64H, § 8, a vendor's right to pursue a § 37 abatement is preserved regardless of whether an exemption certificate or certification has been provided.

V. CONCLUSION

Based on the foregoing, the Board found and ruled that if application of the Regulation's stated methodologies for apportionment resulted in a tax that was "excessive in amount or illegal," there was no basis in either § 1 or the Regulation to deny the appellants an abatement under G.L. c. 62C, § 37.

As discussed above, the Commissioner has sanctioned "any reasonable, but consistent and uniform, method of apportionment that is supported by . . . books and records as they exist at the time the transaction is reported for sales or use tax purposes." Paragraph (15)(a) also includes within the scope of acceptable apportionment methodologies those that are "based on number of computer terminals or licensed users in each jurisdiction where the software will be used."

The software in these appeals was intended for use by employees inside Massachusetts and at Hologic's offices around the country and internationally, and it was accessed by employees from their various work locations. With knowledge of these locations, Hologic provided data to the appellants that showed the percentage of use outside of Massachusetts. The Board found that this approach was consistent with the Regulation's methodologies. Further, as

previously noted, the Commissioner has explicitly stated that he did not intend to challenge the appellants' claimed apportionment percentages and he did not dispute stated amounts of tax collected and remitted by the appellants.

Having concluded that the appellants were entitled to seek apportionment through the abatement process under G.L. c. 62C, § 37, the Board applied uncontested apportionment percentages to undisputed amounts of sales tax to determine the amount by which the self-assessed tax exceeded the tax properly due. Accordingly, the Board issued a decision for the appellants ordering abatements of $59,099, $185,323, and $119,306.78, respectively, for Oracle USA, Inc., Oracle America, Inc., and Microsoft Licensing, GP, plus associated interest under G.L. c. 62C, § 40.

THE APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: _____
Clerk of the Board

M.T.G. TIR 05-15

MASSACHUSETTS TAX GUIDE
SALES AND USE TAX/MISCELLANEOUS EXCISES
TECHNICAL INFORMATION RELEASES

This Supplement includes Department of Revenue documents received by April 27, 2018

05-15. Transfers of Prewritten Computer Software

I. Introduction:

This Technical Information Release announces statutory changes contained in recent legislation, St. 2005, c. 163, §§ 27, 29, 34, 59, 61, concerning sales of standardized computer software ("prewritten software"). As the result of this change, prewritten software sold to a customer in Massachusetts or purchased for use in Massachusetts shall be deemed a transfer of tangible personal property subject to the sales or use tax regardless of the method of delivery, including transfers by electronic means such as the Internet or "load and leave." This change is effective April 1, 2006. Prior to this statutory change, sales or use tax was imposed on sales of prewritten software [FN1] delivered in tangible form such as a disk, but not on prewritten software delivered electronically or by "load and leave." *See* 830 CMR 64H.1.3, DD 01-3 and LR 00-14.

[FN1] Prewritten software was called canned software in some of the Department's prior public written statements.

The legislation also provides that the development and sale of prewritten software shall be considered a manufacturing activity for purposes of certain corporate excise provisions, regardless of the method of the delivery of the software. This may result in the applicability of single sales factor apportionment and to eligibility for potential local property tax benefits, investment tax credits, and certain sales tax exemptions. These changes are effective for taxable years beginning on or after January 1, 2006.

This TIR revokes and replaces any prior public written statements to the extent they are inconsistent.

II. Statutory Changes:

The recent legislation amends the definition of "tangible personal property" in the sales tax statute, G.L. c. 64H, § 1, to add the following: "A transfer of standardized computer software, including but not limited to electronic, telephonic, or similar transfer, shall also be considered a transfer of tangible personal property. The commissioner may, by regulation, provide rules for apportioning tax in those instances in which software is transferred for use in more than one state."

The legislation also amends provisions in the corporate excise statute at G.L. c. 63, §§ 38C and 42B to provide that for purposes of those sections and G.L. c. 63, § 38, "the development and sale of standardized computer software shall be considered a manufacturing activity, without regard to the manner of delivery of the software to the customer."

III. New Sales/Use Tax Treatment:

All transfers of prewritten software on and after April 1, 2006, including but not limited to electronic, telephonic, or similar transfers, downloaded software from the Internet or transfers by "load and leave" are considered transfers of tangible personal property. Sales or use tax will apply when such software is transferred for a consideration to a retail purchaser in Massachusetts or for use in Massachusetts.

On and after April 1, 2006, taxable transfers of software include, but are not limited to, the following:

1. Licenses and leases of prewritten software.

2. Granting the right to use prewritten software installed on a remote server.
3. Upgrades to prewritten software, including upgrades delivered pursuant to maintenance contracts [FN2], regardless of whether the software was taxable when initially transferred to the retail customer.

[FN2] With respect to maintenance contracts sold before April 1, 2006, software vendors are required to collect tax on invoices after April 1, 2006. For example, if a multiple year contract that began in June, 2005 has payments due in June, 2006 and June, 2007, the vendor must collect applicable tax on the payments due in June, 2006 and 2007.

4. License upgrades for prewritten software. *See* LR 93-2.

Transfers of custom software will generally continue to be treated as nontaxable personal service transactions. *See* 830 CMR 64H.1.3. There is no change in the treatment of database or similar electronic information services available to multiple subscribers or data processing, which remain non-taxable services. *See* TIR 05-8.

Generally, business taxpayers that download or otherwise acquire prewritten software for use in Massachusetts from an unregistered out-of-state retailer for a consideration are required to file and pay the use tax due on Form ST-9, Sales/Use Tax Return or ST-10, Business Use Tax Return. Under some circumstances, a business purchaser may give a Multiple Points of Use Certificate to the vendor. *See* Section IV.

Individuals acquiring prewritten software for nonbusiness use from an unregistered out-of-state retailer for a consideration must pay applicable use tax due by filing Form ST-11, Individual Use Tax Return. An individual's use tax may also be paid with the Form 1 Massachusetts Resident Income Tax return. *See* Form 1 instructions and TIR 03-1.

Manufacturers of prewritten software that is delivered electronically may also now qualify for sales tax exemptions under G.L. c. 64H, § 6 (r) and (s) for machinery, materials, tools and fuel, provided that the other requirements of those provisions are met. *See generally* LR 03-11.

IV. Multiple Points of Use—Exemption Certificate:

Business and commercial purchasers of prewritten computer software that will be concurrently available for use in multiple tax jurisdictions must present to the vendor an exemption certificate, Form ST-12, to elect Multiple Points of Use (MPU) treatment. [FN3] Upon receipt of the MPU Exemption Certificate, the vendor is relieved of all obligation to collect, pay, or remit the applicable tax and the purchaser shall be obligated to report and remit the applicable sales or use tax on its sales/use tax return.

[FN3] The holder of a Direct Payment Certificate is not required to give its vendor an MPU certificate to apportion sales/use tax as provided in this section, providing the purchase is otherwise eligible under the Direct Payment Certificate. *See* 830 CMR 64H.3.1.

A purchaser delivering the MPU Exemption Certificate may use any reasonable, but consistent and uniform, method of apportionment that is supported by the purchaser's business records, as they exist at the time a return is filed. Generally, a "reasonable" method must reflect the location of use of the software by the purchaser and not the location of the servers where the software is installed. The purchaser must maintain records and documentation for review by the Department of Revenue's Audit Division in accordance with 830 CMR 62C.22.1, the Records Retention Regulation.

Examples of situations where use of an MPU is appropriate include, but are not limited to the following:

Example 1: Software is installed on a server located in another state but concurrently available for use by purchaser's employees in Massachusetts as well as other states. The purchaser gives the seller a properly completed MPU form. Part of the sales price of the software will be apportioned to Massachusetts for sales/use tax purposes.

Example 2: Software is installed on a server located in Massachusetts but concurrently available for use by purchaser's employees in other states as well as Massachusetts. The purchaser gives the seller a properly completed MPU form. Part of the sales price will be apportioned to those other states for sales/use tax purposes.

Example 3: A business in Massachusetts purchases an enterprise license that allows the purchaser to make copies of software (either from a master disk or downloaded copy) and those copies will be concurrently available for use at the purchaser's business locations in various jurisdictions. The purchaser gives the seller a properly completed MPU form. For sales/use tax purposes, part of the sales price will be apportioned to the other states where the purchaser is using copies of the software.

A Multiple Points of Use Certificate may not be used for computer software received in person by a business purchaser at a business location of the seller, such as a retail store. A Multiple Points of Use Certificate also may not be used for software that is loaded on computer hardware prior to sale; in that situation the sales tax sourcing rules for computer hardware determine the taxability of the transaction, regardless of whether the price for the hardware and software are separately stated.

In accordance with the authority in St. 2005, c. 163, § 34, the Department will promulgate regulations on Multiple Points of Use Certificates and apportionment of sales or use tax to other jurisdictions.

V. Treatment of Corporations as Engaged in Manufacturing Activity:

St. 2005, c. 163, §§ 27, 29 also amend G.L. c. 63, §§ 38C, 42B to provide that for purposes of those provisions and G.L. c. 63, § 38, the development and sale of standardized computer software shall be considered a manufacturing activity, without regard to the manner of delivery of the software to the customer. These changes are effective for taxable years beginning on or after January 1, 2006.

A corporation classified as a manufacturing corporation may use certain tax benefits outlined in 830 CMR 58.2.1(4). In addition, a corporation engaged in manufacturing but not having been so classified may qualify for certain tax benefits described in 830 CMR 58.2.1(5). A corporation engaged in manufacturing activity may also be subject to single sales factor income apportionment for the corporate excise as provided by G.L. c. 63, § 38(l). Previously, corporations engaged in the development and sales of prewritten software could only be treated as engaged in manufacturing to the extent that software was delivered in a tangible medium.

<February 10, 2006 /s/ Alan LeBovidge>

TIR 05-15 Commissioner of Revenue

<General Materials (GM) - References, Annotations, or Tables>

End of Document

Rev. 3/06

Massachusetts Department of Revenue

Form ST-12
Exempt Use Certificate

Vendor's name

Address City/Town State Zip

I hereby certify that the property herein described is purchased or leased for the following indicated purpose and is exempt from the sales or use tax pursuant to Massachusetts General Laws (MGL), Chapter 64H, section 6(i), (j), (r), (s) or (dd), or is prewritten computer software that qualifies for Multiple Points of Use treatment.

1 ☐ The materials, tools or fuel will become an ingredient or component part of tangible personal property to be sold.

2 A ☐ The materials, tools or fuel will be consumed and used directly and exclusively in, or

B The machinery, and/or replacement parts thereof, will be used directly and exclusively in

1 ☐ agricultural production
2 ☐ commercial fishing
3 ☐ industrial plant in the actual manufacture, conversion or processing of tangible personal property to be sold
4 ☐ publishing a newspaper
5 ☐ operation of commercial radio broadcasting or television transmission
6 ☐ furnishing power to an industrial manufacturing plant
7 ☐ furnishing gas, water, steam or electricity when delivered to consumers through mains, lines or pipes
8 ☐ research and development by a manufacturing or research and development corporation under MGL, Ch. 63, sec. 38C or 42B
9 ☐ production of animals for research, testing or other purposes to promote human or animal well-being
10 ☐ other (explain) _____

3 ☐ Sales of equipment used directly in solar, wind-powered or heat pump systems to heat or provide energy needs of the person's principal residence in the Commonwealth.

4 ☐ The fuel will be used in the operation of aircraft or railroads.

5 ☐ The heating fuel will be consumed or used directly and exclusively in heating an industrial plant where at least 75% of the building, location or premises is used for the actual manufacture of tangible personal property to be sold.

6 ☐ Gas ☐ Steam ☐ Electricity (check one) will be consumed and used directly and exclusively in the actual manufacture of tangible personal property to be sold or in the heating of the industrial plant provided at least 75% of the metered energy is used for the combination of such manufacturing or heating of the manufacturing area.

7 ☐ The tangible personal property is a production expense directly incurred in the production of a motion picture by a qualifying motion picture production company and clearly and demonstrably incurred in the Commonwealth.

8 ☐ The tangible personal property is a production expense directly incurred in the production of a motion picture by an accredited film school student, clearly and demonstrably incurred in the Commonwealth and related to a school film project

9 ☐ Multiple Points of Use Certificate. The prewritten computer software will be concurrently available for use in multiple tax jurisdictions. The purchaser agrees to remit apportioned use tax to Massachusetts.

Description of property (complete for any exemption claimed in line 1 or 2; attach statement if necessary)

Service location(s) of qualified property (complete for any exemption claimed in line 6)

Account number(s)

Full liability is hereby assumed for the payment of any sales or use tax due in the event that the property purchased is used for any purpose other than that herein certified. This certificate shall be considered a part of each order unless revoked in writing. All purchase orders under this certificate will clearly indicate that they represent exempt use purchases.

Signed under the penalties of perjury.

Signature Title

Name of company

Address City/Town State Zip

Date Federal identification number (if applicable)

Check applicable box: ☐ Single purchase certificate ☐ Blanket certificate

Part I ADMINISTRATION OF THE GOVERNMENT

Title IX TAXATION

Chapter 64H TAX ON RETAIL SALES OF CERTAIN TANGIBLE PERSONAL PROPERTY

Section 1 DEFINITIONS

Section 1. As used in this chapter the following words shall have the following meanings:—

"Business", any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect.

"Commissioner", the commissioner of revenue.

"Engaged in business", commencing, conducting or continuing in business, as well as liquidating a business when the liquidator thereof holds himself out to the public as conducting such a business.

"Engaged in business in the commonwealth", having a business location in the commonwealth; regularly or systematically soliciting orders for the sale of services to be performed within the commonwealth or for the sale of tangible personal property for delivery to destinations in the commonwealth; otherwise exploiting the retail sales market in the commonwealth through any means whatsoever, including, but not limited to, salesmen, solicitors or representatives in the commonwealth, catalogs

or other solicitation materials sent through the mails or otherwise, billboards, advertising or solicitations in newspapers, magazines, radio or television broadcasts, computer networks or in any other communications medium; or regularly engaged in the delivery of property or the performance of services in the commonwealth. A person shall be considered to have a business location in the commonwealth only if such person (i) owns or leases real property within the commonwealth; (ii) has one or more employees located in the commonwealth; (iii) regularly maintains a stock of tangible personal property in the commonwealth for sale in the ordinary course of business; or (iv) regularly leases out tangible personal property for use in the commonwealth. For the purposes of this paragraph, property on consignment in the hands of a consignee and offered for sale by the consignee on his own account shall not be considered as stock maintained by the consignor; a person having a business location in the commonwealth solely by reason of regularly leasing out tangible personal property shall be considered to have a business location in the commonwealth only with respect to such leased property; and an employee shall be considered to be located in the commonwealth if (a) his service is performed entirely within the commonwealth or (b) his service is performed both within and without the commonwealth but in the performance of his services he regularly commences his activities at, and returns to, a place within the commonwealth. "Within the commonwealth" means within the exterior limits of the commonwealth of Massachusetts, and includes all territory within said limits owned by, or leased or ceded to, the United States of America.

"Gross receipts", the total sales price received by a vendor as a consideration for retail sales.

"Home service provider", the facilities-based carrier or reseller with which the retail customer contracts for the provision of mobile telecommunications service.

"Mobile telecommunications service", commercial mobile radio service, as defined in section 20.3 of title 47 of the Code of Federal Regulations as in effect on June 1, 1999.

[Definition of "Motion picture" applicable as provided by 2005, 158, Sec. 9 as amended by 2007, 63, Sec. 15.]

"Motion picture", a feature-length film, a video, a digital media project, a television series defined as a season not to exceed 27 episodes, or a commercial made in the commonwealth, in whole or in part, for theatrical or television viewing or as a television pilot. The term "motion picture" shall not include a production featuring news, current events, weather and financial market reports, talk show, game show, sporting events, awards show or other gala event, a production whose sole purpose is fundraising, a long-form production that primarily markets a product or service, or a production containing obscene material or performances.

[Definition of "Motion picture production company" applicable as provided by 2005, 158, Sec. 9 as amended by 2007, 63, Sec. 15.]

"Motion picture production company", a company including any subsidiaries engaged in the business of producing motion pictures, videos, television series, or commercials intended for a theatrical release or for television viewing. The term "motion picture production company" shall not mean or include any company which is more than 25 per cent owned, affiliated, or controlled, by any company or person which is in default on a loan made by the commonwealth or a loan guaranteed by the commonwealth.

"Person", an individual, partnership, trust or association, with or without transferable shares, joint-stock company, corporation, society, club, organization, institution, estate, receiver, trustee, assignee, or referee, and any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of individuals acting as a unit.

"Place of primary use", the street address representative of where the customer's use of the mobile telecommunications service primarily occurs, which shall be the residential street address or the primary business address of the customer and which shall be within the licensed service area of the home service provider. The place shall be determined in accordance with 4 U.S.C. sections 121 and 122.

"Prepaid calling arrangement", the right to exclusively purchase telecommunications services, that shall be paid for in advance and enables the origination of the calls using an access number or authorization code, whether manually or electronically dialed.

"Purchaser", a person who purchases tangible personal property or services the receipts from the retail sale of which are taxable under this chapter and includes a buyer, vendee, lessee, licensee, or grantee.

"Retailer", includes (i) every person engaged in the business of making sales at retail; (ii) every person engaged in the making of retail sales at auction of tangible personal property whether owned by such person or others; (iii) every person engaged in the business of making sales for storage, use or other consumption, or in the business of making sales at auction of tangible personal property whether owned by such person or others for storage, use or other consumption; (iv) every salesman, representative, peddler or canvasser who, in the opinion of the

commissioner, it is necessary to regard for the efficient administration of this chapter as the agent of the dealer, distributor, supervisor or employer under whom he operates or from whom he obtains the tangible personal property sold by him, in which case the commissioner may treat and regard such agent as the retailer jointly responsible with his principal, employer or supervisor for the collection and payment of the tax imposed by this chapter; and (v) the commonwealth, or any political subdivision thereof, or their respective agencies when such entity is engaged in making sales at retail of a kind ordinarily made by private persons.

"Retail establishment", any premises in which the business of selling services or tangible personal property is conducted, or, in or from which any retail sales are made.

"Sale" and "selling" include (i) any transfer of title or possession, or both, exchange, barter, lease, rental, conditional or otherwise, of tangible personal property or the performance of services for a consideration, in any manner or by any means whatsoever; (ii) the producing, fabricating, processing, printing or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing or imprinting; (iii) the furnishing and distributing of tangible personal property or services for a consideration by social clubs and fraternal organizations to their members or others; (iv) a transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price; (v) a transfer for a consideration of the title or possession of tangible personal property which has been produced, fabricated or printed to the special order of the customer, or of any publication; (vi) the furnishing of information by printed, mimeographed or multigraphed matter, or by duplicating written or

printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons, and excluding the services of advertising or other agents, or other persons acting in a representative capacity, and information services used by newspapers, radio broadcasters and television broadcasters in the collection and dissemination of news and excluding the furnishing of information by photocopy or other similar means by not for profit libraries which are recognized as exempt from taxation under ss50l(C)(3) of the Federal Internal Revenue Code; (vii) the performance of services for a consideration, excluding (a) services performed by an employee for his employer whether compensated by salary, commission, or otherwise, (b) services performed by a general partner for his partnership and compensated by the receipt of distributive shares of income or loss from the partnership; and (c) the performance of services for which the provider is compensated by means of an honorarium, or fee paid to any person or entity registered under 15 USC 80b–3 or 15 USC 78q–1 for services the performance of which require such registration, for services related thereto or for trust, custody, and related cash management and securities services of a trust company as defined in chapter one hundred and seventy-two.

