COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

U.S. AUTO PARTS NETWORK, INC. v. COMMISSIONER OF REVENUE

Docket No. C339523 Promulgated: December 7, 2021

This an appeal 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 ("appellee" or "Commissioner") to grant an abatement of use tax assessed to U.S. Auto Parts Network, Inc. ("U.S. Auto Parts" or "appellant") for the monthly tax period of October 2017 ("tax period at issue").

Commissioner DeFrancisco heard the appellant's Motion for Summary Judgment and the Commissioner's Cross Motion for Summary Judgment. Chairman Hammond and Commissioners Good, Elliott, and Metzer joined him in the allowance of the appellant's Motion for Summary Judgment and the decision for the appellant.

These findings of fact and report are made at the request of the appellee pursuant to G.L. c. 58A, § 13 and 831 CMR 1.32.

George S. Isaacson, Esq., *Martin I. Eisenstein,* Esq., and *Jamie E. Szal,* Esq. for the appellant.

Timothy R. Stille, Esq., *Brett M. Goldberg,* Esq., and *Michael T. Fatale*, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

I. INTRODUCTION

U.S. Auto Parts appealed to the Appellate Tax Board ("Board") from the Commissioner's refusal to abate an assessment of use tax against it under a newly enacted regulation, 830 CMR 64H.1.7 ("Regulation"). The Commissioner determined that the Regulation required U.S. Auto Parts, which had not previously had a use tax collection, remittance, or return obligation, to collect use tax from Massachusetts customers purchasing its products via the Internet and remit such tax to the Commissioner.

The fundamental issue before the Board is whether the Commissioner could impose a use tax collection and remittance responsibility on U.S. Auto Parts, an out-of-state corporation whose presence in Massachusetts was limited to the placement of "cookies" and "apps" on the computers and portable devices of its Massachusetts customers and the use of third-party "content delivery networks" ("CDNs") that allowed U.S. Auto Parts' customers expedited access to its website via the CDNs' servers located in Massachusetts and elsewhere.

U.S. Auto Parts moved for summary judgment, arguing that it did not have a "physical presence" in Massachusetts under the Supreme Court precedent in ***Quill Corp. v. North Dakota,*** 504 U.S.

298 (1992) ("***Quill***") and, therefore, the Commissioner could not impose on it a use tax collection and remittance responsibility.

The Commissioner opposed U.S. Auto Parts' motion and moved for summary judgment in his favor. The principal focus of the Commissioner's argument is that the Supreme Court's decision in ***South Dakota v. Wayfair, Inc.,*** 138 S.Ct. 2080 (2018) ("***Wayfair***"), promulgated nine months after the effective date of the Regulation and the tax period at issue, overruled ***Quill*** and its physical presence standard and must be applied retroactively to the present appeal.[1]

In addition to the pleadings, each party submitted affidavits to provide the factual bases for their respective motions. The Board found that the parties were in substantial agreement as to all the relevant facts and that there was no genuine dispute as to any material fact. To the extent that the Commissioner took exception to some statements or characterizations contained in the affidavits submitted by U.S. Auto Parts, the Board viewed any facts within those statements in the light most favorable to the Commissioner. *See, e.g.,* ***Lynch v. Crawford,*** 483 Mass. 631, 641

[1] The Commissioner also argued that if the Board were to determine that the analysis in ***Quill,*** and not ***Wayfair,*** governed this appeal, the assessment either should stand under ***Quill*** or the Commissioner should be allowed discovery to explore the issue of whether U.S. Auto Parts' use of cookies, apps, and its third-party CDNs constituted "physical presence" for purposes of the ***Quill*** analysis. As explained below, the Board determined that whether U.S. Auto Parts' contacts amounted to "physical presence" within the meaning of ***Quill*** was an issue of law for which no further factual development was necessary.

(2019). On the basis of the pleadings and the facts contained in the parties' affidavits,[2] the Board made the following findings of fact.

II. ASSESSMENT AND JURISDICTION

By letter dated October 20, 2017, the Commissioner notified U.S. Auto Parts that "based on information available to the Department your business meets the nexus criteria of [the Regulation], and, as such is required to collect and remit sales/use tax on sales of tangible personal property delivered to customers in the Commonwealth." The Commissioner's October 20, 2017, letter requested that U.S. Auto Parts file sales and use tax returns on Forms ST-9 for the periods beginning on the effective date of the Regulation, October 1, 2017.

