SJC-12741

CITRIX SYSTEMS, INC., & another[1] vs. COMMISSIONER OF REVENUE.

Suffolk. October 4, 2019. - February 5, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Taxation, Sales tax. Personal Property.

Appeal from a decision of the Appellate Tax Board.

The Supreme Judicial Court granted an application for direct appellate review.

Mark C. Fleming (Matthew D. Schnall & Elizabeth A. Bewley also present) for the taxpayer.
Pierce O. Cray, Assistant Attorney General (Marikae G. Toye also present) for Commissioner of Revenue.
Ben Robbins & Martin J. Newhouse, for New England Legal Foundation, amicus curiae, submitted a brief.

CYPHER, J. This case concerns whether fees charged for subscriptions to use online software products are subject to

[1] GetGo, Inc., as successor in interest to Citrix Systems, Inc.

Massachusetts sales tax. Citrix Systems, Inc.[2] (Citrix), sold subscriptions for three online software products that enabled users of the software to have some level of access to a remote computer, depending on the specific product. After determining that Citrix's subscription fees constituted sales of software subject to sales tax, the Commissioner of Revenue (commissioner) assessed sales tax against Citrix for the taxable periods April 2007 through June 2009 and October 2009 through December 2011 (relevant taxable periods). The Appellate Tax Board (board) upheld the sales tax assessments. The central issue before us is whether the receipts from sales of subscriptions for the online software products were subject to sales tax under G. L. c. 64H, §§ 1-2 (statute), and 830 Code Mass. Regs. § 64H.1.3 (2006) (regulation). We hold that the subscription fees were subject to sales tax and affirm the board's decision.[3]

Background. 1. The online products. At issue in this case are taxes assessed on subscriptions Citrix sold for three of its online software products. During the relevant taxable periods, Citrix sold subscriptions for three online software products, "GoToMyPC," "GoToAssist," and "GoToMeeting"

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[2] Citrix Systems, Inc. (Citrix), is a publicly traded Delaware corporation doing business in Massachusetts and elsewhere.

[3] We acknowledge the amicus brief submitted in support of Citrix by the New England Legal Foundation.

(collectively, online products). While the specific functions of each online product vary, a shared attribute of the online products is that they create and maintain a screen-sharing connection between a host computer and one or more remote computers connected to the Internet.[4] The online products are not customized, and the board noted that "[t]here is no dispute that the [o]nline [p]roducts constitute software within the meaning of [G. L. c.] 64H."

When using the online products, the host computer runs its own operating system and software applications. A screen-sharing connection allows the user of a remote computer to see the screen output of a host computer and share access to any input controls, such as a keyboard or mouse. Citrix does not

[4] The statement of agreed facts that the parties submitted to the board describes the online products as follows. "GoToMyPC" "allows users to securely access and operate their personal computers from a remote location or device that securely connects to the user's personal computer through Citrix's web servers. Both the host computer and the remote computer or device are typically owned or controlled by the customer." "GoToAssist" "allows users to share screen and input control access to a computer in real time for purposes of facilitating technical support. The remote computer is typically owned or controlled by a technical support professional, who is Citrix's customer, and the host computer is owned or controlled by a third party who is the recipient of the technical support." "GoToMeeting" "permit[s] users to share screen access and control for purposes of online presentations, demonstrations and collaboration. The host computer is owned or controlled by a meeting organizer who is Citrix's customer; the remote computers are owned or controlled by third parties who are participating in the meeting."

provide its customers with a computer and does not allow its proprietary software to be downloaded or otherwise transmitted to its users' computers. In order for Citrix's products to function, users must download and install "Endpoint Software" onto the host computer and the remote computer.[5]

Citrix uses a subscription based model for its online products, with customers paying monthly or annual subscription fees for "access and use" of selected online products. Citrix's technical operations team is responsible for the maintenance, configuration, updating, and control of the Citrix network hardware and the proprietary software running on the Citrix servers. In addition, Citrix provides customer service support.

2. Prior proceedings. Citrix timely filed a Department of Revenue Form ST-9, titled "Sales and Use Tax Return," for each of the relevant taxable periods. In 2011, after an audit of Citrix's tax returns for the months of April 2007 through June 2009, the commissioner issued a notice of intent to assess, followed by a notice of assessment in 2012, reflecting tax assessments and penalties for those months.[6] In response, in

[5] The Endpoint Software is free to download by both customers and noncustomers and is necessary to use each of the online products, and its utility is limited to allowing users to connect to Citrix's network.