"Sale at retail" or "retail sale", a sale of services or tangible personal property or both for any purpose other than resale in the regular course of business. When tangible personal property is physically delivered by an owner, a former owner thereof, a factor, or an agent or representative of the owner, former owner or factor, to the ultimate purchaser residing in or

doing business in the commonwealth, or to any person for redelivery to the purchaser, pursuant to a retail sale made by a vendor not engaged in business in the commonwealth, the person making or effectuating the delivery shall be considered the vendor of that property, the transaction shall be a retail sale in the commonwealth by the person and that person, if engaged in business in the commonwealth, shall include the retail selling price in its gross receipts, regardless of any contrary statutory or contractual terms concerning the passage of title or risk of loss which may be expressly or impliedly applicable to any contract or other agreement or arrangement for the sale, transportation, shipment or delivery of that property. He shall include the retail selling price of the property in his gross receipts. The term "sale at retail" or "retail sale" shall not include (a) sales of tickets for admissions to places of amusement and sports; (b) sales of transportation services; (c) professional, insurance, or personal service transactions which involve no sale or which involve sales as inconsequential elements for which no separate charges are made; or (d) any sale in which the only transaction in the commonwealth is the mere execution of the contract of sale and in which the tangible personal property sold is not in the commonwealth at the time of such execution; provided, however, that nothing contained in this definition shall be construed to be an exemption from the tax imposed under chapter sixty-four I. In the case of interstate telecommunication services other than mobile telecommunications services, the sale of such 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. In the case of interstate and intrastate mobile telecommunications services, the sale

of such services shall be deemed to be provided by the customer's home service provider and shall be considered a sale within the commonwealth if the customer's place of primary use is located in the commonwealth. To prevent actual multi-state taxation of any sale of interstate telecommunication service subject to taxation under this chapter, any taxpayer, upon proof that the taxpayer has paid a tax in another state on such sale, shall be allowed a credit against the tax imposed by this chapter to the extent of the amount of such tax properly due and paid in such other state. However, such credit shall not exceed the tax imposed by this chapter. In the case of the sale or recharge of prepaid calling arrangements, the sale or recharge of such arrangements shall be deemed to be within the commonwealth if the transfer for consideration physically takes place at a retail establishment in the commonwealth. In the absence of such physical transfer for consideration at a retail establishment, the sale or recharge shall be deemed a retail sale within the commonwealth if the customer's shipping address is in the commonwealth or, if there is no item shipped, if the customer's billing address or the location associated with the customer's mobile telephone number, as applicable, is in the commonwealth. For purposes of collection of the tax imposed by this chapter on such sales, such sale shall be deemed to occur on the date that the bill is first issued by the vendor in the regular course of its business; provided, however, in the case of prepaid calling arrangements, the sale shall be deemed to occur on the date of the transfer for consideration. For purposes of reporting the sale or recharge of prepaid calling arrangements, the sale or recharge of the arrangements shall be considered a taxable sale of tangible personal property unless the vendor is otherwise required to report sales of telecommunications services.

"Sales price", the total amount paid by a purchaser to a vendor as consideration for a retail sale, valued in money or otherwise. In determining the sales price, the following shall apply: (a) no deduction shall be taken on account of (i) the cost of property sold; (ii) the cost of materials used, labor or service cost, interest charges, losses or other expenses; (iii) the cost of transportation of the property prior to its sale at retail; (b) there shall be included (i) any amount paid for any services that are a part of the sale; and (ii) any amount for which credit is given to the purchaser by the vendor; and (c) there shall be excluded (i) cash discounts allowed and taken on sales; (ii) the amount charged for property returned by purchasers to vendors upon rescission of contracts of sale when the entire amounts charged therefor, less the vendors' established handling fees, if any, for such return of property, are refunded either in cash or credit, and when the property is returned within ninety days from the date of sale, and the entire sales tax paid is returned to the purchaser; provided, however, that where a motor vehicle is returned pursuant to a rescission of contract such motor vehicle must be returned within one hundred and eighty days of the date of sale; (iii) the amount charged for labor or services rendered in installing or applying the property sold; (iv) the amount of reimbursement of tax paid by the purchaser to the vendor under this chapter; (v) transportation charges separately stated, if the transportation occurs after the sale of the property is made; (vi) the amount of the manufacturers' excise tax levied upon motor vehicles under section 4061(a) of the Internal Revenue Code of 1954 of the United States, as amended; and (vii) a "service charge" or "tip" that is distributed by a vendor to service employees, wait staff employees or service bartenders as provided in section 152A of chapter 149.

"Services", a commodity consisting of activities engaged in by a person for another person for a consideration; provided, however, that the term "services" shall not include activities performed by a person who is not in a regular trade or business offering such person's services to the public, and shall not include services rendered to a member of an affiliated group, as defined by section 1504 of the Internal Revenue Code, by another member of the same affiliated group that does not sell to the public the type of service provided to its affiliate; and provided further, that the term services shall be limited to telecommunications services; and provided further, that nothing herein shall exempt from tax sales of tangible personal property subject to tax under this chapter.

"Tangible personal property", personal property of any nature consisting of any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured or being within the commonwealth, but shall not include rights and credits, insurance policies, bills of exchange, stocks and bonds and similar evidences of indebtedness or ownership. For purposes of this chapter, "tangible personal property" shall include gas, electricity and steam. A transfer of standardized computer software, including but not limited to electronic, telephonic, or similar transfer, shall also be considered a transfer of tangible personal property. The commissioner may, by regulation, provide rules for apportioning tax in those instances in which software is transferred for use in more than one state.

"Tax", the excise tax imposed by this chapter.

"Taxpayer", any person required to make returns or pay the tax imposed by this chapter.

"Telecommunications services", 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.

"Use of a service", enjoyment of the benefit of a service.

"Vendor", a retailer or other person selling tangible personal property or services of a kind the gross receipts from the retail sale of which are required to be included in the measure of the tax imposed by this chapter.

Part I ADMINISTRATION OF THE GOVERNMENT

Title IX TAXATION

Chapter 64H TAX ON RETAIL SALES OF CERTAIN TANGIBLE PERSONAL PROPERTY

Section 2 SALES TAX; SERVICES TAX; IMPOSITION; RATE; PAYMENT

Section 2. An excise is hereby imposed 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, except as otherwise provided in this chapter. The excise shall be paid by the vendor to the commissioner at the time provided for filing the return required by section sixteen of chapter sixty-two C.

Part I ADMINISTRATION OF THE GOVERNMENT

Title IX TAXATION

Chapter 64H TAX ON RETAIL SALES OF CERTAIN TANGIBLE PERSONAL PROPERTY

Section 6 EXEMPTIONS

Section 6. The following sales and the gross receipts therefrom shall be exempt from the tax imposed by this chapter:—

(a) Sales which the commonwealth is prohibited from taxing under the constitution or laws of the United States.

(b) Sales of tangible personal property in transit or stored at points of entry intended for export or import or which the vendor is obligated under the terms of any agreement to deliver (1) to a purchaser outside the commonwealth or to a designee outside the commonwealth of a purchaser outside the commonwealth or (2) to an interstate carrier for delivery to a purchaser outside the commonwealth or to a designee outside the commonwealth of a purchaser outside the commonwealth.

(c) Casual and isolated sales by a vendor who is not regularly engaged in the business of making sales at retail; provided, however, that nothing contained in this paragraph shall be construed to exempt any such sale of

a motor vehicle or trailer, as defined in section one of chapter ninety, or any such sale of a boat or airplane from the tax imposed under chapter sixty-four I.

(d) Sales to the United States, the commonwealth or any political subdivision thereof, or their respective agencies.

(e) Sales to any corporation, foundation, organization or institution, which is exempt from taxation under the provisions of section five hundred and one (c)(3) of the Federal Internal Revenue Code, as amended, and in effect for the applicable period; provided, however, that such sales shall not be exempt unless (1) the tangible personal property or services which are the subject of such sales is used in the conduct of such religious, charitable, educational or scientific enterprise, (2) such corporation, foundation, organization or institution shall have first obtained a certification from the commissioner stating that it is entitled to such exemption, and (3) the vendor keeps a record of the sales price of each such separate sale, the name of the purchaser, the date of each such separate sale, and the number of such certificate. The certificate of exemption issued by the commissioner under clause (2) shall be effective for a period of 10 years from the date of its issuance or until January first, nineteen hundred and eighty-four, whichever shall last expire provided that ninety days prior to said date the commissioner shall notify such corporation, foundation, organization or institution of the expiration date of said certificate. Such corporation, foundation, organization or institution must obtain from the commissioner a renewal of such certificate in order to be entitled to a continuance of such exemption beyond the expiration date of any existing certificate.

(f) Sales of building materials and supplies to be used in the construction, reconstruction, alteration, remodeling or repair of (1) any building structure, public highway, bridge or other public works owned by or held in trust for the benefit of any governmental body or agency mentioned in paragraph (d) and used exclusively for public purposes; (2) any building or structure owned by or held in trust for the benefit of any corporation, foundation, organization or institution described in paragraph (e) and used exclusively in the conduct of its religious, scientific, charitable or educational purposes; (3) any building, structure, residence, school or other facility included under any written contract dated on or after January 1, 1985 arising out of or related to the Massachusetts Port Authority residential and school soundproofing programs, notwithstanding whether such building, structure, residence, school or other facility is owned by or held in trust for the benefit of the Massachusetts Port Authority or is used exclusively for public purposes; provided, however, that such governmental body or agency or such corporation, foundation, organization or institution shall have first obtained a certificate from the commissioner stating that it is entitled to such exemption and the vendor keeps a record of the sales price of each such separate sale, the name of the purchaser, the date of each such separate sale and the number of such certificate; and (4) any building or structure located in a Marine Industrial Park, as defined by 310 C.M.R. 9.02; provided, however, that said building or structure is exclusively used for agricultural production or seafood processing or as a seafood storage facility, notwithstanding whether such building or structure is owned by or held in trust for the benefit of any governmental body or agency mentioned in paragraph (d) and used exclusively for public purposes; provided, further, that if the building or structure ceases to be

used exclusively for agricultural production or seafood processing or as a seafood storage facility, use tax shall accrue on a portion of the sales price on which the exemption was claimed that is proportionate to the remaining useful life of the property. In this paragraph the words "building materials and supplies" shall include all materials and supplies consumed, employed or expended in the construction, reconstruction, alteration, remodeling or repair of any building, structure, public highway, bridge or other such public work, as well as such materials and supplies physically incorporated therein. Said terms shall also include rental charges for construction vehicles, equipment and machinery rented specifically for use on the site of any such tax exempt project or while being used exclusively for the transportation of materials for any such tax exempt project.

(g) Sales of tangible personal property includable in the measure of the excises levied under the provisions of chapters sixty-four A, sixty-four E, 64F and 138.

(h) Sales of food products for human consumption. "Food products" includes cereals and cereal products, flour and flour products, milk and milk products, including ice cream, oleomargarine, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, soft drinks, herbs, spices and salt, sugar and sugar products, candy and confectionery; coffee and coffee substitutes, tea, cocoa and cocoa products; and ice when used for household consumption. "Food products" does not include alcoholic beverages as defined in chapter one hundred and thirty-eight except as hereinafter provided, marijuana products intended for consumption as provided in the definition of "marijuana products" in section 1 of chapter 94G, medicines, tonics and preparations in liquid, powdered, granular,

tablet, capsule, lozenge and pill form sold as dietary supplements or adjuncts. "Food products" does not include meals consisting of any of the items defined as food products in this paragraph for consumption on or off the premises where sold.

"Honor snack tray", any vending arrangement in which only candy or snacks are available in an open tray for the benefit of employees in an establishment that normally does not sell food or food products and for which payment is made on the honor system.

"Meals" shall mean any food or beverage, or both, prepared for human consumption and provided by a restaurant, where the food or beverages is intended for consumption on or off the restaurant premises, and includes food or beverages sold on a "take out" or "to go" basis, whether or not they are packaged or wrapped and whether or not they are taken from the premises of the restaurant.

"Restaurant", shall mean any eating establishment where food, food products, or beverages are provided and for which a charge is made, including but not limited to, a cafe, lunch counter, private or social club, cocktail lounge, hotel dining room, catering business, tavern, diner, snack bar, dining room, vending machine, and any other place or establishment where food or beverages are provided, whether stationary or mobile, temporary or permanent; provided, however, that delicatessen, grocery, market or bakery stores shall not be considered eating establishments within the meaning of this chapter except for any part of such a store which engages, in the sale of dinners, luncheons, barbecued chicken, other than barbecued chicken sold whole and unsliced, sandwiches, snacks, pizzas, and other similar items which are commonly sold at snack bars, coffee shops or luncheon counters; provided, further, that such

stores shall not be deemed to be restaurants under this chapter based solely on the preparation and sale of prepared meat, poultry and fish items if such sales constitute less than a major portion of the total sale of such stores; and provided, further, that a vending machine or honor snack tray shall not be considered an eating establishment within the meaning of this chapter in the instance in which it sells only snacks or candy with a sales price of less than $3.50; and, provided further, that a bed and breakfast establishment or bed and breakfast home, as defined in chapter sixty-four G, shall not be considered an eating establishment within the meaning of this chapter where the value of a breakfast served is included in the rent subject to tax under said chapter sixty-four G.

The following food or beverages sold by a restaurant for consumption off the restaurant premises shall not be deemed to be a meal for the purposes of this chapter:— (a) Food sold by weight, liquid or dry measure, count, or in unopened original containers or packages, including, but not limited to, meat, bread, milk, specialty foods, cream and ice cream; provided, that such foods are commonly sold in such manner in a retail food store which is not a restaurant; (b) Beverages in unopened original containers or packages when sold as a unit having a capacity of at least twenty-six fluid ounces; and (c) Bakery products including but not limited to doughnuts, muffins, bagels, and similar items sold in units of six or more. Prepared meals, snacks, sandwiches, food platters, poultry, fish or meat items, or other food combinations, to the extent that such items are sold by a restaurant whose principal business is the preparation or sale of such items in such form as to be available for immediate consumption without further significant preparation, whether for on or off premise consumption, shall not be excluded under clause (a), (b), or (c).

(i) The sales, furnishing or service of (1) water; (2) gas, steam or electricity used for residential purposes; (3) gas, steam or electricity which are consumed and used directly and exclusively in an industrial plant in the actual manufacture of tangible personal property to be sold or in the heating of such industrial plant; provided that the exemption under this subparagraph (3) shall only be allowed with respect to a metered building, location or premises at which not less than seventy-five percent of the gas, steam or electricity consumed at such metered building, location or premises is used for the purposes of such manufacturing or heating; and the term "industrial plant" shall mean a factory at a fixed location primarily engaged in the manufacture, conversion or processing of tangible personal property to be sold in the regular course of business; and (4) residential main telephone services billed on a monthly recurring basis or billed as message units, and residential intra local access and transport area service billed on a recurring monthly basis; provided that such exemption under this subparagraph (4) shall not exceed the amount of thirty dollars per month.

(j) Sales of (1) fuel used for residential heating purposes; (2) fuel used for heating purposes in an industrial plant; provided that the exemption under this subparagraph (2) shall only be allowed with respect to a building, location or premises in which not less than seventy-five percent of the building, location or premises is used in the actual manufacture of tangible personal property to be sold; and the term "industrial plant" shall mean a factory at a fixed location primarily engaged in the manufacture, conversion or processing of tangible personal property to be sold in the regular course of business; and (3) fuel used in the operation of aircraft or used in the operation of railroads.

(k) Sales of articles of clothing, including footwear, intended to be worn or carried on or about the human body up to one hundred and seventy-five dollars of the sales price on any article of clothing. For the purposes of this section clothing or footwear shall not include special clothing or footwear primarily designed for athletic activity or protective use and which is not normally worn except when so used.

(l) Sales of medicine, insulin needles and insulin syringes on prescriptions of registered physicians and sales of insulin; sales of oxygen, blood or blood plasma; sales of artificial devices individually designed, constructed or altered solely for the use of a particular crippled person so as to become a brace, support, supplement, correction or substitute for the bodily structure including the extremities of the individual; sales of artificial limbs, artificial eyes, hearing aids and other equipment worn as a correction or substitute for any functioning portion of the body; sales of artificial teeth by a dentist and the materials used by a dentist in dental treatment; sales of eyeglasses, when especially designed or prescribed by an ophthalmologist, oculist or optometrist for the personal use of the owner or purchaser; sales of crutches and wheel chairs for the use of invalids and crippled persons; and sales of baby oil; and the rental, sales and repairs of kidney dialysis machines, enteral and parenteral feedings, and feeding devices, suction machines, physician-prescribed, medically necessary breast pumps, oxygen concentrators, oxygen regulators, oxygen humidifiers, oxygen masks, oxygen cannulas, ultrasonic nebulizers, life sustaining resuscitators, incubators, heart pacemakers, canes, all types of hospital beds for home use, tripod quad canes, breast prosthesis, alternating pressure pad units and patient lifts, when prescribed by a physician.

(m) Sales of newspapers, magazines, books required for instructional purposes in educational institutions, books used for religious worship, publications of any corporation, foundation, organization or institution described in paragraph (e) of this section, and motion picture films for commercial exhibition.

(n) Sales of coffins, caskets, burial garments or other materials which are ordinarily sold by a funeral director as part of the business of funeral directing.

(o) Sales of vessels or barges of fifty tons burden or over when constructed in the commonwealth and sold by builders thereof; sales of fuel or substitute therefor, supplies and repairs to vessels engaged in foreign and interstate commerce and sales of vessels used directly and exclusively in commercial fishing, machinery and equipment therefor and replacement parts for such vessels, machinery and equipment.

(p) (1) Sales of livestock and poultry of a kind which ordinarily constitute food for human consumption; (2) sales of feed, including the bags in which the feed is customarily contained, for livestock and poultry of a kind which ordinarily constitute food for human consumption or are to be sold in the regular course of business or for animals produced for research, testing, or other purposes relating to the promotion or maintenance of the health, safety or well being of human beings or animals or for fur-bearing animals, the pelts of which are sold in the regular course of business; (3) sales of fertilizer, including ground limestone, hydrated lime, seed inoculants and plant hormones, as well as other substances commonly regarded in the same category and for the same use, but not including any sales of pesticides, including insecticides, herbicides, fungicides, miticides and all materials registered with the

Environmental Protection Agency as pesticides under the Federal Insecticide, Fungicide and Rodenticide Act and other pesticides commonly regarded in the same category and for the same purpose, except when purchased by a person licensed under chapter 132B or otherwise exempt under paragraph (r); and (4) sales of plants, including parts of plants, suitable for planting to produce food for human consumption or when such plants, including parts thereof or the produce thereof, are to be sold in the regular course of business, including such items as seed potatoes, onion sets, asparagus roots, berry plants or bushes, and fruit trees.

(q) (1) Sales of both returnable and nonreturnable containers when sold without the contents to persons who place the contents in the container and sell the contents together with the container; (2) containers when sold with the contents if the sale price of the contents is not required to be included in the measure of the taxes imposed by this chapter; (3) returnable containers when sold with the contents or resold for refilling. As used in this paragraph the term "returnable containers" means containers of a kind customarily returned by the buyer of the contents for reuse. All other containers are "nonreturnable" containers. Nothing in this paragraph shall be construed so as to tax the sale of bags in which feed for livestock and poultry is contained.

