COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

VERIZON NEW ENGLAND, INC. v. COMMISSIONER OF REVENUE

Docket Nos. C293850-C293856 Promulgated:
June 7, 2011

These are appeals filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39 from the refusal of the Commissioner of Revenue ("Commissioner" or "appellee"), to abate sales taxes assessed against Verizon New England, Inc. ("Verizon" or "appellant") for the monthly tax periods beginning January 1, 1999 and ending December 31, 2001, and the monthly tax periods beginning October 1, 2003 and ending September 30, 2006 (collectively, the "tax periods at issue").

Commissioner Scharaffa heard these appeals and was joined by Chairman Hammond and Commissioners Egan, Rose, and Mulhern in decisions for the appellant.

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

William A. Hazel, Esq., *James F. Ring*, Esq., and *Brad G. Hickey*, Esq. for the appellant.

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

FINDINGS OF FACT AND REPORT

I. Introduction

On the basis of a Statement of Agreed Facts, the testimony, and the exhibits offered into evidence at the hearing of these appeals, the Appellate Tax Board ("Board") made the following findings of fact. The appellant was incorporated under the laws of New York in 1883. It has been qualified to do business in the Commonwealth since 1884. The appellant was originally incorporated as New England Telephone & Telegraph Company but changed its name to "Verizon" in 2001. Verizon provides telecommunications services to customers in Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

For each of the tax periods at issue, the appellant timely filed monthly sales tax returns with the Commissioner. In 2001, the Commissioner commenced an audit of the appellant's monthly sales tax returns filed for periods beginning January 1, 1999 and ending December 31, 2001 (the "first audit cycle"). During the course of the audit, the appellant and the Commissioner entered into

agreements extending the time for the assessment of taxes, and on October 7, 2006, the Commissioner issued to the appellant a Notice of Intention to Assess ("NIA") proposing the assessment of additional sales taxes in the amount of $876,132 for the first audit cycle. Also, in October of 2006, the Commissioner began auditing the appellant's monthly sales tax returns for the periods beginning October 1, 2003 and ending September 30, 2006 (the "second audit cycle"). Again, the Commissioner and the appellant entered into agreements extending the time for the assessment of taxes, and on December 22, 2006, the Commissioner issued to the appellant an NIA proposing the assessment of additional sales taxes in the amount of $622,297 for the second audit cycle.

The appellant requested and received a hearing with the Department of Revenue's Office of Appeals to discuss the Commissioner's proposed additional assessments. On June 4, 2007, the Office of Appeals issued a Letter of Determination upholding the Commissioner's proposed additional assessments in full. On July 3, 2007, the Commissioner issued to the appellant a Notice of Assessment indicating that the additional sales taxes proposed on the October 7, 2006 NIA and on the December 22, 2006 NIA had been assessed on July 1, 2007.

On July 31, 2007, the appellant filed an Application for Abatement with the Commissioner requesting abatements of the additional sales taxes assessed for each of the periods at issue. By Notices of Abatement Determination dated October 1, 2007, the Commissioner denied the appellant's request for abatements for each of the tax periods at issue. The appellant timely filed its petitions with the Board on November 29, 2007. On the basis of the foregoing, the Board found and ruled that it had jurisdiction to hear and decide these appeals.

During the periods relevant to these appeals, G.L. c. 64H, § 2 ("64H, § 2") imposed a tax, at the rate of 5 percent, upon sales at retail in the Commonwealth, by any vendor, of tangible personal property or of telecommunications services performed in the Commonwealth. There was no dispute between the parties that Verizon was a vendor making retail sales of telecommunications services. The primary issue presented in these appeals was whether the Commissioner properly disallowed the exemption found in G.L. c. 64H, § 6(i)(4) ("§ 6(i)(4)") on certain sales of telephone services made by the appellant. Section 6(i)(4) provides an exemption from the sales tax imposed by 64H, § 2 for up to $30.00 of "residential main telephone services" billed on a monthly recurring basis

("$30.00 exemption"). On audit, the Commissioner disallowed the claimed $30.00 exemption in instances in which there were more than one account with the same customer name and billing address and in instances in which it appeared that an account was being used for business, rather than residential purposes, leading to the deficiency assessments at issue.