[6] Between the notice of intent to assess and the notice of assessment, in response to a letter ruling request from Citrix, the commissioner promulgated Letter Ruling 12-10: Screen

2012 Citrix filed an application for abatement, which the commissioner denied. Citrix timely filed a petition with the board, see G. L. c. 62C, § 39, appealing from the commissioner's refusal to grant the abatements for April 2007 through June 2009.

In 2014, the commissioner issued another notice of intent to assess to Citrix, followed by a notice of assessment, reflecting tax assessments and penalties for the months of October 2009 through December 2011. Citrix filed an application for abatement for this period, which the commissioner also denied. Citrix timely filed a petition with the board, appealing from the commissioner's refusal to grant this second abatement request.

In February 2016, the board heard the two appeals together. As part of the proceedings before the board, the board received evidence on the issue whether Citrix's business model involved taxable transfers of software. The parties submitted a

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Sharing Software and the Massachusetts Sales/Use Tax (Sept. 25, 2012) (Letter Ruling 12-10). See 830 Code Mass. Regs. § 62C.3.1(6)(b), (i) (2017) ("A Letter Ruling is an 'advisory ruling' . . . that interprets and applies the Massachusetts tax laws to a specific transaction or other set of facts," and "[a] taxpayer may rely on a Letter Ruling issued to that taxpayer"). Letter Ruling 12-10 stated that the online products constituted prewritten software and "that upon payment of the subscription fee for [the online products], the customer is purchasing the right to use [Citrix's] software and the tools provided therewith, and such purchases are subject to the sales tax when sold to customers located in Massachusetts."

statement of agreed facts and presented exhibits at the hearing, and Citrix presented testimony from its vice-president of technology operations.[7]

3. The Appellate Tax Board decision. In April 2017, the board issued its decision upholding the tax assessment against Citrix, and issued its findings of fact and report in November 2018. The board found that the online products "constituted standardized software and, in turn, tangible personal property within the meaning of G. L. c. 64H, § 1," and that "the sales of the [o]nline [p]roducts . . . were sales of tangible personal property subject to the sales tax pursuant to G. L. c. 64H, §§ 1 and 2." The board rejected two primary arguments raised by Citrix: (1) because there was no "transfer" of software as required by the statute, there was no taxable sale of software, and (2) Citrix's sales of the online products constitute sales of services and not of tangible personal property. In rejecting Citrix's arguments, the board relied on the language and legislative history of the statute, the language of the regulation, and the nature of Citrix's business model.

[7] The board also heard evidence regarding whether Citrix's subscription fees were subject to sales tax by virtue of being sales of telecommunications services. See G. L. c. 64H, §§ 1, 2 (deeming services taxable and defining "services" to include only "telecommunications services"). However, the board did not address the telecommunications issue in its decision.

In its decision, the board looked to the regulatory language that "transfers of rights to use software installed on a remote server" are "[t]axable transfers of prewritten software" that are "generally subject to the Massachusetts sales tax." 830 Code. Mass. Regs. § 64H.1.3(3)(a). The board found that the phrase "transfers of rights to use software installed on a remote server" "clearly applies to the transactions at issue in these appeals" and that the "[c]ommissioner's construction is wholly consistent with the plain terms of the statute." As such, the board rejected Citrix's argument that the regulation improperly extended the statute's reach to remote access transactions. The board further found that the object of Citrix's subscription fees was for customers to "acquire access to and use of" Citrix's products, rejecting Citrix's argument that the true object of the subscription fees was the provision of a service. Accordingly, the board "found and ruled that Citrix's sales of the [o]nline [p]roducts were subject to the sales tax pursuant to G. L. c. 64H, §§ 1 and 2." Citrix appealed therefrom, and we granted its motion for direct appellate review.

Discussion. 1. Applicability of the regulation. Citrix argues that the regulation provisions concerning remote servers "did not (and could not, given the statutory text) eliminate the requirement that there be a 'transfer of title or possession'

for a transaction to constitute a sale."[8] See G. L. c. 64H, §§ 1, 2. Therefore, Citrix contends, its subscription fees were not taxable transfers because the transfers did not involve any actual transfer of title to, or possession of, the online products. Instead, Citrix retained control over the software and hardware that it used to facilitate remote access between its customers' computers. As such, Citrix characterizes its offerings as nontaxable services rather than taxable transfers.

