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REGENCY TRANSPORTATION, INC. v. COMMISSIONER OF REVENUE

Case Information:**Docket/Court:** C310361, Massachusetts Appellate Tax Board**Date Issued:** 12/04/2014**Tax Type(s):** Sales and Use Tax

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39, from the refusal of the Commissioner of Revenue (“appellee” or “Commissioner”), to abate use tax, along with related interest and penalties, assessed to the appellant, Regency Transportation, Inc. (“appellant” or “Regency”), for the monthly tax periods beginning October 1, 2002 and ending January 31, 2008 (“tax periods at issue”).

Commissioner Scharaffa heard this appeal and was joined by Chairman Hammond and Commissioners Rose, Chmielinski, and Good in the decision denying an abatement of the use tax and interest assessed and abating the penalties assessed.

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

Morris N. Robinson, Esq., Matthew A. Morris, Esq., and Timothy R. Weeks, Esq. for the appellant.

Timothy R. Stille, Esq., Frances M. Donovan, Esq., and David Berch, Esq. for the appellee.

OPINION

FINDINGS OF FACT AND REPORT

On the basis of an agreed stipulation of facts as well as exhibits and testimony offered into evidence at the hearing of this appeal, the Appellate Tax Board (“Board”) made the following findings of fact.

I. BACKGROUND AND JURISDICTION

Regency is an S-corporation headquartered in Massachusetts that operates a freight business with terminals in Massachusetts and New Jersey. Regency is licensed by the Interstate Commerce Commission (“ICC”) as an interstate carrier to operate a fleet of tractors and trailers (“Regency Fleet”), numbering from 430 to over 600 vehicles during the tax periods at issue. The Regency Fleet carried and delivered goods throughout the eastern United States.

Pursuant to an audit of the appellant's sales and use tax liabilities for the tax periods at issue, the Commissioner issued a Notice of Assessment on August 11, 2010, imposing a use tax on the full purchase price of each tractor and trailer in the Regency Fleet in the total amount of \$1,472,258.22, including \$298,286.61 of interest and \$391,323.95 of penalties for failure to file use tax returns and failure to pay use tax. On October 7, 2010, Regency filed a Form CA-6, Application for Abatement, requesting a full abatement of the assessment. By way of a Notice of Abatement Determination dated November 24, 2010, the appellee denied Regency's abatement application. Regency then timely filed a petition with the Board on January 5, 2011. Based on the foregoing, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

Underlying this appeal is the appellant's allegation that the Commonwealth's imposition of use tax on vehicles engaged in interstate commerce violated the Commerce Clause of the U.S. Constitution and Equal Protection Clauses of the U.S. and Massachusetts Constitutions. As further detailed in the following Opinion, the Commerce Clause requires that a tax be imposed only where a four prong test is met: that the taxpayer has substantial nexus with the taxing state; that the tax is fairly apportioned; that the tax does not discriminate against interstate commerce; and that the tax is fairly related to the benefits provided by the taxing state. See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (“**Complete**

Auto”). The appellant argued that the imposition of use tax on interstate vehicles fails on all four factors. Regency also argued that its right to equal protection was violated as it alleged that use tax was not enforced against similarly situated taxpayers who used interstate vehicles in Massachusetts and that the appellant was required by the Commissioner to calculate the proper portion of use tax attributable to Massachusetts without proper guidance. Finally, the appellant also argued that its mistaken reliance on a letter ruling issued by the Department of Revenue (“Department”) under prior law constituted reasonable cause for the Commissioner to abate the penalties assessed for failure to file returns and pay tax.

The appellant presented seven witnesses: Ann Lynch, the executive director of the Massachusetts Motor Transportation Association, a transportation industry trade group; Gordon Lewis, a partner with Altman & Company; ¹ Paul Giroux, Vice President of Operations at Regency; Charlene MacDonald, Regency's chief operating officer; Richard Giroux, the president and owner of Regency; Harvey Pullman, an employee of the Department; and Paul Hutchinson, the auditor who conducted the audit underlying the assessment at issue. The appellant also offered records and mileage calculations regarding its level of activity in Massachusetts.

II. APPELLANT'S OPERATIONS AND ROLLING STOCK EXEMPTIONS

Throughout the tax periods at issue, Regency maintained its corporate headquarters in Massachusetts, where all of its administrative staff and its sole officer were located. The appellant also maintained four warehouses and a combined maintenance facility and terminal location in Massachusetts, which it used for repairing and storing vehicles in the Regency Fleet. Regency operated five warehouses in New Jersey and two combined maintenance facility and terminal locations there. The appellant performed 35 percent of its maintenance and repair work at its Massachusetts locations and 35 percent of the work at its New Jersey locations, with the remainder being performed by third parties. During the tax periods at issue, the proportion of Regency's workforce that was employed in the Commonwealth ranged from 63 percent to 83 percent. While all of the Regency Fleet vehicles entered into Massachusetts at some point during the audit period, the Regency Fleet's total miles traveled on Massachusetts roads during the tax periods at issue ranged from 34 percent to 38 percent of total miles driven, more than any other single state.