The Commissioner made no additional assessments with respect to the second issue, which was whether charges made by the appellant for voice mail services were subject to the sales tax imposed by 64H, § 2. The appellant had reported sales taxes on its returns, and it therefore had self-assessed all such taxes for the tax periods at issue, which it collected and remitted to the Commissioner. The appellant contended in its Applications for Abatement and in its petitions with the Board that voice mail was not subject to the sales tax imposed by 64H, § 2 because it was not a "telecommunications service" as defined by G.L. c. 64H, § 1 ("64H, § 1"), and therefore it should not have been included in its tax returns.

The appellant called two witnesses to testify at the hearing of these appeals. Those witnesses were Mr. Vinod Motwani, who was the manager of Verizon's transaction tax audit group, and Mr. Michael Anglin, who, as of the time of

the hearing, had been employed in various positions at Verizon and its predecessors for 38 years. The Commissioner offered the testimony of one witness, Mr. Dale Morrow of the Massachusetts Department of Revenue. Mr. Morrow was the regional director in charge of the audits which generated the deficiency assessments at issue.

II. Audit Methodology

The Commissioner conducted her audit of the appellant's sales tax returns using what is known as a sampling methodology. For the first audit cycle, the Commissioner selected a sample of 579 customer bills, all of which were issued during October of 1999. The Commissioner determined that nine of the 579 bills contained erroneous applications of the $30.00 exemption, resulting in $204.78 of telecommunications services that were, in the Commissioner's opinion, erroneously exempted from tax. The Commissioner then calculated an error rate by taking the $41,198.05 of total sales shown in the sample bill pool and dividing it by the $204.78 of sales that should have been subject to tax in the Commissioner's opinion. The error rate was then applied to the net taxable amount reported for October of 1999, less coin revenue, and then multiplied by the number of months in the audit period to arrive at a total additional tax due of

$836,430 relating to the $30.00 exemption issue.[1] The Commissioner applied the same methodology and error rate for the second audit cycle, arriving at a total additional tax due of $582,595 relating to the $30.00 exemption issue.[2]

The appellant did not dispute the Commissioner's use of the sampling methodology in general, but did dispute certain calculations and adjustments made by the Commissioner in the course of the audit. Prior to the hearing of these appeals, the parties reached an agreement with respect to the audit methodology issues, and that agreement, as reflected in the Statement of Agreed Facts, was that regardless of the Board's determinations on the issues presented in these appeals, the appellant is entitled to abatements totaling $176,139 for the first audit cycle and abatements totaling $89,581 for the second audit cycle. The amount remaining at issue with respect to the $30.00 exemption issue for the first audit cycle was $660,291, and the amount remaining at issue with respect to the $30.00 exemption issue for the second audit cycle was $493,014.

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[1] The NIA proposed an assessment of $876,132, of which $39,702 related to sales taxes assessed by the Commissioner because of insufficient exemption certificates. The appellant did not dispute that issue and paid the $39,702 in full.

[2] The NIA proposed an assessment of $622,297, of which $39,702 related to sales taxes assessed by the Commissioner because of insufficient exemption certificates. The appellant did not dispute that issue and paid the $39,702 in full.

III. The $30.00 Exemption

Section 6(i)(4) provides an exemption from sales tax for up to $30.00 of "residential main telephone services billed on a monthly recurring basis or billed as message units." During the course of the audit, the Commissioner identified nine customer bills ("nine bills") from the total sample which, in her opinion, were improperly treated by Verizon as eligible for the $30.00 exemption. The Commissioner therefore disallowed the $30.00 exemption on those nine bills.

The Commissioner denied four of the nine bills after concluding that the accounts were being used for business, not residential, purposes. Prior to the hearing of these appeals, the parties were able to reach agreements with respect to three out of those four bills, leaving only one bill, the Todd Richman bill ("Todd Richman bill"), in dispute. The remaining five bills ("five bills") each reflected an account billed to a billing address at which an additional account was also billed to the same individual. The Commissioner denied the $30.00 exemption for each of the five bills because they did not reflect, in the Commissioner's opinion, sales of "residential main telephone services."

