COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

MASSPCSCO **v.** **COMMISSIONER OF REVENUE**	Docket Nos. C278479 C284149 C288621
MASSPCSCO **v.** **BOARD OF ASSESSORS** **OF THE CITY OF WOBURN**	Docket Nos. F283510 F293338
MASSPCSCO **v.** **BOARD OF ASSESSORS** **OF THE CITY OF SPRINGFIELD**	Docket Nos. F282451 F287119

Promulgated: May 7, 2010

Commissioner Scharaffa heard these appeals. Chairman Hammond and Commissioners Egan, Rose, and Mulhern joined him in the decisions for the appellant in the appellant's appeals against the Commissioner of Revenue ("Commissioner") (Docket Nos. C278479 (2005), C284149 (2006), and C288621 (2007)) and the decisions for the appellees in the appellant's appeals against The Board of Assessors of the City of Springfield ("Springfield Assessors") (Docket Nos. F282451 (FY 2005) and F287119 (FY 2006)) and in the appellant's appeals against The Board

of Assessors of the City of Woburn ("Woburn Assessors") (Docket Nos. F283510 (FY 2006) and F293338 (FY 2007)).

The appellant's appeals against the appellee, Commissioner, were filed under the formal procedure pursuant to G.L. c. 58A, §§ 6 and 7 and G.L. c. 58, § 2, from the refusal of the Commissioner to include the appellant on her annual lists under G.L. c. 63, § 30 of domestic and foreign corporations subject to an excise for 2005 through 2007 (the "Corporations Books").

The appellant's appeals against the appellees, Springfield Assessors and Woburn Assessors (collectively, the "Assessors"), were filed under the formal procedure pursuant to G.L. c. 58A, §§ 6 and 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the Assessors to abate taxes on certain personal property in the Cities of Springfield and Woburn, respectively, owned by and assessed to the appellant under G.L. c. 59, §§ 11 and 38, for fiscal years 2005 and 2006 with respect to the Springfield appeals and for fiscal years 2006 and 2007 with respect to the Woburn appeals.

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

John S. Brown, Esq., *Matthew D. Schnall*, Esq., *Darcy A. Ryding*, Esq., and *Shu-Yi Oei*, Esq. for the appellant.

Kevin M. Daly, Esq. and *Daniel Shapiro*, Esq. for the appellee Commissioner.

Richard P. Bowen, Esq. and *Jeffrey T. Blake*, Esq. for the appellee Woburn Assessors.

John M. Lynch, Esq. and *Stephen W. DeCourcey*, Esq. for the appellee Springfield Assessors.

FINDINGS OF FACT AND REPORT

I. Introduction

This matter involves seven appeals brought by MASSPCSCO,[1] a Delaware statutory trust that leases wireless telephone network equipment to one of its affiliates. By order dated April 11, 2006, the Appellate Tax Board ("Board") denied a motion to consolidate certain of the appeals. Later, in a series of orders dated October 25, 2007, April 8, 2008, April 17, 2008, and June 24, 2008, the Board ordered these appeals consolidated for purposes of a hearing on all issues other than valuation. Appeals involving MASSFONCO, an affiliate of MASSPCSCO, were severed in the June 24, 2008 order. On August 13, 2008, MASSPCSCO withdrew three petitions involving the Board of Assessors of the City of Newton that had been consolidated

[1] The "PCS" in MASSPCSCO is an acronym for personal communication services.

with these appeals. On September 10, 2009, the Board scheduled a pretrial conference to establish a date for the completion of the hearing regarding the remaining valuation issues relating to MASSPCSCO's appeals involving the Board of Assessors of the City of Boston (Docket Nos. F282536 (FY 2005) and F283668 (FY 2006)), which had been consolidated and partly heard with the above-captioned appeals.[2]

The Board conducted a two-day hearing for these appeals, beginning on September 8, 2008. At the hearing, three witnesses testified for MASSPCSCO: Michael Heaton, the Director of Property Tax for Sprint/United Management Company ("SUMC"), the company that, at all relevant times, performed certain management, bookkeeping, and accounting services for various Sprint affiliates including MASSPCSCO; Brian Jurgensmeyer, the Director of Accounting and Operations for SUMC; and Melinda Ordway, a Senior Program Manager and Fiscal Analyst in the Commissioner's Division of Local Services.

On the basis of the testimony and exhibits introduced at the hearing of these appeals, together with the parties'

[2] MASSPCSCO, the Springfield Assessors, and the Woburn Assessors agreed and stipulated that if MASSPCSCO is not entitled to the "stock-in-trade" exemption under G.L. c. 59, § 5, cl. 16(2), "decisions should be entered in those matters in favor of the Assessors." In other words, unlike the appeals involving Boston, there were no potential valuation issues in the appeals involving Springfield and Woburn.

extensive and detailed Statement of Agreed Facts with eighty-one attached exhibits, the Board made the following findings of fact.

(A) Issues

The two principal issues in these appeals are: (1) whether MASSPCSCO was a foreign corporation within the meaning of G.L. c. 63, § 30 ("Section 30") and entitled to be classified as such by the Commissioner for 2005, 2006, and 2007; and (2) whether MASSPCSCO was entitled to the "stock-in-trade" exemption under G.L. c. 59, § 5, cl. 16(2) ("Clause 16(2)"), which would require a full abatement of the tax assessments placed on its personal property by the Assessors. The Board decided that MASSPCSCO was entitled to be so classified as a foreign corporation but was not entitled to the "stock-in-trade" exemption.

(B) Jurisdiction

(1) Commissioner

On April 25, 2005, the Commissioner issued her 2005 Corporations Book pursuant to G.L. c. 58, § 2.[3] On May 18, 2005, in accordance with G.L. c. 58, § 2, MASSPCSCO timely filed its Petition Under Formal Procedure with the Board claiming to be aggrieved by the Commissioner's failure to include it in her 2005 Corporations Book as a for-profit corporation subject to taxation in Massachusetts.

On May 9, 2006, the Commissioner issued her 2006 Corporations Book. On June 1, 2006, in accordance with G.L. c. 58, § 2, MASSPCSCO timely filed its Petition Under Formal Procedure with the Board claiming to be aggrieved by the Commissioner's failure to include it in her 2006 Corporations Book as a for-profit corporation subject to taxation in Massachusetts.

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[3] G.L. c. 58, § 2 provides in pertinent part:

> The commissioner shall annually, on or before April first of each year, forward to each board of assessors a list of all corporations known to him to be liable on January first of said year to taxation under chapters fifty-nine, sixty A, and sixty-three. . . .
>
> Any person aggrieved by any classification made by the commissioner under any provision of chapters fifty-nine and sixty-three or by any action taken by the commissioner under this section may, on or before April thirtieth of said year or the thirtieth day after such list is sent out by the commissioner, whichever is later, file an application with the appellate tax board on a form approved by it, stating therein the classification claimed.

On April 23, 2007, the Commissioner issued her 2007 Corporations Book. On May 16, 2007, in accordance with G.L. c. 58, § 2, MASSPCSCO timely filed its Petition Under Formal Procedure with the Board claiming to be aggrieved by the Commissioner's failure to include it in her 2007 Corporations Book as a for-profit corporation subject to taxation in Massachusetts.

On the basis of these facts, the Board found and ruled that it had jurisdiction over MASSPCSCO's appeals against the Commissioner.

(2) Springfield Assessors

For fiscal year 2005, MASSPCSCO did not file its form of list with the Springfield Assessors on or before March 1, 2004, but instead filed it on September 27, 2004 in response to a September 8, 2004 request from the City's Law Department written on behalf of the Springfield Assessors.[4] The Springfield Assessors valued the property, as of

[4] Following "seasonable notice" issued by assessors, G.L. c. 59, § 29 requires non-residents and foreign corporation, among others, to bring into the assessors "a true list of all their personal estate in that town not exempt from taxation." "The seasonable filing of a list . . . is a condition precedent to the right to secure an abatement unless the taxpayer shows a reasonable excuse for delay." ***Dexter v. City of Beverly***, 249 Mass. 167, 169 (1924). The Springfield Assessors did not contest the timeliness of MASSPCSCO's filing, and the Board inferred and found from the actions of the parties and MASSPCSCO's reliance on advice from tax professionals and counsel not to file "a true list" because its personal property was exempt that reasonable or good cause for delay existed. On this basis, the Board determined that the form of list was timely filed on September 27, 2004 in response to the Springfield Assessors' request.

January 1, 2004, at $250,500 and assessed personal property taxes thereon, at the rate of $33.36 per thousand, in the amount of $8,356.68. The tax bill was issued on December 31, 2004 and, on March 29, 2005, a payment of $4,286.06 was made on behalf of MASSPCSCO.[5]

On January 26, 2005, in accordance with G.L. c. 59, § 59, MASSPCSCO timely applied to the Springfield Assessors for abatement of the tax. The Springfield Assessors did not act on the abatement application and did not send out notice of their inaction. On July 28, 2005, in accordance with G.L. c. 59, § 65C, MASSPCSCO timely filed a Petition for Late Entry with the Board. By Order dated August 24, 2005, the Board allowed MASSPCSCO's Petition for Late Entry, and, on September 1, 2005, MASSPCSCO seasonably filed its Petition Under Formal Procedure with the Board.

On the basis of these facts, the Board found and ruled that it had jurisdiction over this appeal.

For fiscal year 2006, in accordance with G.L. c. 59, § 29, a form of list was timely filed with the Springfield Assessors on behalf of MASSPCSCO on February 23, 2005. The

[5] In contrast to real estate tax appeals, "a person aggrieved by the refusal of assessors to abate a tax on personal property" must pay only one-half of the tax to preserve [the] right of appeal." G.L. c. 59, § 64. Moreover, for jurisdictional purposes, there is no provision requiring that the tax due on personal property be paid "without the incurring of any interest charges," as is the case for most real estate tax appeals. G.L. c. 59, § 64.

Springfield Assessors valued the property, as of January 1, 2005, at $250,500 and assessed personal property taxes thereon, at the rate of $33.03 per thousand, in the amount of $8,271.51. The tax bill was issued on March 31, 2006. Payments had been made previously on behalf of MASSPCSCO in the amount of $2,089.17 on August 1, 2005 and in the amount of $2,089.17 on November 1, 2005.

On April 4, 2006, in accordance with G.L. c. 59, § 59, MASSPCSCO timely applied to the Springfield Assessors for abatement of the tax. The Springfield Assessors denied the request for abatement on July 3, 2006, and, on July 27, 2006, in accordance with G.L. c. 59, §§ 64 and 65, MASSPCSCO seasonably filed its Petition Under Formal Procedure with the Board.

On the basis of these facts, the Board found and ruled that it had jurisdiction over this appeal.