The vehicles in the Regency Fleet were registered in New Jersey and bore New Jersey license plates during the tax periods at issue. Regency purchased the Regency Fleet vehicles from vendors in New Hampshire, New Jersey, Indiana, and Pennsylvania and accepted delivery and possession outside of the Commonwealth. Regency did not pay sales

or use tax to any jurisdiction on these purchases, as New Hampshire does not impose a sales tax and the three other states provide an exemption for vehicles engaged in interstate commerce. Ann Lynch, the executive director of the Massachusetts Motor Transportation Association, testified that the majority of states that impose tax have such an exemption, generally referred to as a “rolling stock exemption.” While Ms. Lynch was not qualified as an expert in state taxation, the Board found, based on its own review of state taxing statutes, that the majority of states outside of the Commonwealth do provide such an exemption from sales and use tax.

III. APPELLANT'S Cost-Per-Mile Analysis

As Ms. Lynch and Charlene MacDonald, Regency's chief operating officer, testified, the transportation industry's standard metric in determining pricing and profitability is a company's “cost per mile,” which includes taxes. To support its contention that the imposition of use tax on interstate vehicles discriminates against interstate commerce, the appellant offered extensive calculations into evidence, supported by the testimony of Ms. MacDonald, regarding the additional cost per mile Regency bore because of the imposition of Massachusetts use tax. Regency took this cost per mile and determined how many miles inside of Massachusetts the Regency Fleet would have to travel to “recover” the use tax cost, versus a hypothetical Massachusetts competitor which traveled only within Massachusetts. The appellant cited these increased cost per mile calculations to argue that the use tax discriminates against interstate commerce by favoring in-state companies, who, they argue, bear less of a burden of tax.

For the reasons detailed in the following Opinion, the Board found and ruled that this analysis rests on the appellant's fundamental misunderstanding of the relevant case law. The Board found and ruled that, while the fact that Massachusetts imposes use tax on the use of interstate vehicles in the Commonwealth when many states do not may increase costs for taxpayers who use vehicles here, this difference is not unconstitutional discrimination against interstate commerce because Massachusetts allows a credit for any taxes paid to other jurisdictions.

IV. “FAIR APPORTIONMENT” CALCULATION

The appellant alleged that the appellee violated Regency's right to equal protection under the U.S. and Massachusetts Constitutions because it was asked by the Department to calculate an apportioned use tax without standardized guidance that would ensure it was treated similarly to other taxpayers. Paul Hutchinson, a sales and use tax auditor with the

Department who performed the audit resulting in the assessment at issue, testified that after consulting with his supervisors, the Department made the determination that the Regency Fleet was subject to Massachusetts use tax on the full purchase price, because the vehicles were used in Massachusetts and no sales and use tax had been paid elsewhere. After this determination, in a letter dated April 1, 2010, the appellant's representatives stated that they would be providing additional information regarding the use of Regency's tractors and trailers in Massachusetts to provide the Department with their understanding of a "fair apportionment" of the use tax as required under the Commerce Clause of the Constitution.

The appellant maintains that the Department required it to provide a "fair apportionment" calculation despite the lack of statutory or regulatory guidance as to how that apportionment should be done, *e.g.*, based on mileage, time spent in the state, or other metric. The Commissioner denied that such a request was made. For the reasons further detailed in the following Opinion, the Board found and ruled that use tax need not be apportioned in order to satisfy the Commerce Clause and the Board, therefore, did not need to reach the question of whether the Commissioner had made a request for such a calculation.

V. ALLEGED DISCRIMINATORY TREATMENT OF THE APPELLANT

The appellant also alleged that the Department singled it out for hostile tax treatment compared to other similarly situated transportation companies by assessing use tax. Richard Giroux, the president and owner of Regency, testified that he did not believe that other trucking companies in Massachusetts self-assessed use tax on purchases of interstate tractors and trailers, but admitted that he had only actually spoken to a representative of one other company. Other than that anecdotal example, which the Board found to be hearsay, the appellant did not offer any credible evidence in support of its claim that it was "singled out." Charlene MacDonald, Regency's chief operating officer and the main point of contact for the Department's auditor, testified that the audit "went well" and that the auditor's conduct was "professional." The appellant offered no evidence and elicited no testimony that the Department was motivated by any personal animus or bias against the appellant in levying the assessment at issue. Accordingly, the Board found that the Department did not act based on impermissible discrimination or bad faith toward the appellant.

VI. APPELLANT'S RELIANCE ON LETTER RULING 80-22

Richard Giroux, who started the appellant's business in 1985, testified that Regency's vehicles were formerly registered in Massachusetts, but that Regency changed its policies to register its vehicles in New Jersey, because of administrative concerns regarding registration

fees. He testified that around 1987 or 1988, he was informed by George Gentuso, a tractor trailer salesman based in New Hampshire, of the existence of Letter Ruling 80-22 ("LR 80-22"). LR 80-22, issued by the Department in 1980, provided that vehicles were exempt from sales and use tax in Massachusetts if: (1) the motor vehicle was authorized by the ICC as an interstate carrier under a designated docket number or certificate; (2) delivery and possession of the motor vehicle was taken by the purchaser outside of Massachusetts; and (3) the motor vehicle entered Massachusetts for the first time with a load of passengers or freight in interstate commerce.

