COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

HOLYOKE GAS AND ELECTRIC v. COMMISSIONER OR REVENUE DEPARTMENT
&
TOWN OF MANSFIELD MUNICIPAL LIGHTING DEPARTMENT v. COMMISSIONER OF REVENUE

Docket Nos. F224466 & F224467 Promulgated: May 9, 2002

These are consolidated appeals under the formal procedure pursuant to G.L. c. 62C, § 39, from the refusal of the appellee Commissioner of Revenue ("Commissioner") to abate sales taxes assessed against Holyoke Gas and Electric for the tax periods between September 1, 1990 and June 30, 1992 and assessed against the Town of Mansfield Municipal Lighting Department for the tax periods between December, 1990 and June, 1993. Because these appeals raised identical issues, the Board allowed the parties' motion to consolidate the appeals.

Commissioner Scharaffa heard these appeals and was joined in the decision for the appellee by Chairman Burns, former Chairman Gurge and Commissioners Lomans and Gorton.

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

Alan L. Kovacs, Esq. for the appellant.

John DeLosa, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

Based on the testimony, the parties' agreed statement of facts, and exhibits entered into evidence at the hearing of these appeals, the Appellate Tax Board ("Board") made the following findings of fact.

The appellant, Holyoke Gas and Electric Department ("Holyoke Gas and Electric"), is a municipal gas and electric department. The appellant, Town of Mansfield Municipal Lighting Department ("Mansfield Municipal Lighting"), is a municipal electric department. Both appellants are engaged in the non-profit sale of electricity to residential, commercial and industrial customers whose residence or place of business is located within their respective municipality. At all relevant times, each appellant was the exclusive provider of electricity to its municipality.

The appellants were at all material times regulated by the Massachusetts Department of Public Utilities ("DPU"). As such, their rates were subject to approval by their respective municipal Light Boards and were filed with DPU, in accordance with the provisions of G.L. c. 164.

Because of the nature of electricity and the way it is delivered to customers, the appellants were unable, in the regular course of business, to bill their customers for electricity as it was delivered to them. In turn, the appellants' customers were unable to pay for the use of electricity as it was delivered to them or to pay for the use of electricity on the same date as it was billed.

Therefore, following each billing cycle, both Holyoke Gas and Electric and Mansfield Municipal Lighting determined the amount of electricity used by each customer during that cycle. The customer was then sent an invoice for electricity used.[1] A representative Holyoke Gas and Electric invoice, submitted into evidence at the hearing of these appeals, showed a "current bill," which reflected the sales price of electricity if payment was made ***after*** 15 days from the date of billing. That same invoice also showed a "current discount," which reflected the sales price of electricity equal to a ten percent reduction of the "current bill," if payment, including arrearage, was made ***within*** 15 days from the date of billing. A representative Mansfield Municipal Lighting invoice, submitted into evidence at the hearing of these appeals,

[1] Electricity charges, due from a customer for each billing cycle, were based on the full posted kilowatt-hour and purchase power adjustment rates.

showed the "gross due," which reflected the sales price of electricity if payment was made ***after*** 15 days from the date of billing. That same invoice also showed a "net due," which reflected the sales price equal to a ten percent reduction of the "gross due," if payment, including any arrearage, was made ***within*** 15 days from the date of billing.[2] Both appellants offered and charged discounted rates to induce prompt and full payment by their customers. These discounted rates were approved by their respective Light Boards and filed with DPU.

For the tax periods between September, 1990 and June, 1992, Holyoke Gas and Electric filed monthly or quarterly sales tax returns and amended sales tax returns. For the tax periods between December, 1990 and June, 1993, Mansfield Municipal Lighting filed monthly or quarterly sales tax returns. Both Holyoke Gas and Electric and Mansfield Municipal Lighting remitted sales taxes for electricity sold to its commercial customers based upon the

[2] At the time an invoice was sent to a commercial customer by Holyoke Gas and Electric, the amount shown on its records as being owed by the customer was the full amount due at its gross rates. As reflected on its books, when payment was made by the date necessary to receive the discount, the "current discount" amount was then subtracted from the total amount due.

