

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

TOWN FAIR TIRE
CENTERS, INC.

v.

COMMISSIONER OF REVENUE

Docket No. C280607

Promulgated:
June 9, 2008

This is an appeal under the formal procedure pursuant to G.L. c. 62C, § 39 and G.L. c. 58A, § 7, from the refusal of the Commissioner of Revenue ("Commissioner" or "appellee") to grant the appellant, Town Fair Tire Centers, Inc. ("TFT" or "appellant"), an abatement of sales and use taxes for the monthly periods beginning October 1, 2000 and ending April 30, 2003 (the "periods at issue").

Chairman Hammond heard the appeal. Commissioners Scharaffa, Egan, Rose and Mulhern joined him in the decision for appellee.

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

William E. Halmkin, Esq. and David J. Nagle, Esq.,
for appellant.

Kevin M. Daly, Esq. and Timothy R. Stille, Esq., for
appellee.

FINDINGS OF FACT AND REPORT

On the basis of a Statement of Agreed Facts, and the testimony and exhibits introduced in the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact.

During the periods at issue, TFT was a Connecticut corporation principally engaged in the retail sale and installation of tires at its stores located in New England. In all, TFT had 60 stores, including 34 in Connecticut, 5 in Rhode Island, 18 in Massachusetts, and 3 in New Hampshire. TFT also provided a nationwide warranty for the tires that it sold.

Michael Barbaro, the Senior Vice President of Stores for TFT, testified on behalf of appellant at the hearing of this appeal. According to Mr. Barbaro, the physical layout and operation of each of the stores were similar. A customer would come into the store and first go to the front counter. After discussing tire options with a sales associate, the customer would make a selection. The customer would then return to the front counter, where a sales invoice was generated.

After receiving the sales invoice and a number tag to display on the windshield of the vehicle, a customer would then drive the vehicle around to the back of the

store. TFT technicians would retrieve the vehicle based upon the number tag, pull the vehicle into a garage bay, and install the tires. The technicians would return the vehicle to the front of the store and return the keys and work order to the salesperson at the front desk. The salesperson would then deliver the keys and a copy of the sales invoice to the customer.

The sales invoice included the customer's name, telephone number, and address, and the vehicle make and model. The invoices sometimes contained additional information, including an indication that the tires were installed or that the purchase was a wholesale purchase. The stipulated exhibits in this appeal included 313 invoices from TFT's 3 New Hampshire stores, and the vast majority of those contained information showing that the tires were installed on the vehicles. The invoices recorded the manner in which payment was made, and if payment was made by check, the invoice included the purchaser's driver's license information. TFT also maintained a record of customers' addresses for recall and warranty-tracking purposes. Although TFT's invoices did include a field for the vehicle registration number, that field was usually left blank. Of the 313 invoices from the New Hampshire stores entered into evidence, none

contained registration information. However, dozens of the invoices entered into evidence indicated that payment had been made by check and contained Massachusetts driver's license information.

TFT's invoices included a field for sales tax. New Hampshire does not impose a sales tax, but TFT collected the sales tax at its locations in states with a sales tax. TFT did not collect a use tax at its New Hampshire stores. The primary issue in this appeal is whether TFT had an obligation to collect and remit use tax associated with tire sales to Massachusetts residents at its New Hampshire locations (the "sales at issue" or the "tires at issue").

In 2003, auditor Frank Adamski of the Department of Revenue commenced a sales/use tax audit of TFT. Mr. Adamski testified at the hearing of this appeal, and the Board found his testimony to be credible. By agreement with TFT, Mr. Adamski used a block sampling method in his audit. A block sampling method involves selecting one period for review. In the block sampling method, an error rate is created by dividing taxable sales of the selected period by the gross sales for each store under review. In this case, the selected period was September of 2002, and the stores reviewed were

located in Nashua, Salem and Manchester, New Hampshire. The error rate was then applied against the monthly gross sales for each of the stores and for all of the months included in the periods at issue. Mr. Adamski made several adjustments in the course of his audit, resulting in an assessment of tax, penalties and interest in the amount of \$229,311.45.

Of the assessed tax, approximately \$108,947 related to 313 sales identified by Mr. Adamski as sales to Massachusetts residents. Mr. Adamski identified those sales as sales to Massachusetts residents after noting that the invoices contained Massachusetts addresses, and in most cases, Massachusetts telephone numbers. Concluding that Massachusetts residents would use the tires installed on their vehicles in the Commonwealth, Mr. Adamski determined that TFT should have collected and remitted use tax in connection with those 313 sales.

As part of his audit, Mr. Adamski also reviewed resale certificates accepted by TFT at its Massachusetts stores located in Northampton, Saugus, and Quincy. In the course of his audit, Mr. Adamski reviewed some photocopied resale certificates. When he later asked to review the original certificates, he noticed discrepancies between the photocopies and the originals.

Mr. Adamski noted that one certificate was particularly disturbing, that of the Star Provision Co. The "photocopy" stated that Star Provision Co. was engaged in the auto repair business, while the original certificate contained no such description. Mr. Adamski later spoke with the owner of Star Provision Co., who indicated that they were in the meat packing business, and not engaged in auto repair.

