

Sales/Use/Indirect:

Massachusetts Appellate Tax Board Explains that DOR Can't Enforce *Wayfair* Retroactively

Docket No. C339523, Mass. App. Tax Bd. (12/7/21). In a case involving the Massachusetts Department of Revenue's (Department) now repealed sales and use tax economic nexus administrative regulation that included a \$500,000 and 100 sales "cookie nexus" threshold [see *State Tax Matters*, Issue 2017-37, for more details on 830 CMR 64H.1.7 (Vendors Making Internet Sales)] and the former rule's application to an online retail company lacking an in-state physical presence for pre-*Wayfair* tax periods at issue, the Massachusetts Appellate Tax Board (ATB) issued a "Findings of Fact and Report" consistent with its January 28, 2021 summary judgment for the taxpayer and granted the taxpayer's underlying Massachusetts sales tax abatement claim. In doing so, the ATB explained that the US Supreme Court in *Wayfair* did *not* "leave the door open" to the argument that a retailer's virtual presence in a taxing jurisdiction could constitute physical presence. Instead, according to the ATB, the Court in *Wayfair* "clearly articulated that an out-of-state Internet vendor's virtual presence does not satisfy the *Quill* physical presence rule." In this respect, the ATB reasoned that *Wayfair* "overruled *Quill* and allowed states, on a prospective basis, to impose a collection and remittance obligation on such vendors." In the underlying case, the Department unsuccessfully argued that it could apply its former "cookie nexus" regulation to the online retail company for the pre-*Wayfair* tax periods at issue and thereby enforce the holding in *Wayfair* retroactively.

URL: http://newsletters.usdbriefs.com/2017/Tax/STM/170915_10.html

See forthcoming Multistate Tax Alert for more details on this ATB ruling, including related taxpayer considerations, and please contact us with any questions in the meantime.

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