(r) Sales of materials, tools and fuel, or any substitute therefor, which become an ingredient or component part of tangible personal property to be sold or which are consumed and used directly and exclusively in agricultural production; in commercial fishing; in an industrial plant in the actual manufacture of tangible personal property to be sold, including the publishing of a newspaper; in the operation of commercial radio broadcasting or television transmission; in the furnishing of power to an

industrial manufacturing plant; in the furnishing of gas, water, steam or electricity when delivered to consumers through mains, lines or pipes; in the production of animals for research, testing, or other purposes relating to the promotion or maintenance of the health, safety or well being of human beings or animals or in research and development by a manufacturing corporation or a research and development corporation within the meaning of section forty-two B of chapter sixty-three. However, the exemption in this paragraph so far as it applies to sales of electricity, gas and steam consumed and used directly and exclusively in an industrial plant in the actual manufacture of tangible personal property to be sold shall be limited to the extent allowed in paragraph (i). For the purpose of this paragraph, the raising of poultry and livestock shall be construed to be included in the term "agricultural production"; any material, tool or fuel shall be construed to be consumed and used only if its normal useful life is less than one year or if its cost is allowable as an ordinary and necessary business expense for federal income tax purposes or if it is nuclear fuel or a nuclear fuel assembly; and the term "industrial plant" shall mean a factory at a fixed location primarily engaged in the manufacture, conversion or processing of tangible personal property to be sold in the regular course of business.

(s) Sales of machinery, or replacement parts thereof, used directly and exclusively in agricultural production; in commercial fishing; in an industrial plant in the actual manufacture of tangible personal property to be sold, including the publishing of a newspaper; in the operation of commercial radio broadcasting or television transmission; in the furnishing of power to an industrial manufacturing plant; in the furnishing of gas, water, steam or electricity when delivered to consumers through mains, lines or pipes; in the production of animals for research,

testing, or other purposes relating to the promotion or maintenance of the health, safety or well being of human beings or animals or in research and development by a manufacturing corporation or a research and development corporation within the meaning of section forty-two B of chapter sixty-three. For the purpose of this paragraph, the raising of poultry and livestock shall be construed to be included in the term "agricultural production"; the term "industrial plant" shall mean a factory at a fixed location primarily engaged in the manufacture, conversion or processing of tangible personal property to be sold in the regular course of business; and machinery shall be deemed to be used directly and exclusively in the actual manufacture, conversion or processing of tangible personal property to be sold only where such machinery is used solely during a manufacturing, conversion or processing operation to effect a direct and immediate physical change upon the tangible personal property to be sold; to guide or measure a direct and immediate physical change upon such property where such function is an integral and essential part of tuning, verifying or aligning the component parts of such property; or to test or measure such property where such function is an integral part of the production flow or function; used solely to store, transport, convey or handle such property during the manufacturing, converting, or processing operations heretofore specified; or used solely to place such property in the container, package or wrapping in which such property is normally sold to the ultimate consumer thereof. Machinery used directly and exclusively in the actual manufacture, conversion or processing of any tangible personal property which is not to be sold and which would be exempt under paragraph (r) or this paragraph if purchased from a vendor thereof or machinery used during any manufacturing, converting or processing, conveying or packaging

operation or function or for any other purpose, except as heretofore specified, shall not be exempt under this paragraph even though such operation, function or purpose is an integral or essential part of a continuous production flow or manufacturing process. Where a portion of a group of portable or mobile machinery is used directly and exclusively in the actual manufacture, conversion or processing of tangible personal property to be sold, as heretofore defined, the number represented by such portion, if otherwise qualifying, shall be exempt under this paragraph even though the machinery in said group is used interchangeably and not otherwise identifiable as to use.

(t) Sales of tangible personal property through coin operated vending machines at ten cents or less, provided the retailer is primarily engaged in making such sales and keeps records satisfactory to the commissioner.

(u) Sale of a motor vehicle purchased by and for the use of a person who has suffered loss, or permanent loss of use of, both legs or both arms or one leg and one arm or by and for the use of a veteran who has been determined to be permanently disabled by the medical advisory board established under section 8C of chapter 90 and has been issued a disabled veteran number plate under section 2 of said chapter 90. This exemption shall apply to one motor vehicle only owned and registered for the personal, noncommercial use of such person.

(v) Sales of wearing materials or any cloth made up of natural or synthetic fibers and used for clothing purposes.

(w) Sales of the flag of the United States.

(x) Sales of fire trucks to any volunteer, nonprofit fire company or similar organization furnishing public fire protection, and sales of ambulances to any volunteer, nonprofit organization furnishing a public ambulance

service, provided that such company or organization has first obtained a certification from the commissioner stating that it is entitled to this exemption.

(y) Sales of concrete mixing units or replacement parts thereof, to be mounted on truck chassis; provided, however, that sales of truck chassis shall not be exempt under this paragraph.

(z) All medical implements, pads, pouches and solutions purchased by a person who has undergone a colostomy or an ileostomy and which are used entirely as the result of such operation.

(aa) Sales of new and used motor buses used to provide scheduled, intracity local service (as defined by the department of telecommunications and energy), and repair or replacement parts therefor, and materials and tools used in and for the maintenance and repair thereof to, and for the use of common carriers of passengers by motor vehicle for hire, which hold at least one certificate, issued by the department of telecommunications and energy pursuant to the provisions of section seven of chapter one hundred and fifty-nine A. Upon receipt of appropriate evidence of the possession of such a certificate, the commissioner shall prepare and issue to any such duly certificated common carrier a statement that it is entitled to the exemption granted by this paragraph.

The presentation of a copy of the statement which the commissioner is required to prepare and furnish hereunder to the registrar of motor vehicles shall be deemed to constitute compliance with the provisions of the second paragraph of section twenty-five in respect to furnishing evidence of the payment of the tax which would otherwise be due under this chapter.

If any common carrier which qualifies for the exemption granted by this subsection (aa) should ever lose its exempt status hereunder and thereafter purchase any of the items of personal property enumerated hereinabove without paying in full the tax due, it shall be liable to pay interest on the entire unpaid portion of any tax due from it at the rate of six per cent per annum until paid.

Any vendor to whom a copy of the statement, which the commissioner is required to prepare and furnish hereunder, is furnished shall be entitled to rely thereon and he shall not be liable for the collection or payment of the tax which would otherwise be imposed by this chapter.

[There is no paragraph (bb).]

(cc) meals prepared by employees thereof and served in any hospital, sanatorium, convalescent or nursing home, or boarding home for the aged licensed under section seventy-one of chapter one hundred and eleven or in any institution or private house licensed under section twenty-nine of chapter nineteen; meals prepared by the members thereof and served on its premises by any church or synagogue or by any church or synagogue organization to any organization of such church or synagogue the proceeds of which are to be used for religious or charitable purposes; meals served to a resident in a facility providing continuing care to an individual which facility must provide a disclosure statement to a prospective resident as required by section seventy-six of chapter ninety-three; meals served on the premises of an organization which is located within the boundaries of a Massachusetts army or air national guard base that serves as social club for members of the Massachusetts army or air national guard; meals served in an assisted living residence certified pursuant to the provisions of chapter nineteen D; meals furnished by any

person while transporting passengers for hire by air to or from any place within the commonwealth, meals furnished to any organization in which membership is limited to persons sixty years of age or over or to elderly or handicapped persons residing in a housing project qualifying under section thirty-eight to forty, inclusive, of chapter one hundred and twenty-one B and said organization has previously filed with the commissioner, on a form approved by the commissioner, satisfactory proof of its eligibility hereunder; and meals furnished to students by an educational institution which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on; and meals served by summer camps for children eighteen years of age or under or developmentally disabled individuals; provided, however, that such summer camp which offers its facilities off-season to individuals sixty years of age or over for a period not to exceed thirty days in any calendar year shall not lose its exemption hereunder; and meals furnished through programs established under section one L of chapter fifteen.

For the purposes of this section a developmentally disabled individual shall mean an individual who has a severe chronic disability which:

(A) is attributable to a mental or physical impairment or combination of mental and physical impairments;

(B) is likely to continue indefinitely;

(C) results in substantial functional limitations in three or more of the following areas of major life activity: (i) self-care; (ii) receptive and expressive language; (iii) learning; (iv) mobility; (v) self-direction; (vi) capacity for independent living; and (vii) economic self-sufficiency; and

(D) reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.

(dd) Sales of equipment directly relating to any solar, windpowered; or heat pump system, which is being utilized as a primary or auxiliary power system for the purpose of heating or otherwise supplying the energy needs of an individual's principal residence in the commonwealth.

(ee) Sales of patterns, molds, dies, tools, sand-handling equipment and machinery, and replacement parts thereof, used exclusively in the manufacture of cast metal products to be sold in the regular course of business.

(ff) Sales of printed material which is manufactured in the commonwealth to the special order of a purchaser, to the extent the material is delivered to an interstate carrier, a mailing house or a United States Post Office for delivery or mailing to a purchaser located outside the commonwealth or a purchasers designee located outside the commonwealth, including sales of direct and cooperative direct mail promotional advertising materials which are manufactured both inside and outside the commonwealth and which are distributed to residents of the commonwealth from locations both inside and outside the commonwealth. For the purpose of this paragraph, "direct and cooperative direct mail promotional advertising materials" shall mean individual discount coupons, or advertising leaflets incorporating the coupons within the promotional advertising materials no greater than 6 pages in length, and including any accompanying envelopes and labels. In order to be exempt hereunder, the promotional advertising materials

shall be distributed as a part of a package of materials promoting 1 or more than 1 business, each operated at separate and distinct locations, and directed in a single package to potential customers, at no charge to the potential customer, of the businesses paying for the delivery of such material. For the purpose of this paragraph, "direct and cooperative direct mail promotional advertising materials" shall not include mail order catalogs, department store catalogs, telephone directories, or similar printed advertising books, booklets or circulars greater than 6 pages in total length.

(gg) Sales by a typographer, compositor or color separator of composed type, film positives, film negatives, or reproduction proofs thereof, for use in the preparation of printed matter or folding boxes to be sold, or the fabrication or transfer of such film positives, film negatives, reproduction proofs or impressed matters where the fabrication is for and the transfer is to a printer, publisher, or manufacturer of folding boxes, for use in printing.

[There is no paragraph (hh).]

(ii) Rental receipts or charges in connection with service contracts by and between waste service firms and customers for the use, maintenance and repair of refuse containers or bins placed on customers premises by waste service firms.

(jj) sales of "scientific equipment or apparatus" within the meaning of section 170 (e) (4) (B) (v) of the Internal Revenue Code of the United States as amended on January first, nineteen hundred and eighty-three, by the manufacturer when such scientific equipment or apparatus is donated by said manufacturer at no charge to a public or private nonprofit educational institution located in the commonwealth or to the

Massachusetts Technology Park Corporation for the purposes of clause (4) of paragraph (b) of section six of chapter forty J, or to the Bay State Skills Corporation.

(kk) Sales of tangible personal property purchased with federal food stamps and not otherwise exempt under this chapter.

(ll) Sales of one thousand dollars or more of (i) rare coins of numismatic value; (ii) gold or silver bullion or coins; or (iii) gold or silver tender of any nation traded and sold according to its value as precious metal. The word "bullion" shall not include fabricated precious metal which has been processed or manufactured for industrial, professional or artistic uses.

[There are no paragraphs (mm), (nn) and (oo).]

(pp) Sales of vessels used exclusively to provide scheduled commuter passenger service, repair or replacement parts therefor, and materials and tools used in and for the maintenance and repair thereof.

(qq) Sales of gas, steam, electricity or heating fuel for use by any business that has 5 or fewer employees that had gross income of less than $1,000,000 for the preceding calendar year, and that reasonably expects gross income of less than $1,000,000 for the current calendar year. For purposes of this paragraph, employees shall include partners, owners, officers and any other individuals who work for the business but shall not include any employee who normally works for fewer than thirty hours per week or who is hired for a period of less than five months. For purposes of this paragraph, a business shall include all members of an affiliated group, as defined by section 1504 of the Internal Revenue Code, and any other combination of related parties as the commissioner may define by regulation; provided, however, that the commissioner may by regulation require that such business shall have first obtained a

certification from the commissioner stating that it is entitled to such exemption and shall maintain such employment and other records indicating its continuing eligibility for such exemption; that the vendor keep a record of the sales price of each such separate sale, and the number of such certificate; and any other conditions and requirements under which a business may qualify for this exemption; provided, further, that the burden of proving that such business qualifies shall be upon the vendor unless he takes in good faith from the purchaser such certificate to the effect that the business qualifies for this exemption and such certificate is received and made available to the commissioner not later than sixty days from the date of the notice from the commissioner to produce such certificate.

(rr) Sales of commercial gun safes and trigger lock devices.

(ss) Sales of machinery and equipment, if its operation, function or purpose is an integral or essential part of a continuous production flow or process of manufacturing printed material to be sold and such machinery and equipment is used exclusively for that purpose; and sales of prepress items which are used exclusively as part of a continuous production flow or process of manufacturing printed material to be sold.

(tt) Sales of tangible personal property purchased by a consultant contractor or subcontractor, or operating contractor or subcontractor, of any governmental body or agency, described in paragraph (d), for use in fulfilling a consulting or operating contract to provide qualified services in a public project, provided that the consultant contractor or subcontractor or operating contractor or subcontractor is required both to acquire such property and to be reimbursed for the cost of such property pursuant to such contract.

For purposes of this paragraph:

(A) A consultant contractor or operating contractor of any governmental body or agency described in paragraph (d) is a person who enters into a consulting or operating contract to provide qualified services, and agrees to act as the agent for, such governmental body or agency with respect to purchases of tangible personal property on behalf of such governmental body or agency.

(B) A consultant or operating subcontractor is any person who enters into a contract with a consultant or operating contractor to provide qualified services and agrees to act as the agent for a governmental body or agency with respect to purchases of tangible personal property on behalf of such governmental body in fulfilling a consulting contract. A consultant subcontractor or operating subcontractor shall be considered to be reimbursed for the cost of tangible personal property whether it receives such funds directly from any governmental body or agency described in paragraph (d) or indirectly through a consultant contractor or subcontractor or operating contractor or subcontractor, as the case may be.

(C) A consultant subcontractor or operating subcontractor who enters into a contract to provide qualified services with any higher-tiered consultant subcontractor or higher-tiered operating subcontractor is deemed to be a consultant subcontractor or operating subcontractor.

(D) A consulting or operating contract is a contract to provide qualified services under which any governmental body or agency described in paragraph (d) authorizes purchases of tangible personal property to be made on its behalf by a person who agrees to provide qualified services to such governmental body or agency. A governmental body or agency

described in paragraph (d) shall be considered to have authorized such purchases to be made on its behalf by a person when it enters into such a contract that expressly authorizes the person to act as an agent or sub-agent of such governmental body or agency for purposes of making such purchases.

(E) Tangible personal property shall be considered to be used in fulfilling a consulting or operating contract if its acquisition has been authorized by the terms of such contract and any one or more of the following has occurred: (i) it is completely expended in the performance of a contract to provide qualified services; (ii) title to and possession of such property is turned over to a governmental body or agency described in paragraph (d) pursuant to the consulting or operating contract; or (iii) it becomes an ingredient and component part of tangible personal property that is turned over to said governmental body or agency pursuant to the consulting or operating contract; provided, however, that tangible personal property shall not be considered to be used in fulfilling a consulting or operating contract if it is used to administer, oversee, supply, maintain, or control any of the consultant contractor's or operating contractor's or consultant subcontractors or operating subcontractor's own offices, facilities, workshops, vehicles, equipment or business operations.

(F) Qualified services shall include:

(i) studying the feasibility or environmental impact of a public project;

(ii) providing engineering, architectural or other design services necessary to complete a public project;

(iii) managing the planning, design, or construction of a public project; or

(iv) managing the operation or maintenance of any publicly owned mass transportation equipment or facilities.

(G) A public project is any project for the construction, alteration, remodeling, repair, remediation or operation of any public highway, tunnel, bridge, building, real property structure, public mass transportation equipment or facility, or other public work which is owned by or held in trust for the benefit of any governmental body or agency mentioned in paragraph (d) and the cost of which is funded, in whole or in part, by funds appropriated to or authorized for expenditure by any governmental body or agency described in paragraph (d).

(uu) Sales of repair or replacement parts exclusively for use in aircraft or in the significant overhauling or rebuilding of aircraft or aircraft parts or components on a factory basis.

(vv) Sales of aircraft.

[Paragraph (ww) applicable as provided by 2005, 158, Sec. 9 as amended by 2007, 63, Sec. 15.]

(ww) Sales of tangible personal property to a qualifying motion picture production company or to an accredited film school student for the production expenses related to a school film project.

For the purposes of this paragraph a qualifying motion picture production company must expend in the aggregate not less than $50,000 within the commonwealth in connection with the filming or production of one or more motion pictures in the commonwealth within any consecutive 12 month period and have the approval of the secretary of economic development and the commissioner.

Any motion picture production company that intends to film all, or parts of, a motion picture or television program in the commonwealth and qualify for the exemption provided by this paragraph shall provide an estimate of total expenditures to be made in the commonwealth in

connection with the filming or production of such motion picture or television program and shall designate a member or representative of the motion picture production company as a primary liaison with the commissioner for the purpose of facilitating the proper reporting of expenditures and other information as required by the commissioner. Said estimate of expenditures shall be filed prior to the commencement of filming in the commonwealth. Any qualifying motion picture production company that has been approved which fails to expend $50,000 within a consecutive 12 month period shall be liable for the sales taxes that would have been paid had the approval not been granted. The sales taxes shall be considered due as of the date that taxable expenditures were made.

The commissioner shall promulgate rules for the implementation of this paragraph.

[Paragraph (xx) effective until December 31, 2028 applicable as provided by 2008, 130, Sec. 50. Deleted by 2008, 130, Sec. 35. See 2008, 130, Sec. 54 as amended by 2011, 9, Sec. 25; 2013, 46, Sec. 57; and 2018, 112, Sec. 10. See also 2011, 9, Sec. 56; 2013, 46, Sec. 87; and 2018, 273, Sec. 26.]

(xx)(1) Sales of tangible personal property purchased for a certified life sciences company, to the extent authorized pursuant to the life sciences tax incentive program established by section 5 of chapter 23I, for use in connection with the construction, alteration, remodeling, repair or remediation of research, development or manufacturing facilities and utility support systems. Only purchases made on or after the effective date of this section shall be eligible for this exemption.

(2) As used in this section, the following words shall, unless the context clearly requires otherwise, have the following meanings:—

"Life sciences", advanced and applied sciences that expand the understanding of human physiology and have the potential to lead to medical advances or therapeutic applications including, but not limited to, agricultural biotechnology, biogenerics, bioinformatics, biomedical engineering, biopharmaceuticals, biotechnology, chemical synthesis, chemistry technology, diagnostics, genomics, image analysis, marine biology, marine technology, medical devices, nanotechnology, natural product pharmaceuticals, proteomics, regenerative medicine, RNA interference, stem cell research and veterinary science.

"Life sciences company", a business corporation, partnership, firm, unincorporated association or other entity engaged in life sciences research, development, manufacturing or commercialization in the commonwealth, and any affiliate thereof, which is, or the members of which are, subject to taxation under this chapter.

"Utility support systems", all areas of utility support systems including, but not limited to, site, civil, mechanical, electrical and plumbing systems.