Mr. Adamski also began to question many of the certificates, because some of them had missing information. For example, many certificates failed to state the nature of the tangible personal property or services sold by the customer in the regular course of business, as required by G.L. c. 64H, § 8(c). Ms. Kathryn Tutino, Vice President and Comptroller for TFT, testified at the hearing of this appeal regarding the resale certificates. Ms. Tutino testified that it was difficult to obtain completed certificates from all of TFT's customers, and it was possible that TFT employees may have filled in omitted information on some of the certificates. Mr. Adamski also noticed that many of the certificates contained different colored inks and handwriting styles, an indication that they had been completed at different times and by more than one person.

Mr. Adamski sent letters to each of the customers listed on the certificates to confirm that the sales were made for resale. Many of the customers responded and indicated that they did not purchase the tires in question, while others did not respond. Mr. Adamski denied the exemption on those transactions, and determined that sales tax was due from TFT. TFT was given 60 days to cure the defects in the certificates and present evidence that the sales were made for resale, but did not present any evidence in this regard. A total of \$44,805 in sales tax was assessed as a result of the disallowed resale certificates. Of that total, TFT challenged only \$13,670 of sales tax in this appeal, stemming from 16 invoices for sales made to 11 customers.¹ The majority of the 16 disputed invoices indicate that the tires purchased were also installed on the vehicles.

A Form A-37, Consent Extending the Time for Assessment of Taxes, was executed by TFT and the Commissioner, extending the time for the Commissioner to assess tax for all of the periods at issue until June 30, 2004. Following the completion of the audit, the Commissioner issued TFT a Notice of Intent to Assess

¹ \$13,670 is not the amount of sales tax derived directly from the 16 invoices at issue, but instead is the calculated liability as a result of the block sampling method used in this audit.

("NIA") for the periods at issue dated February 13, 2004, proposing an additional assessment of sales and use tax, penalties and interest in the total amount of \$217,773.28. On March 14, 2004, TFT filed a Form DR-1, objecting to the proposed assessment and requesting a pre-assessment hearing with the Department of Revenue's Office of Appeals ("Office of Appeals"). On May 10, 2004, a conference was held between the Commissioner and representatives of TFT. A Form B-37, Special Consent Extending the Time for Assessment of Taxes, was executed by TFT and the Commissioner, extending the time for the Commissioner to assess tax for all of the periods at issue until 90 days from the date of final determination by the Office of Appeals. By notice dated December 15, 2004, the Commissioner notified TFT that assessments proposed on the NIA would be assessed in full. On January 11, 2005, the Commissioner issued a Notice of Assessment for the periods at issue, assessing tax, penalties and interest in the amount of \$229,311.45. On March 29, 2005, TFT timely filed an Application for Abatement with the Commissioner, contesting the assessment, and by Notice of Abatement Determination dated April 25, 2005, the Commissioner denied TFT's Application for Abatement. TFT filed its Petition with

the Board on June 20, 2005. On the basis of these facts, the Board found that it had jurisdiction to hear and decide this appeal.

To the extent that it is a finding of fact, the Board found that TFT was a vendor engaged in business in the Commonwealth. Based upon the Massachusetts addresses, telephone numbers and driver's license information contained in the record, the Board found that the tires at issue were installed on vehicles owned or operated by Massachusetts residents. Based upon the evidence, and in the absence of evidence to the contrary, the Board inferred that the vehicles owned or operated by Massachusetts residents also bore Massachusetts registration plates ("license plates") and certificates of inspection ("inspection stickers"), which provided additional evidence to TFT of the intended place of use of the tires. The Board therefore found that the sales at issue were sales of tangible personal property to be stored, used or consumed in Massachusetts. Accordingly, the Board found that the Commissioner properly assessed TFT for use tax in connection with those sales under G.L. c. 64I, § 4. The Board also found, to the extent that it is a finding of fact, that the disputed resale certificates were not valid resale certificates accepted

in good faith by TFT, and that therefore, the Commissioner properly disallowed the sales tax exemption on those sales. Based on these facts and for the reasons discussed in the following Opinion, the Board issued its decision in this appeal for appellee.

OPINION

I. Use Tax

A. Introduction

The primary issue in this appeal is whether TFT was obligated to collect and remit use tax on tires sold to Massachusetts residents at its New Hampshire stores. General Laws c. 64I, § 2, imposes an excise, at the rate of five percent, on "the storage, use, or other consumption in the commonwealth of tangible personal property... purchased from any vendor... for storage, use, or other consumption² within the commonwealth."

Liability for payment of the tax generally falls upon the person using such property. However, G.L. c. 64I, § 4, imposes a collection duty upon certain vendors, providing that:

Every vendor engaged in business in the commonwealth and making sales of tangible

² Hereafter, for convenience, the Board shall refer only to "use" of the tangible personal property, omitting references to "storage" and "other consumption."

personal property... for... use... in the commonwealth not exempted under this chapter, shall at the time of making the sales, or, if the... use... of the tangible personal property ... is not then taxable hereunder, at the time the... use... becomes taxable, collect the tax from the purchaser.