(3) Woburn Assessors

For fiscal year 2006, in accordance with G.L. c. 59, § 29, a form of list was timely filed with the Woburn Assessors on behalf of MASSPCSCO on February 23, 2005. The Woburn Assessors valued the property, as of January 1, 2005, at $15,380,600 and assessed personal property taxes thereon, at the rate of $21.50 per thousand, in the amount of $330,682.90. The tax bill was issued on January 4, 2006

and on May 3, 2006, a payment was made on behalf of MASSPCSCO as follows:[6]

Tax Paid	Interest Paid	Total Paid
$165,341.45	$5,517.40	$170,858.85

On January 30, 2006, in accordance with G.L. c. 59, § 59, MASSPCSCO timely applied to the Woburn Assessors for abatement of the tax. Because the Woburn Assessors did not act on MASSPCSCO's request for abatement, it was deemed denied three months later. On May 5, 2006, in accordance with G.L. c. 59, §§ 64 and 65, MASSPCSCO seasonably filed its Petition Under Formal Procedure with the Board.

On the basis of these facts, the Board found and ruled that it had jurisdiction over this appeal.

For fiscal year 2007, in accordance with G.L. c. 59, § 29, a form of list was timely filed with the Woburn Assessors on behalf of MASSPCSCO on February 21, 2006. The Woburn Assessors valued the property, as of January 1, 2006, at $9,813,700 and assessed personal property taxes thereon, at the rate of $21.96 per thousand, in the amount of $215,508.85. The tax bill was issued on December 31, 2006 and payments were made on behalf of MASSPCSCO as follows:[7]

[6] See footnote 5, *supra*.
[7] See footnote 5, *supra*.

Date	Tax Paid
July 21, 2006	$ 52,748.64
October 17, 2006	$ 52,748.64
January 16, 2007	$ 2,257.15

On February 1, 2007, in accordance with G.L. c. 59, § 59, MASSPCSCO timely applied to the Woburn Assessors for abatement of the tax. Because the Woburn Assessors again failed to act on MASSPCSCO's request for abatement, it also was deemed denied three months later. On July 30, 2007, in accordance with G.L. c. 59, §§ 64 and 65, MASSPCSCO seasonably filed its Petition Under Formal Procedure with the Board.

On the basis of these facts, the Board found and ruled that it had jurisdiction over this appeal.

II. Underlying Facts

(A) The Companies

Sprint Nextel Corporation, formerly known as Sprint Corporation ("Sprint"), was, at all relevant times, a Kansas corporation that was mainly a holding company with its operations principally conducted by its subsidiaries.

Sprint Spectrum Holding Company, L.P., formerly known as MajorCo, L.P. ("Holdings"), and MinorCo, L.P. ("MinorCo") were, at all relevant times, Delaware limited partnerships. Since November, 1998, all of the partnership

interests in Holdings and MinorCo have been owned by direct or indirect subsidiaries of Sprint.

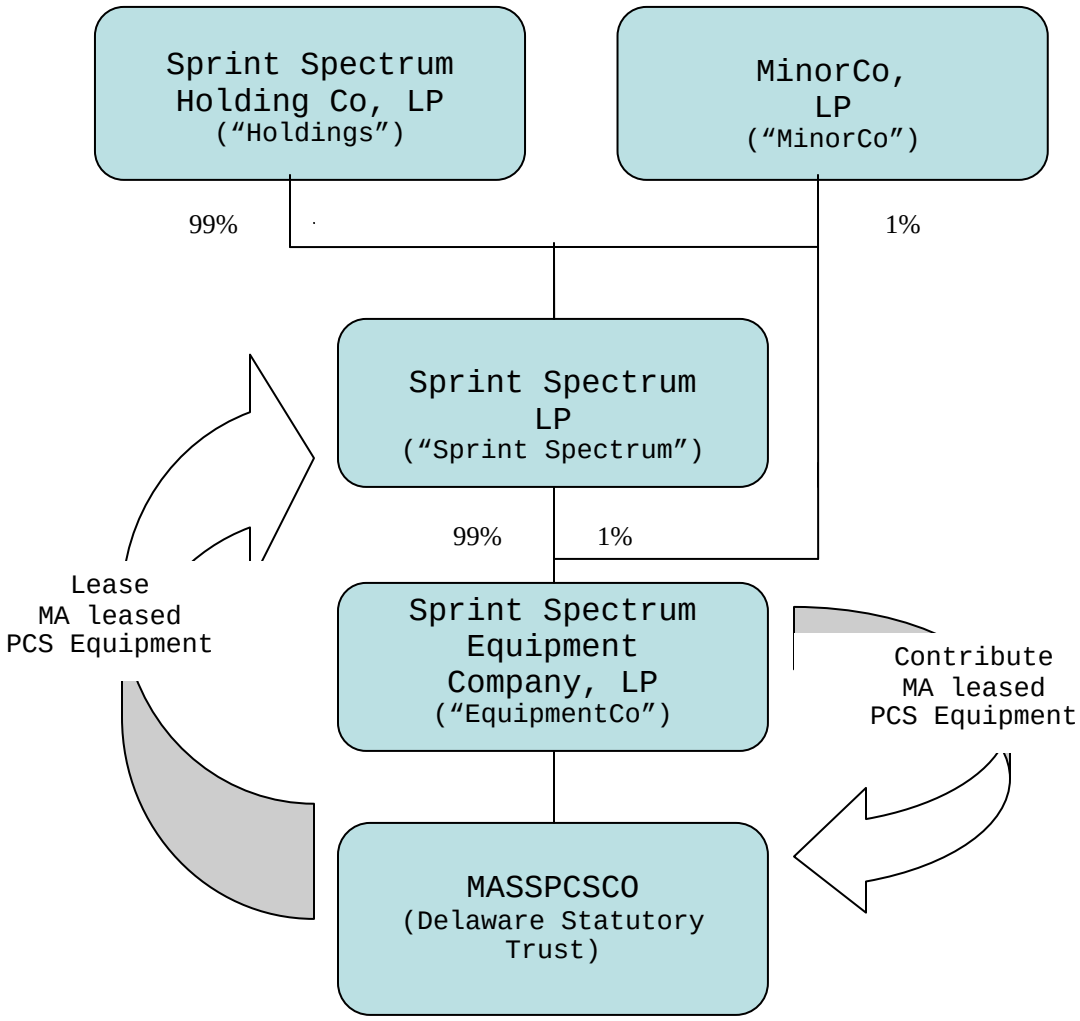
Sprint Spectrum L.P. ("Sprint Spectrum") was, at all relevant times, a Delaware limited partnership. Holdings was the 99% general partner of Sprint Spectrum and MinorCo was the 1% limited partner of Sprint Spectrum.

Sprint Spectrum Equipment Company L.P. ("EquipmentCo") was, at all relevant times, a Delaware limited partnership. Substantially all of the partnership interests in EquipmentCo were owned by Sprint Spectrum.

MASSPCSCO was, at all relevant times, a Delaware statutory trust formed on December 19, 2003. One-hundred percent of the beneficial interest in MASSPCSCO was owned by EquipmentCo.

SUMC was, at all relevant times, a Kansas corporation, and was an indirect wholly-owned subsidiary of Sprint.

The relationship among the foregoing entities is summarized in the following diagram and further discussed below.



(B) Sprint Spectrum and Its National Wireless Network

Sprint Spectrum was formed as a Delaware limited partnership on March 28, 1995. Sprint Spectrum was originally named "MajorCo Sub, L.P.", and changed its name to "Sprint Spectrum L.P." on February 29, 1996. At all relevant times, the partnership interests in Sprint Spectrum have been held by Holdings, as the 99% general partner and MinorCo, as the 1% limited partner. Holdings and MinorCo, in turn, were formed as partnerships among

subsidiaries of four independent companies: Sprint, Telecommunications, Inc. ("TCI"), Comcast Corporation ("Comcast") and Cox Communications, Inc. ("Cox"). The purpose of the joint venture among Sprint, TCI, Comcast and Cox was to establish Sprint Spectrum as a leading provider of wireless communications products and services in the United States by various means, including acquisition and operation, directly through subsidiaries, of a national wireless communications network (the "Network"). On June 3, 1996, Sprint Spectrum registered with the Secretary of the Commonwealth of Massachusetts ("Secretary") as a foreign limited partnership.

EquipmmentCo was formed as a Delaware limited partnership on May 15, 1996 to own and lease to Sprint Spectrum certain personal property that would be used in the Network. EquipmentCo registered with the Secretary as a foreign limited partnership on July 19, 1996. In August 1996, Sprint Spectrum, together with an affiliate, Sprint Spectrum Finance Corporation, issued $250,000,000 aggregate principal amount of 11% Senior Notes and $500,000,000 aggregate principal amount of 12½% Senior Discount Notes (collectively, the "Notes") to fund capital expenditures, including build out of the Network, to fund working capital as required, to fund operating losses and for other

partnership purposes. At the time of the issuance of the Notes, Sprint Spectrum and its direct and indirect subsidiaries, including EquipmentCo, had not commenced commercial operations and had no revenue from operations.

Sprint Spectrum also obtained financing from equipment vendors (the "Vendor Financing"). The terms of the Vendor Financing required that all "Personal Property assets" (as defined in the vendors' commitment letters), which included equipment, be acquired in or transferred to a separate, wholly-owned, single-purpose partnership subsidiary of Sprint Spectrum. That subsidiary was EquipmentCo.

Since August 1996, Sprint Spectrum has been engaged in the business of providing wireless communications services over the Network in the Commonwealth and in other markets across the United States. Using funds that it borrowed, earned, or received as capital contributions, EquipmentCo purchased property to be used in the Network and leased all of its Network property to Sprint Spectrum. The lease payments due from Sprint Spectrum to EquipmentCo under the leases were determined by applying a lease factor to the costs of the various assets leased.

During the second quarter of 1998, Sprint announced that it had entered into a restructuring agreement with TCI, Comcast and Cox to buy out those companies' interests

in Sprint Spectrum (*i.e.*, their partnership interests in Holdings and MinorCo), in exchange for an equity interest in Sprint. The buyout was completed in November, 1998. After the buyout, Sprint loaned approximately $2.9 billion to Sprint Spectrum, and Sprint Spectrum used those funds in part to retire the Vendor Financing.

