

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

CITRIX SYSTEMS, INC. v. COMMISSIONER OF REVENUE

Docket Nos. C321160
C325421

Promulgated:
November 2, 2018

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 Citrix Systems, Inc. ("Citrix" or "appellant") for the tax periods ended April 30, 2007 through June 30, 2009 and October 31, 2009 through December 31, 2011 (collectively, the "periods at issue").

Commissioner Scharaffa heard these appeals and was joined by Chairman Hammond and Commissioners Rose, Chmielinski, and Good in the decisions for the appellee.¹

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

Matthew D. Schnall, Esq. and *Megan M. Walsh*, Esq. for the appellant.

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

¹ The decisions also reflected the parties' stipulation that penalties associated with the contested assessments would be abated.

FINDINGS OF FACT AND REPORT

On the basis of a Statement of Agreed Facts with 91 attached exhibits as well as testimony² and additional exhibits offered into evidence at the hearing of these appeals, the Appellate Tax Board ("Board") made the following findings of fact.

Jurisdiction

Citrix is a publicly traded Delaware corporation that did business in Massachusetts and elsewhere during the periods at issue. For each of these periods, Citrix timely filed a Form ST-9, Sales and Use Tax Return, and timely paid the amount shown as due thereon. Following an audit of Citrix's Sales and Use Tax Returns for the periods ended April 30, 2007 through June 30, 2009, the Commissioner issued a Notice of Intent to Assess dated February 18, 2011 ("First NIA") and a Notice of Assessment dated October 23, 2012 ("First NOA").³ On December 14, 2012, Citrix filed a Form CA-6, Application for Abatement/Amended Return, for the periods relating to the First NOA ("First Abatement

² One witness, Mr. Anshuman Kanwar, was called by and testified on behalf of Citrix. The Commissioner did not offer any witnesses.

³ After the issuance of the First NIA and prior to the issuance of the First NOA, the Commissioner promulgated Letter Ruling 12-10: Screen Sharing Software and the Massachusetts Sales/Use Tax ("Letter Ruling 12-10"). Letter Ruling 12-10 addressed a letter ruling request from Citrix and stated the Commissioner's conclusion that the software products at issue in these appeals constituted sales of prewritten software subject to Massachusetts sales tax imposed under G.L. c. 64H, §§ 1 and 2.

Application"). The Commissioner subsequently issued Notices of Abatement Determination, dated May 13, 2013, denying Citrix's First Abatement Application, and Citrix timely filed a petition with the Board on July 11, 2013.

For the periods ended October 31, 2009 through December 31, 2011, the Commissioner issued a Notice of Intent to Assess dated February 8, 2014 ("Second NIA") and a Notice of Assessment dated March 18, 2014 ("Second NOA"). Citrix filed a Form CA-6, Application for Abatement/Amended Return for the periods relating to the Second NOA on April 8, 2014 ("Second Abatement Application"), and the Commissioner issued Notices of Abatement Determination denying Citrix's Second Abatement Application dated August 1, 2014. Citrix timely filed a petition with the Board on September 15, 2014.

Based on the foregoing, the Board found and ruled that it had jurisdiction to hear and decide these appeals.

Factual Background

The tax at issue in these appeals was assessed by the Commissioner on Citrix's sales of three online software products, "GoToMyPC," "GoToAssist," and "GoToMeeting" (collectively, the "Online Products"). While the specific features of the Online Products vary, they share certain characteristics. In particular, each of the Online

Products, which are described in detail below, creates and maintains a screen-sharing connection between a host computer and one or more remote computers, all of which are connected to the internet. The host computer must have and run its own operating system and software applications, and the screen-sharing connection allows the user of the remote computer to see the screen output of the host computer and, if applicable, to share access to input control via keyboard and a pointing device. The host computer and remote computer may both be owned or controlled by a Citrix customer, or one may be owned or controlled by a third party who is not a Citrix customer. The Online Products, which the parties agree constitute software within the meaning of General Laws chapter 64H ("Chapter 64H"), are not customized for individual customers in any way. Customers may purchase certain options designed to enhance their user experience. The options, like the basic Online Products, are not customized for individual customers.

Citrix sells the Online Products in a subscription format and customers pay monthly or annual subscription fees in exchange for unlimited access to the products during the subscription period. To purchase a subscription, a customer executes a Master Subscription Agreement ("Sales Agreement") that reflects the Online Product(s) that have

been selected, the monthly or annual subscription fee, and the number of authorized users.⁴ The Sales Agreement documents specify that by purchasing a Citrix subscription, the "customer may access and use" the chosen Online Product(s). Citrix also provides customer service as part of the relationship, typically by telephone or other electronic communication.