Many of the essential facts are not in dispute. In addition to its New Hampshire locations, TFT operated 18 stores in Massachusetts during the periods at issue, and its primary business, both in Massachusetts and the other states in which it operated, was the retail sale and installation of tires. The Board therefore found that TFT was a "vendor engaged in business in the commonwealth and making sales of tangible personal property," as set forth in G.L. c. 64I, § 4.

The real controversy between the parties lies in the portion of the statute referring to sales for use "in the commonwealth." Appellant advanced numerous arguments as to why the transactions at issue did not come within the scope of the statute, but those arguments were based on a misinterpretation of the relevant law. Appellant also argued that the Commissioner's attempt to force use tax collection duties upon it in connection with sales at its New Hampshire stores violated its rights under the Due Process and Equal Protection Clauses of the United States Constitution, and the parallel provisions of the

Massachusetts Constitution. For the reasons discussed below, the Board found that the Commissioner's imposition of use tax collection duties upon TFT did not impinge on any of its Constitutional rights.

The burden of proof is on the party seeking abatement. "The taxpayer has the burden of proving as a matter of law its right to an abatement of the tax." *Commissioner of Revenue v. J.C. Penney Company, Inc.*, 431 Mass. 684, 686 (2000) (citing *Towle v. Commissioner of Revenue*, 397 Mass. 599, 603 (1986)). As discussed more fully below, the Board found that appellant failed to prove that the 313 sales at issue did not involve the purchase of tangible personal property to be used in the Commonwealth. Consequently, the Board found that TFT was obligated to collect use tax under G.L. c. 64H, § 4.

B. The Tires at Issue Were Purchased for Use in the Commonwealth

The evidence entered into the record in this appeal included 313 invoices recording sales to customers with Massachusetts addresses. With few exceptions, those invoices also contained Massachusetts telephone numbers, and dozens of them contained Massachusetts driver's license information. In the absence of evidence to the contrary, these facts support the finding that those

customers were Massachusetts residents. In *Montgomery Ward & Co., Inc. v. State Bd. of Equalization*, 272 Cal. App. 2d 728 (Cal. Ct. App. 1969), *cert. denied*, 396 U.S. 1040 (1970), the state of California sought to impose use tax on purchases made via credit card by California residents at Montgomery Ward's Nevada and Oregon retail stores. The Court of Appeal of California found that there was no direct evidence in the record that the purchasers in question were residents of California, but added, "It may be inferred in the absence of other evidence that each customer with a billing address in California is in fact a customer who resides in California [and] that the retailer is therefore charged with knowledge of that fact." *Id.* at 740.

In the instant case, TFT's customers provided Massachusetts addresses, and in most cases, Massachusetts telephone numbers. In numerous instances, when payment was made by check, the invoice contained Massachusetts driver's license information. This evidence provided a sufficient basis for the finding that the tires at issue were installed on vehicles owned or operated by Massachusetts residents, and as such would be used in the Commonwealth, and the Board so found. However, beyond the information that TFT solicited for the invoices, the Board

found that a cursory visual inspection of the vehicles would lead to the logical conclusion that the tires were purchased for use in the Commonwealth.

The Board considered the evidence of record against the backdrop of motor vehicle registration and operation requirements in the Commonwealth. Chapter 90 of the General Laws sets forth the legal framework for motor vehicle registration and operation in the Commonwealth. General Laws c. 90, § 9, prohibits the operation of unregistered vehicles in the Commonwealth, and G.L. c. 90, § 2 provides that the registrar of motor vehicles shall furnish license plates to every person whose vehicle is registered in the Commonwealth. License plates must be properly mounted on vehicles, clean and visible at all times. G.L. c. 90, § 6. General Laws c. 90, § 3 1/2 also provides penalties for any person who improperly registers a motor vehicle in another state "or misrepresents the place of garaging of the motor vehicle or trailer within the commonwealth, for the purposes of evading the payment of motor vehicle excise, sales and use taxes or insurance premiums." G.L. c. 90, § 3 1/2 (c) (emphasis added).

General Laws c. 90, § 7A, in conjunction with 540 CMR 4.04, sets forth the guidelines for the annual inspection of motor vehicles in the Commonwealth, including that upon

the successful completion of each inspection, "the inspector shall remove the old Certificate of Inspection from the windshield... and affix the new Certificate of Inspection." 540 CMR 4.40(2)(d). Furthermore, 830 CMR 4.04(2)(d) requires that each vehicle inspected in the Commonwealth bear the inspection sticker on the "windshield, trailer, semi-trailer or converter" of the vehicle. Based on the evidence, which showed that the vehicles were operated by Massachusetts residents, the Board inferred that the vehicles upon which TFT installed the tires at issue bore Massachusetts license plates and inspection stickers, and that a simple view of those plates and stickers would confirm that the tires would be used in the Commonwealth.