Substantial evidence was entered into the record regarding the meaning of the phrase "residential main telephone services." Mr. Anglin testified that the phrase "residential main telephone services" is a telecommunications industry term. He explained that the phrase is used in the telecommunications industry to describe basic, local residential telephone services, which include the provision of a dial tone and the ability to make and receive local telephone calls. He stated that additional services, such as long distance service and toll calls, are not "residential main telephone services." Mr. Anglin testified that Verizon offers several varieties of "residential main telephone service" packages and that each of the bills at issue reflected charges for Verizon's "residential main telephone service" packages.

Mr. Anglin's testimony was supported by documentary evidence entered into the record. Mr. Anglin explained that Verizon is an incumbent local exchange carrier ("ILEC"), and that each of Verizon's customers purchases services within a specific calling area, known in the telecommunications industry as a local access and transport area ("LATA"). As an ILEC, Verizon is required to file a local exchange tariff ("tariff") with the Massachusetts Department of Telecommunications and Energy, and a copy of

that tariff was entered into the record. The tariff states that "[m]ain telephone exchange service consists of basic exchange services."

The Commissioner, on the other hand, interpreted the phrase "residential main telephone services" as used in § 6(i)(4) to mean the primary telephone account at a residence. It was for this reason that the Commissioner disallowed the claimed exemption in the five bills, each of which reflected an account billed to a billing address at which an additional account was also billed to the same customer.

On the basis of all of the evidence, the Board found that, for purposes of § 6(i)(4), the phrase "residential main telephone services" meant basic local residential telephone services. The testimony and documentary evidence entered into the record reflected that the phrase "residential main telephone services" was commonly understood and used within the telecommunications industry to mean basic local residential telephone services. The Board found it apparent from the statutory language that the Legislature intended to adopt the phrase's established industry meaning, as the Legislature used additional

industry terminology, such as "local access and transport area," and "message units"[3] within § 6(i)(4).

The Board found that the Commissioner's interpretation of the phrase "residential main telephone services," was not supported by the statutory language. The Commissioner's construction of the phrase appeared to read the word "main" to modify the word "residential;" however, that construction is backwards. The word "main" does not precede the word "residential;" rather, it follows, and therefore does not modify, that word.

Moreover, the Commissioner's reading of § 6(i)(4) to impose a limit of one $30.00 exemption per service address was not supported by the language used elsewhere in the statute. Unlike § 6(i)(4), which exempts "*sales* . . . of . . . residential main telephone *services*," G.L. c. 64H, § 6(u) ("§ 6(u)") exempts the "*sale of a motor vehicle*" to permanently disabled veterans and others with certain disabilities, and expressly states that the exemption "shall apply to one motor vehicle only owned and registered for the personal, noncommercial use of such person." It was evident from this statutory language that if the Legislature intended to limit the $30.00 exemption to one

[3] Mr. Anglin testified that "message units" are calls made within a local calling area using residential main telephone services.

per customer, it knew how to and could have. The Board concluded that the Legislature's use of plural terms, coupled with its failure to use express limiting language as it did in § 6(u), indicated its intent not to limit the $30.00 exemption in the manner suggested by the Commissioner.

Further, the guidance issued by the Commissioner on the sale of telecommunications services offered no support for her argument. Within one year of the enactment of § 6(i)(4), the Commissioner promulgated 830 CMR 64H.1.6, her regulation on the taxability of telecommunications services, as well as Technical Information Release ("TIR") 90-8, each of which explained the parameters of the $30.00 exemption. Nowhere in either 830 CMR 64H.1.6 or TIR 90-8 did it state that only one $30.00 exemption would be allowed per customer per service address. The Commissioner first asserted this position in TIR 99-2, which was issued nine years after the enactment of § 6(i)(4). However, the Board found that TIR 99-2 was not entitled to deference because it did not comport with § 6(i)(4) and because it was issued long after the statute's enactment.