Mr. Giroux testified that he obtained a copy of LR 80-22 from Mr. Gentuso and during the period when Regency's vehicles were registered in Massachusetts, the company filed exemption certificates with the Department in accordance with LR 80-22. Mr. Giroux testified that he took steps to ensure that all delivery of vehicles registered with the ICC was taken outside of Massachusetts and the vehicles first entered the Commonwealth bearing a load of freight, in order to adhere to the requirements of LR 80-22. However, Mr. Giroux testified that no exemptions were filed with Massachusetts after the transfer of the Regency Fleet's registrations to New Jersey. Mr. Giroux also testified that Regency paid Massachusetts sales tax on any vehicles it purchased in the Commonwealth.

The regulation on which LR 80-22 was based, 830 CMR 64H.25.1 (codified as Sales and Use Tax Regulation 64H.02 at the time of the ruling's issuance), was amended in 1996. The amendment removed the exemption outlined above and replaced it with an exemption from tax for vehicles used in interstate commerce only where tax was already paid in another jurisdiction or imposition of tax would violate the Constitution. Despite that regulatory change, LR 80-22 continues to be published in the Department's Official MassTax Guide, its compendium of statutes, regulations, and other public written statements, 1 Official MassTax Guide PWS-580 (West 2014), and is made available on the Department's public website. Mr. Hutchinson, who testified that he had over 30 years of experience as an auditor with the Department and had completed over 1,000 audits, also came across LR 80-22 upon initially researching the issue presented. According to his audit file notes and testimony, he judged it to be worthy of addressing with his audit supervisor, who then suggested the auditor seek counsel from William Graham, the Associate Deputy Commissioner of the Audit Division. It was Mr. Graham, according to Mr. Hutchinson's testimony, who informed him of the regulatory change in the treatment of interstate vehicles.

The Board found that while the appellant was not entitled to rely on LR 80-22 as a basis to claim that it did not owe use tax, the uncertainty resulting from its continued publication did serve as a reasonable cause for the appellant's failure to file use tax returns or pay the tax.

As Mr. Giroux testified, during the period when the Regency Fleet was registered in Massachusetts, he regularly filed and received certificates of exemption on his vehicle purchases in accordance with the ruling and he believed the company continued to comply with its strictures. According to his testimony, he was not personally aware of a common practice among companies in his industry to pay use tax on interstate vehicle purchases. The Department continues to publish LR 80-22 in its printed and online guidance to taxpayers, without any caveat or other warning regarding the change to 830 CMR 64H.25.1. Even the Department's auditor, who has over 30 years of experience in the field, initially believed LR 80-22 to be applicable to the appellant's purchases before being corrected by the Associate Deputy Commissioner. On the basis of these facts, the Board found that the appellant had reasonable cause for its failure to file use tax returns or pay use tax for the tax periods at issue.

VII. SUMMARY OF FINDINGS OF FACT

For the reasons set forth in the following Opinion, the Board found and ruled that Regency was liable for Massachusetts use tax on the full sales price of its vehicles that it stored and used in the Commonwealth. The Board ruled that such a tax was permissible under the Commerce Clause and was administered in a manner consistent with the Equal Protection Clause of the U.S. and Massachusetts Constitutions. Accordingly, the Board rejected the appellant's claim for an abatement of the use tax assessed and related interest. However, because of the uncertainty created by the Commissioner's continued publication of incorrect guidance, the Board found and ruled that there was reasonable cause for the appellant's failure to file use tax returns and pay use tax. Therefore, the Board abated the penalties which had been imposed.

OPINION

General Laws c. 64I, § 2 imposes tax on the “storage, use or other consumption in the commonwealth of tangible personal property” purchased for storage, use or consumption in Massachusetts. If tangible property is brought into the Commonwealth by the purchaser within six months of purchase, it is presumed that the property was purchased for storage, use, or other consumption in Massachusetts. G.L. c. 64I, § 8(f). The sales and use taxes are “complementary elements of a unitary taxing program intended to 'reach all transactions, except those expressly exempted, in which tangible personal property is sold inside or outside the Commonwealth for storage, use, or other consumption within the Commonwealth.” *Commissioner of Revenue v. J.C. Penney, Co.*, 431 Mass. 684, 687 (2000) (quoting *M&T Charters, Inc. v. Commissioner of Revenue*, 404 Mass. 137, 140 (1989)). The

use tax imposed by G.L. c. 64I applies to transfers of title or possession of a motor vehicle where the vehicle transferred is thereafter stored, used, or otherwise consumed in Massachusetts. 830 CMR 64H.25.1(3)(a).