TFT argued that use tax collection liability stemming from the collection of information such as that in the instant appeal would impose burdensome record-keeping requirements on businesses, resulting in a chilling effect on commerce. The Board found this argument to be without merit. For reasons wholly unrelated to use tax collection, TFT was in the practice of soliciting the name, address, telephone number, car make and model, and at times, driver's license information, from its customers. It is no more burdensome to take note of a

license plate or inspection sticker than it is to ask for the type of information which TFT was already in the practice of obtaining.³ TFT had, in every instance, the opportunity to observe the license plate and inspection sticker on each vehicle on which it installed tires. That TFT chose not to record this information cannot shield TFT from use tax collection liability when it was apparent from a simple visual inspection that the tires would be used in the Commonwealth. Both the information that TFT solicited for the invoices and the information which was essentially unavoidable to TFT, in the form of license plates and inspection stickers on the vehicles on which it installed the tires, provided sufficient indication of the intended place of use of the tires.

Appellant failed to introduce evidence indicating that the tires at issue were not purchased for use in the Commonwealth. Given the abundance of evidence indicating that the tires were purchased for use in the Commonwealth, and the lack of any evidence to the contrary, the Board found that the tires at issue were purchased for use in the Commonwealth.

³ In fact, it is easier for TFT to obtain the license plate or inspection information than the name, telephone number, address and driver's license of the customer. Information from the license plate and inspection sticker is available at a glance on each vehicle on which tires are installed, and involves no solicitation of information from a customer.

C. **The Commissioner's Imposition of Use Tax Collection Duties Did Not Violate TFT's Due Process Rights Under the Constitution**

Appellant claimed that the Commissioner violated its due process rights by seeking to impose use tax collection duties upon it under G.L. c. 64H, § 4. At the outset, the Board notes that the statute is presumptively valid, and the burden is upon appellant to prove that it is unconstitutional. "In addressing a constitutional challenge to a tax measure, we begin with the premise that the tax is endowed with a presumption of validity and is not to be found void unless its invalidity is established beyond a rational doubt." *Commissioner of Revenue v. Barnett G. Lonstein*, 406 Mass. 92, 94 (1989) (quoting *Andover Sav. Bank v. Commissioner of Revenue*, 387 Mass. 229, 235 (1982)).

The scenario presented by this appeal— a state seeking to impose use tax collection duties upon an out-of-state vendor— is one that the Supreme Court has considered on more than one occasion. "[I]n determining whether a state tax falls within the confines of the Due Process Clause, the Court has said that the 'simple but controlling question is whether the state has given anything for which it can ask return.'" *Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753, 756 (1967) (quoting *Wisconsin v.*

J.C. Penney Co., 311 U.S. 435, 444 (1940)). The Court has additionally held that the "Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992) (quoting *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344-45 (1954)).

The Board found and ruled that the Commonwealth has given TFT something in exchange for which it may ask that TFT collect and remit the use tax at issue. In *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1997), the Supreme Court upheld California's imposition of use tax collection duties upon a District of Columbia corporation which sold maps, books and other products to California residents. The products were ordered via the mail and shipped directly to the purchasers from National Geographic's offices in Maryland and the District of Columbia. National Geographic maintained two offices in California that solicited advertisements for its magazine publication, but those offices played no role in soliciting or filling the orders made by mail. Nevertheless, the Supreme Court found that it was immaterial whether the activity sought to be taxed related to National Geographic's activities within

California. "[T]he Society's two offices, without regard to the nature of their activities, had the advantage of the same municipal services— fire and police protection, and the like— as they would have had if their activities... included assistance to the mail order operations that generated the use taxes." *Id.* at 561.

Likewise in the instant appeal, TFT's Massachusetts activities were identical to its New Hampshire activities — the sale and installation of tires and related services. It is immaterial whether the tires at issue were connected in any way to TFT's business operations in the Commonwealth. As in *National Geographic Society*, TFT benefitted from the many services provided by the Commonwealth, including fire and police protection, road maintenance and other municipal services by virtue of its retail operations in the Commonwealth.

Furthermore, the Board found that there was a "definite link" between the Commonwealth and TFT. It is undisputed that TFT had extensive retail operations in the Commonwealth during the periods at issue. Therein lies a key distinction between the instant case and *Miller Brothers Co.*, the case on which appellant relied most heavily.

In *Miller Brothers Co.*, Maryland sought to impose use

tax collection duties upon a Delaware vendor which sold goods over the counter to Maryland residents at its Delaware store. The Delaware vendor in that case had no stores in Maryland. The extent of its connection with Maryland consisted of occasional deliveries, by common carrier and in its own trucks, of goods to Maryland residents, and the occasional mailing of sales circulars to former customers in Maryland. **Miller Brothers Co. v. Maryland**, 347 U.S. at 341-42. After seizing one of the vendor's delivery trucks in Maryland, Maryland sought to impose use tax collection duties upon all of the vendor's sales to Maryland residents, regardless of whether they were cash-and-carry or delivered items. **Id.**

The Court determined that there was insufficient nexus between Maryland and the vendor, noting the "wide gulf between... active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store." **Id.** at 347. In concluding that Maryland's actions had violated the Due Process Clause, the Court stated that the "burden of collecting or paying [Maryland's] tax cannot be shifted to a foreign merchant in the absence of *some jurisdictional basis not present here.*" **Id.** (emphasis added). In the instant case, TFT had exactly the "jurisdictional basis" which was absent

in **Miller Brothers Co.**: active operation in the Commonwealth, by virtue of its 18 retail stores located here.