Further, assuming *arguendo* that the Commissioner's statutory interpretation was correct, the Board found that the Commissioner's denial of the $30.00 exemption for the

five bills was improper. The Commissioner denied the $30.00 exemption because she concluded that the bills were secondary accounts billed to the same individual for the same residence, in contravention of the statute as she interpreted it. However, the evidence did not support the Commissioner's conclusion regarding the bills. As an initial matter, the Commissioner's assumption equated billing addresses with service addresses, which are not necessarily one and the same. Certain of the bills had billing addresses that were different than the service addresses, as evidenced by the area codes and exchange numbers reflected in the account numbers, many of which did not correspond geographically with the billing location. Mr. Anglin testified that it was fairly common for a customer to have different billing and service addresses. For example, he testified that an individual may prefer to have all bills sent to an office address rather than a residential address. In addition, the billing address for some of the bills was a post office box. Mr. Anglin testified that Verizon never provided telephone service to post office boxes, so those bills did not support the Commissioner's conclusion that they represented a secondary account at a single residence because there was no

indication as to where the telephone services were actually provided.

In sum, the Board found serious flaws in both the factual assumptions made by the Commissioner and in her statutory interpretation. The evidence established that Verizon applied the $30.00 exemption in a manner consistent with the dictates of statute. Accordingly, the Board found that the Commissioner improperly disallowed the $30.00 exemption with respect to the five bills.

Likewise, the Board found that the Commissioner's disallowance of the $30.00 exemption for the Todd Richman bill was improper. The billing address for that bill read "Todd Richman, Broad Reach Consulting, 183 Willis Rd., Sudbury, MA." Although Broad Reach Consulting was listed beneath Mr. Richman's name on the billing address, the customer name on the account was listed only as Todd Richman. Further, the bill reflected charges for unlimited local residential service and residential voice mail service. According to the Statement of Agreed Facts submitted by the parties, the service for the Todd Richman account was installed at a residence, but was subsequently used primarily for business purposes, with occasional personal use.

Mr. Anglin testified that, when ordering telephone services from Verizon, customers must indicate whether they want residential or business telephone service. He also testified that, before installing residential service, it was Verizon's practice to confirm that the account would be used for residential purposes. For example, Mr. Anglin testified that if a technician arrived to install a residential line at a building that appeared to be commercial, the technician would be instructed to inform the customer that residential service could not be installed. It was in Verizon's best interest to verify that a customer who ordered residential service would be using it for that purpose, because, as Mr. Anglin explained, business service was priced differently – and was usually more expensive than – residential service.

The Commissioner denied the $30.00 exemption for the Todd Richman account because, as Mr. Morrow testified, "it looked like a business to us." Verizon argued in these appeals that once it installs residential service to a residence, it is not responsible for monitoring subsequent use of the account to determine eligibility for the $30.00 exemption. Rather, Verizon contended that, as indicated by the Commissioner's regulation, a customer who uses residential telephone services for business purposes must

file a use tax return with the Commissioner and pay the appropriate taxes. 830 CMR 64H.1.6(5)(b) provides, in relevant part, "[t]elephone service provided to a business is not residential service even if the business is located in an individual's home. If an otherwise residential telephone is used for business purposes, the business must file a use tax return and pay tax on the services that it used."

On the basis of all of the evidence, the Board found that Verizon installed residential main telephone service at a residential address to a customer listed as "Todd Richman." Therefore, the Board found that Verizon properly applied the $30.00 exemption to the Todd Richman account, and that nothing in the language of § 6(i)(4) required Verizon to continuously monitor how individual accounts were being used to determine eligibility for the $30.00 exemption. Rather, consistent with 830 CMR 64H.1.6(5)(b), the Board found that if a customer subsequently used residential telephone service for business purposes, it was the obligation of the customer to file a use tax return, and not Verizon's obligation to deny the exemption. The Board therefore found that the Commissioner's denial of the $30.00 exemption for the Todd Richman bill was improper.

IV. Voice Mail Services

64H, § 1 defines "telecommunications services" as:

> any transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiberoptics, laser, microwave, radio, satellite or similar facilities but not including cable television.