An exemption from tax is provided for the sale or transfer of a vehicle that is subsequently brought to or used in Massachusetts if: (1) the purchaser paid a sales or use tax to the state or territory where the sale occurred; (2) the sales or use tax was paid and legally due to the state or territory; (3) the purchaser did not have the right to receive a refund or credit of the sales or use tax from the state or territory where the sale occurred; and (4) the state or territory to which the sales or use tax was paid allows a corresponding exemption with respect to motor vehicle sales and use taxes paid to Massachusetts. 830 CMR 64H.25.1(7)(g) (“Section 7(g) Exemption”). Thus, purchasers may offset use tax liability by any amount previously paid as a qualifying sales or use tax to another jurisdiction. G.L. c. 64I, § 7(c). The sale or transfer of a vehicle that is subsequently brought to or used in Massachusetts for purposes of interstate commerce is exempt from Massachusetts use tax if the transfer is exempt under the Section 7(g) Exemption or its taxation is impermissible under the Constitution of the United States. 830 CMR 64H.25.1(7)(h).

The appellant acknowledged that it used and stored the tractors and trailers that made up the Regency Fleet in Massachusetts throughout the tax periods at issue. Furthermore, the appellant acknowledged that it did not pay sales or use tax to any state on the purchase of the Regency Fleet vehicles. Accordingly, as the Section 7(g) Exemption therefore does not apply, the use and storage of the Regency Fleet in Massachusetts is subject to use tax, unless such a tax is prohibited under the U.S. Constitution.

I. USE TAX ON THE STORAGE AND USE OF REGENCY FLEET DID NOT VIOLATE THE COMMERCE CLAUSE

The appellant argues that the assessment by Massachusetts of use tax on vehicles that are used in interstate commerce violates the Commerce Clause of the U.S. Constitution and therefore may not be imposed. “It is well established that interstate commerce does not enjoy an absolute ‘free trade’ immunity from State taxation.” *M&T Charters, Inc. v. Commissioner of Revenue*, 404 Mass. at 143 (quoting *George S. Carrington Co. v. State Tax Commission*, 375 Mass. 549, 551 (1978)). Instead, pursuant to the test outlined by the Supreme Court in *Complete Auto*, 430 U.S. at 279 , a state tax will be sustained under the Commerce Clause when it satisfies the following four conditions: “[1] it is applied to an activity with a substantial nexus with the taxing state; [2] [it] is fairly apportioned; [3] [it] does not discriminate against interstate commerce; and [4] [it] is fairly related to the services provided by the state.”

1. APPELLANT HAD SUBSTANTIAL NEXUS WITH THE COMMONWEALTH

“The 'substantial nexus' requirement 'seeks to prevent overreaching by States, and limits a State's ability to tax businesses operating within interstate commerce which lack a sufficient connection to the taxing State.’” *Truck Renting and Leasing Association, Inc. v. Commissioner of Revenue*, 433 Mass. 733, 740 (2001) (quoting *Aloha Freightways, Inc. v. Commissioner of Revenue*, 428 Mass. 418, 423 (1998)). Regency has a significant physical presence in Massachusetts where it is headquartered and where the majority of its employees work. Regency regularly stored the Regency Fleet at its Massachusetts terminal location, performed maintenance there, and used the vehicles to conduct its business in the Commonwealth. Use of tangible property within a state's borders coupled with maintaining physical locations and employees in the state has been deemed “nexus aplenty” for purposes of the Commerce Clause. *D.H. Holmes v. McNamara*, 486 U.S. 24, 32-33 (1988) . Further, even where the property is used inside and outside of the Commonwealth's borders, the Supreme Judicial Court held that the Commonwealth had substantial nexus sufficient to assess an unapportioned use tax. See *M&T Charters, Inc.*, 404 Mass. at 143 (unapportioned use tax imposed on a charter vessel that spent only two to four weeks per year in Massachusetts waters but was docked in Massachusetts for maintenance and repair work).

The appellant recognizes that Regency, by virtue of its headquarters and physical presence in Massachusetts, has nexus in the Commonwealth. Despite this fact, the appellant argued that because the vehicles subject to tax engaged in activities inside and outside of Massachusetts, the appellant does not have the requisite substantial nexus with the Commonwealth to allow it to tax all of the appellant's activities when a portion of them occur outside its borders. The identical argument was made by the taxpayer in *Oklahoma Tax Commission v. Jefferson Lines*, 514 U.S. 175, 184 (1995) (“***Jefferson Lines***”), in which the Supreme Court upheld the imposition of a sales tax by Oklahoma on the full price of a bus ticket for travel that originated in Oklahoma but terminated in another state. As the Supreme Court observed in ***Jefferson Lines***, “[t]his point, however, goes to the second prong of ***Complete Auto***,” *Id.*, not whether the appellant had substantial nexus in Massachusetts. Accordingly, the Board found that Regency's physical presence in Massachusetts was substantial nexus sufficient under the Commerce Clause to support the imposition of use tax.