Because TFT's nexus with the Commonwealth is not in dispute, the due process issue in this case turns on a narrower inquiry: the sufficiency of the connection between the Commonwealth and the tires at issue. In **National Geographic Society**, the Court discussed a significant distinction between the facts of **National Geographic Society** and those in **Miller Brothers Co.** While National Geographic Society shipped the purchases in question directly to its California customers, in **Miller Brothers Co.**, "Marylanders went to Delaware to make purchases, the seller did not go to Maryland to make sales." **National Geographic Society**, 430 U.S. at 559.

The Court therefore found that:

[T]he lack of certainty that the merchandise sold over the counter to Maryland customers in Delaware was transported to Maryland prior to its use militated against a finding of adequate nexus with respect to those purchases. The relational defect between the taxing State and the person or property sought to be taxed... obviated any relevance of a relationship between the State and the out-of-state retailer.

Id. at 561-562 (emphasis added). TFT argued that it could not know the intended location of use of the tires at the

time of sale, and that its alleged lack of certainty that the tires would be used in the Commonwealth was a fatal barrier to the imposition of use tax collection duties, as in *Miller Brothers Co.* The Board disagreed. In addition to a sufficient connection between TFT and the Commonwealth, the Board found that there was a definite link between the tires at issue and the Commonwealth, namely that the tires installed by TFT on vehicles were destined for use in the Commonwealth.

The purchases at issue in this case were not cash-and-carry transactions, but instead involved tires installed on vehicles operated by Massachusetts residents.⁴ Substantial indicia of the place of use of the tires were available at a glance, including the license plates and inspection stickers on the vehicles. Further, the information TFT solicited for reasons unrelated to use tax collection, including customer name, address, telephone number and in certain instances, driver's license information, provided sufficient indication that the tires would be used in the Commonwealth. TFT argued that in

⁴One of the 313 invoices entered into evidence in this appeal indicated that the sale was in fact a cash-and-carry transaction. However, that same invoice contained a Massachusetts address, a Massachusetts telephone number, and Massachusetts driver's license information. Based on those indicia, and in the absence of any evidence to the contrary, the Board found that the tires sold were purchased for use in Massachusetts.

order for the imposition of use tax collection duties on out-of-state vendors to withstand constitutional scrutiny, a vendor must make certain, by its own actions, the use of the property within the taxing state, such as by shipping or delivering the property into that state.⁵ The relevant constitutional inquiry, however, is the sufficiency of the vendor's connections with the taxing state, not whether the vendor's own actions ensured use of the property in the taxing state.

The relevance of this inquiry is highlighted by **Miller Brothers Co.**, for in that case, the vendor was in fact shipping or delivering at least some of the goods at issue into Maryland via common carrier or on its own trucks. **Miller Brothers Co. v. Maryland**, 347 U.S. at 341. Nevertheless, the Court struck down the use tax which Maryland sought to impose on *all* of the sales, including those delivered directly into Maryland, because the vendor had no stores in, or other adequate connection with, Maryland. **Id.** at 347.

The Board found no support in the case law for the proposition that only a vendor's shipment or delivery of tangible personal property into the taxing state could

⁵ Even assuming that TFT was correct on this point, the Board found that TFT did, by its own actions in installing the tires on the vehicles, ensure that those tires would be used in the Commonwealth.

remove the lack of certainty that the Court spoke of in *National Geographic Society*, nor any reason to construe G.L. c. 64H, § 4 so narrowly, based upon its legislative intent. Indeed, the Board found that the statute was intended to reach exactly the type of transactions at issue in this appeal.

The use tax established by G.L. c. 64I, together with the sales tax in G.L. c. 64H, are complementary elements of 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... use... within the Commonwealth.'" The use tax thus designed "to prevent the loss of sale tax revenue from out-of-state purchases," and to protect local merchants from loss of business to merchants in other States with lower or nonexistent sales taxes.

J.C. Penney Company, Inc., 431 Mass. at 687 (internal citations omitted).

The Board found that transactions like those in the instant appeal are the exact reason for the imposition of the use tax- to prevent the loss of sales tax revenue through out-of-state purchases and to ensure that local vendors will remain on equal footing with their out-of-state competitors.

Having found that TFT had a sufficient connection with the Commonwealth and that the Commonwealth had a sufficient connection with the tires at issue, the Board

found and ruled that the Commissioner's imposition of use tax collection duties upon TFT did not violate the Due Process Clause.