That same section states that telecommunications services are taxable services for purposes of Chapter 64H. Voice mail services were among the services provided by Verizon to its customers during the periods relevant to these appeals. Verizon reported the sales taxes associated with voice mail services on its tax returns for the periods at issue. In these appeals Verizon sought an abatement of the sales taxes which it self-assessed on its tax returns, arguing that voice mail charges are not telecommunications services for purposes of Chapter 64H and therefore should not have been included in its tax returns.

According to Mr. Anglin, charges made by Verizon for its voice mail services were not charges for the transmission of messages or information, but rather, were charges for the recording and storage of messages on Verizon's voice mail system. Mr. Anglin testified that a subscription to Verizon's voice mail service provided a customer with the ability to store recorded messages or to retrieve them from the system. He further stated that a

person leaving a message on or retrieving a message from the voice mail system makes a phone call for which they incur charges separate and apart from the voice mail charges. The appellant contended that any "transmission of messages or information" occurred only at such time as an individual made the phone call for which they were separately charged, and thus, the appellant contended that the fees it charged for voice mail services were not fees for telecommunications services as defined by 64H, § 1.

On the basis of all of the evidence, the Board found that Verizon's voice mail services constituted "the transmission of messages . . . by electronic or similar means, between or among points by wire, cable, fiberoptics, laser, microwave, radio, satellite or similar facilities." The evidence indicated that a message was transmitted from one point, a caller, to another point, the voice mail system, when a caller recorded the message on the voice mail system. The message was then stored on the voice mail system, and later, transmitted from the voice mail system to a party retrieving the message. Although there were separate charges associated with calling into the voice mail system to record or retrieve messages, that fact in no way altered the reality that voice mail served to transmit messages from one point to another. The mere ability to

store messages without the ability to retransmit and retrieve them would be valueless, and the Board therefore rejected the appellant's arguments that voice mail charges were solely charges for the storage, not transmittal, of messages. Accordingly, the Board found that charges made by Verizon for voice mail services were charges for the "transmission of messages or information by electronic or similar means, between or among points" and that Verizon properly reported sales taxes on its voice mail services. The Board therefore found that Verizon was not entitled to an abatement of those sales taxes.

In conclusion, on the basis of all of the evidence, the Board found that, for each of the bills at issue, the Commissioner's denial of the $30.00 exemption was improper. However, because the Board found that Verizon properly charged and collected sales taxes on its voice mail services, it was not entitled to an abatement of those amounts. Accordingly, the Board issued decisions for the appellant, and, taking into consideration the parties' stipulation, granted abatements totaling $836,430, along with statutory additions, for the first audit cycle and abatements totaling $582,595, along with statutory additions, for the second audit cycle.

OPINION

Two issues were presented for the Board's consideration in these appeals: (1) whether the Commissioner properly disallowed the $30.00 exemption from sales tax on certain sales of telephone services made by the appellant pursuant to § 6(i)(4); and (2) whether the appellant's voice mail services were subject to the sales tax under 64H § 2.

I. The Commissioner Improperly Disallowed the $30.00 Exemption for Each of the Bills at Issue

At all times relevant to these appeals, pursuant to 64H, § 2, Massachusetts imposed a sales tax of five percent upon sales by a vendor of telecommunications services not otherwise exempt. There was no dispute between the parties in these appeals that Verizon was a vendor and that at least some of the sales of telecommunications services made by Verizon were subject to the sales tax. Verizon contended in these appeals that certain of its sales were eligible for the exemption provided by § 6(i)(4), which exempts from sales tax up to $30.00 of "residential main telephone services billed on a monthly recurring basis or billed as message units."

After concluding her audit of Verizon for the periods at issue, the Commissioner disallowed the $30.00 exemption

for two categories of sales: (1) sales of residential telephone services which were billed to a customer at a billing address to which another bill was also issued to the same customer; and (2) sales of residential telephone services which appeared to have been used for business purposes.