2. USE TAX WAS FAIRLY APPORTIONED AS IT AVOIDED POTENTIAL MULTIPLE TAXATION THROUGH A CREDIT FOR TAXES PAID TO OTHER JURISDICTIONS

The second prong of the test outlined in *Complete Auto* requires that a tax be fairly apportioned. The determination of whether a tax is fairly apportioned rests on whether it is both “internally and externally consistent.” *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989) . In order to be internally consistent, “a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result.” *Id.* (citing *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983)). Because Massachusetts provides a credit under G.L. c. 64I, § 7(c) for sales or use tax already paid to any other jurisdiction, there would be no potential for multiple taxation were the same tax to be applied on the Regency Fleet by other jurisdictions. See *M&T Charters, Inc.*, 404 Mass. at 143 .

A tax is “externally consistent” if the “State has taxed only that portion of the interstate activity which reasonably reflects the in-state component of the activity being taxed.” *Goldberg*, 488 U.S. at 262 . A court must make this determination by considering “the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity.” *Id.* The appellant argued that the requirement that a use tax be levied only on the in-state component of a taxable activity mandates that the tax base on property engaged in interstate commerce be apportioned. In *Jefferson Lines*, the Supreme Court stated that it has “consistently approved [the constitutionality of] taxation of sales without any division of the tax base among different States, and [has] instead held such taxes properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future.” 514 U.S. at 186.

The taxpayer in *Jefferson Lines* argued that Oklahoma should be limited to imposing sales tax only on an apportioned value of the ticket which represented the miles of the journey driven in Oklahoma. *Id.* at 191-192. However, the Court found that the taxpayer “failed to raise any specter of successive taxes that might require [them] to reconsider whether an internally consistent tax ... could fail the external consistency test for lack of further apportionment (a result that no sales tax has ever suffered under [the Supreme Court's] cases).” *Id.* at 192. As the Court explained, because a use tax is a compensating tax generally paired with a sales tax, if another state attempted to impose use tax on the value of the ticket, the tax “would not apply when another State's sales tax had been previously paid or would apply subject to credit for such payment” and thus any purchaser would be “free

from multiple taxation.” *Id.* at 193-194. Therefore, the Court found that Jefferson Lines failed to show that Oklahoma’s tax on interstate travel ran afoul of the Commerce Clause requirement of external consistency. *Id.*; see also Goldberg, 488 U.S. at 264-265 (holding that the credit provision in a telecommunications tax was sufficient to avoid multiple taxation to the extent other states imposed a similar tax) and D.H. Holmes, 486 U.S. at 31 (fair apportionment prong of the **Complete Auto** test was satisfied where a Louisiana tax provided for a credit against use tax for sales taxes paid to other states).²

Following the same rationale, other jurisdictions throughout the United States have consistently found use taxes on property used in interstate commerce to be fairly apportioned where a system of credit for taxes paid to other jurisdictions is in place. See e.g., *Irwin Industrial Tool Company v. Illinois Department of Revenue*, 238 Ill. 2d 332, 350-351 (2010) (use tax sustained on airplane hangared 4 percent of the time in the state used by employees to conduct business in other states); *Ex Parte Fleming Foods of Alabama, Inc.*, 648 So. 2d 577, 579-580 (Ala. 1994), *cert. den. sub. nom. Fleming Foods v. Alabama Department of Revenue*, 514 U.S. 1063 (1995) (use tax sustained on out-of-state purchases of trucks used in interstate commerce); *General Motors Corporation v. City & County of Denver*, 990 P.2d 59, 69 (Colo. 1999) (use tax sustained on vehicles tested in state before shipment to other states); *Kellogg Co. v. Department of Treasury*, 204 Mich. App. 489, 495 (1994) (use tax sustained on use of airplanes hangared in the state used by employees to conduct business in a different state); *Miller v. Commissioner of Revenue*, 359 N.W.2d 620, 622 (Minn. 1985) (use tax sustained on farm equipment which was used 68 percent of the time in the state); *Director of Revenue v. Superior Aircraft Leasing Company, Inc.*, 734 S.W.2d 504, 507 (Mo. 1987) (use tax sustained on airplane hangared outside the state when it was used 7 percent of the time for flights to the state); *KSS Transportation Corp. v. Baldwin*, 9 N.J. Tax 273, 285 (1987) (use tax sustained on corporate aircraft hangared in the state but used in other states to conduct business); *PPG Industries, Inc. v. Tracy*, 74 Ohio St. 3d 449, 452 (1996) (use tax sustained on fleet of pace cars used by an automobile paint manufacturer 10 percent of the time in the state); and *Frank W. Whitcomb Construction Corp v. Commissioner of Taxes*, 144 Vt. 466, 473 (1984) (use tax sustained on aircraft used 17 percent of the time in the state).