Part I ADMINISTRATION OF THE GOVERNMENT

Title IX TAXATION

Chapter 64H TAX ON RETAIL SALES OF CERTAIN TANGIBLE PERSONAL PROPERTY

Section 8 PRESUMPTION OF SALE AT RETAIL; BURDEN OF PROOF; RESALE AND EXEMPT USE CERTIFICATES

Section 8. (a) It shall be presumed that all gross receipts of a vendor from the sale of services or tangible personal property are from sales subject to tax until the contrary is established. The burden of proving that a sale of services or tangible personal property by any vendor is not a sale at retail shall be upon such vendor unless he takes from the purchaser a certificate to the effect that the service or property is purchased for resale, and such certificate is received and made available to the commissioner not later than sixty days from the date of notice from the commissioner to produce such certificate. Where a certificate is received within the foregoing time limit but is deficient in some material manner and where such deficiency is thereafter removed, also within the sixty day period, the receipt of such certificate shall be deemed to have satisfied the foregoing time requirement.

(b) The certificate shall relieve the vendor from the burden of proof only if taken in good faith from a person who is engaged in the business of selling services or tangible personal property of the same kind as the

services or property sold and who holds the registration as provided for in section seven and who, at the time of purchasing the service or tangible personal property, intends to sell the service or property in a sale at retail in the regular course of business or is unable to ascertain at the time of purchase whether the service or property will be sold or will be used for some other purpose.

(c) The certificate shall be signed by and bear the name and address of the purchaser and the number of his registration, and shall indicate the general character of the service or tangible personal property sold by the purchaser in the regular course of business. The certificate shall be in such form as the commissioner may prescribe.

(d) If a purchaser who gives a certificate makes any use of the service or property other than retention, demonstration or display while holding it for sale in the regular course of business, the use shall be deemed a retail sale by the purchaser as of the time the service or property is first used by him, and the cost of the service or property to him shall be deemed the gross receipts from such retail sale. If the sole use of the property other than retention, demonstration or display in the regular course of business is the rental of the property while holding it for sale, the purchaser may elect to include in his gross receipts the amount of the rental charge rather than the cost of the property to him.

(e) If the tangible personal property is purchased by a person who will use the property in a manner which exempts it from the tax imposed by this chapter, he may give an exempt use certificate to the vendor, certifying that the property being purchased will be so used. The burden of proving that a sale of tangible personal property by any vendor is

exempt under this chapter shall be upon such vendor unless he takes from the purchaser a certificate to the effect that the property will be used in an exempt manner.

(f) The exempt use certificate shall relieve the vendor from the burden of proof only if taken in good faith for the purchase of property from a person who is engaged in an activity described in paragraph (r) or (s) of section six, and who, at the time of purchasing the tangible personal property, intends to use the property in an exempt manner or is unable to ascertain at the time of purchase whether the property will be used in an exempt manner or will be used for some other purpose, and such certificate is received and made available to the commissioner not later than sixty days from the date of notice from the commissioner to produce such certificate. Where a certificate is received within the foregoing time limit but is deficient in some material manner, and where such deficiency is thereafter removed, also within the sixty day limit, the receipt of such certificate shall be deemed to have satisfied the foregoing time requirement.

(g) The exempt use certificate shall be signed by and bear the name and address of the purchaser and the number of his registration, if any, give a description of the property being purchased, certify the exempt use to which the property will be applied and be in such form as the commissioner may prescribe.

(h) If a purchaser who gives an exempt use certificate makes any use of the property other than the one therein certified, the use shall be deemed a retail sale by the purchaser as of the time the property is first so used and the cost of the property to him shall be deemed the gross receipts from such retail sale.

(i) The commissioner may promulgate regulations determining which services shall be deemed purchased for resale under this section, containing provisions for the issuance of certificates to the effect that services are purchased for resale.

Part I ADMINISTRATION OF THE GOVERNMENT

Title IX TAXATION

Chapter 62C ADMINISTRATIVE PROVISIONS RELATIVE TO STATE TAXATION

Section 16 FILING OF RETURNS BY TAXPAYERS SUBJECT TO CHAPTERS 64A AND 64C, 64E TO 64J, 64L TO 64M AND 138

Section 16. (a) Every distributor and unclassified exporter, as defined in paragraphs (c) and (j) of section one of chapter sixty-four A, shall, on or before the twentieth day of each month file with the commissioner a return stating the number of gallons and the selling price of fuel sold by him in the commonwealth or exported or caused to be exported from the commonwealth during the preceding calendar month and such other information as the commissioner may deem necessary.

Every unclassified importer, as defined in paragraph (i) of section one of chapter sixty-four A, shall, on or before the twentieth day of each month file with the commissioner a return stating the number of gallons of fuel imported or caused to be imported into the commonwealth during the preceding calendar month, and such other information as the commissioner may deem necessary, including information relative to the cost of such fuel by type.

[There is no subsection (b).]

(c) Every licensee under section two of chapter sixty-four C, other than an unclassified acquirer or a retailer, shall, on or before the twentieth day of each calendar month file with the commissioner a return for each place of business maintained, stating the quantity of tobacco products sold by such licensee in the commonwealth during the preceding calendar month and such return shall contain or be accompanied by such further information as the commissioner shall require; provided, that if a licensee ceases to sell tobacco products within the commonwealth he shall forthwith file with the commissioner such a return for the period ending with such cessation. Each unclassified acquirer shall, upon importation or acquisition of tobacco products into or within the commonwealth, file with the commissioner a return stating the quantity of tobacco products imported or acquired and such other information as the commissioner may deem necessary.

(c1/2) Every licensee under section 7B of chapter 64C shall, on or before the twentieth day of each calendar month or on or before the twentieth day of the month following each calendar quarter, as the commissioner shall require, file with the commissioner a return for each place of business maintained, stating the quantity of cigars and smoking tobacco sold by such licensee in the commonwealth during the preceding calendar month or quarter, as the case may be, and such return shall contain or be accompanied by such further information as the commissioner shall require. If a licensee ceases to sell cigars and smoking tobacco within the commonwealth, he shall immediately file with the commissioner a return for the period ending with such cessation.

(d) All stampers, as defined in section one of chapter sixty-four C, shall file with the commissioner, monthly reports on or before the twentieth day of each calendar month showing the number of stamps on hand at the

beginning of the month, the number purchased during the month, the number on hand at the end of the month, the number affixed or otherwise disposed of during the month, and such other information as the commissioner may deem necessary.

(e) Every person licensed under chapter sixty-four E, other than a user, shall, on or before the twentieth day of each month file with the commissioner a return stating the number of gallons of special fuels sold or used by him in the commonwealth during the preceding calendar month, and such further information as the commissioner may deem necessary, including information relative to the cost and gross receipts from the purchase and sale of such fuel by type.

(f) Every person licensed under chapter sixty-four F shall, on or before the thirtieth day of April, July, October and January of each year, file with the commissioner a return stating the number of gallons of fuel and special fuels used by him in the commonwealth during the preceding calendar quarter, and such further information as the commissioner may deem necessary. The commissioner may by regulation require returns under this subsection to be filed annually or on such other basis as he may determine and to have different filing periods for different groups of licensees. Every such return shall be filed on or before the last day of the month after the expiration of the period covered thereby.

(g) Every operator, as defined in section one of chapter sixty-four G, subject to taxation under chapter sixty-four G, shall file a return with the commissioner for each calendar month. The commissioner may by regulation require returns under this section to be filed on a quarterly rather than a monthly basis or on such other basis as he may determine

and to have different filing periods for different groups of operators. Every such return shall be filed within twenty days after the expiration of the period covered thereby.

(g1/2) Notwithstanding subsection (g), the department of revenue shall promulgate regulations to minimize the administrative burden relative to filing returns under said subsection (g) on operators who offer their accommodations to the public for not less than 1 day in 5 separate months, or fewer, in the taxable year. The regulations may authorize an operator to file a return only for a month that the operator's accommodation is offered to the public.

(h) Each vendor who has made any sale taxable under the provisions of chapter 64H, 64I or 64L shall file a return with the commissioner for each calendar month. The commissioner may by regulation require returns under this section to be filed on a quarterly rather than a monthly basis or on such other basis as it may determine and to have different filing periods for different groups of vendors. Every such return shall be filed within twenty days after the expiration of the period covered thereby. A materialman shall file a return with the commissioner each month. Each return shall be filed within 50 days after the expiration of the period covered by the return. The department may require each materialman electing to remit sales and use tax under this section to file an application with the department stating his intention to remit sales and use tax pursuant to this section.

(i) Every purchaser who is required to pay a tax under chapter sixty-four I shall file a return with the commissioner for each calendar month. The commissioner may by regulation require returns under this section to be filed on a quarterly rather than a monthly basis or on such other basis as

he may determine, and to have different filing periods for different groups of purchasers. Such returns shall show the total sales prices of all services or tangible personal property purchased at retail sale upon which the tax imposed has not been paid by purchasers to vendors, the amount of tax for which the purchaser is liable, and such other information as the commissioner deems necessary for the computation and collection of the tax. Every such return shall be filed within twenty days after the expiration of the period covered thereby unless the commissioner by regulation prescribes otherwise. The return filed by a purchaser shall include the sales prices of all services or tangible personal property purchased at taxable retail sale during the calendar month or other period for which the return is filed and upon which the tax imposed has not been reimbursed by the purchaser to a vendor.

(j) Every person licensed under chapter sixty-four J shall, on or before the twentieth day of each month file with the commissioner a return stating the number of gallons of aircraft fuel sold or used by him in the commonwealth during the preceding calendar month, and such further information as the commissioner may deem necessary, including information relative to the cost and gross receipts from the purchase and sale of such fuel.

(k) Every person subject to taxation under section twenty-one of chapter one hundred and thirty-eight shall file a return with the commissioner for each calendar month covering his sales of all alcoholic beverages or alcohol and all malt beverages imported into the commonwealth by him. Every such return shall be filed within twenty days after the expiration of the period covered thereby. In addition, each such person shall annually, on or before March 20, file an information return for the prior calendar year in such form and containing such information as the commissioner

may, by rule or regulation, require including, but not limited to, the total monthly sales amount to each person to whom sales have been made, exclusive of deposits required by sections 321 to 327, inclusive, of chapter 94, and identifying information for such purchasers. If any person fails to file the information return required by this subsection, the person shall be liable for a penalty of $1,000 for each failure. The penalty shall be considered assessed upon the issuance by the commissioner of a notice to the taxpayer setting out the amount of the penalty and the period for which the information return was due. No other notice or demand for payment shall be required as a prerequisite to the imposition or collection of a penalty imposed under this subsection, and the penalty shall be collected in the same manner as a tax. A penalty imposed by the commissioner for a failure to file an information return under this subsection shall be subject to subsection (f) of section 33 relative to waiver of penalties.

(l) Every direct broadcast satellite service provider subject to taxation under section 2 of chapter 64M shall, on or before the twentieth day of each calendar month, file a return with the commissioner stating the gross revenues derived by the direct broadcast satellite service provider during such month from the provision of direct broadcast satellite service and such other information as the commissioner may deem necessary.

Part I ADMINISTRATION OF THE GOVERNMENT

Title IX TAXATION

Chapter 62C ADMINISTRATIVE PROVISIONS RELATIVE TO STATE TAXATION

Section 37 APPLICATION FOR ABATEMENT; HEARING; NOTICE OF DECISION

Section 37. Any person aggrieved by the assessment of a tax, other than a tax assessed under chapter 65 or 65A, may apply in writing to the commissioner, on a form approved by the commissioner, for an abatement thereof at any time: (1) within 3 years from the date of filing of the return, taking into account paragraph (a) of section 79; (2) within 2 years from the date the tax was assessed or deemed to be assessed; or (3) within 1 year from the date that the tax was paid, whichever is later; provided, however, that where the commissioner and the taxpayer have agreed to extend the period for assessment of a tax pursuant to section 27, the period for abatement or for abating such tax shall not expire prior to the expiration period within which an assessment may be made pursuant to such agreement or any extension thereof; and provided further that any abatement that would result in a refund of tax, including a credit of such refund against another liability, is subject to section 36 to the extent of such refund or credit.

The applicant shall, at the time of filing its abatement application, include and attach to it all supporting information, documents, explanations, arguments and authorities that will reasonably enable the commissioner to determine whether the applicant is entitled to the abatement requested. The applicant shall not be considered to have submitted a completed written abatement application until the date on which all such information reasonably requested from the applicant and reasonably necessary for a decision has been furnished to the commissioner. If the commissioner has made a written request to the applicant for additional information, not then contained in the taxpayer's pending abatement application, and the applicant fails to provide such information within 30 days after such request, or within any extended period allowed by the commissioner, that application shall be considered incomplete and shall be denied without prejudice to its timely renewal. The commissioner shall give such applicant written notice that the denial is based upon the lack of sufficient information to grant the taxpayer's abatement application. In a case in which the commissioner has denied an abatement application based upon incomplete supporting information, no interest under section 40 shall begin to accrue upon any such claim which is appealed to the appellate tax board or to a probate court under section 39 before the date on which a decision on such claim on the merits is rendered by the board or court in favor of the taxpayer.

The commissioner shall, if requested, give the applicant a hearing upon his application; and if the commissioner finds that the tax is excessive in amount or illegal, he shall abate the tax, in whole or in part, accordingly. The commissioner shall give notice to the applicant of his decision upon the application.

The commissioner shall, if requested, give the applicant a hearing upon his application if the applicant has not already had a pre-assessment hearing under subsection (b) of section 26; unless the applicant first establishes to the satisfaction of the commissioner that a further hearing is necessary either due to the availability of new factual information or new legal precedent not available to the applicant at the time of the conference permitted under said subsection (b) of said section 26; and if the commissioner finds that the tax is excessive in amount or illegal, he shall abate the tax, in whole or in part, accordingly. The commissioner shall give notice to the applicant of his decision upon the application.

If such person is an operator as defined in section 1 of chapter 64G, a vendor as defined in section 1 of chapter 64H or section 1 of chapter 64I or a direct broadcast satellite service provider as defined in section 1 of chapter 64M who has collected such tax, no actual refund of money shall be made to such person until he establishes to the satisfaction of the commissioner, under such regulations as the commissioner may prescribe, that he has repaid to the purchaser the amount for which the application for refund is made.

In the case of a combined report filed pursuant to section 32B of chapter 63, the principal reporting corporation may act under this section as the agent for any and all corporations that participated in or were required to participate in such filing. In the case of such combined report, the commissioner may offset against an abatement with respect to such corporation, as determined by the commissioner under this section, additional excise that is due or determined to be due under said chapter 63 from any corporation that participated in or was required to participate in the combined report filing, whether that additional excise due may result from the application of the income or non-income measures of the

corporate excise or to the minimum excise tax and whether or not the additional tax is based on issues related to the abatement. Offsets based on issues unrelated to the abatement may reduce or eliminate such abatement, but in no case shall such offset give rise to a net amount of tax due where an assessment would otherwise be barred as untimely.

Code of Massachusetts Regulations
Title 830: Department of Revenue
Chapter 64H.00: Sales and Use Tax (Refs & Annos)

830 CMR 64H.1.3

64H.1.3: Computer Industry Services and Products

Currentness

(1) Statement of Purpose; Effective Date; Outline of Topics.

(a) Statement of Purpose. The purpose of 830 CMR 64H.1.3 is to explain the application of the Massachusetts sales and use taxes to computer products and software.

(b) Effective Date. 830 CMR 64H.1.3, effective October 20, 2006, applies to transactions on and after April 1, 2006.

(c) Outline of topics. 830 CMR 64H.1.3 is organized as follows:

1. Statement of Purpose; Effective date; Outline of Topics

2. Definitions

3. General Rules

4. Sales, Leases, and Rentals of Computer Hardware

5. Sales, Leases, Licenses and Rentals of Masters Related to the Rights to Reproduce Computer Software

6. Sales, Leases, Licenses and Rentals of Custom Computer Software

7. Optional Software Maintenance Contracts

8. Furnishing of Information to Customers

9. Processing of Data Furnished by Customers

10. Additional Copies of Custom Software or Personal Reports

11. Training Services and Materials

12. Transmission of Data

13. Access to Database Services

14. Other Miscellaneous and Nontaxable Services

15. Multiple Points of Use Certificates

(2) Definitions. For purposes of 830 CMR 64H.1.3 the following terms have the following meanings:

Canned Software, *see* Prewritten Software.

Commissioner, the Commissioner of Revenue or the Commissioner's duly authorized designee.

Computer, an electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions.

Computer Equipment, computer hardware and any software loaded onto the hardware prior to sale.

Computer Hardware, the physical components of a computer system.

Computer Software, a set of coded instructions designed to cause a computer or automatic data processing hardware to perform a task.

Custom Software, a software program prepared to the special order of a customer that is not prewritten software.

Database, a collection of interrelated data in a form capable of being processed by a computer, organized to facilitate efficient and accurate inquiries and updates.

Delivered Electronically, delivered to the purchaser by means other than tangible storage media.

Department, the Department of Revenue.

Electronic, relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

Engaged in Business in Massachusetts, *see* M.G.L.C. 64H, § 1.

Imprinted Magnetic Media, magnetic media which have computer-readable programs or data imprinted onto them.

Lease, a lease, rental, or any other temporary transfer of possession or control for consideration, regardless of how the transfer is characterized by the parties.

License, the right to use, copy, or access software, regardless of the location or ownership of any server on which the software may be installed. Unlike a lease, a licensing arrangement may or may not be time limited.

Load and Leave, delivery to the purchaser by use of tangible storage media where the tangible storage media is not physically transferred to the purchaser.

Magnetic Media, storage media, such as hard disks, floppy disks, diskettes, magnetic tape, cards, bar code, or any similar medium that is computer-readable.

Prewritten Computer Software (Prewritten Software), also Known as Canned Software and Standardized Software, computer software, including prewritten upgrades, which is not designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more prewritten computer software programs or prewritten portions thereof does not cause the combination to be other than prewritten computer software. Prewritten computer software includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the specific purchaser. Where a person modifies or enhances computer software of which the person is not the author or creator, the person shall be deemed to be the author or creator only of such person's modifications or enhancements. Prewritten computer software or a prewritten portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains prewritten computer software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement, such modification or enhancement shall not constitute prewritten computer software.

Printed Matter, human-readable information reproduced via printing, photocopying, or similar method of reproduction.

Processing of Data Furnished by Customers, the processing of raw data provided by customers into reports delivered in tangible form or delivered electronically that are not or may not be incorporated in reports furnished to other persons.

Program, the complete sequence of computer instructions necessary to solve a problem, including system and application programs and subdivisions such as assemblers, compilers, routines, generators, and utility programs.

Reports of Individual Information, reports or other information personal and individual in nature that may not be or is not substantially incorporated in reports furnished to any other purchaser, provided via printed matter or other tangible media.

Reports of Standard Information, reports or other information that are not reports of individual information, provided via printed matter or other tangible media.

Tangible Personal Property, personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. Tangible personal property includes electricity, gas, steam, and prewritten computer software. *See* M.G.L. c. 64H, § 1.

(3) General Rules.

(a) Sales Tax. Sales in Massachusetts of computer hardware, computer equipment, and prewritten computer software, regardless of the method of delivery, and reports of standard information in tangible form are generally subject to the Massachusetts sales tax. Taxable transfers of prewritten software include sales effected in any of the following ways regardless of the method of delivery, including electronic delivery or load and leave: licenses and leases, transfers of rights to use software installed on a remote server, upgrades, and license upgrades. The vendor collects sales tax from the purchaser and pays the sales tax to the Commissioner.