The Online Products

GoToMyPC is Citrix's online remote access software product that allows a user to securely access and operate his or her personal computer (commonly referred to as the "host computer") from a remote location or device that securely connects to the user's computer through Citrix's web servers. Both the host computer and the remote computer or device are typically owned or controlled by the customer.

As with all the Online Products, Citrix provides GoToMyPC principally through proprietary software and a dedicated network of computer hardware. To use the product, a customer installs GoToMyPC Endpoint Software on both the

⁴ The Sales Agreements consistently refer to the Online Products as services, as do Citrix's marketing materials and its filings with the Securities and Exchange Commission.

host computer and the remote computer.⁵ A customer then initiates a connection to GoToMyPC between the host computer and the remote computer and is able to view the host computer screen and control the host computer using the keyboard and mouse of the remote computer. The user can execute applications that reside on the host computer, such as a word processor or a web-based application that the host computer accesses online. The applications used by a customer through GoToMyPC are always located on the host computer or third-party servers, not Citrix's servers.

GoToAssist is an online, screen-sharing software application that allows users to share screen and input control access to a computer in real time to facilitate technical support. GoToAssist customers are typically technical support professionals who use the product to connect with individuals who are in need of remote technical support. During a support session, the support professional can view the screen of the support recipient's computer and exercise keyboard and mouse control over that computer. There are two categories of GoToAssist: GoToAssist Express, which is designed primarily for individuals who provide technical support services; and

⁵ Endpoint Software, in some variant, is necessary to use each of the Online Products. There is no charge for Endpoint Software and its utility is limited to facilitating access to the Online Products.

GoToAssist Corporate, which is designed for technical support organizations and technical support departments within businesses.

To initiate a session through GoToAssist, a customer may log into an account through a web browser or can connect to the product using the version of Endpoint Software known as HelpAlert. The GoToAssist software provides the professional with a session identifier code, which the professional communicates to the support recipient. The support recipient then uses the session identifier code to login to the session through his or her web browser at a separate address. After the recipient accepts a prompt, the HelpAlert Endpoint Software is downloaded onto the recipient's computer and the connection can be made between the computers and the GoToAssist software application.

GoToMeeting is a family of online conferencing software applications that include GoToMeeting, GoToWebinar and GoToTraining. The applications allow users to share screen access and control for purposes of an online meeting, presentation, demonstration, or collaboration (collectively, "meeting"). The host computer is owned or controlled by a meeting organizer who is Citrix's customer,

and the remote computers are typically owned or controlled by third parties who are participating in the meeting.

The meeting organizer schedules, convenes, and moderates a GoToMeeting web conference session and may invite participants using telephone, email, or other means. The organizer may initiate the session using a web browser or GoToMeeting Endpoint Software, which is installed on both the participants' and the organizer's devices. The GoToMeeting server software provides a meeting identifier, which invited participants can use to join the session, either by using a browser to visit a website and entering the meeting identifier or by clicking a link in an invitation email. Each participant's browser then initiates the download and installation of the GoToMeeting Endpoint Software on the participant's device. The Endpoint Software on the organizer's computer allows the organizer to begin and end the conference and to make selections regarding the conference, such as the application(s) to be included in the screen sharing. Participants in the conference have no control over the conference other than joining or exiting, participating in chat or feedback, and, as allowed by the meeting organizer, sharing control over one or more applications or documents on the organizer's computer.

Testimony of Mr. Kanwar

Mr. Kanwar, Citrix's Vice President of Technology Operations, leads Citrix's Technical Operations Team. The team is comprised of approximately 130 employees responsible for the maintenance, configuration, update, and control of Citrix's network hardware, which supports the Online Products, and its server software, the software hosted on Citrix's servers that is required to run the Online Products.

Mr. Kanwar testified about the size and complexity of Citrix's hardware network that supports the Online Products and includes between 5,000 and 7,000 servers, approximately 200 routers and switches, and vast storage capacity. The Technical Operations Team constantly monitors the network and responds to any issues or faults in the network that may impact a customer's experience. These can include insufficient capacity, substandard performance, malicious attacks from outside the system, or atypically high network utilization. Mr. Kanwar described this type of activity as falling within the "reactive" side of operations. The "proactive" side includes ensuring sufficient capacity to support customer use as well as general observation of the network.

