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TECHNICAL INFORMATION RELEASE

TIR 22-8: Decision of the Massachusetts Supreme Judicial Court in Oracle USA, Inc. v. Commissioner of Revenue

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I. Introduction

The Massachusetts Supreme Judicial Court ("SJC") recently held that taxpayers have a statutory right to apportion sales and use tax on software transferred for a consideration for use in more than one state and that the general abatement process of G.L. c. 62C, § 37 is available to taxpayers seeking refunds based on such apportionment. *Oracle USA, Inc. v. Commissioner of Revenue*, 487 Mass. 518 (2021). In doing so, the SJC upheld the decision of the Appellate Tax Board ("ATB") in favor of the taxpayers. *See* Docket No. C318441 (Mass. App. Tax Bd. Nov. 27, 2019). This Technical Information Release ("TIR") explains the Commissioner's administration of the SJC's ruling with respect to the factual circumstance at issue in *Oracle*.

II. Facts in Oracle

The taxpayers in *Oracle* were vendors that sold software to their customer, Hologic, Inc. ("Hologic"), a medical device company headquartered in the Commonwealth. The taxpayers collected and remitted sales tax to Massachusetts on the full sales price of the software at the time of the sale. The taxpayers installed their software on Hologic's servers located in the Commonwealth.

Subsequently, Hologic notified the taxpayers that the software was accessed and used by employees outside the Commonwealth as well as those within Massachusetts. Hologic requested a partial refund of the tax it paid upon purchase of the software based on its employees' use of the software outside Massachusetts. To accommodate their customer, the taxpayers filed abatement applications requesting a refund of sales tax paid at the time of purchase, based on the percentage of Hologic employees that accessed and used the software from outside Massachusetts. The abatement applications were filed pursuant to the provisions set forth in G.L. c. 62C, § 37. The apportionment percentages reported were based on the number of Hologic employees that were using the software in Massachusetts as a percentage of the total number of Hologic employees using the software. The taxpayers requested an abatement of the portion of tax that was not attributable to Massachusetts, based on those apportionment percentages. The Commissioner denied the abatement request and the taxpayers appealed to the ATB.

The Commissioner's denial of apportionment was premised on the fact that the purchaser of the software, Hologic, did not follow the apportionment process as provided in 830 CMR 64H.1.3(15).

III. SJC Opinion

The SJC upheld the ATB's decision in favor of the taxpayers. The statute that applies to apportion sales and use tax for software transferred for use in multiple jurisdictions is G.L. c. 64H, § 1. That provision states (in pertinent part) that the Commissioner "may, by regulation, provide rules for apportioning tax in those instances in which software is transferred for use in more than one state." *Id*. The Commissioner's regulation provides several options for apportionment, including a process by which a purchaser of software can present a certificate to the vendor stating that the software will be used in multiple states and that the purchaser agrees to pay all applicable sales and use taxes to Massachusetts and the other relevant states. 830 CMR 64H.1.3(15)(a). Such certificate is required to be presented prior to the due date of the vendor's return on

which the software sale otherwise would be reported. *Id*. Vendors that accept the certificate are not required to collect and remit the sales and use tax with respect to sales to which the certificate applies. *Id.*

The Commissioner contended that G.L. c. 64H, § 1 constrains the process of apportionment available to taxpayers while providing him with discretion to allow apportionment of sales tax in circumstances where software is transferred for use in multiple states. The SJC disagreed with the Commissioner's position that the taxpayers were limited to the apportionment process specifically set forth in the regulation, i.e., that they were not entitled to pay sales tax and then seek a refund based on an apportionment submitted pursuant to the general rule governing tax abatements under G.L. c. 62C, § 37. Furthermore, the SJC determined that G.L. c. 64H, § 1 creates a statutory right to apportion sales and use tax on transfers of software for multi-state use.

The SJC agreed with the Commissioner's contention that the apportionment process set forth in the regulation is appropriate. *See* 487 Mass. at 529. However, the Court rejected the Commissioner's argument that a taxpayer is limited to that process. *Id.* at 530-532. Specifically, the SJC held that neither the statute nor the regulation precludes the application of G.L. c. 62C, § 37 to abatement claims that are submitted based on the apportioned use of software. *Id.* Thus, the taxpayers in *Oracle* were entitled to apportion their use of software either by following the process in the regulation (which they did not do) or by applying for an abatement under G.L. c. 62C, § 37.

Note that in reaching its conclusion, the SJC did not review or approve any specific apportionment method. Instead, the SJC based its decision on apportionment percentages that were calculated on a per user basis, as stipulated by the parties.

IV. Application of the Oracle Decision

Oracle addresses the general procedure for claiming a tax abatement with respect to software transferred for multi-state use. It does not address the specific methods of apportioning the sales or use tax on such transfers. Thus, taxpayers should continue to follow the apportionment process set out in the Commissioner's regulation. Additionally, taxpayers may apply for an abatement based on the apportionment of sales and use tax on software in the time and manner set out under G.L. c. 62C, § 37. In either case, as per the regulation, the Commissioner will generally accept an apportionment method that is based on the number of licensed users in a particular state. However, other methods may also be considered reasonable, depending on the specific facts. *See* 830 CMR 64H.1.3(15)(a).

The burden of proving whether an apportionment methodology meets the requirements as discussed above is on the taxpayer seeking an abatement. The apportionment must accurately reflect the actual use, or a reasonable approximation of the use, of the software in the Commonwealth. A taxpayer that seeks to apportion a software transaction to one or more states other than Massachusetts, must submit all documentation that substantiates the apportioned use in such other states. The taxpayer must also submit documentation that proves the requisite sales or use tax has been remitted to Massachusetts. The apportionment method must be consistent and uniform and supported by the taxpayer's books and records as they existed at the time the transaction was reported for sales or use tax purposes. *See* 830 CMR 64H.1.3(15)(a).

As explained by this TIR, taxpayers can apply for abatements of sales and use tax on software transferred for multi-state use by applying for an abatement in the time and manner set out in G.L. c. 62C, § 37. The Commissioner may request additional documentation before making a determination whether a taxpayer seeking apportionment through an application for abatement has met its burden of proof.

/s/ Geoffrey E. Snyder
Geoffrey E. Snyder
Commissioner of Revenue

GES:RHF:wm

May 19, 2022

TIR 22-8

REFERENCED SOURCES: Massachusetts General Laws (https://malegislature.gov/Laws/GeneralLaws)