(b) Use Tax. The Massachusetts use tax complements the Massachusetts sales tax and is imposed on the use, storage, or other consumption of computer hardware, computer equipment, and prewritten computer software, regardless of the method of delivery, and reports of standard information in tangible form purchased for use, storage, or other consumption in Massachusetts. Apportioned Massachusetts use tax will be imposed on prewritten software concurrently available for use in multiple jurisdictions within the meaning of 830 CMR 64H.1.3(15) without regard to any of the following:

1. The jurisdiction where the purchaser takes delivery;

2. The location or ownership of any server on which the software may be installed; or

3. Whether the purchaser gives the seller an MPU exemption form.

(c) Exceptions to the Massachusetts Use Tax. The Massachusetts use tax is not imposed if:

1. The vendor collected and paid the Massachusetts sales tax on the sale of the tangible personal property;

2. The transaction is exempt from the sales tax; or

3. The purchaser paid a tax or reimbursed the vendor for a tax imposed by another state or territory of the United States on the transaction, provided that:

a. The tax was legally due, without right to a credit or refund; and

b. The other state or territory allows a corresponding exemption for tax paid to Massachusetts.

c. If the tax paid to the other state or territory was less than 5%, the exemption does not apply and Massachusetts use tax is imposed on the difference between the two rates.

(d) Collection and Payment of the Massachusetts Use Tax.

1. Collection and Payment of Use Tax by Vendor Engaged in Business in Massachusetts. When a vendor that is engaged in business in Massachusetts sells taxable software, computer hardware, computer equipment or reports for use, storage, or other consumption in Massachusetts, the vendor shall collect the Massachusetts use tax from the purchaser and remit the tax to the Department. The Department will presume that tangible personal property sold by any vendor for delivery in Massachusetts is sold for use, storage, or other consumption in Massachusetts.

2. Payment of Use Tax by Purchaser. If the vendor does not collect either the Massachusetts sales tax or the Massachusetts use tax, the purchaser should pay the five percent use tax to the Department. *See* 830 CMR 62C.16.2. For software

concurrently available for use in multiple jurisdictions, the purchaser must remit apportioned use tax to Massachusetts as provided in 830 CMR 64H.1.3(15).

(e) Non-taxable Sales. Sales of custom software, personal and professional services, and reports of individual information are generally exempt from Massachusetts sales and use taxes.

(4) Sales, Leases, and Rentals of Computer Hardware.

(a) Tax Treatment of Computer Hardware Sales. Sales, leases, rentals, and installment sales of new or used computer hardware are generally taxable. *See* 830 CMR 64H.1.3(3).

(b) Exemptions from the Sales Tax. The exemptions from the Massachusetts sales tax are contained in M.G.L.C. 64H, § 6.

(c) Installation Charges. Separately stated charges for installing computer hardware of any type are not taxable, so long as the charges are reasonable and set in good faith.

(d) Leases of Computer Hardware.

1. General. Leases of computer hardware are generally taxable in the state where the hardware is physically located.

2. Collection and Payment of Sales Tax on Leases. Lessors of computer hardware will collect and pay sales tax on lease and rental payments as the payments become due. A lessor's gross receipts for any period are the amounts due during that period under the terms of the lease.

3. Access to Computer Hardware on the Premises of Another.

a. Leases include agreements under which a person has access to computer hardware not on that person's premises, if that person or that person's employee operates, directs, or controls the computer hardware.

b. For rules applicable to access of prewritten software on the premises of another, *See* 830 CMR 64H.1.3(3).

(e) Installment Sales of Computer Hardware.

1. Installment sales of computer hardware are generally taxable.

2. Vendors under an installment sales contract for computer hardware should collect and pay sales tax on the total sales price of the hardware. The tax is payable on the return due date immediately following the date of the sale.

3. Separately-stated interest charges under installment sales contracts are not included in the sales price subject to tax as long as the interest charges are set in good faith.

(f) Discounts, Coupons, and Rebates. For the sales tax treatment of discounts, coupons, and rebates, *see* 830 CMR 64H.1.4.

(g) Trade-ins of Computer Hardware.

1. Definition. For the purposes of 830 CMR 64H.1.3(4)(g), the following term has the following meaning:

Trade-in, a previously purchased item transferred to a vendor as full or partial consideration for the purchase of another item.

2. Tax Treatment of Trade-in Transactions. The fair market value of traded-in computer hardware as of the date of the trade-in is ordinarily included in the sales price subject to sales tax as part of the consideration. If an item of computer hardware is returned to a vendor in connection with the purchase of computer hardware and that item has no value, the item is not part of the consideration for the purchase of computer hardware. The facts and circumstances will determine the value, if any, of an item of traded-in computer hardware.

(h) Services Related to a Sale of Computer Hardware.

1. Mandatory Services. If computer hardware cannot be purchased without services such as training, maintenance, developing custom software, and testing, charges for the services are considered part of the sales price and are generally taxable even if separately stated. *See also* 830 CMR 64H.1.3(14).

2. Optional Services. If the purchaser may purchase computer hardware without additional services, separately stated charges for the services are not considered part of the sales price for the hardware and are generally exempt. For purposes of 830 CMR 64H.1.3, separately stated charges must be clearly stated on the bill or invoice presented to the customer as well as on the vendor's books and records. *See also* 830 CMR 64H.1.3(11), (14).

(i) Service Contracts.

1. Definition. For the purposes of 830 CMR 64H.1.3(4), the term Service Contract means an agreement for only service, repair, and maintenance (including consultation and technical assistance) of computer hardware, which may include an agreement to supply necessary parts and materials for repair. The agreement must be optional, as described in 830 CMR 64H.1.3(4)(h)2.

2. Agreements to Provide Parts and Materials. If a service contract includes an agreement to supply necessary parts and materials for the repair of computer hardware, the charges for the service contract are not taxable under the following conditions:

a. The contractor should pay sales tax on purchases of parts and materials for use primarily in service contracts;

b. The contractor should not collect sales tax from the customers on parts and materials provided under the service contracts; and

c. The contractor should collect sales tax from the service contract customers for any tangible personal property not included under the service contract for which the contractor makes a separate charge.

3. Adjustment for Sales Tax Paid by Contractor. If the contractor paid sales tax on the purchase of tangible personal property for which the contractor later collects sales tax from a customer under 830 CMR 64H.1.3(4)(i)2.c., the contractor may then supply its vendor with a resale certificate and request that the vendor refund the sales tax paid on that property. The vendor may seek an abatement of the sales tax previously collected and remitted within the time limitations of M.G.L.C. 62C, § 37. With respect to sales or use tax paid on or after January 1, 2001, the contractor may not recover the tax by making an adjustment to its gross sales on its next sales tax return.

(5) Sales, Leases, Licenses and Rentals of Masters Related to the Rights to Reproduce Computer Software.

(a) Definitions. For the purposes of 830 CMR 64H.1.3(5), the following terms have the following meanings:

Master, a single unit of computer software, custom or canned, sold for use in the production of multiple copies of the software to be sold.

(b) Sales of Reproduction Masters as Part of a Sale of Rights. The sale of the right to reproduce a program is generally subject to Massachusetts sales tax, regardless of whether the transaction is characterized as a sale, lease, license or rental, unless an exemption applies.

(c) Examples.

Example 1: Acme Software Development Co. sells prewritten software to Bates Manufacturing, Inc. As part of the contract, Acme transfers a master of the software to Bates. The sale includes the rights for Bates to make 100 copies of the software for use by its employees. The total contract price is $10,000. The sales price subject to tax is $10,000.

Example 2: Acme Software Development Co. sells prewritten software to Copyrighted Software Corp., along with unlimited rights to copy and incorporate the software into a spreadsheet software package that Copyrighted will sell to its customers. The total contract price is $10,000. The sale between Acme and Copyrighted is exempt under M.G.L.C. 64H, § 6(r), because the software will become an ingredient or component part of tangible personal property to be sold by Copyrighted.

Example 3: Acme Software Development Co. sells a master copy of prewritten software to Diligent Distributors Corp., along with unlimited rights to copy, market and sell the software to the public. The total contract price is $15,000. The sale between Acme and Diligent may be a sale for resale, providing the requirements of M.G.L.C. 64H, § 8 or M.G.L. c. 64I, § 8 are met.

Example 4: Acme Software Development Co. sells a master copy of a word processing software package to Massachusetts Computer Company. Massachusetts Computer Company will copy and load the software package on to the hard drive of

computers sold both inside and outside of Massachusetts. The contract provides that Acme is paid $5,000 at the signing of the contract and $250 for each copy of the software that is made by Massachusetts Computer Company. The sale between Acme and Massachusetts Computer Company is exempt under M.G.L.C. 64H, § 6(r), because the software will become an ingredient or component part of tangible personal property to be sold. Sales or use of the computer equipment in Massachusetts is taxable.

Example 5: Acme Software Development Co. sells prewritten software to On-Line Games, Inc., a Massachusetts company. The sales price is $5,000. On-Line Games will incorporate the software into a product that will be marketed and sold on the Internet as a game. The game may be downloaded by the purchaser from the On-Line Games website for a cost of $5. The sale between Acme and On-Line Games is exempt under M.G.L.C. 64H, § 6(r) because the software will become and ingredient or component part of tangible personal property to be sold. Sales of the game to purchasers in Massachusetts are taxable sales of prewritten software.

Example 6: Acme Software Development Co. sells prewritten software to On-line Products, Inc., a Massachusetts company. The sales price is $12,000. On-line Products will incorporate the software into a digital product that is not software and is sold on the Internet. The digital product may be downloaded by the purchaser from the On-line Products website for a cost of $5. The software becomes a part of a digital product that is not taxable when downloaded to customers in Massachusetts; the exemption in M.G.L.C. 64H, § 6(r) does not apply. Acme must collect sales tax on the $12,000 sales price paid by On-line for the prewritten software.

(6) Sales, Leases, Licenses and Rentals of Custom Computer Software.

(a) Exemption for Sales of Custom Software. Sales of custom software are generally exempt from sales tax as professional service transactions regardless of the method of delivery.

(b) Professional Service Transactions. A professional service transaction for custom software is one in which the principal object of the purchaser is the professional and personal services of a programmer, systems analyst, or other person who imprints or has imprinted the result of the services on magnetic media, the cost of which is an inconsequential element of the cost of the entire transaction. The cost of the medium is the price paid for the medium by the programmer, regardless of any improvement made to the medium by the programmer.

(c) Definition of "Inconsequential Element". The term "Inconsequential Element" generally means a cost of less than 10% of the total contract price. The definition of "Inconsequential Element" is only a guideline and may vary depending on the facts and circumstances of a particular transaction.

(d) Custom Modifications to Prewritten Software. Sales of custom modifications to prewritten software are generally not taxable if the sales price of the prewritten software and the charges for the custom modification are separately stated. The charges must be reasonably allocated and determined in good faith. For purposes of 830 CMR 64H.1.3, separately stated charges must be shown on the bill or invoice presented to the customer as well as on the vendor's books and records. The sales price of the original prewritten software is taxable.

(e) Documentation Regarding Costs of Tangible Personal Property in Relation to Entire Transaction. The vendor or purchaser may state in transaction documents that the estimated cost of tangible personal property related to a custom modification transaction or any other service transaction described in 830 CMR 64H.1.3, is an inconsequential element

of the entire transaction. This statement will not be considered a separate statement of the cost of the tangible personal property. The cost of the tangible personal property so estimated is not taxable solely because of this statement.

(f) Custom Software Sold to Subsequent Purchasers. If custom software sold to a single purchaser is later sold to others, the later sales are sales of prewritten software. The sale of custom software to a subsequent purchaser that meets the requirements for a custom modification under 830 CMR 64H.1.3(6)(d) is not taxable.

(7) Optional Software Maintenance Contracts.

(a) Definition. For the purposes of 830 CMR 64H.1.3(7), the term Computer Software Maintenance Contract means an agreement to furnish maintenance services, upgrades, enhancements or updates of prewritten software, which may include an agreement for service, repair, and maintain computer hardware. Maintenance services may include including technical assistance and consultation. The agreement must be optional, as described in 830 CMR 64H.1.3(4)(h)2.

(b) Tax Treatment of Optional Computer Software Maintenance Contracts. Charges for optional software maintenance contracts that do not include upgrades are generally not taxable. An optional contract is one that the customer is not obligated to purchase as a condition to acquiring the software. Charges for an optional maintenance contract must always be separately stated on the invoice to the customer.

(c) Computer Software Maintenance Contracts.

1. Charges for Upgrades and Services not Separately Stated. For transactions on and after January 1, 2007, if the charges for upgrades and services are not separately stated, tax applies to 50% of the sales price of the maintenance contract.

2. Charges for Upgrades and Services Separately Stated. If an upgrades plus service contract separately and reasonably states charges for the service and upgrades portions of the contract, charges for the upgrades portion are taxable, and charges for the service portion are not taxable.

3. Cost of Upgrades to be Reasonable and in Good Faith. If the separately stated costs of upgrades to be supplied appear reasonable and are set in good faith, they will be accepted by the Commissioner. If the estimated costs of upgrades to be supplied do not appear reasonable, the Commissioner may assess additional sales tax using the method in 830 CMR 64H.1.3(7)(c)1.

(d) Prior Relationship of Contractor to Vendor not Relevant. The rules set out in 830 CMR 64H.1.3(7) apply regardless of the fact that the contractor may have been a vendor who sold the customer an item of computer hardware.

(e) Examples:

Example 1: Faithful Computer Services, Inc., entered into an agreement with General Medical Professional Corporation to service personal computers General recently purchased from another vendor. For $1,500 a year, Faithful will periodically check General's personal computers and will be available to correct any problems that arise. Faithful has also agreed to replace any worn-out parts at no charge during the term of the agreement. Faithful should pay sales tax on

all parts it buys to service General's computers and should not charge General sales tax for the parts. Faithful's $1,500 yearly charge to General is not taxable.

Example 2: Floppy Disk Co. sold General Medical Professional Corporation a prewritten billing software package for $1,500 for use on personal computers General purchased from another vendor. Floppy also entered into an optional agreement for $600 with General to maintain the software package, replace defective disks, and provide any updates to the package if released. Floppy is unable to determine the value of any upgrades at the time of sale. Floppy must collect and remit tax on $1,800 ($1,500 plus 50% of $600).

(8) Furnishing of Information to Customers.

(a) Tax Treatment of Sales of Reports of Standard Information. Sales of reports or other information on printed matter or magnetic media, sold or intended to be sold to two or more purchasers, are generally taxable. Such reports may reflect collection, compilation, or analysis of information. Examples include database files, mailing lists, market research, and surveys.

(b) Exemption for Sales of Reports of Individual Information. The sale of a report of individual information, whether printed or on magnetic media, is not taxable if the report may not be or is not substantially incorporated into reports furnished to other persons.

(9) Processing of Data Furnished by Customers.

(a) Exemption for Processing of Data Furnished by Customers. Charges for processing data furnished by customers are generally exempt from sales tax, regardless of the method of delivery of the processed information to the customer. Processing data may include the following: summarizing data, computing data, extracting data, sorting files, and sequencing data as well as services that provide the customer or subscriber with additional, different, or restructured information. The following are examples of exempt data processing: charges automated teller machine (ATM) terminal driving services, electronic funds transfer services, or credit card or check verification services. 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. Telecommunications services consumed in the provision of data processing services are taxable.

(b) Tax Treatment of Converting Information From One Medium to Another. If the necessary steps for processing data furnished by a customer have been completed and the customer pays a vendor to convert the data from one medium to another tangible medium, the separately stated charges for conversion are taxable, including charges for transferring data from a storage medium compatible with one computer system to a storage medium compatible with another.

(c) Examples:

Example 1: Hasty Manufacturing Co. contracted with International Research Associates to process the results of a consumer market survey. Hasty sent the raw data, completed questionnaires, to International. International will enter the data into its computer, tabulate the results, and analyze the research. International will present Hasty with a printed report with its conclusions and a magnetic tape containing all the tables and graphs. International's charges are not taxable.

Example 2: Hasty Manufacturing Co. has a payroll software package that computes each employee's pay. Hasty processes its entire payroll on its own computer but pays International Banking Services Corp. to print the checks. International's charges for printing are taxable.

Example 3: Hasty Manufacturing Co. just bought a new word processing system. Hasty paid International Conversion Services, Inc., to transfer the information on the diskettes used on the old system to new diskettes. International's charges for the new diskettes are taxable.

(10) Additional Copies of Custom Software or Personal Reports.

(a) General. Where a vendor sells custom software or reports of individual information to a purchaser who requires multiple copies, separately stated charges for copying the custom software or report in tangible media are taxable, regardless of the exemptions of 830 CMR 64H.1.3(6) and 830 CMR 64H.1.3(8)(b).

(b) Tax Treatment of Charges for Replacement Copy Provided in Tangible Media. Separately stated charges for replacing custom software which has been rendered unusable are generally taxable. *See also* 830 CMR 64H.1.3(7)(b) through (f).

(11) Training Services and Materials.

(a) Training Services. Charges for training not provided as a mandatory part of the sale of computer hardware are not taxable. *See* 830 CMR 64H.1.3(4)(h)1., on charges for mandatory training.

(b) Training Materials. Charges for instruction books and manuals in tangible form and canned tutorial software are generally taxable.

(12) Transmission of Data. Taxable telecommunications services, such as telephone and telegraph services, include transmission, conveyance, or routing of voice, data, or any other information or signals to a point, or between or among points. The term “telecommunications services” includes, without limitation, such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code or protocol of the content for purposes of transmission, conveyance or routing without regard to whether such service is referred to as voice over Internet protocol services or is classified by the Federal Communications Commission as enhanced or value added. Charges for encryption services, security authentication and data monitoring provided with data transmission services are also subject to tax as telecommunications services. 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 for purposes 830 CMR 64H.1.3(9).

(13) Access to Database Services.

(a) Exemption for Database Services. Charges for access by telephone or other means to databases stored in computer hardware not on the premises of the customer are generally not taxable.

(b) Retrieval of Data by Customer. In a database service transaction, the customer does not direct or control the entry of data into the database but merely selects data for retrieval.

(c) Tax Treatment of Printing Charges. Separate charges for the actual printing of retrieved data are generally taxable. Separate charges for transmitting retrieved data for a customer who will print the data on the customer's printer are not taxable.

(d) Tax Treatment of Related Computer Hardware Transactions. The sale of a computer terminal or other computer hardware used in retrieving data from a database is generally taxable.

(14) Other Miscellaneous and Nontaxable Services.

(a) General Rule. Generally, charges for the access or use of software on a remote server are subject to tax. However, where there is no charge for the use of the software and the object of the transaction is acquiring a good or service other than the use of the software, sales or use tax does not apply. *See, e.g.*, 830 CMR 64H.1.3(13).

Example 1: Bob goes to an Internet website that hosts auctions of various items of tangible personal property and places a bid for $100 on an item of vintage clothing. Although Bob has accessed and used software on a remote server, the object of the transaction is acquiring the item on which he is bidding in the on-line auction. No tax applies to the access. If Bob's bid is the winning one, sales or use tax is due on any tangible personal property purchased at the on-line auction that is shipped to a Massachusetts customer, however the purchase of clothing in this example is exempt under M.G.L.C. 64H, § 6(k).