Mr. Kanwar also described his team's involvement in "change management" in the "software development lifecycle." This includes putting the server software through various stages of testing before the software is placed into the "live systems." The software travels through a "software development pipeline" before it is implemented, which includes successive stages of its employment on hardware, various tests, and "flipping on the switch" for successive waves of users, thereby allowing feedback and modification as updates are incrementally integrated into the system. Mr. Kanwar also testified that Citrix maintains control over the software at all times and opined that Citrix's customers are "ultimately looking for . . . the ability to connect with other entities."

Based on the evidence presented and the reasonable inferences drawn therefrom, the Board found and ruled that the Online Products constituted standardized software and, in turn, tangible personal property within the meaning of G.L. c. 64H, § 1. The Board further found and ruled that the sales of the Online Products at issue in these appeals were sales of tangible personal property subject to the sales tax pursuant to G.L. c. 64H, §§ 1 and 2. Accordingly, the Board issued decisions for the appellee in these appeals.

OPINION

Massachusetts law imposes a sales tax on sales of tangible personal property in the Commonwealth. G.L. c. 64H, §§ 1 and 2. For purposes of the sales tax, a sale includes:

any transfer of title or possession, or both, exchange, barter, lease, rental, conditional or otherwise, of tangible personal property . . . in any manner or by any means whatsoever.

G.L. c. 64H, § 1.

Tangible personal property is defined in Chapter 64H as:

personal property of any nature consisting of any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured or being within the commonwealth, but shall not include rights and credits, insurance policies, bills of exchange, stocks and bonds and similar evidences of indebtedness or ownership. For purposes of this chapter, "tangible personal property" shall include gas, electricity and steam. **A transfer of standardized computer software, including but not limited to electronic, telephonic, or similar transfer, shall also be considered a transfer of tangible personal property.**

G.L. c. 64H, § 1 (emphasis added).

For a number of years prior to 2005, whether standardized software was subject to sales or use tax in Massachusetts depended on its method of delivery.⁶ More

⁶ Even earlier, a distinction had been drawn between standardized and custom software, with only the former being subject to sales and use tax. See, e.g. Letter Ruling 88-14: Computer Software Sales.

specifically, if standardized software was delivered in tangible form, such as a CD-ROM or a floppy disk, it was subject to tax. If, however, standardized software was delivered electronically or by load and leave,⁷ it was not subject to tax. See, e.g., Directive 01-3: Sales Tax Consequences of Computer Software "Load and Leave" Transactions. In 2005, the Massachusetts Legislature addressed this disparity and created uniform sales tax treatment for sales of standardized software, regardless of the method by which the sale is made. To accomplish this, the definition of tangible personal property was expanded, as reflected in the emphasized language above, to incorporate transfers of standardized computer software "including but not limited to electronic, telephonic, or similar transfer[s]." St. 2005, c. 163, § 34 (effective April 1, 2006) (the "2005 statutory change").

Following the 2005 statutory change, the Commissioner promulgated a regulation on October 20, 2006 that, in pertinent part, construed the application of the sales tax

⁷ In a load and leave transaction, a vendor installs software directly onto a customer's computer using tangible storage media, but does not transfer the tangible medium used to load the software as part of the sale.

to sales of prewritten software (the "Regulation").⁸ See 830 CMR 64H.1.3. In particular, the Regulation specifies that

[s]ales in Massachusetts of . . . prewritten computer software, regardless of the method of delivery . . . are generally subject to the Massachusetts sales tax. Taxable transfers of prewritten software include sales effected in any of the following ways regardless of the method of delivery, including electronic delivery or load and leave: licenses and leases, **transfers of rights to use software installed on a remote server.**

Id. (emphasis added).

There is no dispute that the Online Products constitute software within the meaning of Chapter 64H. As to the issue of whether the products qualify as prewritten software, Citrix did not explicitly oppose the characterization, but it remained an issue for the Board to resolve.

The Regulation provides that prewritten computer software, which is "also known as [c]anned [s]oftware and [s]tandardized [s]oftware,"⁹ is defined as computer software

⁸ Several months prior to the issuance of the Regulation, the Commissioner issued Technical Information Release 05-15: Transfers of Prewritten Computer Software ("Technical Information Release 05-15"), which outlined the 2005 statutory change to the definition of tangible personal property and the consequences for treatment of sales of prewritten software under the sales and use tax. Technical Information Release 05-15's discussion as it relates to the issues before the Board in these appeals is substantively the same as the Regulation and Technical Information Release 05-15 is therefore not discussed further in these findings of fact and report.