The Commissioner then issued a Notice of Failure to Register and File on December 12, 2017, to which U.S. Auto Parts responded by letter dated January 12, 2018. Because U.S. Auto Parts did not file a return or remit tax for the tax period at issue, the Commissioner issued a Notice of Intent to Assess on January 29, 2018, and a Notice of Assessment on March 15, 2018. The assessment for the tax period at issue totaled $60,139.81 and included a double assessment of tax under G.L. c. 62C, § 28, penalties for a

[2] The Board allowed the Commissioner's Motion to Strike the Affidavit of Professor Eric Goldman. Accordingly, the Board did not rely on any facts or opinions contained in Professor Goldman's affidavit.

late filed return and late payment of tax under G.L. c. 62C, § 32, and interest ("subject assessment").

On April 9, 2018, U.S. Auto Parts timely filed an abatement application with the Commissioner. The Commissioner took no action on the abatement application and, on September 9, 2019, U.S. Auto Parts withdrew its consent for the Commissioner to act after more than six months. The abatement application was therefore deemed denied under G.L. c. 58A, § 6 as of September 9, 2019. U.S. Auto Parts timely appealed to the Board on October 18, 2019.[3] On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

III. U.S. AUTO PARTS' CONTACTS WITH MASSACHUSETTS

At all material times, U.S. Auto Parts was an online retailer headquartered in California that sold after-market automobile parts and accessories. U.S. Auto Parts sold products over the Internet, and to a lesser extent by catalog, to customers throughout the United States, including Massachusetts. During the twelve months preceding the tax period at issue, U.S. Auto Parts had more than $500,000 in Massachusetts sales from one-hundred or more on-line transactions with Massachusetts customers, threshold amounts that triggered the applicability of the Regulation.

[3] With the Board's permission, U.S. Auto Parts filed an amended petition on January 28, 2020.

U.S. Auto Parts delivered the products sold to its customers via common carrier from locations outside of Massachusetts. It did not own or lease any offices, facilities, inventory, or equipment in Massachusetts, and had no employees or representatives in Massachusetts.

With respect to its Internet sales, U.S. Auto Parts sold its products primarily through three websites: Carparts.com; JC Whitney; and the Auto Parts Warehouse. U.S. Auto Parts also made Internet sales through secondary websites.

To facilitate its Internet sales, U.S. Auto Parts used the following electronic tools that the Commissioner determined, in accordance with the Regulation, constituted the requisite in-state physical presence under ***Quill***:

A. Cookies

U.S. Auto Parts used "cookies" to improve its customers' use of its websites. A cookie is a data file of up to four kilobytes in the form of an electric or magnetic charge in specific sequences that is transferred from the U.S. Auto Parts websites to a customer's computer. The purpose of the cookie is to facilitate communications between the U.S. Auto Parts websites and the customer.

The transfer of a cookie or cookies to a customer's computer occurred when a customer accessed a U.S. Auto Parts website. When a customer returned to the U.S. Auto Parts website, the cookie was

designed to give the website access to a portion of the customer's computer's memory. Cookies included both "first party cookies" that were used directly by U.S. Auto Parts itself and "third party cookies" that were used by other parties who provided advertising and other services to U.S. Auto Parts. Both types of cookies recorded customer data for use by U.S. Auto Parts.

Each cookie had an expiration date after which it could no longer be used. Some cookies expired after the customer's browsing session was over, others expired in a few days, months, or up to five years.

B. Mobile applications

In addition to accessing U.S. Auto Parts website via a computer, U.S. Auto Parts customers were able to download a mobile application for portable digital devices ("apps") on their portable devices, including cell phones. The U.S. Auto Parts' apps were available for portable devices using either the iOS or Android operating systems. Customers, including Massachusetts customers, could download U.S. Auto Parts apps from anywhere in the United States for use anywhere in the United States.

Like cookies that can be stored on the computers of customers, apps are stored on the customer's portable device in the form of electric or magnetic strings of data. Unlike cookies that have expiration dates, apps downloaded by a U.S. Auto Parts customer

will generally remain on the customer’s portable device until customers remove the apps.