Like the taxpayer in *Irwin Industrial Tool Company*, Regency also “[i]n opposition to this overwhelming weight of authority ... cites only one Alabama case.” 238 Ill. 2d at 351. In that case, *Boyd Brothers Transportation, Inc. v. State Department of Revenue*, 976 So.2d 471, 482 (Ala. App. 2007) (“**Boyd Brothers**”), the Alabama Court of Appeals struck down an unapportioned use tax on the value of trucks used in interstate commerce as violating the Commerce Clause. However, like the Supreme Court of Illinois, the Board found the Alabama Court of Appeals did not even address the issue of credit provisions in lieu of apportionment

and deviated from a decision of its own supreme court, *Ex Parte Fleming Foods of Alabama, Inc.*, 648 So. 2d at 579-580 . The issue in ***Ex Parte Fleming Foods of Alabama, Inc.*** was identical to the issue before the Board in this appeal, namely whether use tax could be levied based on the storage and use in a state of vehicles involved in interstate commerce that were purchased in another state where no sales tax was assessed. *Id.* at 578. The Alabama Supreme Court held that because the sale of the vehicles would have been taxable had it occurred in Alabama, the vehicles were subsequently used and stored in Alabama, and the state provided for a credit for tax paid to prevent multiple taxation, the use tax was fairly apportioned. *Id.* at 579. The Board thus ruled, as so many other jurisdictions have on the same issue, that because the Massachusetts use tax is internally consistent and the appellant has failed to show that it is under any threat of the practical effect of multiple jurisdictions imposing tax on the Regency Fleet, the use tax is fairly apportioned.

3. USE TAX DID NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE

The third prong of the ***Complete Auto*** test requires that a tax must not discriminate against interstate commerce. The Massachusetts use tax is imposed at the same rate as the sales tax and is levied on residents and nonresidents alike. G.L. c. 64I, § 2. Regency argued that the use tax nonetheless discriminates against interstate commerce as it inflicts additional costs per mile on Regency, making it less competitive relative to other transportation carriers. However, the Board found and ruled that the appellant's arguments are based on an incorrect interpretation and improper reliance on *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266 (1987) and its Massachusetts counterpart, *American Trucking Assns., Inc. v. Secretary of Administration*, 415 Mass. 337 (1993) , which both struck down flat, unapportioned user fees imposed on trucking companies for the use of state roads.

The Courts in both cases found that these fees placed an impermissible burden on interstate trucking companies which may be required to pay similar fees in multiple jurisdictions, versus their purely intrastate competitors which would only have one fee to pay. *American Trucking Assns., Inc.*, 483 U.S. at 284- 285 ; *American Trucking Assns., Inc.*, 415 Mass. at 345 . Therefore, the resulting cost-per-mile to operate was higher for interstate taxpayers than those who only operated intrastate. *American Trucking Assns., Inc.*, 483 U.S. at 286 ; *American Trucking Assns., Inc.*, 415 Mass. at 346 . The appellant, seizing on this cost-per-mile comparison, provided the Board with extensive calculations as to the cost-per-mile impact by showing the amortization of the Massachusetts use tax over the miles driven by the Regency Fleet in the Commonwealth. These calculations purported to show that the use tax discriminates against interstate commerce by placing a heavier burden on Regency

versus other interstate carriers that are not subject to Massachusetts use tax and intrastate carriers which travel only in Massachusetts.

However, this argument misapprehends the Courts' decisions in the ***American Trucking Assns., Inc.*** cases in two important respects. First, the Courts found the flat user fees violated the Commerce Clause because they were not internally consistent, as taxpayers could potentially be subject to the same tax in multiple jurisdictions (resulting in the additional cost per mile for interstate carriers). ***Id.*** The appellant conceded that the Massachusetts use tax is internally consistent, due to the credit mechanism. Second, the Massachusetts use tax is a tax on the storage or use of tangible property in the Commonwealth not a tax on the use of its roads, like the tax in ***American Trucking Assns., Inc.***, or a tax on any activity taking place outside of the Commonwealth. Therefore, the appellant's cost-per-mile comparison where Regency might "recover" its use tax cost over so many miles in Massachusetts is not relevant to a determination of whether a sales or use tax on property discriminates against interstate commerce. See *Jefferson Lines*, 514 U.S. at 198-199 ("even if dividing Oklahoma sales taxes by in-state miles to be traveled produces on average a higher figure when interstate trips are sold than when the sale is of a wholly domestic journey, there is no discrimination against interstate travel; miles traveled within the State simply are not a relevant proxy for the benefit conferred upon the parties to a sales transaction ...the potential for interstate movement after the sale has no bearing on the reason for the sales tax").

Instead, the appellant essentially makes a claim that because Massachusetts levies sales and use taxes on interstate tractors and trailers while many other states do not, it makes the cost of doing business more expensive for companies that purchase or use vehicles here. Perhaps this is the reason the appellant continued to stress that the Board consider the "practical effect" of its use tax burden that other taxpayers not storing or using trucks in Massachusetts do not bear as evidence that the use tax is not fairly apportioned and discriminates against interstate commerce. See *Mobil Oil Corp. v. Commissioner of Taxes of Vt.*, 445 U.S. 425, 443 (1980) (noting that ***Complete Auto*** rejected the line of cases holding that the direct taxation of interstate commerce was impermissible and adopted instead a "consistent and rational method of inquiry [that focused on] the practical effect of [the] challenged tax .") However, the "practical effect" of the cost of paying tax in one jurisdiction is not the same as the practical effect of multiple taxation that offends the Commerce Clause. Discrimination results when a state subjects taxpayers doing business outside of the state to disparate tax treatment from those based inside the state, not when a state subjects all taxpayers to tax on a transaction that another state may exempt. Some states may tax things that others do not and "[t]he adverse economic impact in dollars and cents upon a participant in interstate commerce for crossing a state boundary and thus becoming subject to another