(C) Taxation of the Network from 1999 through 2002

From 1999 through 2002, Sprint Spectrum filed returns with the Commissioner pursuant to G.L. c. 59, § 41. In conformity with the Commissioner's instructions, because it owned no underground conduits, poles, wires or pipes, Sprint Spectrum limited the property reported on the Forms 5941 to machinery used in manufacture, namely, electric generators. The aggregate valuation certified by the Commissioner for the personal property reported by Sprint Spectrum was $330,800 for fiscal year 2000, $330,800 for fiscal year 2001, $1,703,000 for fiscal year 2002, and $1,762,900 for fiscal year 2003. On January 13, 2003, in response to an order of the Board in ***RCN-BecoCom, LLC v. Commissioner of Revenue***, Docket Nos. F253495 & F257397 (order dated August 1, 2002) (***RCN-BecoCom*** Order"),[8] the Commissioner announced that filers of Form 5941 organized

[8] The Board determined, among other things, that RCN-BecoCom, as an LLC, was not entitled to the corporate exemption under G.L. c. 59, § 5, clause 16(1).

as partnerships or limited liability companies that filed federal returns as partners or as disregarded entities would, beginning with the fiscal year 2004 returns due on March 1, 2003, be required to report "all machinery, including switching equipment, used for telephone and telegraph purposes" that it owned.

After Sprint Spectrum filed a fiscal year 2004 Form 5941, on February 28, 2003, reporting all of the machinery and equipment located in the Commonwealth that it leased from EquipmentCo and used in the Network, the Commissioner certified an aggregate taxable value of $172,899,300, nearly a 100-fold increase over the fiscal year 2003 certified value.

(D) The Formation and Operation of MASSPCSCO

As a result of the change in the Commissioner's interpretation of the Massachusetts property tax law resulting from the ***RCN-BecoCom*** Order, Sprint undertook a review of Massachusetts property tax law, and sought advice from outside professionals at Deloitte & Touche LLP ("Deloitte & Touche"). Sprint had previously considered shifting its Massachusetts tangible personal property to certain utility corporations that operate within the Sprint business structure, but Sprint determined that such a restructuring was inadvisable. In a memorandum dated

December 10, 2003, Deloitte & Touche advised Sprint to restructure by creating, among other things, MASSPCSCO:

> The crux of the restructuring is to place otherwise taxable Massachusetts assets in an entity that is recognized as a corporation for purposes of the relevant property tax exemptions in Massachusetts, while being disregarded for federal income tax purposes so as to avoid the creation of federal income tax issues.

In the memorandum, Deloitte & Touche also recommended that MASSPCSCO "be structured, if possible, to engage in third party transactions"; and that profits be directed to "defend against any assertion of a sham transaction theory" and to "protect against any change in the state's position that a federally disregarded entity does not have gross income for state tax purposes." Deloitte & Touche further recommended that leases from MASSPCSCO to Sprint Spectrum be at "arms' length prices."

In a follow-up memorandum regarding Sprint's "Property Tax Restructuring Profile," Deloitte & Touche summarized the purposes of the restructuring:

> For business, legal and tax purposes, Sprint will undergo an internal organizational restructuring strategy that enables the Company to qualify for certain personal property tax exemptions for its switching equipment and other personal property in Massachusetts without requiring the assets to be placed in corporate solution for federal income tax purposes. Specifically, the use of a federally disregarded Delaware Business Trust ("DBT") for holding Massachusetts assets permits Sprint to take advantage of differences in state

> and federal entity classification rules, and obtain certain corporate property tax exemptions without federal income tax consequences, and with acceptable state income and sales tax impacts.

Mr. Heaton's direct testimony also confirmed that MASSPCSCO's creation was "undertaken with a view toward Massachusetts property taxes." On cross-examination, he even went so far as to agree with his interrogator that MASSPCSCO's creation was done solely for tax purposes.

EquipmentCo executed a Trust Agreement forming MASSPCSCO as a Delaware statutory trust and filed a certificate of Trust with the Delaware Secretary of State. All of the beneficial interests in MASSPCSCO were owned, at all relevant times, by EquipmentCo. MASSPCSCO did not file an election to be treated as an association taxable as a corporation for federal tax purposes. MASSPCSCO filed corporate excise tax returns on Forms 355 with the Commissioner which the Commissioner received on the following dates:

Tax Year	**Return Received**
2003 & 2004	June 6, 2005
2005	September 15, 2006
2006	July 18, 2007

Sprint's tax compliance group had apparently inadvertently neglected to file an automatic six-month extension for tax years 2003 and 2004. The Commissioner neither audited nor declined to accept any of MASSPCSCO's corporate excise tax

returns, and therefore did not make any adjustment to the amounts of tax reported on them.

By a document executed on December 22, 2003, EquipmentCo transferred all of its tangible personal property located in Massachusetts, including towers, antennas, switches and related software, and other equipment, to MASSPCSCO as a contribution to capital valued at net book cost and without any other consideration. MASSPCSCO then became the owner of that Network property. No sales tax was paid in connection with that transfer. On December 23, 2003, Sprint Spectrum and EquipmentCo executed a Lease Termination Agreement pursuant to which they terminated, as of December 31, 2003, the lease of that property from EquipmentCo. On December 23, 2003, Sprint Spectrum and MASSPCSCO executed a lease agreement. EquipmentCo retained its property located outside Massachusetts and continued to lease that property to Sprint Spectrum.

Since December 2003, MASSPCSCO has performed activities similar to those previously conducted by EquipmentCo with respect to the Network assets located in Massachusetts. MASSPCSCO has held existing assets that are leased to Sprint Spectrum, has had new assets purchased on its behalf using funds that were borrowed, earned, or

received as capital contributions and has leased those assets to Sprint Spectrum, and retired obsolete assets.

At all relevant times, Sprint Spectrum paid rent to MASSPCSCO on a monthly basis for the leased property. Mr. Heaton testified that the lease factors were calculated to produce a rate of return of 9%, presumably on the net book cost of the leased property. This same rate of return was used from 1996 through at least 2006 and was applied to all categories of leased property. There was no evidence showing how this rate of return was calculated or determined or demonstrating its relationship to a market rate of return. Contrary to advice from the accounting firm of Ernst & Young, MASSPCSCO did not implement, during the relevant time period, a lease factor schedule which would have assigned different lease factors to different types and categories of property and likely more accurately reflected market values. At all relevant times, sales taxes were collected and paid on a monthly basis on the lease payments made by Sprint Spectrum. For purposes of paying over sales taxes to the Commissioner, SUMC made the payments by checks drawn on a bank account in the name of SUMC. Each of the payments was contemporaneously charged to the account of MASSPCSCO.

At all relevant times, MASSPCSCO had no employees. All functions and services necessary or desirable for the management, administration and operation of MASSPCSCO's business, as required or requested by MASSPCSCO, were performed by employees of SUMC, under a services agreement dated December 14, 2004. In return for its services, MASSPCSCO reimbursed SUMC by a fixed payment of $2,000 per month for a total of $24,000 per year on revenues between $23,000,000 and $41,700,000 for calendar years 2004 through 2006 and property, plant, and equipment valued at $211,000,000 to $328,000,000 for those same years. MASSPCSCO did not as of January 1, 2005, January 1, 2006 or January 1, 2007, hold any assets other than property leased to Sprint Spectrum.

During calendar years 2004 through 2006, MASSPCSCO did not lease, or seek or attempt to lease, property to any person or entity other than Sprint Spectrum. During calendar years 2004 through 2006, MASSPCSCO did not consider or conduct any regular business activities other than those incident to the purchase, ownership and leasing of Network equipment to Sprint Spectrum. Any repairs to the equipment leased were the responsibility of the lessee, not MASSPCSCO. MASSPCSCO did not purchase the equipment it leased to Sprint Spectrum; instead Sprint Spectrum

purchased the equipment and marked the purchase against MASSPCSCO's account on a common ledger. Sprint Spectrum and MASSPCSCO did not maintain separate bank accounts. The lease payments made by Sprint Spectrum to MASSPCSCO were implemented by ledger entries transferring amounts to MASSPCSCO's account in Sprint's books. MASSPCSCO was not compensated for any services it performed for any person or entity. During calendar years 2004 through 2006, MASSPCSCO did not lease or occupy any office space or real estate, except that certain inventory of MASSPCSCO was stored, prior to delivery to Sprint Spectrum sites, in facilities shared with other affiliates of Sprint.

At all relevant times, the administrative trustee of MASSPCSCO was an employee of SUMC and was authorized only to take action as directed by EquipmentCo. EquipmentCo was empowered to remove or appoint any trustee without cause at any time. The nominal trustee, Wilmington Trust Company, was not entitled to exercise any powers under the trust or control over MASSPCSCO; it was appointed for the limited purpose of fulfilling certain requirements under Delaware law.

(E) The Commissioner's Treatment of MASSPCSCO

Pursuant to G.L. c. 58, § 2, the Commissioner, through the Division of Local Services Municipal Data Management &

Technical Assistance Bureau ("Data Management"), prepares an annual list of for-profit corporations known to the Commissioner to be liable for Massachusetts corporate excise, local property, or motor vehicle excise taxes as of January first of each year. The Commissioner "forwards" this annual list to the boards of assessors of the Commonwealth's cities and towns. The publication is officially known as *Massachusetts Domestic and Foreign Corporations Subject to an Excise*, but is commonly, and in this Findings of Fact and Report, referred to as the "Corporations Book."

The information compiled for the Corporations Book derives from two sources, the Commissioner's internal database of taxpayers qualifying as "active" corporations under chapter 63 and the Secretary's new corporations database. The Commissioner's internal database is referred to as MASSTAX and includes all active taxpayers filing as for-profit corporations.[9] The Secretary's database is a compilation of newly registered corporations doing business in Massachusetts that is communicated to the Commissioner for inclusion in the Corporations Book.

[9] An "active" taxpayer is one that has filed a return or paid a corporate excise within the last five years.

Despite being organized in 2003, MASSPCSCO's 2003 and 2004 Forms 355, Corporate Excise Returns, were not filed on its behalf by Sprint with the Commissioner until June 6, 2005. Extensions of time to file those returns were not requested, either. Previously, MASSPCSCO had registered with the Secretary as a trust, and the Secretary had classified MASSPCSCO as a trust. Consequently, MASSPCSCO was not among the entities listed in either the Secretary's new corporations list or the MASSTAX corporations database for 2005. Pursuant to established procedures, the Commissioner compiled her 2005 Corporations Book by supplementing the prior year's list with: information from a list obtained from the Secretary of new corporation filings; a list of entities that had filed corporate excise tax returns; and applications for manufacturing corporation status. MASSPCSCO was not included in any of those data sources. As a result, the 2005 Corporations Book, which was published on April 25, 2005, did not contain MASSPCSCO among its listing of corporations.