C. CDNs

CDNs were third-party entities that allowed U.S Auto Parts’ websites to be accessed on the CDNs’ interconnected servers located throughout the world, including servers located in Massachusetts, and helped to facilitate and improve a customer’s access to U.S. Auto Parts websites by handling Internet traffic directed to the websites. Customers attempting to access the U.S. Auto Parts websites were routed to the CDNs’ server that could provide the fastest response to the customer. U.S. Auto Parts’ use of the CDNs allowed its customers faster access to its websites than would be possible if the websites were only available to customers through U.S. Auto Parts’ own servers.

U.S. Auto Parts did not specify or control to which of the CDNs’ servers its customers were directed. Massachusetts customers’ website access requests were directed to the CDNs’ servers providing the fastest and most reliable access to the U.S. Auto Parts websites, which could be a CDNs’ server in Massachusetts or a server located outside of Massachusetts.

Once the website access requests were directed to one of the CDN’s servers, customers had access to a full reproduction of the U.S. Auto Parts websites. By accessing the U.S. Auto Parts websites, customers would download software code that helped the

websites appear and properly function, along with the cookies previously described. Customers visiting the U.S. Auto websites were therefore accessing the websites through, and receiving software and cookies from, one of the CDN's servers.

As will be detailed in the following Opinion and on the basis of the foregoing undisputed facts, the Board ruled that U.S. Auto Parts' use of cookies, apps, and CDNs did not constitute physical presence in the Commonwealth within the meaning of ***Quill***. The Board further ruled that the Court's decision in ***Wayfair*** cannot be applied retroactively to the tax period at issue. Accordingly, because the Board ruled that the ***Quill*** physical presence standard precluded the Commissioner's assessment of use tax and related penalties and interest, the Board issued a decision for the appellant in this appeal and granted an abatement in the amount of $60,139.81 plus statutory additions.

OPINION

I. STATUTORY FRAMEWORK

At all material times, Massachusetts imposed an excise on the "storage, use or other consumption" of tangible personal property purchased from a vendor for storge, use, or other consumption in the commonwealth. G.L. c. 64I, § 2. Responsibility for payment of the use tax to the Commissioner is generally on the purchaser of the tangible personal property. G.L. c. 64I, § 3.

However, in certain instances, the vendor bears responsibility for collecting the use tax from the purchaser and remitting it to the Commissioner. During the tax period at issue, G.L. c. 64I, § 4 provided, in pertinent part, that every "vendor engaged in business in the commonwealth and making sales of tangible personal property or services for storage, use or other consumption in the commonwealth . . . shall at the time of making the sales . . . collect the [use] tax from the purchaser. . . . The tax required to be collected by the vendor shall constitute a debt owed by the vendor to the commonwealth."

The version of the statute applicable to the tax period at issue defined a vendor "engaged in business in the commonwealth" as one 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 communication medium.

G.L. c. 64H, § 1, made applicable to the use tax pursuant to G.L. c. 64I, § 1.

The above language was added by St. 1988, c. 202, § 19 ("1988 Amendment"). In response to the 1988 Amendment of the definition

of "engaged in business in the commonwealth," the Commissioner issued TIR 88-13, in which he stated that the "general effect of this amendment is to expand the jurisdiction of Massachusetts to enable the State to collect sales and use taxes from foreign vendors that regularly solicit orders for sales from Massachusetts customers, through the mails or otherwise, but that do not maintain a business location in the Commonwealth." The Commissioner went on in TIR 88-13 to advise the public that the Department of Revenue would "refrain from enforcing" the newly expanded taxing authority "until federal statutory or case law specifically authorizes each state to require foreign mail order vendors to collect sales and use taxes on goods delivered to that state."

II. THE PHYSICAL PRESENCE RULE: *BELLAS HESS* AND *QUILL*

The Commissioner's reluctance to exercise the expanded authority to tax out-of-state vendors that exploit the Massachusetts retail sales market by "any means whatsoever," including advertising, is understandable given the state of U.S. Supreme Court precedent at that time. Some twenty-two years prior to the 1988 Amendment, the Supreme Court ruled that Illinois' attempt to impose a use tax collection and remittance obligation on a mail order house with no outlets, sales representatives, or other physical presence in Illinois violated both the Due Process and Commerce Clauses of the U.S. Constitution. *See* ***National Bellas***

Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753 (1967) ("***Bellas Hess***").