With respect to the first category, the Board found and ruled that the Commissioner's adjustments were improper, as there was neither legal nor factual support for the Commissioner's conclusions. The Commissioner interpreted the phrase "residential main telephone services" to mean main residential telephone services, i.e., the primary account at a service address. Thus, the Commissioner denied the $30.00 exemption for accounts for which an additional bill was issued to the same customer at the same billing address because the Commissioner interpreted the statute to permit only one $30.00 exemption per customer per service address. The Board disagreed.

Based on the ample evidence of record, the Board found and ruled that, for purposes of § 6(i)(4), the phrase "residential main telephone services" meant basic local residential telephone services, which was its established meaning within the telecommunications industry. The Board found and ruled that the Legislature's liberal use of

telecommunications industry terminology within § 6(i)(4) indicated its intent to give the phrase "residential main telephone services" the same meaning for purposes of § 6(i)(4) that it had within the telecommunications industry. *See* ***Eaton Financial Corporation v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2000-526, 536 (finding that the Legislature's repeated use of financial accounting terminology within a statute indicated its intent to incorporate standard accounting practice and concepts into the statute). *See also* ***Web Industries, Inc. v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1999-122, 129; ***Winslow Brothers & Smith Co. v. Hillsborough Mills,*** 319 Mass. 137, 141 (1946) (quoting ***Hoffman v. Palmer,*** 129 F.3d 976, 984 (2d Cir. 1942)) ("Each trade has its peculiar jargon and courts rely on that jargon when it finds its way into a statute dealing with that trade.").

The Commissioner's arguments to the contrary were unavailing. The Commissioner's construction appeared to read the word "main" to modify the word "residential," but that construction is backwards. The term "residential" precedes the term "main," and therefore it does not modify that word. Moreover, the Commissioner's reading of § 6(i)(4) to impose a limit of one $30.00 exemption per

customer per service address was not supported by the language used elsewhere in the statute. Unlike § 6(i)(4), which exempts "*sales* . . . of . . . residential main telephone *services*," § 6(u) exempts the "*sale of a motor vehicle*" to permanently disabled veterans and others with certain disabilities, and expressly states that the exemption "shall apply to one motor vehicle only owned and registered for the personal, noncommercial use of such person." (emphasis added). It was evident from the statutory language that if the Legislature intended to limit the $30.00 exemption to one per customer per service address, it could have done so. *See* ***Commissioner of Revenue v. Cargill, Inc.,*** 429 Mass. 79, 82 (1999) ("Had the Legislature intended to limit the credit in the manner advocated by the commissioner, it easily could have done so.") The Board concluded that the Legislature's use of plural terms, coupled with its failure to use express limiting language as it did in § 6(u), indicated its intent not to limit the $30.00 exemption in the manner suggested by the Commissioner.

Further, the Board afforded no weight to the authority cited by the Commissioner. The Commissioner cited TIR 99-2, in which she asserted for the first time, nine years after the enactment of § 6(i)(4), that it permitted only

one $30.00 exemption per customer per service address. However, TIR 99-2 represented a departure from 830 CMR 64H.1 and TIR 90-8, the regulation and TIR issued by the Commissioner within one year after the enactment of § 6(i)(4), neither of which referenced the limitation asserted by the Commissioner in TIR 99-2. The Board found and ruled that TIR 99-2 was entitled to no weight, both because it was issued long after the enactment of § 6(i)(4), and because it sought to impose limitations not authorized by the statutory language. *See* ***Miller Studio, Inc. v. Commissioner of Revenue,*** Mass. ATB Findings of Fact and Reports 1992-48, 61 (citing ***Xtra., Inc. v. Commissioner of Revenue,*** 380 Mass. 277, 282-83 (1980)); ***Wellington v. Comm'r of Corps. & Tax'n,*** 359 Mass. 448, 451-52 (1971) (holding that administrative interpretation issued long after the statute's enactment was not entitled to deference); ***Bureau of Old Age Assistance of Natick v. Commissioner of Pub. Welfare***, 326 Mass. 121, 124 (1950) ("[A]n administrative board or officer has no authority to promulgate rules and regulations which are in conflict with the statutes or exceed the authority conferred by the statutes by which such board or office was created."). Accordingly, the Board rejected the Commissioner's arguments.