⁹ For purposes of the sales and use tax, there is no distinction in Massachusetts law among standardized software, prewritten software, and canned software.

"which is not designed and developed by the author or other creator to the specifications of a specific purchaser." 830 CMR 64H.1.3(2). Conversely, custom software is "a software program prepared to the special order of a customer that is not prewritten software." *Id.*

The software that comprises the Online Products is complex and requires continuous development, monitoring, and maintenance. It is not, however, made to the specifications or prepared to the special order of any individual purchaser. To the contrary, having chosen which among the Online Products to purchase, every customer receives access to and use of fundamentally the same online software application, whether it is GoToMyPC, GoToAssist, or GoToMeeting. The only variations in the Online Products are optional features, which are available for purchase by all customers and are customized to none. Given these facts and absent any contrary authority, the Board found and ruled that the Online Products constitute standardized computer software within the meaning of Chapter 64H.

As previously noted, the Regulation states that sales of standardized software in Massachusetts include "transfers of rights to use software installed on a remote server." 830 CMR 64H.1.3(3). Each of the Online Products resides on Citrix's servers. To access the Online Products,

a customer executes a Sales Agreement that explicitly grants the customer the right, for a fee, to access and use one or more of the products. Before using an Online Product, a customer downloads the applicable Endpoint Software, which enables access to the product. The customer is then able to use the chosen Online Product. In sum, the transfer of the right to use software installed on a remote server is precisely the transaction effected when a customer purchases one or more of the Online Products from Citrix.

Citrix's response to this analysis was twofold. First, Citrix argued that there was no taxable sale of software because there was no "transfer" of software as required by Chapter 64H. According to Citrix, while the 2005 statutory change to the definition of tangible personal property extended the taxation of software to software transferred electronically, the change did not encompass access to software that is remotely hosted by a vendor. In Citrix's view, the Commissioner improperly sought to extend the tax to remote access transactions, which are beyond the scope of Chapter 64H. This extension was reflected first in Technical Information Release 05-15, and next, the Regulation, both of which, in effect, Citrix seeks to

invalidate. The Board did not find Citrix's argument persuasive.

The Board is mindful of the maxim that "[t]he right to tax must be plainly conferred by statute. It is not to be implied." *McCarthy v. Commissioner of Revenue*, 391 Mass. 630, 632-33 (1984). However, this well-established rule operates in concert with the principle that "regulations are not to be declared void unless their provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate." *Expedito Duarte v. Commissioner of Revenue*, 451 Mass. 399, 408 (2008) (citing *Smith v. Commissioner of Transitional Assistance*, 431 Mass. 638, 646 (2000)); see also *Regency Transportation, Inc. v. Commissioner of Revenue*, 473 Mass. 459, 466 (2016) ("[w]e accord substantial deference to the agency's regulations and apply all presumptions in favor of the validity of the administrative action and [do] not declare it void unless its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate").

As technology and computer business practices have evolved, so too has Massachusetts law relating to the taxation of software. As discussed above, the 2005 statutory change, which expanded the definition of tangible personal property to include "[a] transfer of standardized

computer software, including but not limited to electronic, telephonic, or similar transfer," reflects the Legislature's intent to create uniform sales tax treatment for sales of standardized software, regardless of the method of sale. G.L. c. 64H, § 1. The definitional change is facially broad in scope and not only specifies various types of transfers to which it applies but, by incorporating the words "including but not limited to," anticipates others. The Commissioner construed this expansive statutory language to include "transfers of rights to use software installed on a remote server." 830 CMR 64H.1.3(3), a definition that clearly applies to the transactions at issue in these appeals. The Commissioner's construction is wholly consistent with the plain terms of the statute. Consequently, any argument that the Regulation "cannot by any reasonable construction be interpreted in harmony with the legislative mandate" must fail. *Expedito Duarte*, 451 Mass. at 408.

Citrix also argued that its sales of the Online Products constitute sales of services and not of tangible personal property. In support of its argument, Citrix points to several facts, including that: the Sales Agreements consistently refer to the Online Products as services, as do Citrix's marketing documents and filings

with the Securities and Exchange Commission; and the network hardware and server software systems that function together to provide the Online Products do not operate automatically, but require numerous employees to operate and maintain the systems. Citrix also places particular emphasis on Mr. Kanwar's "uncontested" testimony that Citrix's customers are "ultimately looking for . . . the ability to connect with other entities," which reflects his opinion that provision of the Online Products constitutes services.