State's taxing jurisdiction is neither necessary to establish a Commerce Clause violation, nor sufficient." American Trucking Assns., Inc., 483 U.S. at 284, n. 15 [internal citations omitted]. The appellant here seeks to "use the commerce clause of the United States Constitution not as protection against multiple or discriminatory taxation, but as an escape from any taxation at all. This the Constitution does not permit." M&T Charters, Inc., 404 Mass. at 143-144 .³

4. USE TAX WAS FAIRLY RELATED TO STATE BENEFITS PROVIDED

The final constraint of the *Complete Auto* test states that a tax must be "fairly related" to the services provided by the state. This prong "requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed." Jefferson Lines, 514 U.S. at 199 . A taxpayer's "receipt of police and fire protection, the use of public roads and mass transit, and the other advantages of civilized society" have been found to be sufficient state provided services to satisfy the Commerce Clause requirements. Goldberg, 488 U.S. at 268 (citing D.H. Holmes, 486 U.S. at 32). While using, storing, and maintaining its vehicles in Massachusetts, Regency is the beneficiary of all of the above services. Accordingly, the Board ruled that the use tax was fairly related to the services provided by the Commonwealth while the vehicles were used and stored here.

Therefore, as the Board found and ruled that the imposition of use tax on the Regency Fleet satisfies all four prongs of the *Complete Auto* test, it does not violate the Commerce Clause of the U.S. Constitution.

II. APPELLANT WAS NOT DENIED EQUAL PROTECTION BECAUSE THE COMMISSIONER DID NOT ACT PURSUANT TO IMPERMISSIBLE CONSIDERATIONS OR BAD FAITH IN MAKING ITS ASSESSMENT

Regency has also alleged that it has been deprived by the Commonwealth of its right to equal protection under both the U.S. and Massachusetts Constitutions. First, the appellant maintained that the auditor improperly required it to provide a "fair apportionment" calculation without any guidance as to how to complete it, which would have resulted in inconsistent and unpredictable applications of the use tax law. Second, Regency alleged that the Department intentionally and arbitrarily singled out the company for hostile tax treatment by assessing use tax on its vehicles while its competitors did not pay tax.

In order to succeed on a claim of denial of equal protection under the U.S. Constitution by selective enforcement of a facially neutral law, a taxpayer must prove that: "(1) [said taxpayer] compared with others similarly situated, was selectively treated; and (2) such

selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.” *Rubinovitz v. Rograto*, 60 F.3d 906, 909-910 (1st Cir. 1995) (citing *Le Clair v. Saunders*, 627 F.2d 606, 609-610 (2nd Cir. 1980)); *Yerardi's Moody Street Restaurant & Lounge, Inc. v. Board of Selectmen*, 878 F.2d 16, 21 (1st Cir. 1989) ; *Subash v. Internal Revenue Service*, 514 F.Supp. 2d 114, 119 (D. Mass. 2007) ; *Cote-Whitacre v. Dep't of Pub. Health*, 446 Mass. 350, 376 (2006) . The review of a selective enforcement claim under the Massachusetts Constitution is “generally the same” as the one under the U.S. Constitution. *Cote-Whitacre*, 446 Mass. at 376 .

The Board found that the appellant did not introduce any evidence or elicit any testimony regarding any malice, bad faith, or discrimination on impermissible grounds on the part of the auditor or the Department during the conduct of the audit. With respect to the appellant's first allegation, the appellant did not offer any evidence that it was required to provide the Department with a calculation based on an impermissible consideration. Regency asserted that it was assessed use tax on its vehicles while others were not, while failing to provide any evidence of that claim aside from hearsay testimony of Regency's president concerning a conversation with a competitor. Assuming, *arguendo*, that no other taxpayers in Massachusetts paid use tax on their use in Massachusetts of vehicles in interstate commerce, where there is no showing that the selective treatment is based on discriminatory considerations or a bad faith intent, “[m]ere unequal enforcement of laws without more, does not rise to the level of a constitutional violation.” *Subash*, 514 F.Supp. 2d at 119 (citing *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). The fact that the Commissioner has not made assessments in prior periods does not preclude her from making an assessment in later periods. See **The First National Bank of Boston v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 1993-181, 204. As the appellant introduced no evidence of any bad faith or intentional discrimination against Regency or any of its employees by the Department in making its assessment, the Board found and ruled that there was no violation of the appellant's constitutional right to equal protection.