D. The Commissioner's Imposition of Use Tax Collection Duties Did Not Violate TFT's Constitutional Right to Equal Protection

Appellant additionally argued that it had been denied equal protection under the Fourteenth Amendment and Article 10 of the Constitution of the Commonwealth because, it alleged, the use tax assessment at issue arose solely because of TFT's voluntary solicitation of customer information. Appellant argued that this was inherently discriminatory because other similarly-situated vendors who chose not to collect such information would not be liable for collection of the use tax.

As an initial matter, appellant failed to introduce any evidence that other similarly-situated vendors received more favorable treatment than TFT:

[T]he first step in an equal protection case is determining whether the plaintiff has demonstrated that she was treated differently than others who were similarly situated to her. Absent a threshold showing that she is similarly situated to those who allegedly receive favorable treatment, the plaintiff does not have a viable equal protection claim.

Klinger v. Department of Corrections, 31 F.3d 727, 731

(1994) (internal citations omitted). For this reason appellant's claim must fail. Instead of evidence entered into the record, appellant's equal protection argument consisted of the assertion that other vendors who chose not to collect the same information as TFT would not be responsible for collecting the use tax. This bare assertion, which is insufficient to sustain an equal protection claim, also fails to recognize that it was not just the information that appellant "chose" to collect which gave rise to the obligation to collect the use tax, but information which was plainly apparent to appellant in the form of license plates and inspection stickers on each vehicle upon which it installed tires.

Even assuming, *arguendo*, that appellant's contention was correct, appellant offered no evidence that the discrimination existed or was of the magnitude necessary to constitute a violation of its equal protection rights. "The equal protection clause imposes no 'iron rule of equality.'" ***Kenneth Keniston & others v. Board of Assessors of Boston & Others***, 380 Mass. 888, 894 (1980) (quoting ***Allied Stores of Ohio, Inc. v. Bowers***, 358 U.S. 522, 526 (1959)). See also ***Lehnhausen v. Lake Shore Auto Parts Co.***, 410 U.S. 356, 364 (1973) (holding that the discrimination must be shown to be hostile and

oppressive). Furthermore, "[W]here taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.'" **Kenneth Keniston**, 380 Mass. at 893 (quoting **Lehnhausen**, 410 U.S. at 359).

Considering the broad deference given to states in implementing their taxing regimes, and appellant's failure to introduce any credible evidence supporting its claim into the record, the Board found that the Commissioner did not violate appellant's right to equal protection.

E. Appellant's Arguments Were Based on a Misreading of the Statutes

TFT advanced a series of additional arguments as to why it was not liable for collecting a use tax in connection with the tire sales at issue. Those arguments, however, were based on a fundamental misreading of the applicable statutes and were therefore rejected by the Board.

TFT argued that the sales at issue were not subject to use tax because, as retail sales completed outside of the Commonwealth, they were not subject to the Massachusetts sales tax. TFT relied on G.L. c. 64I,

§7(b), which exempts from the use tax “[s]ales exempt from the taxes imposed under chapter sixty-four H.” This circular reading of the statutes would render the use tax meaningless. As discussed above, the sales tax and the use tax 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... use... within the Commonwealth.”” **J.C. Penney Company, Inc.**, 431 Mass. at 687 (quoting **M & T Charters, Inc. v. Commissioner of Revenue**, 404 Mass. 137, 140 (1989)) (other citations omitted). The exemption from the use tax under G.L. c. 64I, §7(b) correlates to sales expressly exempted under G.L. c. 64H, and not to sales generally outside the scope of G.L. c. 64H because they were not sales at retail in the Commonwealth.

This point is illustrated in **Casino by the Sea v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 1997-666, a case cited by TFT in an attempt to support its argument. At issue in that case was the use tax on a vessel purchased in South Carolina and brought to the Commonwealth for use. The taxpayer argued that it was a commercial vessel, exempt from sales tax under

G.L. c. 64H, § 6(o), and that as such, the vessel was also exempt from use tax. Because the Board found that the vessel was primarily a recreational vessel rather than a commercial vessel, the Board found that it was not exempt under G.L. c. 64H, § 6(o), and was therefore not exempt from the use tax. *Id.* at 675-76. Though the vessel at issue in **Casino by the Sea** was purchased outside of the Commonwealth and was not subject to sales tax under G.L. c. 64H, it was subject to the use tax because no express exemption applied. This premise is consistent with the purpose of the use tax, to reach those transactions which are not subject to the sales tax by virtue of being completed outside of the Commonwealth. TFT's circular reading of the statutes would undermine the purpose of the use tax. The Board therefore rejected this argument.

TFT made two further, related arguments: that liability for the use tax falls on the purchasers of the tires at issue, and not upon TFT; and that any use tax liability arises only after the out-of-state sales are complete, so that TFT cannot be responsible for collection of the tax. Again, these arguments are based on an incorrect reading of the statute.