Approximately one year before the 1988 Amendment was enacted, North Carolina adopted a similar expansion to its sales and use tax provisions regarding out-of-state retailers, defining a "retailer" to include "every person who engages in regular or systematic solicitation of a consumer market in this State." *See* ***Quill,*** 504 U.S. at 302-03 (1992). Quill Corporation, which had no physical presence in North Dakota as that term was defined in ***Bellas Hess***, challenged the constitutionality of the North Dakota statute. The North Dakota Supreme Court declined to follow the physical presence test in ***Bellas Hess,*** ruling that developments in Due Process and Commerce Clause jurisprudence as well as in the mail order industry justified rejection of the ***Bellas Hess*** analysis. ***Quill,*** 504 U.S. at 303-04.

The Supreme Court granted *certiorari* and agreed with the North Dakota Supreme Court that developments in the Court's Due Process jurisprudence supported the conclusion that the Due Process Clause does not require physical presence in a state for the imposition of a duty to collect and remit use tax. ***Id.*** at 308. However, the Court concluded that the ***Bellas Hess*** "bright-line" physical presence rule "furthers the end of the dormant Commerce Clause." ***Quill,*** 504 U.S. at 314. After conceding that the bright-line rule of ***Bellas Hess*** is "artificial at its edges" and may turn on small

factors, the Court noted the benefits of such a rule, and in particular:

> a bright-line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals. Indeed, it is not unlikely that the mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation created in ***Bellas Hess.***

Id. at 316.

The Court also noted that the bright-line physical presence rule had "engendered substantial reliance and had become part of the basic framework of a sizeable industry," and that adhering to settled precedent advanced the "stability and orderly development of the law," in keeping with the underpinnings of the doctrine of *stare decisis*. ***Id.*** at 317. Finally, the Court deferred to the "ultimate power" of Congress to regulate commerce, particularly where the Court's "overruling of ***Bellas Hess*** might raise thorny questions concerning the retroactive application of those taxes and might trigger substantial unanticipated liability for mail order houses." ***Id.*** at 318, n.10.

In light of the Court's decision in ***Quill*** upholding the physical presence rule, the Commissioner revoked TIR 88-13, since not only was there no federal statutory or case law authorizing the imposition of a collection and remittance obligation on out-of-state vendors with no physical presence in Massachusetts, but the Court had reaffirmed that imposing such an obligation violated

the Commerce Clause. *See* TIR 96-8. Instead, the Commissioner indicated in TIR 96-8 that he would enforce the definition of engaged in business "to the extent allowed under constitutional limitations," *i.e.,* the physical presence limitation as reaffirmed in ***Quill.***

III. THE REGULATION

Some twenty-five years after ***Quill,*** and with no federal statute or Supreme Court decision having abrogated the physical presence rule, the Commissioner adopted the Regulation. In the Regulation, the Commissioner determined that out-of-state Internet vendors with a large volume of sales to Massachusetts customers "invariably have one or more" contacts with Massachusetts that constitute in-state physical presence satisfying ***Quill,*** including cookies, apps, and CDNs. *See* 64H1.7(1)(b)(2)(a and b).[4]

Assuming that a non-Massachusetts vendor making sales into Massachusetts had one or more of the contacts outlined in the Regulation, the vendor would have an obligation to register, collect, and remit Massachusetts use tax for the period October 1, 2017 through December 31, 2017 if, during the preceding 12 months, the vendor "had in excess of $500,000 in Massachusetts sales from transactions completed over the Internet and made sales resulting

[4] In making the subject assessment, the Commissioner did not rely on a third category of contacts mentioned in the Regulation at 830 CMR 64H.1.7(1)(b)(2)(c), contracts or relationships with online marketplace facilitators and/or delivery companies.

in a delivery into Massachusetts in 100 or more transactions." 830 CMR 64H.1.7(3).

There is no dispute that U.S. Auto Parts used cookies, apps, and CDNs to facilitate Massachusetts sales during the tax period at issue and that its volume of Massachusetts sales over the Internet and deliveries to Massachusetts customers satisfied the threshold specified in the Regulation. The parties also agree that, in the absence of the Regulation, the Commissioner could not impose the subject assessment after almost thirty years of refraining from implementing the broad "engaged in business" language found in the 1988 amendment in light of the physical presence rule of ***Bellas Hess*** and ***Quill.*** Accordingly, the principal issue before the Board is whether the Commissioner could by regulation impose a collection and remittance obligation on U.S. Auto Parts – and assess it tax, penalties, and interest for its failure to do so -- where its only in-state contacts were cookies, apps, and CDNs.