Example 2: Ann wants to acquire prewritten computer software to prepare her personal income tax return. The vendor of the software gives her the option of purchasing the software on a disk that will be mailed to her home or she can pay to securely access the software on the vendor's server through the Internet and use of a personal access code. In either case, the functionality of the software is the same. The object of the transaction here is the use of the software. Charges for the prewritten software will be subject to sales or use tax regardless of the method of delivery chosen by Ann.

(b) Tax Treatment of Miscellaneous Service Transactions. Charges for web site hosting, designing computer systems, designing data storage and retrieval systems, consulting services, feasibility studies, evaluations of bids, technical analysis, programming, and the like are generally not taxable if they are not part of a sale of computer hardware or prewritten software. If the miscellaneous services are a mandatory part of a taxable sale of computer hardware or prewritten software, the charges for the services are taxable. *See* 830 CMR 64H.1.3(4)(h).

(c) Standards for Determining Whether Services are Separate From a Sale of Computer Hardware or Prewritten Software. The following factors indicate, but do not determine, whether a particular service is separate from a sale of computer hardware or prewritten software.

1. Any association or affiliation of the service contractor with the vendor;

2. The separate statement and documentation of the charges in the vendor's books and records;

3. Whether the services are contracted for or provided before the sale; and

4. The language of the agreement.

(d) Location of Performance of Services. The place where services such as designing computer systems, consulting, analysis, and programming are performed is immaterial to the sales tax treatment of charges for the services.

(15) Multiple Points of Use Certificates.

(a) General Rule. A business purchaser that is not a holder of a direct pay permit that knows at the time of its purchase of prewritten computer software that the software will be concurrently available for use in more than one jurisdiction shall deliver to the seller in conjunction with its purchase an exemption certificate claiming multiple points of use, Form ST-12. Prewritten computer software, for purposes of 830 CMR 64H.1.3(15) includes, but is not limited to, computer software delivered or accessed electronically, regardless of the location of the server where the software is installed, software delivered by load and leave, or in tangible form. Computer software received in-person by a business purchaser at a retail business location of the seller is not included. Computer software for personal use is not included.

1. Upon receipt of an exemption certificate claiming multiple points of use, the seller is relieved of all obligation to collect, pay, or remit the applicable tax and the purchaser shall be obligated to collect, pay, or remit the applicable tax on a direct pay basis. Except as provided in 830 CMR 64H.1.3(15)(a)7., a certificate claiming multiple points of use must be received by the seller no later than the time the transaction is reported for sales or use tax purposes.

2. A purchaser delivering an exemption certificate claiming multiple points of use may use any reasonable, but consistent and uniform, method of apportionment that is supported by the purchaser's books and records as they exist at the time the transaction is reported for sales or use tax purposes.

3. A reasonable, but consistent and uniform, method of apportionment includes, but is not limited to, methods based on number of computer terminals or licensed users in each jurisdiction where the software will be used. A reasonable, but consistent and uniform method of apportionment may not be based on the location of the servers where the software is installed.

4. A purchaser delivering an exemption certificate claiming multiple points of use shall report and pay the appropriate tax to each jurisdiction where concurrent use occurs. The tax due will be calculated as if the apportioned amount of the prewritten computer software had been delivered to each jurisdiction to which the sale is apportioned pursuant to 830 CMR 64H.1.3(15)(a)2.

5. A Multiple Points of Use Certificate may not be used for software received in person by a business purchaser at a retail store.

6. A Multiple Points of Use Certificate may not be used for software that is loaded on computer hardware prior to sale. In that situation, the sales tax sourcing rules for computer hardware determine the taxability of the transaction, regardless of whether the price for the prewritten software is separately stated.

7. The exemption certificate claiming multiple points of use will remain in effect for all future sales eligible for apportionment under 830 CMR 64H.1.3(15) by the seller to the purchaser, except as to the subsequent sale's specific apportionment that is governed by 830 CMR 64H.1.3(15)(a)2., until it is revoked in writing.

8. The purchase of software loaded onto a server located in a single state that will be available for access by a purchaser's employees in multiple jurisdictions is concurrently available for use in more than one jurisdiction within the meaning of 830 CMR 64H.1.3(15) if the purchaser knows at the time of its purchase that the software will be concurrently available for use in multiple jurisdictions.

9. Delivery of a copy of the software is not necessary for the software to be "concurrently available for use in more than one jurisdiction" within the meaning of 830 CMR 64H.1.3(15).

10. The purchase of a license that allows the licensee/customer to make copies of software that will be used in more than one jurisdiction by the customer is concurrently available for use in more than one jurisdiction within the meaning 830 CMR 64H.1.3(15) if the purchaser knows at the time of its purchase that the software will be concurrently available for use in multiple jurisdictions.

11. Examples:

Example 1: Prewritten software is installed on a server located in another state but concurrently available for use by purchaser's employees in Massachusetts as well as other states. The purchaser gives the seller a properly completed MPU form. Part of the sales price of the software will be apportioned to Massachusetts for sales/use tax purposes.

Example 2: Prewritten software is installed on a server located in Massachusetts but concurrently available for use by purchaser's employees in other states as well as Massachusetts. The purchaser gives the seller a properly completed MPU form. Part of the sales price will be apportioned to those other states for sales/use tax purposes.

Example 3: A business in Massachusetts purchases an enterprise license that allows the purchaser to make copies of software (either from a master disk or downloaded copy) and those copies will be concurrently available for use at the purchaser's business locations in various jurisdictions. The purchaser gives the seller a properly completed MPU form. For sales/use tax purposes, part of the sales price will be apportioned to the other states where the purchaser is using copies of the software.

Example 4: A sale of software eligible for MPU treatment includes a separately stated charge for a maintenance contract including upgrades and telephone support. The charges for upgrades and services provided under the maintenance contract are not separately stated. Both the sales price of the software and the taxable sales price of the service contract, determined under 830 CMR 64H.1.3(7)(c)1. are subject to MPU apportionment.

Example 5: Prewritten software concurrently available for use by the purchaser's employees in other states as well as Massachusetts is delivered in a tangible medium to the purchaser's offices in New Hampshire. New Hampshire does not impose a sales tax and the purchaser does not give the seller a properly completed MPU form. Apportioned use tax is due to Massachusetts.

Example 6: Prewritten software concurrently available for use by the purchaser's employees in other states as well as Massachusetts is delivered via a master copy in tangible medium to the purchaser's offices in Connecticut. The vendor

collects and remits Connecticut sales tax. Providing that the conditions of 830 CMR 64H.1.3(3)(c) are met, no additional use tax may be due to Massachusetts.

(b) Seller Remittance of Apportioned Tax. Notwithstanding 830 CMR 64H.1.3(15)(a), when the seller knows that the prewritten software will be concurrently available for use in more than one jurisdiction, but the purchaser does not provide an exemption certificate claiming multiple points of use, the seller may work with the purchaser to produce the correct apportionment. The purchaser and seller may use any reasonable, but consistent and uniform, method of apportionment that is supported by the seller's and purchaser's business records as they exist at the time the transaction is reported for sales or use tax purposes. If the purchaser certifies to the accuracy of the apportionment and the seller accepts the certification, the seller shall collect and remit the tax to the appropriate jurisdictions as provided in 830 CMR 64H1.3(15)(a)4. In the absence of bad faith, the seller is relieved of any further obligation to collect tax on any transaction where the seller has collected and remitted tax pursuant to the information certified by the purchaser, provided that the seller retains records of the methodology used to apportion the tax in addition to the purchaser's written certification.

(c) When the seller knows that the prewritten software will be concurrently available for use in more than one jurisdiction and the purchaser does not have a direct pay permit and does not provide the seller with an exemption certificate claiming multiple points of use exemption as required by 830 CMR 64H.1.3(15)(a) or the certification required by 830 CMR 64H.1.3(15)(b), the seller shall collect and remit the tax as provided by 830 CMR 64H.6.7, unless the purchaser is otherwise exempt.

(d) A holder of a direct pay permit shall not be required to deliver an exemption certificate claiming multiple points of use to the seller. A direct pay permit holder shall follow the provisions of 830 CMR 64H.1.3(15)(a)2. in apportioning the tax due on prewritten computer software that will be concurrently available for use in more than one jurisdiction.

(e) Nothing in 830 CMR 64H.1.3(15) shall limit a person's obligation for sales or use tax to any state in which the qualifying purchases are concurrently available for use, nor limit a person's ability under state, federal, or constitutional law, to claim a credit for sales or use taxes legally due and paid to other jurisdictions.

The Massachusetts Administrative Code titles are current through Register No. 1416, dated May 1, 2020

Mass. Regs. Code tit. 830, § 64H.1.3, 830 MA ADC 64H.1.3

End of Document

Code of Massachusetts Regulations
Title 830: Department of Revenue
Chapter 64H.00: Sales and Use Tax (Refs & Annos)

830 CMR 64H.3.1

64H.3.1: Direct Payment Program

Currentness

(1) Statement of Purpose. Effective Date. Outline of Topics.

(a) Statement of Purpose. The purpose of 830 CMR 64H.3.1 is to explain the requirements for receiving direct payment authority, the requirements for presentation and acceptance of direct payment certificates for sales of tangible personal property and taxable services, and the reporting and payment requirements for participating purchasers. The direct payment program is intended to allow certain large volume purchasers to purchase items without paying sales or use tax to the vendor at the point of sale and instead allowing the purchaser to pay the sales/use tax directly to the Department of Revenue on a monthly basis for all purchases made within that month. This program is intended to streamline the administration of these taxes for these large volume purchasers and for the Department of Revenue.

(b) Effective Date. 830 CMR 64H.3.1 is effective as of January 1, 2001 and authorizes the use of direct payment certificates (Form ST-14) as of that date.

(c) Outline of Topics. 830 CMR 64H.3.1, is organized as follows:

1. Statement of Purpose, Effective Date, Outline of Topics.

2. Definitions.

3. General Rule.

4. Purchaser Qualification.

5. Bond Requirements.

6. Use of Direct Payment Certificates (Form ST-14).

7. Monthly Reporting and Payment of Tax.

8. Audit and Recordkeeping Requirements.

9. Term and Renewal.

10. Revocation, Termination and Penalties.

(2) Definitions. For the purpose of 830 CMR 64H.3.1 the following terms have the following meanings, unless the context requires otherwise:

Commissioner. The Commissioner of Revenue or the Commissioner's duly authorized representative.

Purchases for Business Purposes. Purchases that are made by a qualified purchaser and used by the qualified purchaser in connection with the active conduct of a trade or business and not for any household or consumer use.

Qualified Purchaser. A purchaser that operates a business and acquires tangible personal property or services subject to sales/use tax, and has been granted direct payment authority under the requirements of 830 CMR 64H.3.1.

Sales Tax. Use Tax or Tax. The sales tax imposed by M.G.L. c. 64H and/or the use tax imposed by M.G.L. c. 641.

Vendor. A retailer or other person selling tangible personal property or taxable services the gross receipts from the retail sale of which are required to be included in the measure of the tax imposed by M.G.L. c. 64H or c. 641.

(3) General Rule.

(a) Collection of Tax. Vendors are generally required to collect tax on the retail sale of all tangible personal property and taxable services and to remit that tax to the Commissioner under the provisions of M.G.L. c. 64H, § 3(a). Under the direct payment program, the burden of proving that the vendor was not required to collect the tax is on the vendor unless the vendor takes a direct payment certificate (Form ST-14) from a qualified purchaser in good faith. The Form ST-14 is a two-part form issued by the Commissioner to qualified purchasers. The upper portion of the form is the direct payment permit, signed by the Commissioner, certifying that the holder of the permit has direct payment authority. The lower portion of the form is the direct payment certificate that is to be completed by the qualified purchaser for transactions with specific vendors. A qualified purchaser may reproduce the Form ST-14 as needed for transactions with vendors, but must retain the original in its possession. Once a Form ST-14 is accepted, in good faith, by a vendor, the liability for the payment of the sales or use tax and for the filing of all related returns is placed upon the qualified purchaser. The qualified purchaser will be required to file sales/use tax returns with and pay the appropriate tax directly to the Department of Revenue.

(b) Conditions of Use. The use of Form ST-14 will in no way affect the amount of tax due from any transaction. Form ST-14 may only be used for purchases for business purposes. Form ST-14 may not be presented for the purchase of motor vehicles, boats, airplanes, meals, alcoholic beverages, or any other goods or services specifically excluded by the Commissioner upon the Form ST-14.

(4) Purchaser Qualifications. Any purchaser meeting the qualification criteria listed in 830 CMR 64H.3.1(4)(a)1. through 6. may apply to the Commissioner for direct payment authority on the form prescribed by the Commissioner (Form DPP-1). Interested

purchasers should send a completed Application for Direct Payment Authority, including all other required information, to the Audit Support Unit.

(a) Selection Criteria. To be considered for selection for direct payment authority, a purchaser must meet each of the following criteria:

1. The purchaser must operate a business that regularly acquires tangible personal property or taxable services;

2. The purchaser must reasonably expect and demonstrate that its purchases subject to Massachusetts sales/use tax will be of a sufficient dollar volume to allow the Commissioner to find that the purposes of the direct payment statute will be furthered by granting a direct payment permit to the applicant. The Commissioner anticipates that a dollar volume of $1,000,000 of purchases subject to Massachusetts sales/use tax ($50,000 of tax liability) per year or greater will be sufficient to satisfy this criterion;

3. The purchaser must register as a vendor under M.G.L. c. 64H and c. 641, and must agree to file monthly sales/use tax returns and pay the Department of Revenue monthly on the purchases made;

4. The purchaser shall demonstrate to the satisfaction of the Commissioner that it maintains a viable automated accounting system that can track its taxable purchase transactions, produce written periodic reports, and accurately calculate the sales/use tax due;

5. The purchaser shall identify the names and business addresses of all business locations from which the direct payment certificate, if granted, will be used, or to which goods will be sold and/or delivered. A Form ST-14 will be limited to use by the single legal entity to whom and in whose name the certificate is issued; and

6. The purchaser shall provide all additional information that the Commissioner believes necessary to verify the adequacy of the purchaser's self-assessment, collection and remittance procedures, and any other information necessary to substantiate any aspect of the purchaser's application.

(b) Notification of Acceptance or Rejection. The Commissioner will review the Application for Direct Payment Authority to determine if the selection criteria have been met. If the Commissioner determines that the selection criteria have been satisfied, he will grant direct payment authority to the purchaser. The granting of direct payment authority to a particular purchaser is solely at the discretion of the Commissioner. Notice of acceptance or rejection of a purchaser's request will be made in writing within 90 days of the Commissioner's receipt of a completed application. If the application is rejected, the notice will state the reason(s) for rejection. If no notice of acceptance or rejection is received within 90 days of the receipt of a completed application, the application will then be deemed to be denied and the applicant may appeal such denial pursuant to the provisions of 830 **CMR 64H.3.1**(4)(c). Each qualified purchaser granted direct payment authority will be sent an original Form ST-14 signed by the Commissioner. An applicant denied direct payment authority may re-apply only after a sufficient change in the purchaser's circumstances that would warrant another review. The new request will be treated as a newly filed application and must contain complete documentation as required by 830 **CMR 64H.3.1**. Purchasers seeking direct payment authority may neither represent that they have such authority nor conduct business as if they have such authority while an application is pending.

(c) Appeal Process. A purchaser that has been denied direct payment authority may appeal the decision of denial in writing to the Appeal and Review Bureau. The decision of the Appeal and Review Bureau shall be the final determination of any administrative appeal. Purchasers denied direct payment authority on appeal may reapply as noted in 830 CMR 64H.3.1(4)(b).

(5) Bond Requirements. The Commissioner may require a purchaser to post a bond in an amount, and from a surety, acceptable to the Commissioner as a condition of receiving a Form ST-14 if, in the discretion of the Commissioner, it is in the best interest of the Commonwealth to require such security. The amount of the bond must be at least equal to the estimated yearly tax amount that will be due from the purchaser if direct payment authority is granted, but may be higher if the circumstances require.

(6) Use of Direct Payment Certificates (Form ST-14).

(a) Acceptance of Form ST-14. On each and every occasion when a qualified purchaser purchases tangible personal property or taxable services for use in the course of its business, the qualified purchaser must present its Form ST-14 to the vendor to certify that the qualified purchaser has direct payment authority. In lieu of presenting its Form ST-14 on each separate occasion when a qualified purchaser makes a purchase from a vendor, the qualified purchaser and vendor may agree that the delivery of the Form ST-14 shall serve as applying on a "blanket" basis to all sales made by the vendor to the qualified purchaser and covered by the direct payment certificate. A vendor that is presented with a valid Form ST-14 and that accepts same in good faith shall not collect the tax upon the purchaser's purchases and shall not include the sales covered by the Form ST-14 in its gross receipts for the purposes of collecting and remitting tax, and will be relieved of the return and payment obligations of M.G.L. c. 62C with respect to these sales. For each transaction in which the qualified purchaser uses its Form ST-14, all return, payment and other obligations of a vendor under M.G.L. c. 62C, 64H and 64I shall rest with the qualified purchaser. A qualified purchaser shall not transfer, assign, loan or otherwise permit any other person or entity to use or possess its Form ST-14. A qualified purchaser shall not use its Form ST-14 to purchase tangible personal property or taxable services on behalf of any other person or entity. Either practice by a qualified purchaser shall be grounds for revocation and termination of its direct payment permit.

(b) Good Faith Requirements for Form ST-14. The burden of demonstrating that the vendor was not obligated to collect a sales/use tax from a purchaser shall rest with the vendor. Acceptance of a Form ST-14 shall relieve the vendor from the requirement of collecting the tax only if the vendor accepts the form in good faith from a qualified purchaser who, at the time of purchasing the tangible personal property or taxable services, intends to use the property or services only for business purposes. A vendor may seek confirmation from the Commissioner prior to accepting a Form ST-14 as to whether the purchaser who tenders the certificate is a qualified purchaser. The vendor may make such inquiries of the qualified purchaser that the use of the Form ST-14 is proper as will reasonably satisfy the vendor that it is given in good faith. Form ST-14 may not be accepted for any types of transactions disallowed by 830 CMR 64H.3.1, or specifically disallowed by the Commissioner.

(c) Requirements for Proper Form ST-14. Each Form ST-14 must be in the form prescribed by the Commissioner and must contain the following information:

1. Name of qualified purchaser;

2. Address of qualified purchaser;

3. Qualified purchaser's registration number and permit number;

4. Effective date of the Form ST-14;

5. Expiration date of the Form ST-14;

6. Certification that the tangible personal property and services are being purchased only for business purposes; and

7. Any other information the Commissioner may require.

(d) Vendor Requirements. All vendors must retain the Forms ST-14 for the period of time required by the provisions of the record retention regulation, 830 CMR 62C.25.1. Upon written notice to a vendor, the Commissioner may require the vendor to produce any and all Forms ST-14 accepted by the vendor during any period for which a tax return has been filed or for which a return is due. The vendor must make the requested Forms ST-14 available for inspection by the Commissioner within 60 days of the date of the Commissioner's request. If the vendor does not produce the requested Form ST-14 within the 60-day period, the vendor must carry the burden of proving, by other evidence, that the vendor was not required to collect the tax based on the qualified purchaser's direct payment authority.

(7) Monthly Reporting and Payment of Tax. Qualified purchasers are required to file with the Commissioner a monthly sales and use tax return (Form ST-9), accompanied by payment of the tax due, by following each of the applicable provisions of 830 CMR 62C.16.2: *Sales and Use Tax Returns and Payments*. Each responsible person of a qualified purchaser may be held personally liable under the provisions of M.G.L. c. 64H, §16, and c. 64I, §17, as applicable for sales/use taxes not remitted to the Department of Revenue.