Additionally, the Board found and ruled that there was no factual support for the Commissioner's adjustments. Each of the five bills reflected, in the Commissioner's opinion, accounts for which an additional account was billed to the same customer at the same service address. Because the Commissioner interpreted § 6(i)(4) to permit only one $30.00 exemption per customer per service address, the Commissioner disallowed the $30.00 exemption for each of the five bills. However, the evidence did not support the Commissioner's conclusions. The Commissioner equated billing addresses with service addresses, which are not necessarily one and the same. For example, one of the bills for which the $30.00 exemption was denied was mailed to a post office box. Since Verizon does not provide residential telephone service to post office boxes, the Commissioner's conclusions regarding that bill were incorrect. Several of the bills had different billing and service addresses, as evidenced by area codes and exchange numbers which did not correspond geographically with the billing addresses. Further, as Mr. Anglin testified, it was not unusual for customers to have different billing and service addresses, as, for example, in the case of an individual who preferred to have bills mailed to an office address rather than a residence. In sum, even if the Board

agreed with the Commissioner's conclusion that § 6(i)(4) permitted only one $30.00 exemption per customer per service address, which it did not, the Board found and ruled that there was insufficient evidence in the record to support the Commissioner's adjustments.

Likewise, the Board found and ruled that the Commissioner's disallowance of the exemption for the Todd Richman bill was improper. Section 6(i)(4) exempts up to $30.00 of sales of "residential main telephone services billed on a monthly recurring basis or billed as message units, and residential intra local access and transport area service billed on a recurring monthly basis." There was ample evidence in the record establishing that the services sold by Verizon to Todd Richman were "residential main telephone services billed on a monthly recurring basis." Thus, the Board found and ruled that Verizon correctly applied the $30.00 exemption in accordance with the language of the statute.

Although it appeared from the record that Mr. Richman used the account at issue primarily for business purposes, the Board found nothing in the language of § 6(i)(4) that required Verizon to monitor accounts for use to determine eligibility for the $30.00 exemption. In fact, 830 CMR 64H.1.6(5)(b) expressly places the obligation on a customer

who uses residential telephone services for business purposes to file a use tax return and pay the appropriate taxes. Accordingly, the Board found and ruled that Verizon properly applied the $30.00 exemption to the Todd Richman bill because it was a sale of residential main telephone services. The Board therefore found and ruled that the Commissioner's disallowance of the $30.00 exemption for that account was improper.

The burden of proof is on the party seeking an abatement. ***Staples v. Commissioner of Corporations and Taxation,*** 305 Mass. 20, 26 (1946). A "taxpayer is not entitled to an exemption unless he shows that he comes within . . . the express words" of the statute. ***Animal Rescue League of Boston v. Assessors of Bourne,*** 310 Mass. 330, 332 (1941). In the present appeal, the Board found and ruled that the appellant demonstrated that the sales at issue fell within the express language of the statute because they were sales of "residential main telephone services" as set forth in § 6(i)(4). Moreover, the Commissioner's assessments were based on faulty factual assumptions and on an incorrect interpretation of the relevant statute, and could not be upheld. *See* ***Food Service Associates, Inc. and Dennis G. Maxwell v. Commissioner of Revenue,*** Mass. ATB Findings of Fact and

Reports, 2001-341, 363-64 (quoting ***Chef Chang's House, Inc. v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1996-738, 751) ("[T]he [Commissioner's] analysis was predicated on . . . dubious assumptions and was thus unreliable and invalid."). Accordingly, the Board found and ruled that the appellant met its burden of proving its right to an abatement, and decided this issue for the appellant.

II. Verizon's Voice Mail Services were Taxable Telecommunications Services

In addition to abatements of the deficiency assessments made by the Commissioner in these appeals, Verizon sought abatements of sales taxes which it reported for its voice mail services during the periods at issue. 64H, § 1 defines "telecommunications services" as:

> any transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiberoptics, laser, microwave, radio, satellite or similar facilities but not including cable television.