At the time an invoice was sent to a commercial customer by Mansfield Municipal Lighting, the amount shown on its records as being owed by the customer was the "net" amount due. If payment was not made by the "due date" indicated on the invoice, the difference between the "gross" amount due and the "net" amount due was then reflected in the record as an additional amount due from the customer.

amounts actually paid by these customers during a particular billing cycle. Both appellants, therefore, remitted to the Commissioner sales taxes based, in part, on discounted sales prices paid by the customers ***after*** the date of billing.

On January 13, 1993, following a July, 1992 audit of the tax periods between September, 1990 and June 30, 1992, the Commissioner issued a Notice of Intention to Assess to Holyoke Gas and Electric, for an additional $131,474.54 of sales taxes due, plus interest, for the tax periods at issue. On February 23, 1993, a Notice of Assessment for that same amount of sales taxes due, plus interest, was issued by the Commissioner.[3] Holyoke Gas and Electric paid the assessment in full.

On January 10, 1994, following an audit of the tax periods between December, 1990 and June, 1993, the Commissioner issued a Notice of Intention to Assess to Mansfield Municipal Lighting, for an additional $31,845.75 of sales taxes due, plus interest and penalties. On April 6, 1994, a Notice of Assessment for that same

[3] The assessment for additional sales taxes due, relating to discounts for early payments at issue here, totaled $110,322.84. The Commissioner's additional assessments included adjustments made as a result of journal entry errors made by Holyoke Gas and Electric and adjustments made as a result of Holyoke Gas and Electric's failure to collect sales tax from customers who were unable to demonstrate their exemption from sales tax. These assessments are not at issue in the instant matter.

amount of sales taxes due, plus interest, was issued by the Commissioner. Mansfield Municipal Lighting paid the assessment in full.

The Commissioner's assessments were based on the premise that sales tax is due on the full purchase price of the electricity, with no exclusion for discounts allowed after the time of sale. Accordingly, the subject assessments represented the difference between the tax due on the full or gross purchase price and the amount of tax charged by the appellants based on the discounted price.

On or about July 28, 1994, Holyoke Gas and Electric and Mansfield Municipal Lighting timely filed separate applications for abatement with the Commissioner for their respective tax periods at issue. On January 4, 1995, the Commissioner denied both abatement applications.

Thereafter, on March 2, 1995, the appellants timely filed their petitions with this Board. On the basis of the above facts, the Board determined that it had jurisdiction to hear and decide this matter and consolidated these appeals for hearing.

Based on the evidence presented, the Board found that the appellants, as vendors of electricity, sold electricity on the date they billed their customers in the regular course of their business. The Board further found that the

appellants offered a discounted sales price to its customers ***after*** that billing or deemed sales date. The Board also found that the appellants collected and remitted sales taxes based on sales prices of electricity reduced by cash discounts taken ***after*** the date of sale.

Accordingly, and for the reasons detailed in the following Opinion, the Board found and ruled that the appellants failed to collect and remit the full amount of sales taxes due the Commonwealth on electricity sold. The Commissioner's denial of the sales tax abatement applications of Holyoke Gas and Electric and Mansfield Municipal Lighting, therefore, was correct and the Board issued decisions for the appellee in these appeals.

OPINION

The question raised by the present appeals is whether early payment discounts, allowed and taken after the time of sale of electricity, must be included in determining the sales price upon which the sales tax is based.

The sales tax is imposed "***upon sales*** at retail." G.L. c. 64H, § 2 (emphasis added). The word "upon" is commonly defined as "on the occasion of, at the time of" or "on". *THE RANDOM HOUSE COLLEGE DICTIONARY* 1444 (1975). The "sale" takes place on the "transfer of title or

possession, or both" of tangible personal property for a consideration. G.L. c. 64H, § 1 (*definition of "sale"*).