After MASSPCSCO's June 6, 2005 filings and tax payments, the Commissioner's MASSTAX database recognized MASSPCSCO as an active foreign corporation in its database. Its listing did not represent, however, a studied determination by the Commissioner as to MASSPCSCO's proper

filing status. The Commissioner left MASSPCSCO out of her 2006 and 2007 Corporations Books, on advice of counsel, because of the pending litigation involving this matter's 2005 appeals before the Board and the perceived position of local boards of assessors that MASSPCSCO was not entitled to recognition as a for-profit corporation for purposes of local property tax exemptions. Notwithstanding these omissions, the Commissioner issued two letters to local boards of assessors – one prior to and one subsequent to the publication of the 2005 Corporations Book – stating that MASSPCSCO was a foreign corporation, and explaining that its failure to be listed in the Corporations Book resulted from the administrative procedures used in compiling the Corporations Book.

(F) Abatement Amounts at Issue

The parties stipulated that if MASSPCSCO is properly classified as a "foreign corporation" within the meaning of Section 30 and if the personal property that MASSPCSCO leases to its affiliates is "stock in trade" that is exempt under Clause 16(2), then MASSPCSCO is entitled to abatements in the following amounts:

Assessors	Fiscal Year	Abatement Amounts at Issue
Springfield	2005	$ 8,356.68
Springfield	2006	$ 8,271.51
Woburn	2006	$ 330,682.90
Woburn	2007	$ 215,508.85

III. Board's Ultimate Findings of Fact

(A) MASSPCSCO Was a Foreign Corporation Within the Meaning of Section 30

Based on all of the evidence and its subsidiary findings above, and as explained more fully in its Opinion below, the Board ultimately found that, at all relevant times, MASSPCSCO was a foreign corporation within the meaning of Section 30 and entitled to be classified as such by the Commissioner for 2005, 2006, and 2007. The Board found that MASSPCSCO's omission from the Commissioner's 2005 Corporations Book resulted solely from the fact that MASSPCSCO was not included in any of the data sources that the Commissioner consulted in preparing the Corporations Book. The omission did not reflect a determination by the Commissioner concerning MASSPCSCO's status as a foreign corporation. The Board found that, at all relevant times, the Commissioner did not, in preparing the annual Corporations Book, make any substantive determinations concerning the status of any entity, except with respect to

entities that had applied for classification as manufacturing corporations, which MASSPCSCO did not do.

With respect to MASSPCSCO's omission from the 2006 and 2007 Corporations Books, the Board found that MASSPCSCO's omission resulted solely from advice of counsel because of the pendency of this litigation before the Board regarding MASSPCSCO's prior omission from the 2005 Corporations Book and the perceived position of local boards of assessors that MASSPCSCO was not entitled to recognition as a for-profit corporation for purposes of local property tax exemptions. In omitting MASSPCSCO from the 2006 and 2007 Corporations Books, the Board found that the Commissioner again did not make any substantive determination regarding MASSPCSCO's status as a foreign corporation and, admittedly, deviated from her usual practice and procedures, which, but for the deviation, would have resulted in MASSPCSCO's inclusion. Moreover, in letters to boards of assessors, following MASSPCSCO's omission from her 2005 Corporations Book, the Commissioner referred to MASSPCSCO as a foreign corporation.

The Board found that, at all relevant times, MASSPCSCO satisfied the definition of a foreign corporation contained in Section 30 because it was an association or organization established, organized and chartered under Delaware law; it

was organized for the ostensible purpose of owning property and leasing it to an affiliate, a purpose for which corporations could be organized under Chapter 156B and, after July 1, 2004, under Chapter 156D; and it had privileges, powers, rights and immunities not possessed by individuals or partnerships, including perpetual existence, freely transferable shares, centralized management through its administrative trustee and officers, and limited liability on the part of its beneficial owner, even if the owner chose – as permitted under MASSPCSCO's trust agreement and applicable Delaware law – to participate in the management of MASSPCSCO's business.

Accordingly, the Board found that the MASSPCSCO's omission from the 2005, 2006, and 2007 Corporations Books was not determinative of, or necessarily germane to, MASSPCSCO's status as a foreign corporation under Section 30 and that MASSPCSCO met the definition of a foreign corporation under Section 30. The Board, therefore, decided that MASSPCSCO was a foreign corporation within the meaning of Section 30 for the years at issue and was entitled to be classified as such by the Commissioner.

(B) MASSPCSCO Was Not Entitled to the "Stock-in-Trade" Exemption under Clause 16(2)

Based on all of the evidence and its subsidiary findings above, and as explained more fully in its Opinion below, the Board ultimately found that, at all relevant times, MASSPCSCO was not entitled to the "stock-in-trade" exemption under Clause 16(2). The Board found that MASSPCSCO's activities were not undertaken for the purpose of profit or gain and MASSPCSCO was not operated for a predominantly business purpose. In addition, the Board found that MASSPCSCO's original transaction with EquipmentCo, transferring Massachusetts property from EquipmentCo to MASSPCSCO, as well as MASSPCSCO's continuing lessor-lessee relationship with Sprint Spectrum lacked economic substance.

The Board further found that MASSPCSCO was created for the predominant and essentially sole purpose of avoiding taxation in the form of personal property taxes for its personal property located in Massachusetts. MASSPCSCO's assertions that its organization served to enhance Sprint's cash flow and its future ability to borrow were without merit. With respect to enhancing cash flow, the Board determined that enhanced cash flow was unlikely, or even fictional, in a scenario where payments were mere ledger

adjustments between affiliates. With respect to enhanced borrowing power, the Board determined that it too was unlikely, or even fictional, because during the relevant time period, there was no evidence of any vendor or lender requirements placed on MASSPCSCO, or for that matter on EquipmentCo,[10] or even on Sprint Spectrum, requiring the existence of a separate entity, like MASSPCSCO, to finance the purchase of needed property and equipment. Furthermore, the Board found that MASSPCSCO was not engaged in the ordinary course of the leasing business or engaged in any substantive business at all. Accordingly, the Board found that MASSPCSCO was not entitled to the "stock-in-trade" exemption under Clause 16(2).

OPINION

The two principal issues in these appeals are: (1) whether MASSPCSCO was a foreign corporation within the meaning of G.L. c. 63, § 30 ("Section 30") and entitled to be classified as such by the Commissioner for 2005, 2006, and 2007; and (2) whether MASSPCSCO was entitled to the "stock-in-trade" exemption under G.L. c. 59, § 5, cl. 16(2) ("Clause 16(2)"), which would require a full abatement of

[10] EquipmentCo's Vendor Financing and the vendors' concomitant financing requirement of a separate, wholly-owned, single-purpose subsidiary of Sprint Spectrum to hold all Personal Property assets, which was EquipmentCo's purported business purpose, were retired in 1999.

the tax assessments placed on its personal property by the Assessors. The Board decided that MASSPCSCO was entitled to be so classified as a foreign corporation but was not entitled to this exemption.

I. MASSPCSCO Was a Foreign Corporation within the Meaning of Section 30

Clause 16(2) provides that "[a] foreign corporation . . . as defined in section thirty of chapter sixty-three" is exempt under clause 16(2) on all property other than "real estate, poles, underground conduits, wires and pipes, and machinery used in the conduct of the business." G.L. c. 59, § 5, cl. 16(2). Numerous cases link the corporate tax terminology used in Clause 16 with the same meaning that has attached to the corresponding terms in applying the taxes imposed by Chapter 63. *See*, *e.g.*, ***Bell Atlantic Mobile Corp. v. Commissioner of Revenue***, 451 Mass. 280, 285-86 (2008) ("***Bell Atlantic Mobile Corp.***") (describing analysis of utility exemption as turning on construction of G.L. c. 63, § 52A); ***RCN-BecoCom, LLC v. Commissioner of Revenue***, 443 Mass. 198, 206 (2005) ("***RCN-BecoCom***")(recognizing that entity must be subject to taxation under Chapter 63 in order to qualify for exemption); ***Assessors of Holyoke v. State Tax Commission,*** 355 Mass. 223, 225-26 (1969)(resolving question

of classification for purposes of clause 16(3) by reference to Chapter 63 definition of "manufacturing corporation"); ***In re MCI Consolidated Central Valuation Appeals***, Mass. ATB Findings of Facts and Reports 2008-255, 358-59 ("***MCI***")(applying utility exemption to "foreign corporations subject to annual corporate utility franchise tax under G.L. c. 63, § 52A"), *aff'd in pertinent part*, 454 Mass. 635 (2009).

During the years at issue, paragraph 2 of Section 30 defined a foreign corporation, subject to certain exclusions not relevant here, as a:

> [C]orporation, association or organization established, organized or chartered under laws other than those of the commonwealth, for purposes for which domestic corporations may be organized under chapter 156, chapter 156A, chapter 156B, chapter 156D or section 19F to 19W, inclusive, of chapter 175, or chapter 180 which has privileges, powers, rights or immunities not possessed by individuals or partnerships.

G.L. c. 63, § 30(2), as in effect prior to St. 2008, c. 173, § 38. As described in greater detail below, the Board found and ruled that, at all relevant times, MASSPCSCO satisfied this definition. The Board found that MASSPCSCO was an association or organization established, organized and chartered under Delaware law; it was organized for the ostensible purpose of owning property and leasing it to an affiliate, a purpose for which

corporations could be organized under Chapter 156B and, after July 1, 2004, under Chapter 156D; and it had privileges, powers, rights and immunities not possessed by individuals or partnerships, including perpetual existence, freely transferable shares, centralized management through its administrative trustee and officers, and limited liability on the part of its beneficial owner, even if the owner chose – as permitted under MASSPCSCO's trust agreement and applicable Delaware law – to participate in the management of MASSPCSCO's business.

Furthermore, and for essentially those same reasons, the Commissioner concluded in Letter Ruling 91-2 that Delaware business trusts formed under 12 Del. C. § 3801, *et seq.*, were properly treated as foreign corporations within the meaning of Section 30. The trusts in Letter Ruling 91-2 were organized to operate mutual funds. The Commissioner concluded that they were associations formed under Delaware law that were "so far clothed with the functions and attributes of a corporation as to come within the just application of principles relating to corporations." (Citations omitted.)

MASSPCSCO was formed partly in reliance on Letter Ruling 91-2, and for each year at issue, MASSPCSCO filed a corporate excise tax return as a foreign corporation.

Despite the late filing of the 2004 return, for which the Board found Sprint's tax compliance group inadvertently neglected to file an automatic six-month extension, as they had for EquipmentCo's Massachusetts return, MASSPCSCO fully complied with all of its obligations as a foreign corporation for these purposes. As of the close of the hearing, the Board found that the Commissioner had made no adjustments to MASSPCSCO's corporate excise tax filings and her records indicated that MASSPCSCO was an eligible filer for the corporate excise.

Finally, and as discussed in greater detail below, the Board found that while MASSPCSCO's operations were limited to leasing property to a related party, that limitation did not alter MASSPCSCO's status as a foreign corporation under Section 30. For Section 30 purposes, the Board found that MASSPCSCO's status should be determined by its governing trust instrument and the terms of the statute, without reference to the business activities that it undertook during the relevant time period.