Verizon argued that the voice mail fees which it charged its customers were not fees for the "transmission of messages," but rather, were fees charged for the ability to store messages. Verizon contended that the transmission of messages occurred only when a customer placed a call to the voice mail system to retrieve a stored message, at

which time a separate charge, not encompassed by the voice mail charges, would be incurred by the customer.

On the basis of all of the evidence, the Board found and ruled that Verizon's voice mail services were "telecommunications services" as defined by 64H, § 1 because they constituted "the transmission of messages . . . by electronic or similar means, between or among points by wire, cable, fiberoptics, laser, microwave, radio, satellite or similar facilities." The evidence indicated that a message was transmitted from one point, a caller, to another point, the voice mail system, when a caller recorded the message on the voice mail system. The message was then stored on the voice mail system, and later, transmitted from the voice mail system to a party retrieving the message. Although there were separate charges associated with calling into the voice mail system to record or retrieve messages, that fact in no way altered the reality that voice mail served to transmit messages from one point to another. The mere ability to store messages without the ability to retransmit and receive them would be valueless, and the Board therefore rejected the appellant's arguments that voice mail charges were solely charges for the storage, not transmittal, of messages. Accordingly, the Board found that charges made by Verizon

for voice mail services were charges for the "transmission of messages or information by electronic or similar means, between or among points" and that Verizon properly reported sales taxes on its voice mail services. The Board therefore found that Verizon was not entitled to an abatement of those sales taxes.

Several other states which have considered the taxability of voice mail charges have reached the same conclusion. In ***Paging Network of Ariz. v. Department of Revenue,*** No. 1058-93-S, 1995 Ariz. Tax Lexis 19 at *1, (Ariz. B.T.A. March 21, 1995), the Arizona Board of Tax Appeals rejected a taxpayer's claim that voice mail was not a taxable telecommunications service. ***Id.*** at 4-5. In so ruling, the Board of Appeals stated that the purpose of the taxpayer's voice mail service was to "pass on or enable the sending or passing of messages from one person to another." ***Id.*** at 5. The Board of Appeals noted that there "would be no revenue to [the Taxpayer] if the messages were only stored and never transmitted." ***Id.***

Similarly, in ***BellSouth Telecommunications, Inc. v. Johnson,*** No. M2005-00865-COA-R3-CV, 2006 Tenn. App. Lexis 699 at *1, (Tenn. Ct. App. Oct. 27, 2006), the Tennessee Court of Appeals concluded that voice mail services were taxable telecommunications services because it concluded

that "the true object of the voice mail services . . . is to facilitate, albeit delayed, the transmission and receipt of a telephone communication." ***Id.*** at 10. The court further noted that "the fact that the oral message is held in abeyance in a computer memory does not change the service provided, that is, the customer can communicate with a specific person or persons through telephonic means." ***Id.*** at 11.

The appellant's attempts to distinguish these cases were unavailing. In both cases, as here, the relevant inquiry was whether voice mail services involved the transmission of messages, and in both cases, the courts concluded that they did. The Board agreed with the reasoning in these cases, and found and ruled that the appellant's voice mail services were telecommunications services as defined by 64H, § 1. The Board therefore found and ruled that Verizon had properly reported sales taxes for its voice mail services, and that it was not entitled to abatements of those taxes.

CONCLUSION

On the basis of all of the evidence, the Board found and ruled that the appellant met its burden of proving that the deficiency assessments at issue resulted from the

Commissioner's improper disallowance of the $30.00 exemption. Accordingly, the Board issued a decision for the appellant in these appeals and, after taking into consideration the parties' agreements as reflected in the Statement of Agreed Facts, granted abatements totaling $836,430, along with statutory additions, for the first audit cycle and abatements totaling $582,595, along with statutory additions, for the second audit cycle. Additionally, the Board found and ruled that the appellant's voice mail services were subject to the sales tax imposed by 64H, § 2 because they were "telecommunications services" as defined by 64H, § 1. Accordingly, the Board found and ruled that the appellant was not entitled to abatements of the sales taxes which it reported for its voice mail services.

APPELLATE TAX BOARD

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

A true copy,

Attest: _____
Clerk of the Board