A vendor doing business in the Commonwealth is obligated to collect a sales tax from purchasers upon non-exempt sales at retail of tangible personal property.[4] G.L. c. 64H, §§ 2 and 3. The excise is imposed at a rate of five percent of the vendor's gross receipts from all such sales. G.L. c. 64H, § 2.

The "gross receipts" upon which the five percent excise is based is defined as the "total sales price received by a vendor as a consideration for retail sales." G.L. c. 64H, § 1. "Sales price" is defined as "the total amount paid by a purchaser to a vendor as consideration for a retail sale" except for certain exclusions, including "cash discounts allowed and taken on sales." ***Id.***

Regarding the interpretation of statutory language:

> '[t]he general and familiar rule is that a statute must be interpreted according to the intent of the Legislature ascertained from all the words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object

[4] Prior to September 1, 1990, all sales of gas and electricity used for heating purposes were exempt from the excise imposed under Chapter 64H. As of September 1, 1990, however, the definition of the phrase "tangible personal property" was amended to specifically include "gas, steam and electricity." St. 1990, c. 150, § 359; G.L. c. 64H, § 1. Accordingly, the appellants' retail sales of electricity to certain commercial customers were subject to the excise imposed under the provisions of Chapter 64H for the tax periods at issue.

> to be accomplished, to the end that the purpose of its framers may have effectuated.'

Industrial Finance Corporation v. State Tax Commission, 367 Mass. 360, 364 (1975) (*quoting* ***Hanlon v. Rollins***, 286 Mass. 444, 447 (1934)). *See also* ***Acting Superintendent of Bournewood Hospital v. Baker,*** 431 Mass. 101, 104 (2000); ***Commissioner of Revenue v. Dupee,*** 423 Mass. 617, 620 (1996); ***Board of Education v. Assessor of Worcester,*** 368 Mass. 511, 513 (1975); ***Lincoln-Sudbury Regional School District v. Brandt-Jordan Corporation of New Bedford***, 356 Mass. 114, 117-118 (1969).

The Commissioner interprets the statutory exclusion from sales price of cash discounts to mean that only discounts "allowed and taken at the time of sale are excluded from the sales price of tangible personal property upon which the sales tax is based." 830 CMR 64H.1.4(1). The Regulation provides that if the cash discount is taken ***at the time of sale***, the discount is ***excluded*** in determining "sales price", but that if the cash discount is taken ***after the time of sale***, including discounts for early payment by customers who purchase on credit, the discount is ***included*** in determining "sales price". ***Id.*** Such a construction of G.L. c. 64H, § 1, which provides that cash discounts "on sales" means cash discounts allowed and taken

"at the time of sales," is reasonable and consistent with the plain meaning of § 1 and is therefore entitled to weight in interpreting § 1. *See, e.g.,* ***Dupee v. Commissioner of Revenue,*** 16 Mass. App. Tax Bd. Rep. 114, 123 (1994), *aff'd* 423 Mass. 617 (1996)(statutory interpretation contained in duly promulgated regulation which is consistent with statutory provision is presumed to be valid); *see also* ***Monsanto Co. v. Commissioner of Revenue,*** 1997 ATB Adv. Sh. 1154, 1162 (Docket No. F224265, Dec. 3, 1997).