(8) Audit and Recordkeeping Requirements. Qualified purchasers shall maintain a list of all vendors to whom they have issued Form ST-14, including the date each was issued. Upon the request of the Commissioner a qualified purchaser shall produce this list, the original Form ST-14, or any other information required to verify the qualified purchaser's compliance with the requirements of 830 CMR 64H.3.1, or that the proper tax is being paid in a timely manner. All records must be retained for the period of time required by the provisions of the record retention regulation, 830 CMR 62C.25.1.

(9) Term and Renewal. Direct payment authority granted to a particular qualified purchaser will be valid for a term of not greater than five years, and will expire on December 31 st of the final calendar year of the current term. Qualified purchasers must apply for renewal of direct payment authority no later than 120 days before the end of the current term. The Commissioner will review the purchaser's participation in the program as well as the selection criteria set forth in 830 CMR 64H.3.1(4)(a) to determine whether a renewal should be granted. Notification of the decision of renewal or termination will be given to the qualified purchaser no later than 30 days before the end of the current term. The qualified purchaser must notify the Commissioner within 30 days of any changes that occur to the form of legal organization of the qualified purchaser that would require a new federal FID number or department of revenue registration number for that purchaser. In such event, the existing direct pay permit (Form ST-14) shall be null and void and the new purchaser shall re-apply for direct payment authority under the new organizational structure following the application process outlined in 830 CMR 64H.3.1. If any organizational change occurs, whether by

merger, acquisition or otherwise, whereby the qualified purchaser entity no longer conducts an active trade or business or no longer has a legal existence, the direct payment authority shall automatically terminate.

(10) Revocation. Termination and Penalties.

(a) Revocation and Termination. Direct payment authority may be revoked by the Commissioner at any time upon 30 days written notice to the qualified purchaser, and may be revoked without notice if the Commissioner determines that the collection of any tax due from the qualified purchaser is in jeopardy. Any qualified purchaser whose direct payment authority is either forfeited voluntarily, revoked by the Commissioner, or has expired shall return the original Form ST-14 to the Commissioner and immediately notify all vendors from whom it has purchased taxable items that its Form ST-14 is no longer valid. In addition, the Commissioner has the discretion to disallow the qualified purchaser from using its direct payment authority for transactions with a particular vendor if in his discretion it is warranted.

(b) Penalties. A qualified purchaser that fails to give such notice shall be fined $1,000 per vendor to which notification was required to have been given.

The Massachusetts Administrative Code titles are current through Register No. 1416, dated May 1, 2020

Mass. Regs. Code tit. 830, § **64H.3.1**, 830 MA ADC **64H.3.1**

End of Document

Code of Massachusetts Regulations
Title 830: Department of Revenue
Chapter 64H.00: Sales and Use Tax (Refs & Annos)

830 CMR 64H.6.7

64H.6.7: Out-of-State Sales and Deliveries

Currentness

(1) Statement of Purpose, Outline.

(a) Statement of Purpose. 830 CMR 64H.6.7 explains the sales tax treatment of sales of tangible personal property by a Massachusetts vendor to be delivered outside of Massachusetts.

(b) Outline. 830 CMR 64H.6.7(1)(b) lists the sections contained in 830 CMR 64H.6.7.

1. Statement of Purpose, Outline.

2. Definitions.

3. Sales of Tangible Personal Property for Delivery Out of State.

4. Compliance.

(2) Definitions. For the purposes of 830 CMR 64H.6.7 the following definitions apply:

Commissioner, the Commissioner of Revenue or the Commissioner's duly appointed representative.

Interstate carrier, a carrier in the business of delivering goods across state lines, including the United States Postal Service.

Sale, any transfer of title to or possession of tangible personal property as defined in M.G.L. c. 64H, § 1(12)(a) through (f).

Sales tax, the excise imposed by M.G.L. c. 64H.

Use tax, the excise imposed by M.G.L. c. 641.

Vendor's own truck, a vehicle owned by the vendor or operated for the vendor by one not in the business of transporting goods for the public at large.

(3) Sales of Tangible Personal Property for Delivery Out of State.

(a) General Rules. In general, whether a sale of tangible personal property to be delivered out of state is subject to sales or use tax depends upon the following principles. It is assumed for purposes of 830 CMR 64H.6.7 that the sale is not exempt under any other provision of Massachusetts law.

1. If the purchaser or the purchaser's agent takes possession of the property within Massachusetts, whether or not for redelivery or use outside Massachusetts, the sale is taxable.

2. Where the property sold is not in Massachusetts at the time a contract for its sale is made and the only contact with Massachusetts is the mere execution of the contract, the sale is exempt under M.G.L. c. 64H, § 1(13)(d).

3. If the vendor is obligated by an agreement to deliver the property to its purchaser outside Massachusetts (whether by interstate carrier or in the vendor's own truck), the sale is exempt under M.G.L. c. 64H, § 6(b).

4. If the vendor is obligated by an agreement to deliver the property to the purchaser's designee outside Massachusetts, the sale will be exempt if the purchaser of the property is outside of Massachusetts at the time the order for the property is placed. M.G.L. c. 64H, § 6(b). Please note that absent any evidence as to the location of the purchaser, the Commissioner will presume that the purchaser is inside Massachusetts at the time the order for the property is placed.

5. If the vendor is obligated by an agreement to deliver the property to the purchaser's designee outside Massachusetts and the purchaser is within Massachusetts when the order for the property is placed, the sale will generally be taxable unless both title to and possession of the property pass outside Massachusetts. Under the Uniform Commercial Code, passage of title depends upon the following circumstances:

a. Title specified in contract. If a contract specifies where title will pass, title passes in accordance with the terms of the contract

b. Contract silent on passage of title.

i. If the contract is silent on the passage of title, title passes in Massachusetts when the property is delivered to an interstate carrier for redelivery to the purchaser's designee and the sale is taxable.

ii. If the contract is silent on the passage of title and if the property is to be delivered to the designee by the dealer (for example, in the dealer's own truck), title will not pass until delivery is completed. Under this circumstance, there is no sale in Massachusetts, and no sales tax is imposed.

(b) Use Tax.

1. Reports to other States. If property purchased in Massachusetts is delivered out of state, a use tax may be due in the other jurisdiction. The Department of Revenue and the tax authorities of other states routinely share tax information.

2. Property returned to Massachusetts. If property purchased in Massachusetts is delivered out of state but is later returned to Massachusetts for use, storage, or other consumption in Massachusetts and no sales tax was paid on the property, the use tax will apply if the property was originally purchased with the intent to use, store, or otherwise consume it here. M.G.L. c. 641, §§ 2, 8(f). The use tax statute presumes that personal property brought into Massachusetts within six months of the date of purchase was purchased for use here. M.G.L. c. 641, § 8(f).

3. Property stored in Massachusetts. If property purchased outside Massachusetts is brought into Massachusetts the use tax will apply, unless the property was brought here solely to be kept or retained for the purposes of subsequent transportation outside Massachusetts. M.G.L. c. 641, § 1. The sales tax does not apply to the purchase of property outside Massachusetts and brought into Massachusetts.

4. Payment of use tax. If a use tax is due, the purchaser must file an Individual Use Tax Return, Form ST-11, with the Commissioner and pay the tax imposed. M.G.L. c. 641, §§ 2, 3. This return and payment are due on or before the 20th day of the month following the month in which the property is first used here. Failure to file a return and pay the use tax when due will subject the taxpayer to interest and penalties calculated from the due date of the return or payment M.G.L. c. 641, § 2; M.G.L. c. 62C, § 16(i). See 830 CMR 62C.16.2.

These provisions are illustrated by the following. In all of these examples, a use tax may be due if property delivered out of state is returned to Massachusetts for use, storage, or other consumption in Massachusetts. *See* Example 12.

Example 1: Adams buys a boat at a boatyard in Massachusetts and takes delivery of the boat there. The boat is then sailed to Delaware and docked. When Adams takes possession of the boat in Massachusetts, the sale in Massachusetts is complete; the sales tax applies even though Adams sails the boat to Delaware for use there. *See* 830 CMR 64H.6.7(3)(a)1.

Example 2: Bean goes to a computer store in Massachusetts and buys a personal computer that she then takes to her home in Maine. When Bean takes possession of the computer in Massachusetts, the sale in Massachusetts is complete; the sales tax applies even though Bean transports the computer to Maine for use there. *See* 830 CMR 64H.6.7(3)(a)1.

Example 3: Carter while in Massachusetts orders a chair sent to his daughter in Maine. The chair will be sent there from the Massachusetts vendor's out-of-state warehouse. This sale is exempt from tax because the chair was not in Massachusetts at the time the contract for its sale was made and the chair is to be delivered out of state for use there. *See* 830 CMR 64H.6.7(3)(a) 2.

Example 4: Donaldson goes to a furniture dealer in Massachusetts and orders a couch to be delivered from the store to her summer home in Maine. Since the vendor is obligated to have the couch delivered to its purchaser outside Massachusetts, the sale of the couch is exempt regardless of the delivery method used. *See* 830 CMR 64H.6.7(3)(a) 3.

Example 5: Evans buys a car from a dealer in Massachusetts who agrees to deliver the car to Evans's residence in Connecticut. Since the dealer is obligated to deliver the car to its purchaser outside Massachusetts, the sale of the car is exempt from sales tax. *See* 830 CMR 64H.6.7(3)(a)3. The dealer should retain proof that delivery of the car was made in Connecticut.

Example 6: Foster writes to a Massachusetts antique dealer from his home in Vermont and orders a china platter sent to his daughter in Michigan. Where the purchaser of the property is located outside of Massachusetts at the time of the sale and the property will be delivered out of state to the purchaser's designee, the sale is exempt, regardless of the delivery method used. *see* 830 CMR 64H.6.7(3)(a)4.

Example 7: Graham goes to a shop in Massachusetts and orders a vase sent to her daughter in New Hampshire. The contract for the sale of the vase specifies that title to the vase will not pass until it is delivered in New Hampshire. This sale is exempt because by the terms of the contract title will pass outside Massachusetts. *See* 830 CMR 64H.6.7(3)(a) 5.a. Note that the rationale of Example 6 does not apply here, since the purchaser of the property was within Massachusetts at the time of sale.

Example 8: Harrison goes to a shop in Massachusetts and orders a vase sent to his daughter in New Mexico. The contract is silent on the passage of title. The vase will be delivered by interstate carrier. This sale is taxable because title to the property passes in Massachusetts. Where the contract is silent on the passage of title, title passes when the property is delivered to the interstate carrier. *See* 830 CMR 64H.6.7(3)(a)5.b.i. Once again, the rationale of Example 6 does not apply.

Example 9: Irons while in Massachusetts orders an antique from a Massachusetts vendor sent to her son in Rhode Island. The antique will be delivered to Rhode Island in the dealer's truck. Here, too, the rationale of Example 6 is inapplicable because Irons was in Massachusetts when he ordered the antique. The antique is to be delivered to Rhode Island in the dealer's own truck, and title to it will not pass until delivery is completed there. *See* 830 CMR 64H.6.7(3)(a)5.b.ii. This sale is, therefore, exempt from sales tax.

Example 10: Joiner Corp., a Massachusetts corporation with laundromats in several states, orders washers and dryers from another Massachusetts corporation to be delivered to its new units in New Jersey. The sale of the washers and dryers is exempt from Massachusetts tax because the washers and dryers are to be delivered to their purchaser outside Massachusetts. *See* 830 CMR 64H.6.7(3)(a) 3. The parties must consider the New Jersey sales and use tax treatment of this transaction.

Example 11: Kanga Corp., a corporation located in Massachusetts, orders key chains as gifts for its customers from Lockco Co., also located in Massachusetts. Kanga supplies Lockco with lists of the customers, all of whom are located outside Massachusetts. Lockco sends the key chains to these customers by interstate carrier. Here, Lockco is obligated to deliver the property to the purchaser's designees outside of Massachusetts and the sale will be be taxable unless title and possession pass outside of Massachusetts. Because title passes in Massachusetts when Lockco delivers the chains to the interstate carrier, the sale is taxable. *See* 830 CMR 64H.6.7(3)(a)5.b(i).

Example 12: Mills buys a pearl necklace and a diamond ring at stores in Massachusetts and has them shipped to her at her winter home in Florida. One month later, Mills returns to her home in Massachusetts, bringing the jewelry with her. Since the items were delivered to Mills out of state, they were exempt from the sales tax. Here, however, Mills bought both items intending to return them to Massachusetts for use, storage, or other consumption here. In these circumstances, the Massachusetts use tax applies. This tax is imposed at the same rate as the sales tax (5%) and must be paid to the Department of Revenue by the 20th day of the month following the month the items were first used here, using Form ST-11 (Individual Use Tax Return). *See* 830 CMR 64H.6.7(3)(b)1., 2. and 4.

Example 13: Nelson Department Stores, Inc., buys store counters in North Carolina and transports them in Nelson's own trucks to Massachusetts where Nelson has a warehouse. The counters remain in the warehouse for several months. Nelson subsequently ships some of the counters to two Massachusetts stores and ships some of the counters to a Delaware store. The use tax applies to the use of the counters at the two Massachusetts stores, but no use tax and no sales tax applies to the retention of the counters eventually sent to the Delaware store. *See* 830 CMR 64H.6.7(3)(b)3.

(4) Compliance.

(a) Record-Keeping. The vendor must maintain books and records under M.G.L. c. 62C, § 25, sufficient to substantiate taxable and tax-exempt sales. See 830 CMR 62C.25.1.

1. Transactions in which the property is not in Massachusetts at the time of sale (sales exempt under M.G.L. c. 64H, § 1(13)(d)). Records for transactions exempt under M.G.L. c. 64H. § 1(13)(d) and 830 CMR 64H.6.7(3)(a)2. must substantiate that the property was in fact transferred to the recipient from a location outside Massachusetts. The following are examples of acceptable records of such transactions: the contract for the sale of the property and warehouse records indicating that the property was not in Massachusetts at the time the contract was executed. Similar records substantiating the terms of the contract and the location of the property at the time of sale are also acceptable.

2. Property sold for delivery out of state (sales exempt under M.G.L. c. 64H, § 6(b)). Records for transactions exempt under M.G.L. c. 64H, § 6(b), and 830 CMR 64H.6.7(3)(a)3. through 5. must substantiate that the vendor was obligated to deliver the item out of state, the name and address of the purchaser, and the place and manner of delivery, e.g., "own truck" or "FOB destination." In the case of property driven, towed, or sailed out of state, the records should specify the name of the person driving, towing, or sailing the property and the means by which that person returned to Massachusetts. Where applicable, records should also indicate the name and address of any designee to receive the property. The following records, properly completed, are acceptable records of delivery:

a. Invoices:

b. Bills of lading or freight manifests;

c. Delivery records or receipts signed by the customer:

d. Delivery logs, mail logs, trip or travel logs (including receipts for travel expenses), as applicable; or

e. Other similar records.

(b) Record Retention

1. The vendor must retain copies of the records required by 830 CMR 64H.6.7(4)(a) as records of exempt transactions. Since the burden of proof that a transaction is exempt from tax lies upon the vendor, M.G.L. c. 64H, § 8(a), failure to maintain adequate records will generally mean that the vendor will not sustain this burden of proof. This may result in the assessment of additional tax, plus interest and penalties.

2. The records required by 830 CMR 64H.6.7(4)(a) must be kept, at a minimum, until the statute of limitations for making additional assessments for the tax period for which the return was due has expired. Generally this is three years from the due date of the return or from the actual date the return was filed, whichever is later. *See* 830 CMR 62C.25.1(3); 830 CMR 62C.26.1. The statute of limitations is six years if the vendor omits from the sales tax return an amount greater than 25% of the amount properly includible on it. M.G.L. c. 62C, § 26(h).

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or states of assignment, using a method that reflects an effort to approximate the results that would be obtained under the applicable rules or standards set forth in 830 CMR 63.38.1(9)(d).

ii. Approximation Based Upon Known Sales. In any instance where, applying the applicable rules in 830 CMR 63.38.1(9)(d)4., pertaining to sales of services, a taxpayer can ascertain the state or states of assignment of a substantial portion of its sales of substantially similar services ("assigned sales"), but not all of such sales, and the taxpayer reasonably believes, based on all available information, that the geographic distribution of some or all of the remainder of such sales generally tracks that of the assigned sales, it shall include those sales which it believes tracks the geographic distribution of the assigned sales in its sales factor in the same proportion as its assigned sales. 830 CMR 63.38.1(9)(a)1.e.ii. also applies in the context of licenses and sales of intangible property where the substance of the transaction resembles a sale of goods or services. *See* 830 CMR 63.38.1(9)(d)5.e. and 6.a.v.

f. Rules With respect to Exclusion of Sales from the Sales Factor.

i. In any case in which a taxpayer cannot ascertain the state or states to which a sale is to be assigned pursuant to the applicable rules set forth in 830 CMR 63.38.1(9)(d) (including through the use of a method of reasonable approximation, where relevant) using a reasonable amount of effort undertaken in good faith, the sale shall be excluded from the numerator and the denominator of the taxpayer's sales factor.

ii. In any case in which a taxpayer can ascertain the state or states to which a sale is to be assigned pursuant to the applicable rules set forth in 830 CMR 63.38.1(9)(d), but the taxpayer is not taxable in one or more such states, the sales that would otherwise be assigned to such states where the taxpayer is not taxable shall be excluded from the numerator and denominator of the taxpayer's sales factor. The rules to determine whether a taxpayer is taxable in a state are set forth at 830 CMR 63.38.1(5).

g. Changes in Methodology: Commissioner Review.

i. General Rules Applicable to Original Returns. In any case in which a taxpayer files an original return for a taxable year in which it properly assigns its sales using a method of assignment, including a method of reasonable approximation, in accordance with 830 CMR 63.38.1(9)(d), the application of such method of assignment shall be deemed to be a correct determination by the taxpayer of the state or states of assignment to which the method is properly applied. In such cases, neither the Commissioner nor the taxpayer (through the form of an audit adjustment, amended return, abatement application or otherwise) may modify the taxpayer's methodology as applied for assigning such sales for such taxable year. However, the Commissioner and the taxpayer may each subsequently, through the applicable administrative process, correct either factual errors or calculation errors with respect to the taxpayer's application of its filing methodology.

ii. Commissioner Authority to Adjust a Taxpayer's Return. The Commissioner's ability to review and adjust a taxpayer's assignment of sales on a return to more accurately assign such sales consistent with the rules or standards of 830 CMR 63.38.1(9)(d), includes, but is not limited to, each of the following potential actions.

(A) In any case in which a taxpayer fails to properly assign a sale in accordance with the rules set forth in 830 CMR 63.38.1(9)(d), including the failure to properly apply a hierarchy of rules consistent with the principles of 830 CMR 63.38.1(9)(d)1.d.ii., the Commissioner may adjust the assignment of such sales in accordance with the applicable rules in 830 CMR 63.38.1(9)(d).

(B) In any case in which a taxpayer uses a method of approximation to assign its sales and the Commissioner determines that the method of approximation employed by the taxpayer is not reasonable, the Commissioner may substitute a method of approximation that the Commissioner determines is appropriate or may exclude the sales from the taxpayer's numerator and denominator, as appropriate.

(C) In any case in which the Commissioner determines that a taxpayer's method of approximation is reasonable, but has not been applied in a consistent manner with respect to similar transactions or year to year, the Commissioner may require that the taxpayer apply its method of approximation in a consistent manner.

