

Sales/Use/Indirect:

Massachusetts Supreme Judicial Court Affirms that DOR Cannot Enforce *Wayfair* Retroactively

Case No. SJC-13283, Mass. (12/22/22). Deferring to the Massachusetts Appellate Tax Board's (ATB) ruling in the same case from 2021 involving an online retail company and pre-*Wayfair* tax periods at issue [see *State Tax Matters*, Issue 2021-49, for details on this 2021 ruling], the Massachusetts Supreme Judicial Court (Court) held that the use of mobile applications (apps), cookies, and content delivery networks (CDNs) does *not* constitute an in-state physical presence as required by "pre-2018 jurisprudence" under the Massachusetts Department of Revenue's (Department) now repealed sales and use tax economic nexus administrative regulation that included a \$500,000 *and* 100 sales "cookie nexus" threshold [see former 830 CMR 64H.1.7 (Vendors Making Internet Sales) for more details on this regulation]. The Court explained that the former regulation incorporated the bright-line rule set forth in the US Supreme Court's pre-2018 jurisprudence and does *not* by its plain terms permit the Department to apply the US Supreme Court's new rule (*i.e.*, *Wayfair*) to the former tax periods at issue in this case. The Court also concluded that the existence of in-state "electrons" does *not* satisfy the applicable physical presence test for the prior periods at issue and thus given the online retailer's lack of an in-state physical presence, it affirmed granting the taxpayer's underlying Massachusetts sales tax abatement claim. Please contact us with any questions.

URL: <https://www.mass.gov/files/documents/2022/12/22/b13283.pdf>

URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/STM/211210_4.html

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