Moreover, the Commissioner's regulation detailing the treatment of discounts for sales tax purposes is consistent with the sound administration of the sales tax. *See* ***Polaroid Corporation v. Commissioner of Revenue,*** 393 Mass. 490, 497 (1984) (terms of a statute are to be construed in harmony with other statutory provisions and the general statutory scheme). Vendors making sales taxable under Chapter 64H are required to timely file sales tax returns and remit the appropriate sales tax.[5] Determination of the "sales price" upon which the tax is

[5] A vendor who has made a taxable sale under Chapter 64H must file a return with the Commissioner for each calendar month. That sales tax return must be filed by the twentieth day of the month following the calendar month at issue. G.L. c. 62C, § 16(h). The vendor must also pay the sales tax on or before the twentieth day of the month following the calendar month at issue. 830 CMR 62C.16.2(4)(d).

based, therefore, must be made expeditiously and with a degree of certainty. Determination of the "sales price," at a point in time ***after*** the sale, as the appellants suggest, would create administrative uncertainty as to the appropriate sales tax base. Reading the statutory exclusion of cash discounts from the sales price as the Commissioner has done in his Regulation is reasonable in light of the statutory provisions mandating timely filing of sales tax returns and timely payment of sales taxes. "The prompt payment of taxes is necessary for the orderly functioning of government." ***Old Colony R. Co. v. Assessors of Boston,*** 309 Mass. 439, 443 (1941); ***Napier v. Springfield,*** 304 Mass. 174, 177 (1939); ***Salisbury Beach Associates v. Assessors of Salisbury,*** 225 Mass. 399, 401 (1917).

Because of the nature of electricity and the way it is delivered to customers, it is difficult to conceptualize the precise moment when a "transfer of title or possession . . . for a consideration" of the electricity takes place. Accordingly, the Commissioner treats the sale of electricity as having been made on the date the vendor bills its customers in the regular course of its business. *See* Technical Information Release 90-7, n. 8 ("TIR 90-7, n. 8."), which provides that:

> For purposes of a vendor's payment of sales tax over to the Commissioner, a sale of gas, steam, or electricity will be treated as having been made on the date that it is billed by the vendor in the regular course of its business. A sale of heating oil is treated as having been made on the date of actual delivery.

In the instant appeal, the early payment discounts at issue took place ***after*** the date of billing of the electricity sold. Accordingly, application of TIR 90-7 to these appeals requires the conclusion that the cash discounts offered by the appellants took place after the sale and are therefore not eligible for exclusion from the sales price pursuant to G.L. c. 64H, §1. *See also* 830 CMR 64H.1.4(1), Example 3 ("Retailer C offers any customer who purchases a camera on credit a 2 per cent discount for payment within ten days. A customer purchases a $200.00 camera on credit. The sales price subject to tax is $200.00, whether or not payment is made within ten days.")

The Board ruled that 830 CMR 64H.1.4 and TIR 90-7 were consistent with the relevant statutory provisions of G.L. c. 64H and were reasonable interpretations of those provisions. Moreover, as a contemporaneous administrative interpretation of the 1990 amendment to G.L. c. 64H, § 1 subjecting commercial sales of electricity to sales tax, TIR 90-7 is entitled to weight in the construction of § 1 as it applies to discounts given on sales of electricity.

See, e.g., ***Xtra, Inc. v. Commissioner of Revenue,*** 380 Mass. 277, 282 (1980); ***Lowell Gas. Co. v. Commissioner of Corporations and Taxation,*** 377 Mass. 255, 262 (1979). Accordingly, the Board found that the appellants, by collecting sales taxes based on a sales price reduced by a cash discount allowed after the date of sale to its customers, failed to properly collect and remit the full amount of sales taxes due under G.L. c. 64H, § 2.

The appellants claim, however, that the Commissioner, through the application of 830 CMR 64H.1.4(1) and TIR 90-7, n. 8, treats suppliers of electricity such as the appellants disparately from suppliers of heating oil[6] in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Part 1, Articles 1 and 10 of the Massachusetts Constitution.[7] They assert that only heating oil vendors can take advantage of cash discounts at the time of sale because sales of heating oil, unlike sales of electricity, steam and natural gas, involve discreet delivery of known quantities of product. They therefore maintain that vendors of electricity cannot

[6] The appellants assert that suppliers of gas and steam are similarly afforded disparate treatment, violative of both the United States and Massachusetts Constitutions.