General Laws c. 64I, § 2 imposes a tax upon the

"use... in the commonwealth of tangible personal property... purchased... for... use... within the commonwealth." This Board in the past has recognized the "element of intent embodied in G.L. c. 64I, § 2," namely that the purchaser must have purchased the tangible personal property with the intent to use it in the Commonwealth. *Casino by the Sea* at 1997-675. Contrary to TFT's assertion that the use tax liability arises only after a purchaser brings the property into the Commonwealth for use, the liability for the tax arises at the time of the purchase if the purchaser's intent is to use the property in the Commonwealth. It is not a "springing" use tax liability, as suggested by TFT, but a certain liability, secured by the purchaser's intent at the time of the purchase.

General Laws c. 64I, § 3 places the liability for the use tax imposed under G.L. c. 64I, § 2 upon the person using the tangible personal property in the Commonwealth. That section further provides that such liability

shall not be extinguished until said tax has been paid to the commissioner, except that a receipt from a vendor engaged in business in the commonwealth or from a vendor who is authorized... to collect the tax and who is, for the purposes of this chapter, regarded as a vendor engaged in business in the

commonwealth, given to the purchaser... shall be sufficient to relieve the purchaser from further liability.

General Laws c. 64I, § 4, in turn, imposes the duty of collecting the use tax upon "[e]very vendor engaged in business in the commonwealth and making sales of tangible personal property... for ... use... in the commonwealth." That section also requires vendors collecting such a tax to "give the purchaser a receipt therefore in the manner and form prescribed by the commissioner." *Id.* While payment of the use tax falls upon the person making the taxable use, collection of the tax is imposed on vendors engaged in business in the Commonwealth that make sales of tangible personal property for use in the Commonwealth. A purchaser's liability for the use tax terminates upon the showing of a receipt indicating payment of the use tax at the time of purchase, furnished by a vendor as directed in G.L. c. 64I, § 4. Contrary to TFT's argument, the statute squarely imposes the collection of the tax upon vendors engaged in business in the Commonwealth. Vendor collection promotes the "efficient administration of the tax statutes." *Commissioner of Revenue v. Jafra Cosmetics, Inc.*, 433 Mass. 255, 264 (2001) (citing *Baker Transport, Inc. v. State Tax Comm'n*, 371 Mass. 872, 875 (1977));

Commissioner of Revenue v. Boback, 12 Mass. App. Ct. 602, 604 (1981)). While it is true, as TFT pointed out, that individual purchasers may file use tax returns and remit the tax on their own, the possibility of self-assessment and payment in no way exempts vendors from the collection duties imposed under G.L. c. 64I, § 4. The Board therefore rejected this argument, as it was contrary to the plain and unambiguous language of the statute.

TFT argued that the imposition of use tax collection duties for out-of-state sales would leave it in an untenable position should the taxable use of the property never occur. Because of the relatively small dollar amount involved in any transaction, and because it is not the ultimate payer of the tax, TFT argued that it would have little incentive to apply for a refund of the tax in the event that the taxable use in the Commonwealth never occurred. The Board did not find this argument compelling. The same argument could be made for any of the trustee taxes for which vendors or employers are merely collectors, rather than the ultimate taxpayers. The potential lack of motivation on the part of a taxpayer to seek a refund is no reason to dismantle the statutory scheme implemented by the Legislature. This argument is in essence a policy complaint and is better

addressed to the Legislature than the Board. See **S.J. Groves & Sons, Co. v. State Tax Commission**, 372 Mass. 140, 145 (1977).

Last, appellant argued that TFT's installation of the tires at issue did not ensure that those tires would be used in the Commonwealth, because anything could happen to the tires once the sale was complete, i.e., they could be used elsewhere by the customer, stolen or destroyed before ever being used in the Commonwealth. This argument, speculative at best, ignores the legal precedent laying such concerns to rest.

It is well established that the tangible personal property need not be used exclusively, or even primarily, in the Commonwealth in order for a use tax to arise. **Towle**, 397 Mass. at 605. See also **M & T Charters, Inc.**, 404 Mass. at 143. More importantly, as discussed above, there is an "element of intent embodied in G.L. c. 64I, § 2," namely that a purchaser must purchase the tangible personal property with the intent to use it in the Commonwealth. **Casino by the Sea** at 1997-675. Whatever fate befalls the tires once purchased, the use tax is properly imposed if the purchaser intended to use the tires in the Commonwealth at the time of the purchase. This fact cuts both ways, as a purchaser who purchases

tangible personal property with no intent to use that property in the Commonwealth is not liable for the use tax, even if that property is subsequently used in the Commonwealth. See ***The Macton Corporation v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1993-95, 108.

In ***J.C. Penney Company, Inc.***, the Supreme Judicial Court found that the taxpayer's mailing of catalogs into the Commonwealth via United States Postal Service constituted a taxable use of those catalogs in the Commonwealth, and upheld the Commissioner's imposition of a use tax. ***J.C. Penney Company, Inc.***, 431 Mass. at 685. J.C. Penney's control of the catalogs effectively ended once they were placed into the mail, and like the tires at issue in the instant appeal, the catalogs in theory could have been lost, stolen or destroyed prior to reaching their Massachusetts destination. But the Supreme Judicial Court in ***J.C. Penney Company, Inc.*** was not troubled by this possibility, and neither is the Board.