III. APPELLANT HAD REASONABLE CAUSE FOR NON-FILING OF USE TAX RETURNS AND NON-PAYMENT OF USE TAX DUE TO RELIANCE ON LETTER RULING 80-22

General Laws c. 62C, § 33(f) provides that a penalty for any failure to file a return or timely pay tax may be abated if it is due to “reasonable cause and not due to willful neglect.” The determination of whether reasonable cause existed “requires an 'objective standard,' whereby 'at a minimum, a taxpayer must show that he exercised the degree of care that an

ordinary taxpayer in his position would have exercised.” *Haar v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 2014-515, 529 (quoting *Geoffrey, Inc. v. Commissioner of Revenue*, 453 Mass. 17, 25-26 (2009)); *Commissioner of Revenue v. Wells Yachts South, Inc.*, 406 Mass. 661, 665 (1990) .

Letter rulings are issued to individual taxpayers and may not be relied upon by other taxpayers. 830 CMR 62C.3.2(8)(a); *AA Transp. Co. v. Commissioner of Revenue*, 454 Mass. 114, 122 (2009) . However, the Commissioner does publish letter rulings, after redaction of any specific taxpayer names and details, for the guidance of taxpayers and their representatives. 830 CMR 62C.3.2(10). A letter ruling is deemed revoked if it is not included in the latest public version of the Official MassTax Guide. 830 CMR 62C.3.1(11)(a). Richard Giroux, Regency's president, testified that he relied on the holding in LR 80-22 and for years received stamped exemptions from the Commonwealth according to its terms. LR 80-22 was not issued to the appellant and the regulation under which it was issued has since been amended. While LR 80-22 thus does not govern the outcome of this appeal, it has continued to be published in the Department's official collection of public written statements.

The Board found that Mr. Giroux believed LR 80-22 to be a public written statement by the Commissioner that addressed his exact fact pattern and he took care for decades to ensure that the appellant complied with LR 80-22. The Board found and ruled that an ordinary taxpayer in the appellant's position, given its history of prior successful reliance on the ruling and the fact that its vehicles are exempt from tax in every state of purchase, would not be unreasonable in continuing to believe that no use tax was due. Further, the Commissioner continues to publish LR 80-22 in the official compendium of public written statements without any caveat or other signal to taxpayers that its content was erroneous and should not be relied on. Indeed, the Department's own auditor with 30 years of experience came to a preliminary conclusion that LR 80-22 was applicable to the appellant's use of vehicles in the Commonwealth. The Board found and ruled that, given the uncertainty resulting from the Commissioner's continued publication of LR 80-22, it was not unreasonable for a taxpayer like the appellant to be similarly misled.

Conclusion

On the basis of the foregoing, the Board found and ruled that the imposition of use tax on the appellant's storage and use of the Regency Fleet in Massachusetts was not in violation of the Commerce Clause of the U.S. Constitution or the Equal Protection Clause of the U.S. and Massachusetts Constitutions. Accordingly, the Board upheld the portion of the assessment representing the use tax due and interest thereon. However, the Board found and ruled that

the appellant had reasonable cause for failing to file use tax returns or pay use taxes because of the uncertainty resulting from the continued publication of a public written statement by the Commissioner after it was no longer based on good law. Therefore, the Board granted an abatement of \$391,323.95 of penalties that were assessed.

THE APPELLATE TAX BOARD

By: _____

Thomas W. Hammond, Jr., Chairman

A true copy,

Attest:

Clerk of the Board

¹ Mr. Lewis is a financial consultant who assisted the appellant in attempting to refinance its debt. The sole content of his testimony concerned an occurrence where a potential lender ultimately refused to extend credit to the appellant because of the amount of the tax assessment at issue. The Board found his testimony to be wholly irrelevant to the issue of whether the tax was properly due and gave it no weight.

² The appellant argued that G.L. c. 64I, § 7, as interpreted by 830 CMR 64H.25.1, is unconstitutional on its face because it does not prescribe a specified “fair apportionment” formula and thus taxpayers are left to determine whether it should be done based on mileage, time spent in the state, or some other determination. As the Supreme Court has made clear, a tax is fairly apportioned if the tax provides for formulary apportionment or provides a credit for taxes paid that prevents multiple taxation of the same values. See *Jefferson Lines*, 514 U.S. at 195 (“reject[ing] the idea that a particular apportionment formula must be used simply because it would be possible to use it” and upholding a tax as fairly apportioned when the risk of multiple taxation was obviated by credits for taxes paid).

³ The appellant has characterized Massachusetts’ imposition of use tax on interstate vehicles as an “assault” on the rolling stock exemptions in other states and exhorts the Board to overturn the assessment on the grounds that it is “poor public policy” for

Massachusetts to collect use tax while other states do not. The Legislature has chosen not to enact a rolling stock exemption and the Board may not do so, absent legislative action. The appellant also warns that a decision in favor of the appellee could potentially subject any out-of-state companies picking up or dropping off goods in Massachusetts to use tax and the resulting “surge” in assessments would discourage taxpayers from entering the state. The Board noted that the Commonwealth already assesses use tax on certain property engaged in interstate travel, such as aircraft. See *The New York Times Company v. Commissioner of Revenue*, 427 Mass. 399, 409 (1998) .

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