[7] The Massachusetts Supreme Judicial Court has found that there is no distinction between the equal protection standard to be applied under the Massachusetts Constitution and that applied under the United States Constitution. ***Seiler Corporation v. Commissioner of Revenue,*** 384 Mass. 635, 693 (1981); ***Opinion of the Justices,*** 270 Mass. 593, 599 (1930).

take a discount at the time of sale due to the nature of their product. As a direct consequence, the appellants argue that heating oil vendors are given a competitive advantage over the class of electricity vendors and that the sales tax burden does not fall equally on all members of the class of commercial users of energy.

The Board ruled, however, that the appellants' argument fails in several respects. First, the appellants failed to provide the Board with evidence of the impossibility of creating a billing practice that provides their customers with cash discounts "allowed and taken at the time of sale".[8] 830 CMR 64H.1.4(1). Second, even had the appellants demonstrated the impossibility of providing customers with a discounted sales price at the time of sale, they failed to produce credible evidence, other than the conclusory testimony of their employees, of the existence of a competitive advantage afforded to vendors of heating oil. They produced no credible evidence that fuel oil dealers give such a discount in the regular course of business, that the percentage of fuel oil dealers that allow such a discount is significant or that such a

[8] A discounted rate billed to the customers as the "current bill" might be one such option.

practice, if it exists, effects or in any way unduly burdens the appellants' businesses.

Even assuming that the statute at issue, as interpreted by the Commissioner through his regulation and TIR, treats the appellants as a class of vendors of electricity disparately from the class of vendors of heating oil, a state legislature has wide latitude in enacting its tax laws without offending constitutional principles. The United States Supreme Court has ruled that:

> It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation . . . . [A legislature] may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is ***any conceivable state of facts that would support it***.

Carmichael v. Southern Coal & Coke, 301 U.S. 495, 509 (1937)(emphasis added)(citations omitted). *See also* ***Federal Communications Commission v. Beach Communications, et. al.,*** 508 U.S. 307, 313 (1993). Therefore, under a rational-basis review, "the statute bears a strong presumption of validity, and the burden of proving the measure invalid rests with the party challenging it." ***The Prudential***

Insurance Company of America v. Commissioner of Revenue, 429 Mass. 560, 568 (1999). *See also* ***Aloha Freightways, Inc. v. Commissioner of Revenue,*** 428 Mass. 418, 423 (1998); ***Opinion of the Justices,*** 425 Mass. 1201, 1203-1204 (1997), (*quoting* ***Daley v. State Tax Commission***, 376 Mass. 861, 865-866 (1978)); ***Andover Savings Bank v. Commissioner of Revenue***, 387 Mass. 229, 235 (1982).

Any distinction in a tax statute that has a rational basis will survive a challenge of the equal protection clause." ***Liberty Mutual Insurance Company v. Commissioner of Revenue***, 405 Mass. 352, 358 (1989) (*quoting* ***Smith v. Commissioner of Revenue,*** 383 Mass. 139, 141 (1981)). *See also* ***Lily Transportation Corp. v. Board of Assessors of Medford,*** 427 Mass. 228, 232 (1998); ***Seiler Corp. v. Commissioner of Revenue***, 384 Mass. 635, 639 (1981); ***Old Colony R. Co. v. Assessors of Boston,*** 309 Mass. 439, 446 (1941). "Absent a showing that a statute burdens a suspect group or fundamental interest, it will be upheld as long as it is rationally related to the furtherance of a legitimate state interest." ***Prudential Insurance Company***, 429 Mass. at 568 (*quoting* ***Dickerson v. Attorney General***, 396 Mass. 740, 743 (1986)). Moreover, where a regulation is consistent with the statute which it interprets and represents a reasonable interpretation of that statute, the

administrative interpretation is entitled to deference. *See* ***Fleming v. Contributory Retirement Appeal Board,*** 431 Mass. 374, 375 (2000); ***Dupee v. Commissioner of Revenue,*** 16 Mass. App. Tax Bd. Rep. 114, 123 (1994), *aff'd* 423 Mass. 617 (1996).