IV. RETROACTIVE APPLICATION OF *WAYFAIR*

The Commissioner's primary argument in support of the subject assessment and his Motion for Summary Judgment is that the physical presence rule is not applicable to this appeal because the Supreme Court's decision in ***Wayfair*** overruling the ***Bellas Hess*** and ***Quill*** physical presence rule must be applied retroactively.

In ***Wayfair,*** the Court reviewed a South Dakota statute that, like the statute at issue in ***Quill,*** sought to require out-of-state

retailers with no physical presence in the state to collect and remit use tax, in another effort to have the Court abrogate the physical presence rule. ***Wayfair,*** 138 S. Ct. at 2089 ("South Dakota conceded that the Act cannot survive under ***Bellas Hess*** and ***Quill*** but asserted the importance, indeed the necessity, of asking this Court to review those earlier decisions in light of current economic realities.").

The South Dakota statute required out-of-state sellers to collect and remit sales tax "as if the seller had a physical presence in the state" if the seller, on an annual basis, delivered more than $100,000 in goods and services into the state or engaged in 200 or more separate transactions for the delivery of goods and services in the state. ***Id.*** In describing the minimum sales or transactions requirement of the South Dakota statute, which is clearly inconsistent with the physical presence rule, the Court noted that the statute "forecloses the retroactive application of this requirement and provides means for the Act to be appropriately stayed until the constitutionality of the law has been clearly established." ***Id.***

After analyzing the Court's Commerce Clause cases and the dramatic developments in the national economy brought on by the widespread use of the Internet, the Court overruled ***Quill*** and determined that the physical presence rule was an incorrect interpretation of the Commerce Clause. ***Id.*** at 2099.

Despite abrogating the physical presence rule, the Court did not rule that the South Dakota statute was consistent with the Commerce Clause. Rather, the Court remanded the case to the state court because the "question remains whether some other principle in the Court's Commerce Clause doctrine might invalidate the Act." ***Id.*** Because these issues were not litigated or briefed, the Court declined to resolve them. ***Id.***

However, the Court did provide guidance on features of the South Dakota statute "that appear designed to prevent discrimination against or undue burdens upon interstate commerce." ***Id.*** One such feature that the Court referenced as preventing a Commerce Clause violation was that the statute "ensures that no obligation to remit the sales tax may be applied retroactively." ***Id.*** *See also* **id.** at 2098 (recognizing that the South Dakota statute affords protection to certain merchants because, *inter alia*, "the law is not retroactive").

Despite the Court's emphasis on the South Dakota statute's non-retroactivity provision as a protection against Commerce Clause violations, the Commissioner in the present appeal argued that the Court's ***Wayfair*** decision abrogating the physical presence rule must be applied retroactively. Quoting language from ***Harper v. Va. Dep't of Taxation,*** 509 U.S. 86, 97 (1993) ("***Harper***"), the Commissioner argued that the ***Wayfair*** Court's rejection of the physical presence rule "must be given full retroactive effect in

all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."

Harper involved the question of whether taxpayers could benefit from a prior Supreme Court decision in ***Davis v. Michigan Dep't. of Treasury,*** 489 U.S. 803 (1989) ("***Davis***") holding that a state's attempt to tax retirees on Federal benefits while exempting them from tax on state retirement benefits violated the constitutional doctrine of intergovernmental tax immunity. ***Harper***, 509 U.S. at 89. The taxing jurisdiction in ***Harper*** argued that ***Davis*** must be applied prospectively but not retroactively. ***Harper,*** 509 U.S. at 92.