The commissioner counters that the regulation provides a straightforward resolution to the issue. The commissioner contends that Citrix was selling the right to access and use software installed on the Citrix remote servers, which is precisely what the text of the regulation covers. See 830 Code Mass. Regs. § 64H.1.3(3)(a), (14)(a). For the reasons that follow, we hold that the fees charged for subscriptions to use the online products are subject to Massachusetts sales tax.[9]

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[8] Citrix does not challenge the regulation as ultra vires.

[9] As an initial matter, we hold that the board properly relied on the regulation in determining whether Citrix's sale of subscriptions for the online products was subject to the Massachusetts sales tax. See Smith v. Commissioner of Transitional Assistance, 431 Mass. 638, 646 (2000) ("regulations are not to be declared void unless their provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate" [quotation omitted]). As noted, Citrix did not challenge the regulation as ultra vires.

a. Standard of review. In reviewing the board's decision, "[w]e uphold findings of fact of the board that are supported by substantial evidence. We review conclusions of law, including questions of statutory construction, de novo." Shrine of Our Lady of La Salette Inc. v. Assessors of Attleboro, 476 Mass. 690, 696 (2017), quoting New England Forestry Found., Inc. v. Assessors of Hawley, 468 Mass. 138, 149 (2014). See Boston Professional Hockey Ass'n v. Commissioner of Revenue, 443 Mass. 276, 285 (2005) ("We will not modify or reverse a decision of the board if the decision is based on both substantial evidence and a correct application of the law").

Tax statutes are strictly construed, with ambiguity resolved in favor of the taxpayer. See Dental Serv. of Mass., Inc. v. Commissioner of Revenue, 479 Mass. 304, 310 (2018). That being said, we give weight to the board's interpretation of tax statutes, "because the board is an agency charged with administering the tax law and has expertise in tax matters" (quotation omitted). AA Transp. Co. v. Commissioner of Revenue, 454 Mass. 114, 119 (2009) (upholding board's reasonable interpretation of ambiguous provision in tax statute). Moreover, the taxpayer bears the burden of establishing its right to an abatement, and "[t]his obligation is not a light one." Boston Professional Hockey Ass'n, 443 Mass. at 285.

b. Statutory framework. General Laws c. 64H, § 2, provides that "[a]n excise is hereby imposed upon sales at retail in the commonwealth . . . of tangible personal property or of services performed in the commonwealth." See G. L. c. 64H, § 1 ("sale" includes "any transfer of title or possession . . . of tangible personal property or the performance of services for a consideration," and "services" is "limited to telecommunications services"). "[A] transfer of tangible personal property" includes "[a] transfer of standardized computer software, including but not limited to electronic, telephonic, or similar transfer." Id. As such, sales of standardized computer software are subject to sales tax in Massachusetts. G. L. c. 64H, §§ 1, 2.

c. Legislative history of G. L. c. 64H. Before the Legislature's 2005 amendment to G. L. c. 64H (2005 amendment), the method by which software was delivered determined whether standardized software was subject to sales tax in the Commonwealth. See Department of Revenue Directive 01-3 (May 8, 2001) (sales tax applied to "physical transfer of pre-written 'canned' software for a consideration" but not to purely electronic transfers of software or "load and leave" transactions whereby vendor installed software on customer's computer but retained possession of medium used to install software). Between the statute's enactment in 1966, see St.

1966, c. 14, and the 2005 amendment, administrative and judicial interpretations demonstrated the emphasis placed on the method of delivery. A short time after the passage of the statute, an emergency regulation promulgated by the State Tax Commission required a transfer of possession for a rental or lease transaction to be taxable. Emergency Regulation No. 3(3) (Apr. 28, 1966) (transfer of possession required customer to assume "control or direction" of subject property). And before 2005, this court held that the transfer of title or possession was a hallmark of a taxable sale. See Circuit City Stores, Inc. v. Commissioner of Revenue, 439 Mass. 629, 637-639 (2003) (taxable sale occurred within Massachusetts so long as title passed); Browning-Ferris Indus., Inc. v. State Tax Comm'n, 375 Mass. 326, 330 & n.4, 331 n.5 (1978) (relying in part on Emergency Regulation No. 3[3] to indicate that "control in the customer . . . sufficient to make out a 'possession'" was necessary to find taxable sale of tangible personal property).