Further, there is no constitutional requirement that tax statutes or regulations be so framed that they insure absolute equality of the economic impact on all persons of the burdens and benefits of the tax. ***Shea v. Boston Edison Company,*** 431 Mass. 251, 260 (2000); ***Roberts v. State Tax Commission,*** 360 Mass. 724, 728 (1972); ***Old Colony R. Co. v. Assessors of Boston,*** 309 Mass. at 446 ("Taxation is a practical matter, and mathematical uniformity in the distribution of the public burden arising from governmental expenses is an impossibility.")

On its face, neither the statute at issue nor the Commissioner's regulation interpreting that statute distinguish between types of commodities sold. Even if the statute did distinguish between types of energy vendors, "[t]he Constitution permits the Legislature to make reasonable classifications of persons, property, income and expenses for different treatment under tax statutes." ***Roberts v. State Tax Commission,*** 360 Mass. at 728. Moreover, should such a distinction exist, the Legislature

has recognized that sufficient grounds exist to distinguish electric companies from fuel oil dealers.[9] In addition, the nature of the appellants' industry and its product, and the means employed in conveying that product to its customers, may be sufficient grounds to distinguish the treatment of the appellants from the treatment of fuel oil dealers.[10] ("The nature of the business and the incidents that characterize the property employed in the business may reflect actual underlying differences warranting separate classification." ***Barnes v. State Tax Commission,*** 363 Mass. 589, 584 (1973). *See also* ***Opinion of the Justices,*** 425 Mass. at 1204.

The appellants have failed to sustain their heavy burden of proving that there is no rational basis to support the classification at issue, on any conceivable basis. ***Prudential Insurance Company,*** 429 Mass. at 568.

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[9] Sections 6(r) and (s) of Chapter 64H provide exemptions to a taxpayer for its purchases of materials, tools and fuel and machinery, used directly and exclusively in the furnishing of gas, steam or electricity, but no similar exemption exists for fuel oil dealers. (*See also* ***Lowell Gas Co. v. Commissioner of Corporations & Taxation,*** 377 Mass. 255, 257 (1979), where gas mains, gas services and meter installations installed by a gas company as components of their gas distribution systems were held exempt from sales and use taxes.) The Legislature has also provided a different rate of taxation between utility corporations' excise and fuel oil dealers who operate in the corporate form. *Compare* G.L. c. 63, § 52A and G.L. c. 63, § 32.

[10] The appellants are regulated by the Massachusetts Department of Public Utilities, while the fuel oil industry is not. The appellants' rates, therefore, are set by DPU, while the fuel oil industry is subject to the vagaries of the open market. The nature of electricity requires that it be sold and delivered continuously, whereas fuel oil is sold and delivered at one point in time.

They thus have failed to demonstrate a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Part 1, Articles 1 and 10 of the Massachusetts Constitution.

A person who claims to be aggrieved by the refusal of the Commissioner to abate a tax in whole or in part has the burden of establishing the right to an abatement. ***Staples v. Commissioner of Corporation and Taxation***, 205 Mass. 20, 26 (1940). There is a presumption in favor of the Commissioner that the assessment is valid. ***Schlaiker v. Great Barrington,*** 365 Mass. 245, 245 (1972).

The appellants bore the burden of establishing their claims for abatement. ***Towle v. Commissioner of Revenue,*** 367 Mass. 599, 603 (1986); ***William S. Rodman & Sons, Inc. v. State Tax Commission***, 373 Mass. 606, 610-611 (1977). The appellants failed to meet their burden of proof.

Accordingly, the Board issued a decision for the appellee in these appeals.

APPELLATE TAX BOARD

By: _____
Abigail A. Burns, Chairman

A true copy:

Attest: _____
Clerk of the Board