For all of these reasons, the Board found that the Commissioner's imposition of the use tax on the tires at issue was correct, and that TFT was obligated, as a vendor engaged in business in the Commonwealth, to collect the use tax at issue.

**II. The Resale Certificates at Issue Were Not Valid
Resale Certificates Accepted in Good Faith**

Under G.L. c. 64H, § 8(a), all sales of tangible personal property are presumed to be taxable sales unless the contrary is established, and the burden of proving that sales are not taxable is upon the vendor. General Laws c. 64H, § 8(b) provides, in pertinent part, that:

The certificate shall relieve the vendor from the burden of proof only if taken in good faith from a person who is engaged in the business of selling services or tangible personal property of the same kind as services or property sold and who holds the registration as provided for in section seven and who, at the time of purchasing the service or tangible personal property, intends to sell the service or property in a sale at retail in the regular course of business.

As discussed above, auditor Frank Adamski questioned certain resale certificates accepted by TFT after detecting irregularities on the face of many of the certificates. In some instances, after contacting the purported customers, Mr. Adamski received confirmation that they were not engaged in the business of selling tires or that they had not even made the purchases in question. The Commissioner accordingly disallowed the sales tax exemption on a number of sales, generating the assessment of the sales tax at issue. TFT has conceded much of that assessment, and contests in this appeal only

\$13,670 of sales tax stemming from 16 invoices for sales made to 11 different customers.

The issue presented in connection with the sales tax assessment is whether TFT accepted valid resale certificates in good faith. A vendor can be said to accept a certificate in "good faith" unless he "has knowledge of facts which give rise to a reasonable inference that the purchaser does not intend to resell the property." ***International Business Machines Corp. v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1997-1028, 1055 (quoting ***Arkin-Medo, Inc. v. Commissioner of Revenue Services***, 684 A.2d 1220, 1223 (1996), *further review denied* 688 A.2d 330 (1997)). On the basis of the facts entered into evidence, the Board found that TFT had knowledge of facts giving rise to an inference that the tires were not purchased for resale, and that TFT failed to meet its burden of proving that it accepted resale certificates in good faith from purchasers engaged in selling tires in the regular course of business.

Of the 16 invoices at issue in this appeal, some involved purchasers whose names did not necessarily lead to an inference that they were engaged in the sale of

tires, such as Broadway Glass, Inc. or ER Grafics.⁶ Other invoices involved purchasers whose names suggested the possibility that they were engaged in the sale of tires, for example, Sunoco of Peabody or A & D Automotive. The nature of TFT's business, however, was clear from the record: TFT was primarily engaged in the business of selling tires and installing those tires on the vehicles of its customers. Regardless of the type of business in which the purchaser was engaged, the Board found it obvious that tires actually installed on a customer's vehicle were not intended for resale, but rather were intended for use. The majority of the disputed invoices indicate that the tires purchased had been installed on the vehicles. The Board found, with respect to those sales, that TFT had knowledge of facts giving rise to an inference that the purchasers did not intend to resell the tires, and therefore, that TFT did not accept the resale certificates in good faith.

Acceptance in good faith is not the only requirement of the statute. G.L. c. 64H, § 8(c) sets forth the information required to appear on each resale certificate:

⁶ The resale certificate indicated that the business was called "ER Grafics" while the invoices indicated that it was "ER Graphics."

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

Many of the resale certificates at issue were lacking information required by the statute. Specifically, several of the certificates did not indicate the type of service or tangible personal property sold by the purchaser, or information about the nature of the purchaser's business. TFT did not enter into the record any evidence regarding the nature of the business engaged in by the purchasers, or the type of property sold by them, and the Board therefore could not determine whether the purchases at issue were for resale in the regular course of business. It is well settled that the burden of proof is on the party seeking an abatement. "The taxpayer has the burden of proving as a matter of law its right to an abatement of the tax." *J.C. Penney Company, Inc.*, 431 Mass. at 686 (citing *Towle*, 397 Mass. at 603). The Board found that TFT did not meet its burden of proving that it accepted, in good faith, resale certificates from persons engaged in the business

of selling tangible personal property of the same kind sold by TFT.

Conclusion

The Board found and ruled that the tires at issue were purchased for use in the Commonwealth, and that, as a vendor engaged in business in the Commonwealth, TFT was obligated to collect use tax upon the sale of those tires. The Board further found and ruled that appellee did not violate any of appellant's Constitutional rights by imposing use tax collection duties upon appellant. The Board also found and ruled that appellant did not meet its burden of proving that it accepted resale certificates in good faith from purchasers engaged in the business of selling the type of tangible personal property sold by appellant. For all of the foregoing reasons, the Board issued a decision in favor of appellee in this appeal.

APPELLATE TAX BOARD

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

A true copy,

Attest: _____
Clerk of the Board