For all of these reasons, which are discussed in greater particularity below, the Board found and ruled that MASSPCSCO was a foreign corporation within the meaning of Section 30.

(A) MASSPCSCO Was an Association or Organization Established, Organized or Chartered under Laws Other Than Those of Massachusetts and Was Not a Foreign LLC

Both Section 30 and the Commissioner's corporate excise tax regulations recognize that the term "foreign corporation" includes certain unincorporated associations. The statute refers disjunctively to a "*corporation, association or organization* established, organized or chartered" under the laws of another jurisdiction. (Emphasis added.) The regulations refer to "a form of organization recognized in Massachusetts as that of a foreign corporation under [Section 30], *whether or not the entity is described as a corporation* by the state under whose laws the entity is organized." 830 CMR 63.39.1(2) (emphasis added).

A Delaware statutory trust is by definition an "unincorporated association" that is created by a trust instrument "under which property is or will be held, managed, administered, controlled, invested, reinvested and/or operated . . . by a trustee or trustees or as otherwise provided in the governing instrument for the benefit of such person or persons as are or may become beneficial owners or as otherwise provided in the governing instrument." 12 Del. C. § 3801(g). In contrast to a

Massachusetts business trust, which is a contractual entity recognized as a matter of common law, *see* ***Minkin v. Commissioner of Revenue***, 425 Mass. 174, 178 (1997), the status of a Delaware statutory trust as a separate legal entity is governed by statute. *See, e.g.*, 12 Del. C. § 3801(g). The statutory trust has no existence as a separate entity until an instrument is filed with the Delaware Secretary of State. 12 Del. C. § 3810(a)(2). As the Commissioner concluded in Letter Ruling 91-2, the Board ruled here that when a statutory trust makes the required filing with the Delaware Secretary of State, it becomes "an association or organization established, organized or chartered under the laws of Delaware."

On December 19, 2003, EquipmentCo executed a trust agreement for MASSPCSCO conforming to the terms of 12 Del. C. § 3801(g). That same day, MASSPCSCO filed a certificate of trust with the Delaware Secretary of State in compliance with 12 Del. C. § 3801(a)(1). Upon filing of the certificate, MASSPCSCO became an unincorporated association organized under Delaware law. 12 Del. C. § 3801(a)(2). MASSPCSCO was not a "limited liability company" under Delaware law because that term is limited to entities formed under the Delaware Limited Liability Company Act, 6 Del. C. § 18-101, *et seq.* MASSPCSCO was formed instead

under the Delaware Statutory Trust Act, and the Board, therefore, ruled that, at all relevant times, it was a statutory trust under Delaware law, not an LLC.

The Board further ruled that the characterization of MASSPCSCO under Delaware law is conclusive for purposes of its status as a non-LLC under Section 30 because the provisions of Section 30 adopt the definition from the Massachusetts LLC statute, which in turn relies on the name given to an entity under the laws of the state in which the entity was organized. *See* Section 30(2)(referring to "a foreign limited liability company as defined in section 2 of chapter 156C"); G.L. c. 156C, § 2 (defining a foreign limited liability company as "a limited liability company formed under the laws of any state other than the commonwealth or the laws of any foreign country or other foreign jurisdiction *and denominated as such under laws of such state or foreign country or other foreign jurisdiction*")(emphasis added). Because MASSPCSCO was not an LLC under Delaware law, the Board ruled that it was not an LLC for purposes of Section 30.

(B) MASSPCSCO Was Established for the Ostensible Purposes for Which a Corporation May Be Organized under Massachusetts Law

Section 30 limits foreign corporations to those entities organized "for purposes which domestic

corporations may be organized" under the general corporate provisions of Massachusetts law, principally, Chapter 156B and, for periods after July 1, 2004, Chapter 156D. That limitation distinguishes corporations subject to the general corporate excise from those subject to special excise or tax regimes, such as financial institutions (G.L. c. 63, § 2) and utilities (G.L. c. 63, § 52A), which are likewise subject to different corporate laws and regulations. The general Massachusetts corporate statutes, Chapter 156B, as in effect prior to July 1, 2004, and Chapter 156D, as in effect beginning July 1, 2004, apply to:

> All domestic corporations having capital stock whether established before or after [the effective date of the statute], either by general or special law, for the purpose of carrying on business for profit *except* corporations organized for the purpose of carrying on the business of a bank, savings bank, co-operative bank, trust company, credit union, surety or indemnity company, or safe deposit company, or for the purpose of carrying on within the commonwealth the business of an insurance company, railroad, electric railroad, street railway or trolley motor company, telegraph or telephone company, gas or electric light, heat or power company, canal, aqueduct or water company, cemetery or crematory company, any other corporation which on October 1, 1965 have or may thereafter have the right to take land within the commonwealth by eminent domain or to exercise franchises in public ways granted by the commonwealth or by any county, city or town, and corporations subject to chapter 157 [agricultural and other cooperatives]

> and corporations subject to chapter 157A [employee cooperatives].

G.L. c. 156D, § 17.01(1); G.L. c. 156B, § 3 (emphasis added).

Although those statutes contain a long list of types of businesses excluded from statutory coverage, the Board ruled that, at all relevant times, none of the exclusions applied to MASSPCSCO, a professed lessor of wireless communications equipment. The only exclusion that possibly could have applied by its terms was the exclusion for telephone companies. In ***Bell Atlantic Mobile Corp.***, however, both the Board and the Supreme Judicial Court determined that a company engaged in the wireless telephone business is not a "telephone company" within the meaning of G.L. c. 59, § 39, G.L. c. 63, § 52A, and G.L. c. 166. ***Bell Atlantic Mobile Corp.***, Mass. ATB Findings of Fact and Reports at 2008-184; 451 Mass. at 281, 288. The term "telephone company" should be given the same construction under Chapters 156B and 156D that it has under Chapter 166, because those statutes – together with the statutory regimes regulating other types of utilities and financial institutions – are designed to partition the universe of corporations for regulatory purposes. *Cf.* ***Chandler v. County Commissioners***, 437 Mass. 430, 436 (2002) ("[a] term

appearing in different portions of a statute is to be given one consistent meaning"); ***Arnold v. Commissioner of Corporations & Taxation***, 327 Mass. 694, 700 (1951)("It is a general rule of statutory construction that ordinarily a term appearing in different portions of a statute is to be given the same meaning."). Accordingly, even if MASSPCSCO could otherwise be considered a telephone company because of the nature of the equipment that it leased, the Board ruled that that conclusion was foreclosed by ***Bell Atlantic Mobile Corp***.

In determining whether MASSPCSCO was established for purposes for which a domestic corporation might be organized under Chapters 156B and 156D, the Board also found and ruled that, at all relevant times, MASSPCSCO was a for-profit company. MASSPCSCO's trust agreement provides that it is a for-profit company. Moreover, every Delaware statutory trust is a for-profit company unless the trust instrument specifically provides otherwise, because the statute gives the beneficial owners the right (unless overridden by the trust instrument) to "share in all profits and losses of the statutory trust." 12 Del C. § 3805(a).

The fact that MASSPCSCO's business was limited during the years at issue to the leasing of property to an

affiliate would not have prevented it from being organized under Chapter 156B or Chapter 156D. In ***Brown, Rudnick, Freed & Gesmer v. Assessors of Boston***, 389 Mass. 298 (1983) ("***Brown Rudnick***"), the Supreme Judicial Court recognized that a domestic corporation could be organized, under Chapter 156B, for the purpose of leasing property to an affiliate. ***Id.*** at 302. The Board found and ruled that, under the circumstances here, it is entirely logical and consonant to apply that proposition to a foreign entity, like MASSPCSCO.

(C) MASSPCSCO Has Corporate Privileges, Powers, Rights and Immunities

The primary issue in determining whether an unincorporated association is a foreign corporation under Section 30 is the question of whether the association "has privileges, powers, rights or immunities not possessed by individuals or partnerships." The Commissioner has interpreted that phrase as requiring an analysis similar to the federal entity classification regulations in effect prior to 1997 (the "*Kintner* regulations," Treas. Reg. § 301.7701-2, as in effect prior to January 1, 1997). *See* LR 01-7 (Sept. 4, 2001); LR 99-13 (June 24, 1999); LR 97-2 (May 23, 1997); LR 95-8 (July 12, 1995); LR 91-2; *see also* TIR 97-8 (June 16, 1997)(noting that the

replacement of the *Kintner* regulations by the federal "check-the-box" regulations did not alter the Massachusetts rules for classifying unincorporated business entities other than LLCs). The factors considered in the federal regulations and in the Massachusetts rulings as pointing toward corporate status include: **(1)** perpetual life (Treas. Reg. § 301.7701-2(a)(1), (d); LR 01-7; LR 97-2; LR 95-8); **(2)** transferable equity interests (Treas. Reg. § 301.7701-2(a)(1), (e); LR 01-7; LR 97-2; LR 95-8); **(3)** centralized management (Treas. Reg. § 301.7701-2(a)(1), (c); LR 99-13; LR 95-8); **(4)** limited liability for debts of the entity on the part of the equity owners who participate in management (Treas. Reg. § 301.7701-2(a)(1), (d); LR 99-13; LR 91-2); **(5)** the ability to merge or consolidate with corporations and other entities (LR 91-2); and **(6)** the imposition of conditions on the ability to maintain a derivative action (LR 91-2).

The Board found and ruled that Delaware statutory trusts in general, and MASSPCSCO in particular, have all of those privileges, powers, rights and immunities, and more. As the Commissioner observed in Letter Ruling 91-2,[11] unless the trust provides otherwise: a Delaware statutory trust

[11] The citations below refer to the current provisions of the Delaware Statutory Trust Act, which are materially the same as the provisions reviewed in Letter Ruling 91-2.

has perpetual life, and will not terminate or dissolve upon the death, incapacity, dissolution, termination or bankruptcy of a beneficial owner, 12 Del C. § 3808(a)-(b); the beneficial interests in the trust are freely transferable, 12 Del. C. § 3805(d); the trust is managed by the trustees and officers, 12 Del. C. § 3806(a), (i); the beneficial owners are entitled to limited liability whether or not they participate in management, 12 Del. C. §§ 3803(a)-(b), 3806(a), 3808(e); the trust has the power to merge or consolidate with business entities organized under Delaware law or the law of any other jurisdiction, 12 Del. C. § 3815; the trust can sue or be sued in its own name and under the same title principles applicable to corporations, 12 Del. C. § 3804(a); and derivative actions are governed by provisions substantially identical to those governing corporations, 12 Del. C. § 3816. MASSPCSCO's trust agreement does not eliminate any of those privileges, powers, rights and immunities. Rather, the Board found that the trust agreement specifically confirms the applicability of several of those statutory provisions. The agreement also specifically permits MASSPCSCO's beneficial owner, EquipmentCo, to participate directly in the management of the trust. Under Massachusetts common law, vesting the owner with that degree of control would

cause EquipmentCo to have unlimited liability for MASSPCSCO's debts, *see, e.g.,* ***Frost v. Thompson***, 219 Mass. 360 (1914)(holding that an association in which the shareholders control the trustees is properly regarded as a partnership in which the shareholders are personally liable to third-party creditors), but under Del C. § 3806(a), EquipmentCo is shielded from such liability.