The Court in ***Harper*** agreed with the taxpayers that the decision in ***Davis,*** which decided an issue of first impression, must be applied retroactively to claims made by taxpayers in other jurisdictions who were subjected to the same type of discriminatory tax. ***Id.*** at 98. The Court in ***Harper*** reasoned that "selective application of new rules violates the principle of treating similarly situated [parties] the same," (***id.*** at 95) and that the benefit of a judgment in favor of a party must be "applied to other litigants whose cases were not final at the time of the [first] decision." ***Id.*** at 96. In other words, taxpayers who were subjected to the same type of discriminatory tax by other jurisdictions and

had claims pending in those jurisdictions should be afforded the same relief as the taxpayers who prevailed in ***Harper.***

In large measure, the Court in ***Harper*** relied on its prior decision in ***James B. Beam Distilling Co. v. Georgia***, 501 U.S. 529 (1991) ("***Beam***"). The statute at issue in ***Beam*** imposed an excise on imported alcohol and distilled spirits at double the rate imposed on alcohol and distilled spirits manufactured from in-state products. ***Beam***, 501 U.S. at 532. In a prior decision, the Court invalidated such a tax as violative of the Commerce Clause. *See* ***Bacchus Imports, Ltd. v. Dias,*** 468 U.S. 263 (1984) ("***Bacchus***"). The taxing jurisdiction in ***Beam*** refused to apply the ***Bacchus*** Commerce Clause analysis retroactively. ***Beam***, 501 U.S. at 533.

After analyzing its precedents on prospective and retroactive application of its rulings, the ***Beam*** Court held that its ***Bacchus*** ruling should be applied retroactively to the taxpayer in ***Beam*** because "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." ***Beam***, 501 U.S. at 544. In so doing, the Court recognized that "litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally." ***Id.*** at 537.

Both ***Harper*** and ***Beam*** involved situations where taxpayers were being taxed under a scheme that had been declared unconstitutional in prior Supreme Court cases. In order to avoid similarly situated

taxpayers from being treated unequally, and to avoid the unconstitutional impositions of tax, the Court held that its prior rulings should be applied retroactively to the taxpayers before it to allow them the same benefit afforded the litigants in the prior cases.

In contrast, the facts of the present appeal are the converse of those at issue in ***Harper*** and ***Beam***. Rather than allowing similarly situated taxpayers to take advantage of a decision that limited the power of a taxing jurisdiction to impose a discriminatory tax as in ***Harper*** and ***Beam***, the Commissioner in the present appeal is seeking to retroactively apply a ruling that overturned prior Court precedent and that expanded the ability of states to tax out-of-state vendors who were not previously subject to tax. There is no issue here of similarly situated taxpayers being able to be treated equally regarding an unconstitutional tax. Rather, retroactive application of ***Wayfair*** in the present appeal would mean that the Commissioner could use his expanded authority under ***Wayfair*** to tax a vendor that acted consistently with then-current Commerce Clause jurisprudence. Nothing in ***Harper*** and ***Beam*** supports the notion that a taxing authority may apply a court ruling retroactively against taxpayers who were acting consistently with then-current law.

Further, the Regulation by its terms contemplates in-state physical presence within the meaning of ***Quill*** as decided by the

Court in 1982 – that is, traditional physical presence. The Regulation explains that "[t]he provisions of M.G.L. c. 64H, § 1 are enforced to the extent allowed by the 'physical presence' dormant Commerce Clause standard as set forth in ***Quill Corp. v. North Dakota***, 504 U.S. 298 (1992)." 830 CMR 64H.1.7(1)(b)(2). A retroactive application in the instant case of the ***Wayfair*** decision, which overruled the traditional physical presence rule under ***Bellas Hess*** and ***Quill***, would expand the Regulation beyond the scope of its publicly promulgated terms.

Moreover, because the tax at issue here is a transactional tax, retroactive application of ***Wayfair*** would require U.S. Auto Parts to pay from its own resources a tax that is designed to be collected from its customers, with no practical ability to recover the funds from its customers.

Given the ***Wayfair*** Court's emphasis on the non-retroactive application of the statute at issue there to avoid Commerce Clause concerns and the language of the Regulation itself, together with the lack of support for, and fundamental unfairness of, retroactively applying a change in the law on the facts at issue, the Board ruled that ***Wayfair*** cannot be applied retroactively in this appeal. Accordingly, the subject assessment must stand or fall on whether U.S. Auto Parts' use of cookies, apps, and CDNs servers in Massachusetts constituted physical presence within the meaning of ***Quill***.

V. PHYSICAL PRESENCE UNDER QUILL

Relying on the Regulation, the Commissioner determined that U.S. Auto Parts' use of cookies, apps, and CDNs servers constituted sufficient physical presence under ***Quill*** to justify the subject assessment. However, the Court's reasoning in ***Wayfair*** clearly reveals the contrary.