Massachusetts sales tax law distinguishes between sales of tangible personal property, which are taxable absent an exemption, and sales of services, which are generally not subject to tax. G.L. c. 64H, §§ 1 and 2.¹⁰ The Regulation acknowledges this distinction in the context of charges for remote access to standardized software, which are generally subject to tax, as follows:

[W]here there is no charge for the use of the software and the object of the transaction is acquiring a good or service other than the use of the software, sales or use tax does not apply. See, e.g., 830 CMR 64H.1.3(13).

830 CMR 64H.1.3(14) (a).

¹⁰ Personal service transactions that involve sales of tangible personal property "as inconsequential elements for which no separate charges are made" are also not subject to the sales tax. G.L. c. 64H, § 1.

The Supreme Judicial Court first enunciated the test to determine the "object of the transaction" in *Commissioner of Revenue v. Houghton Mifflin Co.*, 396 Mass. 666, 670 (1986). In *Houghton Mifflin*, the Court considered application of the sales tax to transactions involving provision of typesetting and compositing services in which the taxpayer also received tangible reproduction proofs. The Court held that "bundled transactions" such as these, where the service and property components of a transaction are integrated, are subject to the rule that

the character of the transaction must be analyzed to ascertain whether the buyer's basic purpose was to acquire the property which was sold to it, or to obtain the services.

Houghton Mifflin, 396 Mass. at 670.

As referenced above, in Letter Ruling 12-10, the Commissioner considered whether Citrix's sales of the Online Products were subject to sales tax. In reaching the conclusion that the sales were so subject, the Commissioner noted Citrix's ancillary provision of services, likely in the form of customer service, and ultimately determined that the object of the transactions was Citrix's sale of the right to use its prewritten software. The Commissioner's analysis implicitly addressed concerns raised by Citrix in these appeals. For example, Letter

Ruling 12-10 states that, in part, to determine "the object of the transaction, the Department [of Revenue] generally looks to the customer's experience in using the product rather than the 'behind the scenes' operations where the software is accessed on a seller's server."

The "behind the scenes" operations referenced by the Commissioner include the many support functions necessary to develop, maintain, test, and troubleshoot the Online Products as well as Citrix's network hardware. While these operations may be numerous and costly and require substantial employee support, the evidence presented and common sense do not indicate that they are services sought by Citrix's customers. Rather, Citrix's customers subscribe to, access, and use the Online Products without any view to the unseen support operations. In essence, the support operations are part of Citrix's overhead, which is necessary to its provision and use of the standardized software products that it sells.

The Regulation also provides an example that is instructive in the current appeals:

Example 2: Ann wants to acquire prewritten computer software to prepare her personal income tax return. The vendor of the software gives her the option of purchasing the software on a disk that will be mailed to her home or she can pay to securely access the software on the vendor's server through the Internet and use of a personal

access code. In either case, the functionality of the software is the same. The object of the transaction here is the use of the software. Charges for the prewritten software will be subject to sales or use tax regardless of the method of delivery chosen by Ann.

830 CMR 64H.1.3(14) (a).

The consumer in Example 2 may access prewritten software that resides on remote servers to achieve a specific goal, completion of her tax returns. Similarly, Citrix's customers access and use the Online Products to achieve their goals, which include remote computer access, shared-screen technical support, and web conferencing. In each case, it is the functionality of standardized software that customers seek and that enables them to complete specific tasks.

Finally, the Board acknowledges that Citrix's various written materials refer to the Online Products as services, and that Mr. Kanwar, a high-level Citrix employee, views the products as services. However, these facts must be considered in the broader context of all available facts in these appeals. In this regard, the evidence established that the basic purpose of Citrix's customers in purchasing one or more of the Online Products is to acquire access to and use of the product(s), each of which constitutes

standardized computer software as contemplated by Chapter 64H.

In sum, the Board found and ruled that the Online Products constitute standardized software within the meaning of Chapter 64H; the Regulation's definition of a sale as including "transfers of rights to use software installed on a remote server" was within the scope of Chapter 64H; the Regulation's definition of a sale accurately describes the sales at issue in these appeals; and the sales at issue were sales of tangible personal property and not services. Based on these conclusions and the record as a whole, the Board found and ruled that Citrix's sales of the Online Products were subject to the sales tax pursuant to G.L. c. 64H, §§ 1 and 2. Accordingly, the Board issued decisions for the appellee in these appeals.

THE APPELLATE TAX BOARD

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

A true copy,

Attest: _____
Clerk of the Board