Accordingly, the Board ruled that, under the *Kintner* regulations and the Commissioner's rulings, an entity is classified as a corporation if it possesses a majority of the previously delineated corporate characteristics. The Board therefore found and ruled here that because MASSPCSCO possessed all of these relevant characteristics, it too should be regarded as a corporation under Section 30.

(D) Summary

On this basis, the Board found and ruled that, at all relevant times, MASSPCSCO was a foreign corporation within the meaning of Section 30 and was entitled to be classified as such by the Commissioner because it was an "association . . . established, organized or chartered under laws other than those of the commonwealth, for purposes for which domestic corporations may be organized under chapter 156, chapter 156A, chapter 156B, chapter 156D or section 19F to 19W, inclusive, of chapter 175, or chapter 180 which has

privileges, powers, rights or immunities not possessed by individuals or partnerships." G.L. c. 63, § 30.

II. MASSPCSCO Is Not Entitled to the "Stock-In-Trade" Exemption under Clause 16(2)

The general rule in Massachusetts is that "all property, real and personal, situated within the Commonwealth, and all personal property of the inhabitants of the Commonwealth wherever situated, unless expressly exempt, shall be subject to taxation." G.L. c. 59, § 2. General Laws c. 59, § 18, commences with the preamble, "All taxable personal estate within or without the commonwealth shall be assessed to the owner in the town where he is an inhabitant on January first, except as provided in chapter sixty-three and in the following [seven] clauses of this section . . . ." All tangible personal property is taxable under G.L. c. 59, § 18, clause first. ***RCN-BecoCom***, Mass. ATB Findings of Fact and Reports at 2003-410, *aff'd*, 443 Mass. 198 (2005). General Laws c. 59, § 18, clause first states: "First, All tangible personal property, including that of persons not inhabitants of the commonwealth, except ships and vessels, shall, unless exempted by section five, be taxed to the owner in the town where it is situated on January first."

MASSPCSCO alleged that, at all relevant times, it was the owner of personal property in Woburn and Springfield, but claimed that it was entitled to an exemption from local property taxes, pursuant to Clause 16(2), because it leased its personal property to an affiliated entity. Thus, MASSPCSCO claimed that its property was "stock in trade" within the meaning of that clause. The following emphasized language of Clause 16(2) exempts from local property tax:

> In the case of (a) domestic business corporation or (b) a foreign corporation, both as defined in section thirty of chapter sixty-three, all property owned by such corporation other than the following: - real estate, poles, underground conduits, wires and pipes, and machinery used in the conduct of the business, which term, as used in this clause, shall not be deemed to include *stock in trade or any personal property directly used in connection with dry cleaning or laundering processes or in the refrigeration of goods or in the air-conditioning of premises or in any purchasing, selling, accounting or administrative function.* (Emphasis added.)

"An exemption is a matter of special favor or grace and to be recognized only where the property falls clearly and unmistakenly within the express words of a legislative command." ***Southeastern Sand & Gravel, Inc. v. Commissioner of Revenue***, 384 Mass. 794, 796 (1981) (*citing* ***Children's Hospital Medical Center v. Assessors of Boston***, 353 Mass. 35, 43 (1967)).

This principal has explicitly been made applicable to claims for exemptions under the stock-in-trade provision of Clause 16(2). "'[T]he burden of proof is upon the one claiming an exemption from taxation to show clearly and unequivocally that he comes within the terms of the exemption.'" ***Brown Rudnick***, 389 Mass. at 304(*quoting* ***Boston Symphony Orchestra, Inc. v. Assessors of Boston***, 294 Mass. 248, 257 (1936)). A claim of exemption must fail if the operative facts merely cast doubt on the claim of exemption. ***Boston Symphony Orchestra, Inc.***, 294 Mass. at 257. "[T]he proof must be such as leaves the question free from doubt." ***Trustees of Boston University v. Assessors of Brookline***, 11 Mass. App. Ct. 325, 331 (1981)(citations omitted). Accordingly, the Board ruled that to prevail, MASSPCSCO must prove clearly and unequivocally that, at all relevant times, it came within the terms of the stock-in-trade exemption under Clause 16(2).

(A) MASSPCSCO Failed to Qualify for the Stock-In-Trade Exemption under the Test Established in *Brown Rudnick*

The leading case dealing with the applicability of the stock-in-trade exemption to non-arm's-length leasing situations is ***Brown Rudnick***. In ***Brown Rudnick***, the Supreme Judicial Court considered the issue of whether a domestic

business corporation organized under G.L. c. 156B, which was wholly owned by a related partnership, for the stated purpose of engaging in the business of leasing personal property, and whose only business activity was leasing personal property to the related partnership, was not a "domestic business corporation" for purposes of the stock-in-trade exemption under Clause 16(2). In holding that the Board correctly ruled that the corporation was not entitled to the exemption, the Court found that the fact that an entity was organized as a "domestic business corporation" within the meaning of Clause 16(2) was not the end of the inquiry. To end the analysis there, the Court found, would "elevate form over substance." ***Brown Rudnick***, 389 Mass. at 303. Drawing an analogy to the many cases dealing with charitable exemptions under G.L. c. 59, § 5, cl. 3, the Court stated:

> We think that a similar inquiry is appropriate here to determine whether a corporation claiming exemption under G.L. c. 59, Section 5, Sixteenth (2), is operated for dominantly business purposes. We think, also, that the definition of business used by the board, "an activity which occupies the time, attention and labor of men for purposes of livelihood, profit or gain" is apt. ***Whipple v. Commissioner of Corps. & Taxation***, 263 Mass. 476, 485-486 (1928).

In other words, the Supreme Judicial Court placed the burden of proof on the taxpayer in ***Brown Rudnick*** – just as

it is on MASSPCSCO here – to show "clearly and unequivocally" that, at all relevant times, it was "in fact engaged in business." ***Brown Rudnick***, 389 Mass. at 303, 304 (quoting ***Boston Symphony Orchestra***, 294 Mass. at 257.

The Court ruled that the Board had correctly recognized and applied the reasoning of ***Higgins v. Smith***, 307 U.S. 473 (1940), that "transactions, which do not vary control or change the flow of economic benefits, are to be dismissed from consideration." ***Id.*** at 476. The Court also quoted with approval the language of Judge Learned Hand in ***National Investors Corp. v. Hoey***, 144 F.2d 466 (2d Cir. 1944):

> "[T]o be a separate jural person for purposes of taxation, a corporation must engage in some industrial, commercial, or other activity besides avoiding taxation: in other words, that the term 'corporation' will be interpreted to mean a corporation which does some 'business' in the ordinary meaning; and that escaping taxation is not 'business' in the ordinary meaning."

Id. at 468.

After examining the formation and activities of MASSPCSCO, the Board found and ruled that MASSPCSCO could not meet this ***Brown Rudnick*** standard.

(1) MASSPCSCO Was Formed for the Predominant Purpose of Avoiding Massachusetts Personal Property Taxes

MASSPCSCO was formed by Sprint in response to the Board's and the Supreme Judicial Court's decisions in ***RCN-BecoCom***, which held, among other things, that limited liability companies classified as telephone companies were not exempt from taxation of their personal property under Clause 16, because Clause 16's exemption provisions applied only to corporations, not to limited liability companies. Beginning with fiscal year 2004, the Commissioner informed telephone and telegraph filers that partnerships and LLCs filing as partnerships or disregarded entities would be valued by the Commissioner on all poles, wires, underground conduits, wires and pipes situated in the Commonwealth, and all machinery, including switching equipment, used for telephone or telegraph purposes. For LLCs, like Sprint Spectrum, which had previously reported to the Commissioner only generators, this ruling greatly expanded the property deemed reportable to the Commissioner under G.L. c. 59, § 41, for central valuation purposes. In Sprint Spectrum's case, the Commissioner's certified central valuation increased from $1,762,900 for fiscal year 2003 to $172,899,300 for fiscal year 2004.

Faced with a one-hundred fold increase in its property taxes in Massachusetts, Sprint consulted Deloitte & Touche for advice on how to mitigate it. Deloitte & Touche issued a memorandum dated December 10, 2003 purporting to describe "a restructuring strategy that can enable Sprint to qualify for certain personal property tax exemptions for its switching and other personal property in Massachusetts. The proposed structure creates eligibility for the exemptions without requiring assets to be placed in corporate solution for federal income tax purposes." Sprint had previously considered shifting its Massachusetts tangible personal property to certain utility corporations that operate within the Sprint business structure, but Sprint determined that such a restructuring was inadvisable. Deloitte & Touche concluded, based partly on the Commissioner's LR 91-2, that a "Delaware Business trust," now known as a Delaware statutory trust, would be recognized as a "corporation" for Massachusetts property tax purposes, but could be disregarded for federal income tax purposes. Deloitte & Touche further concluded that the Delaware business trust would not be taxed on its income for Massachusetts purposes, and that all of the trust's income would be treated as that of the parent Sprint's limited partnerships. Deloitte & Touche explained that

"[t]his flow-through of income occurs because the Massachusetts definitions of gross income and net income applicable to business corporations tie to the Code" and that "[i]n other situations involving federally disregarded entities that are treated as separate corporate entities for Massachusetts purposes, the [Commissioner] has ruled that, because of [sic] the entities are disregarded for federal income tax purposes and therefore have no federal taxable income, the entity has no taxable income for Massachusetts income tax purposes." (Footnote and citations omitted).

Subsequent to the Deloitte & Touche memorandum and follow-up memorandum, Sprint formed MASSPCSCO for the admitted purpose of avoiding local property taxes in Massachusetts. However, the Board found that some of the "legitimizing" strategies suggested in the Deloitte & Touche memoranda were not followed by Sprint. For example, MASSPCSCO did not engage in any leasing activities with third parties despite Deloitte & Touche's recommendation to do so. The Board found that, at all relevant times, MASSPCSCO did not lease, or attempt to lease, any property to any person other than Sprint Spectrum. The Board also found that MASSPCSCO did not conduct any regular business activities other than those incident to the purchase,

ownership and leasing of Network equipment to Sprint Spectrum.