In analyzing the physical presence rule of ***Quill*** in the context of the modern economy, the Court recognized that it is an "inescapable fact of modern commercial life that a substantial amount of business is transacted . . . with no need for physical presence within a State in which business is conducted." ***Wayfair,*** 138 S.Ct. at 2093 (quoting ***Quill,*** 504 U.S. at 308). The Court also recognized the anomaly of a business with one salesperson in every state that must collect sales tax in all jurisdictions into which its goods are delivered "but a business with 500 salespersons in one central location and a website accessible in every State need not collect sales taxes on otherwise identical nationwide sales." ***Id.***

The Court also used an example of a business with a small warehouse in a taxing jurisdiction that must collect and remit tax on all of its sales, even those having nothing to do with the goods in the warehouse, while another vendor with a sophisticated website accessible in every state escapes taxation on the sale of the same goods despite its "pervasive Internet presence." ***Id.*** at 2094.

After pointing to these problems with the physical presence rule and noting that modern "e-commerce does not analytically align with a test that relies on the sort of physical presence defined in ***Quill***" the Court went on to observe:

> But it is not clear why a single employee or a single warehouse should create a substantial nexus while "physical" aspects of pervasive modern technology should not. For example, a company with a website accessible in South Dakota may be said to have a physical presence in the State via the customers' computers. A website may leave cookies saved to the customers' hard drives, or customers may download the company's app onto their phones . . . . Between targeted advertising and instant access to most customers via any internet-enabled device, "a business may be present in a State in a meaningful way without" that presence "being physical in the traditional sense of the term."

Id. at 2095 (quoting ***Direct Marketing Assn. v. Brohl,*** 135 S. Ct. 1124 (2015)). The Court concluded this section of its analysis by stating that "the continuous and pervasive virtual presence of retailers today is, under ***Quill,*** simply irrelevant. This Court should not maintain a rule that ignores these substantial virtual connections to the State." ***Id.***

Based on the above language and analysis in ***Wayfair***, it is clear that the Court did not view whatever "physical aspect" of modern technology, such as those on which the subject assessment was based, that may be present in a taxing jurisdiction as satisfying the physical presence rule under ***Quill***.

In addition, the ***Wayfair*** Court pointed to the Regulation itself as an example of states' attempts to apply the physical

presence rule to online retail sales that are "proving unworkable." ***Id.*** at 2097. After noting that states like Massachusetts are "confronting the complexities of defining physical presence in the Cyber Age," the Court observed that such attempts "are likely to embroil courts in technical and arbitrary disputes about what counts as physical presence." ***Id.*** at 2098.

The ***Wayfair*** Court's analysis of an Internet retailer's virtual presence in a taxing jurisdiction leaves no doubt that U.S. Auto Parts' Massachusetts presence in the form of the cookies, apps, and CDNs servers did not constitute physical presence within the meaning of ***Quill***, and the Board so ruled.

VI. APPROPRIATENESS OF SUMMARY JUDGMENT

Given the ***Wayfair*** Court's clear analysis concerning the failure of a retailer's virtual presence to satisfy the physical presence rule, the Commissioner's argument that he should be allowed discovery on the nature and extent of U.S. Auto's virtual presence is unnecessary and would be an example of the "technical and arbitrary dispute" that the ***Wayfair*** Court cautioned against. The ***Wayfair*** Court's analysis makes such inquiries moot. Had the Court wished to leave the door open to the argument that the extent of a retailer's virtual presence in a taxing jurisdiction could constitute physical presence, a step less drastic than overruling its own longstanding precedent, it could have easily done so. Instead, it clearly articulated that an out-of-state Internet

vendor's virtual presence does not satisfy the ***Quill*** physical presence rule and, therefore, it overruled ***Quill*** and allowed states, on a prospective basis, to impose a collection and remittance obligation on such vendors.

VII. CONCLUSION

For all of the foregoing reasons, the Board issued a decision for the appellant and granted an abatement in the amount of $60,139.81 plus statutory additions.

THE APPELLATE TAX BOARD

By: /S/ *Thomas W. Hammond*
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: /S/ *William J. Doherty*
Clerk of the Board