However, in 2005 the Legislature expanded the definition of tangible personal property to include "transfer[s] of standardized computer software, including but not limited to electronic, telephonic, or similar transfer."[10] St. 2005,

[10] The 2005 amendment provided in full that "[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

c. 163, § 34. The 2005 amendment created uniform sales tax treatment for sales of standardized software that did not depend on the method of delivery. See id.

d. Regulation pursuant to the 2005 amendment. Subsequent to the 2005 amendment, the commissioner promulgated 830 Code Mass. Regs. § 64H.1.3, construing the 2005 amendment to allow sales tax on fees charged for the use of software on remote servers. 830 Code Mass. Regs. § 64H.1.3(3)(a). See G. L. c. 14, § 6 (commissioner has authority to make "such reasonable regulations, not inconsistent with law, as may be necessary to interpret and enforce any statute imposing any tax, excise or fee"). Title 830 Code Mass. Regs. § 64H.1.3(3)(a) provides:

> "Sales in Massachusetts of computer hardware, computer equipment, and prewritten computer software, regardless of the method of delivery . . . 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."

See 830 Code Mass. Regs. § 64H.1.3(2) (defining "prewritten computer software" as "computer software, including prewritten upgrades, which is not designed and developed by the author or

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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 (effective April 1, 2006).

creator to the specifications of a specific purchaser"). The regulation further states that "[g]enerally, charges for the access or use of software on a remote server are subject to tax." 830 Code Mass. Regs. § 64H.1.3(14)(a).[11]

e. Application of the regulation to Citrix's subscription fees for its online products. When a Citrix customer purchases a subscription for access to an online product, the customer gains access to a remote network of Citrix's servers running proprietary software, which is necessary for Citrix's products to function. Therefore, it is apparent that Citrix's subscription fees involved "transfers of rights to use software installed on a remote server." 830 Code Mass. Regs. § 64H.1.3(3)(a). See 830 Code Mass. Regs. § 64H.1.3(14)(a) ("Generally, charges for the access or use of software on a remote server are subject to tax"). Moreover, the commissioner and the board construed the regulation to allow sales tax on Citrix's sales of subscriptions for its online products. As the board and the commissioner were acting within their area of

[11] The commissioner has interpreted 830 Code Mass. Regs. § 64H.1.3 in various letter rulings. See, e.g., Letter Ruling 12-8 (July 16, 2012) (describing sales of access to software on remote servers as "virtual download[s] of [standardized] software," and reasoning that "customer acquires the same functionality as if the software was actually downloaded to the customer's [computer]," and therefore such sales are generally taxable). See also Letter Ruling 12-10; Letter Ruling 12-5 (May 7, 2012).

expertise, "we are generous in our deference" and "[ensure] only that their interpretation is reasonable." Massachusetts Fine Wines & Spirits, LLC v. Alcoholic Beverage Control Comm'n, 482 Mass. 683, 687 (2019), quoting Craft Beer Guild, LLC v. Alcoholic Beverages Control Comm'n, 481 Mass. 506, 525, 527 (2019).

In addition, the statute's legislative history supports the commissioner's and the board's reading of the regulation. The 2005 amendment sought to fix the disparities in tax treatment dependent on method of software delivery. Therefore, the commissioner's and board's reading of the regulation and statute to include virtual delivery of software via remote access rights within the taxable realm is rational. See AA Transp. Co., 454 Mass. at 119.

2. Sale of tangible personal property. Citrix argues in the alternative that even if we treat the subscription sales of remote access rights as transfers of tangible personal property, the "true object" of its offerings was the provision of a remote connection service, and therefore Citrix's subscription fees should be treated as nontaxable sales of service. The commissioner counters that the regulation's two-part test for transactions involving sales of both tangible property and services precludes Citrix's argument that its products are nontaxable services. We agree with the board that Citrix's

sales of subscriptions for the online products constituted sales of tangible personal property.

The statute provides that taxable "sale[s] at retail" do not include "professional . . . or personal service transactions which involve no sale or which involve sales as inconsequential elements for which no separate charges are made." G. L. c. 64H, § 1. The regulation articulates a conjunctive two-part test for when tax does not apply to charges for access or use of software on a remote server: "[W]here there is [(1)] no charge for the use of the software and [(2)] 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" (emphasis added). 830 Code Mass. Regs. § 64H.1.3(14)(a).