Deloitte & Touche also recommended that the leases from MASSPCSCO to Sprint Spectrum be at "arms' length prices." The Board found that MASSPCSCO did not produce credible evidence in support of this proposition. Rather, it appeared that the net book values at which the Network equipment was transferred from EquipmentCo to MASSPCSCO, and not market values, likely formed the basis for the rent charged Sprint Spectrum by MASSPCSCO. In addition, MASSPCSCO did not introduce any credible evidence demonstrating that the lease factors that were used to calculate rent were premised on fair market rates. Moreover, it appeared that Sprint Spectrum and MASSPCSCO did not implement the lease factors schedule suggested by their professional advisors. Consequently, there was insufficient evidence in the record to allow the Board to determine if the purported lease payments payable by Sprint Spectrum to MASSPCSCO were consistent with the relevant marketplace.

Recognizing the identity of management and control between MASSPCSCO and Sprint Spectrum and Sprint's ability to direct profit among its subsidiaries, Deloitte & Touche stated that while MASSPCSCO should recognize a profit "to

defend against any assertion of a sham transaction theory, nevertheless we recommend that this profit be kept low to protect against any change in the state's position that a federally disregarded entity does not have gross income for state tax purposes." The Board found that this recommendation not only supported the supposition that MASSPCSCO was formed for tax avoidance purposes, but also helped to demonstrate that MASSPCSCO did not operate independently from Sprint or Sprint Spectrum and the notion of "profit," as it pertained to MASSPCSCO, was illusory.

(2) MASSPCSCO Did Not Operate as a Business Independent of Sprint Spectrum

At all relevant times, Sprint Spectrum, a subsidiary of Sprint, operated a wireless communications system. Holdings was the 99% general partner and MinorCo was the 1% limited partner of Sprint Spectrum. All of the partnership interests in Holdings and MinorCo were held by direct and indirect subsidiaries of Sprint giving Sprint complete ownership and control over Sprint Spectrum.

This identity of ownership and control was carried forward to MASSPCSCO. All of the beneficial interests in MASSPCSCO were held, at all relevant times, by EquipmentCo. The sole administrative trustee of MASSPCSCO was an employee of SUMC, another wholly-owned Sprint subsidiary.

Under the terms of the trust creating MASSPCSCO, the administrative trustee is authorized to take all actions necessary or incidental, in his reasonable discretion, to the conduct of the business of MASSPCSCO, but only as directed by EquipmentCo. Virtually all of the partnership interests in EquipmentCo were owned by Sprint Spectrum. Thus, Sprint Spectrum, the lessee under the lease with MASSPCSCO, completely controlled, through EquipmentCo, MASSPCSCO, the nominal lessor under the lease. EquipmentCo also had the control to appoint or remove MASSPCSCO's administrative trustee at any time. The "Delaware trustee" of MASSPCSCO, Wilmington Trust Company, was, at all relevant times, a trustee for the sole and limited purpose of fulfilling the requirements of Delaware law and was not entitled to exercise any powers under the trust. Because the formation of MASSPCSCO was not a transaction which varied control or changed the flow of economic benefits between the two entities, the Board found and ruled that it was justified in examining the true nature of the relationship between them and whether the activities of MASSPCSCO were in the nature of a business. *See* ***Brown Rudnick***, 389 Mass. at 304-305 (*citing* ***Higgins v. Smith***, 308 U.S. at 476).

(3) MASSPCSCO Did Not Engage in Business within the *Brown Rudnick* Test

The Board found that, at all relevant times, MASSPCSCO did not conduct any regular business activities other than those incident to the purchase, ownership and leasing of equipment to Sprint Spectrum. Sprint Spectrum, through its ownership of EquipmentCo, MASSPCSCO's sole beneficiary, owned and controlled MASSPCSCO.

The Board found that, at all relevant times, neither Sprint Spectrum nor MASSPCSCO maintained separate bank accounts, and any lease payments made by Sprint Spectrum to MASSPCSCO were implemented by ledger entries transferring amounts to MASSPCSCO's account on Sprint's books. Sprint, the publically traded parent holding company of Sprint Spectrum, and all other Sprint subsidiaries, issued consolidated financial statements, which included the operations of all of its subsidiaries. Formal financial statements were not prepared in the ordinary course of MASSPCSCO's business, although informal ones were prepared for purposes of this litigation. Therefore, at the Sprint level, the Board determined that these ledger entries had little economic substance.

The Board further found that, at all relevant times, MASSPCSCO had no employees. All functions and services

necessary or desirable for the management, administration and operation of MASSPCSCO's business were performed by employees of SUMC, another Sprint subsidiary, under a services agreement dated December 14, 2004, almost one year after the formation of MASSPCSCO. In return for its services, MASSPCSCO reimbursed SUMC $2,000 per month for a total of $24,000 per year on revenues between $23,000,000 and $41,700,000 for calendar years 2004 through 2006 and property, plant, and equipment valued at $211,000,000 to $328,000,000 for those same years. There was no credible evidence to establish, and the Board doubted, that this charge approximated fair cash value.

The Board also found that, at all relevant times, MASSPCSCO did not hold any assets other than property leased to Sprint Spectrum, nor did it lease property to anyone other than Sprint Spectrum. It did not even attempt to lease property to any other person or entity. MASSPCSCO was not compensated for any services it performed for any person or entity. MASSPCSCO did not lease or occupy any office space or real estate, except that certain inventory of MASSPCSCO was stored prior to delivery to Sprint Spectrum sites, in facilities shared with other affiliates of Sprint. MASSPCSCO had no dealings with third parties other than those incident to its ownership, maintenance and

dealings with respect to its property including the lease of that property to Sprint Spectrum.

Given the identity of interests between MASSPCSCO and Sprint Spectrum, and the fact that MASSPCSCO did not engage in any transactions other than those incident to the non-arm's-length leases with its ultimate owner, Sprint Spectrum, the Board found and ruled that, at all relevant times, MASSPCSCO did not engage in any real business other than escaping taxation. Accordingly, the Board found and ruled that it failed to show, even by a preponderance of the evidence, that it was "operated for dominantly business purposes." ***Brown Rudnick***, 389 Mass. at 303.

(4) The *Brown Rudnick* Test Applies to MASSPCSCO Even Though It Was a Foreign Corporation and Not a Massachusetts Business Corporation

MASSPCSCO contended that the holding in ***Brown Rudnick*** does not apply to foreign corporations as that term is used in Clause 16(2). Nothing in the Court's reasoning supports this distinction. The Clause 16(2) stock-in-trade exemption applies to (a) "domestic business corporations" and (b) "foreign corporations," both defined in Section 30. ***Brown Rudnick*** dealt with a case in which the entity that was organized to lease property to an affiliate was organized as a domestic corporation. In the present appeals, the entity that was organized to lease property to

an affiliate was a Delaware statutory trust. The Board has found that MASSPCSCO, the Delaware statutory trust here, was, at all relevant times, a foreign corporation under Section 30. MASSPCSCO posited that the ***Brown Rudnick*** test should be confined to business corporations under Section 30 and not applied to Section 30 foreign corporations.

The definition of foreign corporation in Section 30 refers to corporations, associations and organizations established, organized or chartered under laws other than those of the Commonwealth, for which domestic corporations may be organized under, *inter alia*, G.L. c. 156B and, after July 1, 2004, under G.L. c. 156D. MASSPCSCO admitted that it was organized for the purpose of owning property and of leasing it to an affiliate, a purpose for which the Board has found and ruled a corporation could be organized under Chapters 156B and Chapter 156D. Chapters 156B and 156D apply to domestic corporations organized for the purpose of carrying on business for profit. Thus, the "for profit" standard of Chapters 156B and 156D have been carried into the definition of foreign corporations. The Board found and ruled that, under the circumstances, it strained credulity to suggest, as MASSPCSCO has, that the Legislature intended to treat a foreign corporation more

leniently than a domestic business corporation for purposes of the stock-in-trade exemption.

Moreover, the Supreme Judicial Court's analysis in ***Brown Rudnick*** did not focus merely on the word "business" in the phrase "business corporation." Like MASSPCSCO, the corporation in ***Brown Rudnick*** claimed to have been organized for profit. As the Supreme Judicial Court ruled in ***Brown Rudnick***, the stated purpose of the organization does not end the inquiry. "It still must be shown that the corporation was, in fact, engaged in business." ***Brown Rudnick***, 389 Mass. at 304. In other words, form does not control over substance.

(5) EquipmentCo's Purported Business Purposes Cannot Be Imputed to MASSPCSCO

Prior to 2004, Sprint formed EquipmentCo to own and lease back to its affiliates the categories of personal property that are the subject of these appeals. Those property categories included towers, antennas, switches and related software. EquipmentCo was originally created at the request of Sprint's vendors which, for financing purposes, required that all assets provided to Sprint be held by a separate entity. EquipmentCo's primary purpose

was to satisfy those vendors' demands.[12] However, as Sprint grew and became an established business with significant assets, and once it retired that initial Vendor Financing, the vendor restriction requiring assets to be held in a separate company was no longer necessary.

By the time that MASSPCSCO was created, there were no longer any vendor restrictions in place. Consequently, the purported business reason for creating a separate entity to hold assets had expired. Accordingly, the Board found and ruled that EquipmentCo's original "business purpose" could not be imputed to MASSPCSCO, and it did not even maintain any vitality for EquipmentCo. As the Board previously found, there were no other credible reasons, other than property tax avoidance, for MASSPCSCO's creation. Therefore, the Board further found and ruled that, at all relevant times, MASSPCSCO did not "perform[] any function other than to shelter [Sprint] from personal property liability." ***Brown Rudnick***, 389 Mass. at 306.

[12] It was not necessary for the adjudication of these appeals for the Board to determine whether the financing requirements of EquipmentCo's vendors constituted a business reason or purpose for the *creation* of EquipmentCo. For purposes of these appeals, the Board simply assumed that it was.

(B) MASSPCSCO Has Failed to Show That It Was Formed for a Substantial Business Purpose or Actually Engaged in Substantial Business Activity and Therefore Was Not a Sham

The sham transaction doctrine focuses on whether a transaction, including a business reorganization that results in tax benefits, has practical economic effects beyond tax avoidance. "[F]or a business reorganization that results in tax advantages to be respected for tax purposes, the taxpayer must demonstrate that the reorganization is 'real' or 'genuine,' and not just form over substance. Stated otherwise, the entity resulting from the reorganization must be one which is 'formed for a substantial business purpose or actually engage[s] in substantial business activity." ***The Sherwin-Williams Company v. Commissioner of Revenue***, 438 Mass. 71, 84 (2002)("***Sherwin-Williams Co.***")(quoting ***Northern Ind. Pub. Serv. Co. v. Commissioner of Internal Revenue***, 115 F.3rd 506, 511 (7th Cir. 1997)); *see also* ***Bass v. Commissioner of Internal Revenue***, 50 TC 595, 600 (1968).