(D) In any case in which a taxpayer excludes sales from the numerator and denominator of its sales factor on the theory that the assignment of such sales cannot be reasonably approximated, the Commissioner may determine that the exclusion of such sales is not appropriate, and may instead substitute a method of approximation that the Commissioner determines is appropriate.

(E) In any case in which a taxpayer fails to retain contemporaneous records that explain the determination and application of its method of assigning its sales, including its underlying assumptions, or fails to provide such records to the Commissioner upon request, the Commissioner may treat the taxpayer's assignment of sales as unsubstantiated, and may adjust the assignment of such sales in a manner consistent with the applicable rules in 830 CMR 63.38.1(9)(d).

(F) In any case in which the Commissioner concludes that a taxpayer's customer's billing address was selected for tax avoidance purposes, the Commissioner may adjust the assignment of sales to such customer in a manner consistent with the applicable rules in 830 CMR 63.38.1(9)(d).

iii. Taxpayer Authority to Change a Method of Assignment on a Prospective Basis. In filing its original return for a tax year, a taxpayer may change its method of assigning its sales under 830 CMR 63.38.1(9)(d) from the method it used in the preceding year, including changing its method of approximation from that used on previous returns. However, the taxpayer may only make such change for purposes of improving the accuracy of assigning its sales consistent with the 830 CMR 63.38.1(9)(d), including, for example, to address the circumstance where there is a change in the information that is available to the taxpayer as relevant for purposes of complying with such rules. Further, a taxpayer that seeks to change its method of assigning its sales must disclose, in the original return filed for the year of the change, the fact that it is has made the change, and must retain and provide to the Commissioner upon request documents that explain the nature and extent of the change, and the reason for the change. If a taxpayer fails to adequately disclose such change or retain and provide such records upon request, the Commissioner may disregard the taxpayer's change and substitute an assignment method that the Commissioner determines is appropriate.

iv. Commissioner Authority to Change a Method of Assignment on a Prospective Basis. The Commissioner may direct a taxpayer to change its method of assigning its sales in tax returns that have not yet been filed, including changing the taxpayer's method of approximation, if upon reviewing the taxpayer's filing methodology applied for a prior tax year, the Commissioner determines that such change is appropriate to

reflect a more accurate assignment of the taxpayer's sales within the meaning of 830 CMR 63.38.1(9)(d), and determines that such change can be reasonably adopted by the taxpayer. The Commissioner will provide the taxpayer with a written explanation as to the reason for making such change. In any case in which a taxpayer fails to comply with the Commissioner's direction on subsequently filed returns, the Commissioner may deem the taxpayer's method of assigning its sales on such returns to be unreasonable, and may substitute an assignment method that the Commissioner determines is appropriate.

h. Industry-specific Alternative Apportionment Rules. Prior to the enactment of St. 2013, c. 46, § 37, the Commissioner promulgated six industry-specific alternative apportionment regulations to address industries where the application of the provisions of M.G.L. c. 63, § 38 were not reasonably adapted to approximate the net income derived from business carried on within Massachusetts. *See* M.G.L. c. 63, § 38(j). Following the enactment of St. 2013, c. 46, § 37, the Commissioner reviewed those six industry-specific alternative apportionment regulations, and determined for each industry that the provisions of M.G.L. c. 63, § 38 as a whole continue not to be reasonably adapted to approximate the net income derived from business carried on within Massachusetts. However, in the case of three of the industries, the Commissioner determined that industry-specific alternative sales factor rules were no longer needed in light of St 2013, c. 46, § 37. In the case of the other three industries, the Commissioner determined that the industry-specific alternative sales factor rules remain necessary.

i. Industry-specific Sales Factor Provisions that Remain in Effect. Prior to the enactment of St. 2013, c. 46, § 37 the Commissioner promulgated industry-specific alternative apportionment regulations for pipeline companies, corporations engaged in the electricity industry, and corporations engaged in the telecommunications industry. *See* 830 CMR 63.38.8 (pipeline companies); 830 CMR 63.38.10 (electricity industry) and 830 CMR 63.38.11 (telecommunications industry). These industry-specific regulations remain fully in effect and are not superseded in whole or in part by 830 CMR 63.38.1(9)(d), as these regulations continue to address circumstances where the provisions of M.G.L. c. 63, § 38, including M.G.L. c. 63, § 38(f), are not reasonably adapted to approximate the net income derived from business carried on within Massachusetts. However, a special rule pertaining to taxpayers that provide telecommunications services that are also engaged in the sale or license of digital goods and services shall apply notwithstanding the rules set forth in 830 CMR 63.38.11. *See* 830 CMR 63.38.1(9)(d)7.b.ii.

ii. Industry-specific Sales Factor now Determined under 830 CMR 63.38.1.(9)(d). Prior to the enactment of St. 2013, c. 46, § 37 the Commissioner promulgated industry-specific alternative apportionment regulations for motor carriers, airlines, and courier and package delivery services. *See* 830 CMR 63.38.2 (airlines); 830 CMR 63.38.3 (motor carriers); 830 CMR 63.38.4 (courier and package delivery services). In each of these cases, the sales factor is now determined pursuant to 830 CMR 63.38.1(9)(d). The industry-specific property and payroll factor rules for those industries remain fully in effect

i. Application to Services Provided Directly or Indirectly to a RIC. Nothing in 830 CMR 63.38.1(9)(d) shall be construed to supersede or affect the application of 830 CMR 63.38.7 that apply to mutual fund service corporations. *See* M.G.L. c. 63, § 38(m). However, rules with respect to mutual fund sales, as defined at 830 CMR 63.38.1(2), as made by a taxpayer that is not a mutual fund service corporation, are set forth at 830 CMR 63.38.1(9)(d)4.d.iii.(D).

Code of Massachusetts Regulations
Title 830: Department of Revenue
Chapter 63.00: Taxation of Corporations (Refs & Annos)

830 CMR 63.38M.1

63.38M.1: Massachusetts Research Credit

Currentness

(1) Statement of Purpose, Outline of Topics, Effective Date.

(a) Purpose of 830 CMR 63.38M.1. 830 CMR 63.38M.1 explains the calculation of the corporate excise credit for Massachusetts research expenses afforded by M.G.L.C. 63, § 38M.

(b) Outline of Topics. Following is a list of sections contained in 830 CMR 63.38M.1.

1. Statement of Purpose, Outline of Topics, Effective Date.

2. Definitions.

3. General.

4. Massachusetts Qualified Research Expenses.

5. Massachusetts Qualified Research Base Amount.

6. Massachusetts Basic Research Payments.

7. Controlled Groups and Entities Under Common Control.

8. Limitations on the Credit.

9. Interaction with Other Credits.

10. Carry Over of Unused Credit.

11. Mergers and Changes of Ownership.

12. Combined Groups.

13. Election to Calculate Massachusetts Qualified Research Expense Credit Separately for Defense Related Activities and Other Qualified Activities.

14. Recordkeeping and Accounting Requirements.

(c) Effective Date. 830 CMR 63.38M.1 generally applies to expenses incurred on or after January 1, 1991. The election described in 830 CMR 63.38M.1(13) may be made for taxable years beginning on or after January 1, 1995. Changes in the effect of the election to use Massachusetts gross receipts described in 830 CMR 63.38M.1(5)(d)3., are generally effective for tax years beginning on or after January 1, 1997.

(2) Definitions. For purposes of 830 CMR 63.38M.1, the following terms shall have the following meanings, unless the context requires otherwise:

Aggregated group, a group of entities required to aggregate their activities under 830 CMR 63.38M.1(7), for purposes of determining the credit.

Basic Research, any research, the payments for which, are basic research payments under Section 41(e) of the Code.

Code, the Internal Revenue Code of the United States as amended and in effect on August 12, 1991.

Corporation, a corporation organized under or subject to M.G.L.C. 156B, and subject to the excise imposed by M.G.L.C. 63, § 32, or a corporation, association, or organization established under laws other than those of Massachusetts, and subject to the excise imposed by M.G.L.C. 63, § 39.

Credit or Massachusetts credit, the credit for research expenses allowed by M.G.L.C. 63, § 38M, as added by St. 1991, c. 176, § 6.

Defense Related Activities, any activity carried out in Massachusetts, relating to the business of researching, developing and producing for sale, pursuant to a contract or subcontract, of any arm, ammunition or implement of war designated in the munitions list published pursuant to 22 U.S.C. 2778, but only to the extent that such property is specifically designed, modified, or equipped for military purposes, or equipment for the National Aeronautics and Space Administration.

Federal Credit, the credit against the federal income tax allowed by Section 38(b)(4) of the Code, as determined under Section 41(a) of the Code.

Qualified Research, any research, the expenses related to which are qualified research expenses under Section 41(b) of the Code.

Research facility located in Massachusetts, a site, physically located in Massachusetts used to conduct qualified or basic research.

(3) General.

(a) Computation of Credit. The Massachusetts credit for research expenses for the taxable year shall be an amount equal to the sum of the following amounts:

1. 10% of the excess, if any, of Massachusetts qualified research expenses for the taxable year, as determined under 830 CMR 63.38M.1(4), over the Massachusetts qualified research base amount, as determined under 830 CMR 63.38M.1(5), plus

2. 15% of Massachusetts basic research payments for the taxable year, as determined under 830 CMR 63.38M.1(6).

(b) Eligibility for the Credit. The Massachusetts credit for research expenses is available to all domestic corporations subject to tax under M.G.L.C. 63, § 32, and all foreign corporations subject to tax under M.G.L.C. 63, § 39.

(c) Eligible Expenses. The credit applies only to research expenses incurred on or after January 1, 1991.

(d) Effect on Net Income. In determining net income for a taxable year under M.G.L.C. 63, § 30.5(b), the deduction that may be taken with respect to any expenses that qualify for the credit must be determined by reducing the amount of such expenses for the taxable year by the amount of the credit determined for the taxable year under 830 CMR 63.38M.1(3)(a). For purposes of this provision, 830 CMR 63.38M.1(3)(d), the amount of the credit includes any amount of credit disallowed for the taxable year under the limitations described at 830 CMR 63.38M.1(8), but does not include any amount of credit carried over from previous taxable years under the provisions of 830 CMR 63.38M.1(10). Also, in determining net income for a taxable year, Subsection (c) of Section 280C of the Code, as amended and in effect for the taxable year, shall not apply.

(e) S Corporations. S corporations may apply the credit against their corporate excise liability under the non-income or, if applicable, the income measure of the corporate excise. The credit does not flow through to the individual shareholders of an S corporation.

(f) Unincorporated Flow-Through Entities. Unincorporated flow-through entities, such as partnerships and joint ventures, shall be treated as flow-through entities for purposes of determining the credit, unless the aggregation provisions of 830 CMR 63.38M.1(7), require otherwise. All amounts relevant to the calculation of the credit that are paid or received by such entities shall be attributed to the owners of the entities in accordance with Section 704 of the Code, as amended and in effect for the taxable year, and shall be taken into account in determining the credit for the taxable year during which the taxable year of the unincorporated flow-through entity ends.

(g) Accounting Rules. For all purposes under 830 CMR 63.38M.1, in determining when a research expense is incurred, corporations shall use the same method of accounting as they use to compute the federal credit under Section 41 of the Code.

(4) Massachusetts Qualified Research Expenses.

(a) General. A corporation's Massachusetts qualified research expenses for a taxable year are those expenses that meet both of the following requirements:

1. The expenses must be qualified research expenses under Section 41(b) of the Code; and

2. The expenses must have been incurred for research activity conducted in Massachusetts.

(b) Research Activity Conducted in Massachusetts. Expenses incurred for research activity conducted in Massachusetts are:

1. Wages. Wages paid for qualified services, as defined by Section 41(b)(2)(B) of the Code, performed in Massachusetts;

2. Supplies. Amounts paid for supplies, as defined by Section 41(b)(2)(C) of the Code, used or consumed in Massachusetts in conducting qualified research;

3. Computer fees. Amounts paid for the right to use computers located in Massachusetts in the conduct of qualified research that takes place in Massachusetts, to the extent such amounts are treated as in-house research expenses under Section 41(b)(2)(A)(iii) of the Code;

4. Contract research expenses. 65% of amounts paid to other persons as contract research expenses, as defined by Section 41(b)(3) of the Code, to the extent attributable to research activity conducted at a research facility located in Massachusetts.

Where such expenses relate to amounts paid for services performed both within and outside Massachusetts or tangible personal property used both within and outside Massachusetts, the amount of the expense must be prorated between Massachusetts and non-Massachusetts activity based on the ratio of days the service provider or tangible personal property was employed in research in Massachusetts to the total number of days the service provider or tangible personal property was employed in research both within and outside Massachusetts.

(5) Massachusetts Qualified Research Base Amount.

(a) General. The Massachusetts qualified research base amount is the product of the following amounts:

1. The Massachusetts fixed-base percentage, and

2. The average annual gross receipts of the corporation for the four taxable years preceding the taxable year for which the credit is being determined, as computed under 830 CMR 63.38M.1(5)(d).

(b) Minimum Massachusetts Qualified Research Base Amount. Notwithstanding the provisions of 830 CMR 63.38M.1(5)(a), in no event shall the Massachusetts qualified research base amount for the taxable year for which the credit is being determined be less than 50% of the Massachusetts qualified research expenses as computed for the taxable year under 830 CMR 63.38M.1(4)(a).

(c) Massachusetts Fixed-Base Percentage.

1. General rule. Except as provided below, the Massachusetts fixed-base percentage is determined by dividing the corporation's aggregate Massachusetts qualified research expenses, as determined under 830 CMR 63.38M.1(4)(a), for all taxable years beginning after December 31, 1983, and before January 1, 1989, by the corporation's aggregate gross receipts for such taxable years, as computed under 830 CMR 63.38M.1(5)(d). However, in no event shall the Massachusetts fixed-base percentage exceed 16%. Massachusetts fixed-base percentage shall be rounded to the nearest 1/100 of 1%.

2. Start-up companies. If there are fewer than three taxable years beginning after December 31, 1983, and before January 1, 1989, in which the corporation had both (i) gross receipts, computed under Section 41(c)(3)(A) of the Code, attributable to Massachusetts sales, or, in the case of a corporation that makes the election to use federal gross receipts under 830 CMR 63.38M.1(5)(d), gross receipts, computed under Section 41(c)(3)(A) of the Code, whether or not attributable to Massachusetts sales, and (ii) Massachusetts qualified research expenses, as determined under 830 CMR 63.38M.1(4)(a), the Massachusetts fixed base percentage is three percent.

3. Inadequate Records. If a corporation cannot compute the Massachusetts fixed-base percentage as required by 830 CMR 63.38M.1(5)(a)1., due to inadequate accounts and records for the base period, the Massachusetts fixed base percentage is 16%.

(d) Gross receipts. For purposes of 830 CMR 63.38M.1(5)(a)2., the average annual gross receipts of the corporation for the four taxable years preceding the taxable year for which the credit is being determined shall be computed in the same manner as required under Section 41(c)(1)(B) of the Code, and for purposes of 830 CMR 63.38M.1(5)(c)1., aggregate gross receipts for the base period shall be determined in the same manner as required under Section 41(c)(3)(A) of the Code. Gross receipts may be reduced by returns and allowances as allowed under Section 41(c)(5) of the Code.

1. Election to use Massachusetts Gross Receipts. Notwithstanding the provisions of this subsection, 830 CMR 63.38M.1(5)(d), a corporation may elect to compute gross receipts using only those gross receipts attributable to Massachusetts sales, provided that the election shall apply to both the computation of the average annual gross receipts for purposes of 830 CMR 63.38M.1(5)(a)2., and aggregate gross receipts for purposes of 830 CMR 63.38M.1(5)(c)1.

2. Method of Election. The election may be made when filing the return for the first taxable year for which the credit is claimed and must be made thereafter in accordance with 830 CMR 63.38M.1 (5)(d)3. The election generally may not be made retroactively on an amended return or claim for abatement. However, subject to the limitations in M.G.L.C. 62C, § 37, and 830 CMR 62C.37.1, a corporation may make an election on an amended return for the earliest taxable year within that limitation period provided that the corporation was eligible for the credit for that taxable year and did not claim the credit on the return for that taxable year or any prior year. Corporations shall indicate their election by checking the appropriate box on Schedule RC, Research Credit or RC-A, Research Credit-Aggregation.

3. Election Effective for Three Taxable Years.

a. Generally a corporation will be bound by its choice to compute the credit using Massachusetts gross receipts or federal gross receipts for three consecutive taxable years commencing with the year in which the choice is made.

Thereafter, the corporation may alter its choice prospectively in any subsequent taxable year, provided that any change in method shall be binding for the three year period commencing with the year of the change.

b. If a corporation first claimed the credit for any taxable year commencing before January 1, 1997, it may change its method prospectively, as provided in 830 CMR 63.38M.1.(5)(d)3.a., in a taxable year commencing on or after January 1, 1997, provided that it used (or was bound by) the previous method for at least three taxable years. A corporation may not change its method for any taxable year commencing before January 1, 1997.

c. Any change of method permitted under 830 CMR 63.38M.1(5)(d)3, must be made on the return for the taxable year in which the change will take effect and may not be revoked or retroactively altered by filing an amended return or claim for abatement. However, in order to assist taxpayers who may have filed their 1997 returns prior to the promulgation of 830 CMR 63.38M.1 as amended, a corporation that is otherwise eligible to do so may change its method for its taxable year beginning during the 1997 calendar year either on its original return for that year or by filing an amended return for such taxable year on or before the due date, determined without regard to extensions, of the return for the next taxable year.

4. Aggregated groups. All members of an aggregated group, as defined by 830 CMR 63.38M.1.(7)(b), must compute gross receipts in the same manner. If the group elects to base the computation of the credit on Massachusetts gross receipts, the election is binding on all members in subsequent taxable years as provided in 830 CMR 63.38M.1(5)(d)3. Entities that are members of an aggregated group when an election is made shall continue to be bound by the election for the three year period commencing with the year of the change, whether or not they remain part of the group. However, when an entity leaves an aggregated group and in any subsequent taxable year becomes a member of a new aggregated group, the entity shall compute gross receipts in the same manner as the new aggregated group.

5. Massachusetts gross receipts. Gross receipts attributable to Massachusetts sales for any taxable year shall include all gross receipts as computed under 830 CMR 63.38M.1(5)(d), that are included in the numerator of the corporate excise apportionment sales factor under M.G.L.C. 63, § 38(f), as determined for the taxable year in which the gross receipts are received or deemed received under M.G.L.C. 63. For purposes of determining gross receipts attributable to Massachusetts sales under 830 CMR 63.38M.1(5)(d)5., the throwback rule of M.G.L.C. 63, 38 (f) shall apply.

(e) Proration of Massachusetts Qualified Research Base Amount. For taxable years beginning before January 1, 1991, and ending before December 31, 1991, only, the Massachusetts qualified research base amount shall be multiplied by a fraction, the numerator of which is the number of days in such taxable year beginning on or after January 1, 1991, and the denominator of which is the total number of days in such taxable year.

(6) Massachusetts Basic Research Payments.

(a) General. Massachusetts basic research payments taken into account for purposes of 830 CMR 63.38M.1(3)(a)2., shall be equal to the excess of such Massachusetts basic research payments over the Massachusetts base period amount.

(b) Base Period. For purposes of determining Massachusetts basic research payments the base period is the three taxable year period ending with the taxable year immediately preceding the first taxable year of the corporation beginning after