For the second requirement, regarding the object of the transaction, the commissioner argues that the board was correct in finding that "the basic purpose of Citrix's customers in purchasing . . . the [o]nline [p]roducts is to acquire access to and use of the product(s)."[12] Citrix counters that the board's factual findings regarding this requirement lack substantial

[12] The commissioner argues that Citrix's offerings fail the first requirement because Citrix charges fees to use its software. Citrix responds that "no charge" means "no separate charge," or no "separately itemized fee." Because, as explained infra, we hold that the board was justified in determining that the second requirement was not met, we need not address the first requirement.

evidence. We hold that substantial evidence supported the board's determination that the object of the transaction was acquiring access to and use of the online products.

The substantial evidence "standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom." Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 420 (1992). We uphold an agency's finding of fact as long as it is supported "upon consideration of the entire record" and a "reasoning mind [could have made the finding] by reference to the logic of experience" (quotations omitted). New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 466 (1981). See Tennessee Gas Pipeline Co. v. Assessors of Agawam, 428 Mass. 261, 265-266 (1998) ("reasonable basis in logic" sufficient to uphold agency finding). Factual findings are set aside "if the evidence points to no felt or appreciable probability of the conclusion or points to an overwhelming probability of the contrary" (quotation omitted). New Boston Garden Corp., supra.

In determining "the object of the transaction" with respect to Citrix's products, the board found that "the evidence established that the basic purpose of Citrix's customers in purchasing one or more of the [o]nline [p]roducts is to acquire access to and use of the product(s), each of which constitutes standardized computer software as contemplated by [G. L.

c.] 64H."[13] The board reasoned that although Citrix's operations "include the many support functions necessary to develop, maintain, test, and troubleshoot the [o]nline [p]roducts as well as Citrix's network hardware," and these operations may "require substantial employee support, the evidence presented and common sense do not indicate that they are services sought by Citrix's customers." The board analogized Citrix's offerings to a tax preparation example provided in the regulation. See 830 Code Mass. Regs. § 64H.1.3(14)(a), Example 2. In the example, a customer seeks to "acquire prewritten computer software to prepare her personal income tax return," which the example states is taxable regardless of whether the customer receives a disk containing the software or the right to access and use the software online. Id.

The board found that in the tax preparation example and in Citrix's sales of subscriptions to the online products, "it is the functionality of standardized software that customers seek

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[13] The commissioner addressed the object of the transaction standard in Letter Ruling 12-10, supra. The commissioner stated that he "generally looks to the customer's experience in using the product rather than the 'behind-the-scenes' operations where the software is accessed on the seller's server." Id. The commissioner acknowledged that Citrix employed "hundreds of people worldwide to maintain software and hardware," but found that Citrix's products involved "little or no interaction" with Citrix employees. Id. Therefore, the commissioner stated that Citrix's subscription fees were best characterized as charges for remote access to software rather than as charges for services. Id.

and that enables them to complete specific tasks." The board also acknowledged that "Citrix's various written materials refer to the [o]nline [p]roducts as services," and it acknowledged the testimony of Citrix's vice-president of technology operations that he viewed Citrix's products as services.[14] However, the board found that when the testimony and written materials were "considered in the broader context of all available facts," the evidence established that the basic purpose of the transaction was acquiring access to and use of the online products.

Contrary to Citrix's contention, the board's findings do not lack substantial evidence. When considering the entire record, a "reasoning mind" could find that Citrix's customers were paying for software rather than for unseen support operations. See New Boston Garden Corp., 383 Mass. at 466. The record established that Citrix's products involved access to a network of servers hosting proprietary software and that this software is necessary for Citrix's online products to function. The testimony of the vice-president of technology operations, viewing the products as services, and the written materials, describing the offerings as services, do not establish an "overwhelming probability" that Citrix's users were paying for

[14] In addition to the written materials describing the online products as services, Citrix's master subscription agreement also stated that it was granting its customers "access and use" to its software.

services rather than accessing Citrix software.[15] See id. Therefore, we affirm the board's determination that Citrix's sales of subscriptions for the online products constituted sales of tangible personal property and as such were subject to Massachusetts sales tax.

So ordered.

[15] In addition, we agree with the commissioner that the Citrix software's automated system cannot itself be characterized as a service because such a holding could "undo 830 [Code. Mass. Regs.] § 64H.1.3(3)(a)'s classification of a granted right to access and use such software as a taxable sale in the first place."