Sherwin-Williams Co. involved a reorganization in which wholly owned subsidiaries entered into genuine obligations with unrelated third parties in furtherance of the subsidiaries' claimed corporate purposes, and the subsidiaries, among other things, maintained their own bank

accounts, hired employees, set their own investment policies, invested assets for their own accounts, and hired and paid professionals. ***Sherwin-Williams Co.***, 438 Mass. at 85-87. The Supreme Judicial Court found that the subsidiaries were "viable business entit[ies] engaged in substantive business activity rather than in a 'bald and mischievous fiction,'" and, therefore, were entitled to be respected for tax purposes. ***Sherwin-Williams Co.***, 438 Mass. at 89 (quoting ***Moline Props. v. Commissioner of Internal Revenue***, 319 U.S. 436, 439 (1943)).

In the instant matter, the Board found that MASSPCSCO not only ignored advice from Deloitte & Touche to enter into leasing agreements with third parties, but otherwise failed to operate independently and evidence a legitimate and viable business purpose. Unlike EquipmentCo, MASSPCSCO was not created to facilitate and comply with vendor financing requirements, which had been retired in 1999. Rather, the Board found that the dominant, and essentially sole, reason for its organization was for tax avoidance purposes.

The Board found that, at all relevant times, MASSPCSCO had no employees. All functions and services necessary or desirable for the management, administration and operation of MASSPCSCO's business, were performed by employees of

SUMC, under an apparently non-arm's length service agreement dated almost a year after MASSPCSCO was organized. MASSPCSCO was required to reimburse SUMC for those services by a fixed payment of only $2,000 per month. Sprint Spectrum and MASSPCSCO did not maintain separate bank accounts. The lease payments made by Sprint Spectrum to MASSPCSCO were implemented by ledger entries transferring amounts to MASSPCSCO's account in Sprint's books. MASSPCSCO was not compensated for any services that it performed for any person or entity. MASSPCSCO did not even purchase the equipment it leased to Sprint Spectrum; instead Sprint purchased the equipment and marked the purchase against MASSPCSCO's account on a common ledger that was maintained by Sprint. No evidence was introduced to substantiate that any interest was charged or paid on this "loan," or that there was a fixed repayment schedule. Moreover, the Board found that it was unclear from the evidence if MASSPCSCO was ever required to repay the debt. *See* ***The TJX Companies, Inc. v. Commissioner of Revenue***, 2009 Mass. App. Unpub. LEXIS 168, *12-13 (April 3, 2009)("***TJX Companies***")(upholding the Board's disallowance of interest payments on loans which the Board determined were not *bona fide* because, among other reasons, they simply constituted a circular flow of funds without

appropriate documentation, interest rates, or repayment schedules).

MASSPCSCO did not hold any assets other than property leased to Sprint Spectrum. MASSPCSCO did not lease property to any person other than Sprint Spectrum. MASSPCSCO did not conduct any regular business activities other than those incident to the purchase, ownership and leasing of Network equipment to Sprint Spectrum. There was no evidence presented at the hearing of these appeals showing that the transactions between Sprint and MASSPCSCO were at market rates or that the leases were arm's-length transactions. At the time the assets were originally transferred from EquipmentCo to MASSPCSCO, "for simplification purposes, the fixed assets [were] transferred at net book value rather than fair market value through investment and subsidiary accounts." In addition, the leases between EquipmentCo and MASSPCSCO were signed by Sprint's Assistant Vice President for State and Local Taxation, as both the lessee and the lessor. The Board further found that there was no credible evidence that the rents or lease factors were at market rates. MASSPCSCO did not even implement the lease factor schedules prepared by Ernst & Young.

Lastly in this regard, the Board found that Sprint assured itself of complete control over MASSPCSCO. At all relevant times, the administrative trustee was an employee of SUMC and was authorized only to act as directed by EquipmentCo, a subsidiary of Sprint. EquipmentCo was empowered to remove the administrative trustee at any time for any reason. The nominal trustee, Wilmington Trust Company, was appointed merely for the sole and limited purpose of fulfilling requirements under Delaware law and was not entitled to exercise any powers under the trust.

In sum, at all relevant times, MASSPCSCO had no employees; did not maintain separate bank accounts; did not independently invest any of its profits; did not do business with any other parties other than what was incidental to its leasing of equipment to its parent; did not attempt to lease any property to third parties; did not maintain any office space or real estate; was unable to exercise any independent control; did not purchase any of its equipment; and was not shown to be dealing with affiliates in an arm's-length manner or to be responsible for any debt incurred as a result of any purchases of equipment or property on its behalf.

Accordingly, the Board found and ruled that the reorganization of Sprint and, more particularly,

EquipmentCo, by creating MASSPCSCO as the repository for property and equipment located in Massachusetts, and the lease agreements between Sprint Spectrum and MASSPCSCO did not "vary control or change the flow of economic benefits between . . . entities." ***Brown Rudnick***, 389 Mass. at 305. The Board further found and ruled that MASSPCSCO did not perform any corporate function other than to attempt to shelter Sprint from personal property tax liability in Massachusetts. ***Id.*** at 306. MASSPCSCO evidenced virtually none of the examples of economic substance or substantive business activity embraced by the Supreme Judicial Court in ***Sherwin-Williams Co***., 438 Mass. at 85-88. Based on the subsidiary findings developed from a review and analysis of the entire record, the Board found and ruled here that MASSPCSCO's purported business dealings with Sprint Spectrum and its affiliates were without economic substance and that MASSPCSCO was not a viable business entity engaging in substantial business activity. The Board further found and ruled that MASSPCSCO's acquisition of its equipment and property and its leasing transactions had no "practical economic benefit beyond the creation of tax benefits." ***Id.*** at 85. The Board therefore ruled that the transfer of property and equipment to MASSPCSCO and

MASSPCSCO's subsequent leasing of it to Sprint Spectrum were shams.

(C) The Assessors Properly Assessed MASSPCSCO as the Owner of the Subject Property

MASSPCSCO claimed that if the Board disregarded the transfer of the subject personal property to MASSPCSCO for purposes of eligibility for the Clause 16(2) exemption, then the Board should completely disregard MASSPCSCO for all purposes, including assessment purposes. MASSPCSCO proposed that if the Board were to find that MASSPCSCO was not the owner of the subject personal property for purposes of Clause 16(2), then the Assessors should have assessed the personal property taxes to either EquipmentCo, as the transferor of the subject personal property to MASSPCSCO, or Sprint Spectrum, as the default owner of the subject personal property. The Board noted that, under G.L. c. 59, § 18, Second, the Assessors presumably could have assessed all or some of the subject personal property to Sprint Spectrum, instead of MASSPCSCO, as the "person having possession of the same on January first."

"While the courts recognize that tax avoidance or reduction is a legitimate goal of business entities, the courts have, nonetheless, invoked a variety of doctrines . . . to disregard the form of a transaction where the

facts show that the form of the transaction is artificial and is entered into for the sole purpose of tax avoidance and there is no independent purpose for the transaction." ***Falcone v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1996-727, 734-35. The sham transaction doctrine is one such judicially created doctrine for preventing the misuse of the tax code. ***Horn v. Commissioner of Internal Revenue***, 968 F.2d 1229, 1236 (D.C. Cir. 1992).

Massachusetts recognizes the sham transaction doctrine and, accordingly, has given the taxing authorities the ability to disregard, for taxing purposes, transactions that have no economic substance or business purpose other than tax avoidance. ***Sherwin-Williams Co.***, 438 Mass. at 79. Furthermore, this doctrine prevents taxpayers from claiming the tax benefits of transactions that, although within the language of the tax code, are not the type of transaction the law intended to favor with the benefit. ***Syms Corp. v. Commissioner of Revenue***, 436 Mass. 505, 510 (2002). MASSPCSCO offered no direct authority for the proposition that a taxing authority is authorized under this doctrine to divest an entity of ownership of property simply because it has been determined that it does not qualify for a statutory exemption.

In its application for abatement and pleadings to this Board, MASSPCSCO admitted that it was the owner of the Network property located in Springfield and Woburn. Pursuant to G.L. c. 59, § 18, the Assessors, relying on filings made by MASSPCSCO or its affiliates, fulfilled their statutory duty and assessed the subject property to MASSPCSCO. The Board found and ruled that MASSPCSCO may not now claim that it was not the owner of the subject property because the Board found and ruled that it was not qualified or eligible for the stock-in-trade exemption under Clause 16(2). The Board's findings here are focused on MASSPCSCO's qualifications or eligibility for the exemption under Clause 16(2). The Board did not find or rule that another entity was, at all relevant times, the owner of the subject property for other purposes, such as personal property tax assessments under Section 18. Rather, the Board found and ruled the MASSPCSCO was the owner for personal property assessment purposes. Unlike the situation in ***TJX Companies***, where "the fruits of a sham transaction [were] appropriately [and necessarily] disregarded and reapportioned to the parent," 2009 Mass. App. Unpub. LEXIS 168 at *14, the Board ruled here that there was no need for "reattribution" of gain or income "to the parent" to properly redress the ill-begotten fruits

from the subject sham transaction because disallowance of the exemption was enough, and all that was required, to remedy the tax mischief created by the scheme.

Accordingly, the Board found and ruled that its findings and rulings here that MASSPCSCO did not qualify for the Clause 16(2) exemption did not vitiate or negate MASSPCSCO's ownership of the property for purposes of property tax assessment and Section 18.

(D) Summary

The Board found and ruled that MASSPCSCO failed to qualify for the stock-in-trade exemption under Clause 16(2) because it did not pass the test established in ***Brown Rudnick***. The Board also found and ruled that MASSPCSCO was formed for the predominant and essentially sole purpose of avoiding Massachusetts personal property taxes; MASSPCSCO did not operate as a business independent from Sprint Spectrum; MASSPCSCO did not engage in business as defined in ***Brown Rudnick***; the ***Brown Rudnick*** test applied to MASSPCSCO even though, at all relevant times, it was a foreign corporation and not a domestic business corporation; and EquipmentCo's original business purpose could not be imputed to MASSPCSCO. The Board also found and ruled that MASSPCSCO failed to show that the subject reorganization and transactions had economic substance or a

legitimate business purpose. Finally, the Board found and ruled that MASSPCSCO was properly assessed by the Assessors for the personal property taxes at issue.

III. Conclusion

On this basis, the Board decided that: (1) MASSPCSCO was a foreign corporation within the meaning of Section 30 and entitled to be classified as such by the Commissioner for 2005, 2006, and 2007; but (2) MASSPCSCO was not entitled to the "stock-in-trade" exemption under Clause 16(2).

APPELLATE TAX BOARD

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

A true copy

Attest: _____
Clerk of the Board