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# A Year's Review of Massachusetts Tax Cases

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***Allied Domecq Spirits & Wines USA, Inc. v. Comm'r of Revenue*, 85 Mass. App. Ct. 1125 (2014)**

In a unique case, the Massachusetts Appeals Court affirmed a ruling of the Appellate Tax Board (ATB) that two corporations could not be combined for corporation excise tax purposes for 1996 through 2004. The distinctive aspect of this case was that a company was found not to have *nexus* with Massachusetts even though it rented property in the state and had employees in the state. If the company had been found to have *nexus*, it could have applied its losses to offset the income of an affiliated Massachusetts taxpayer in a combined report. The Appeals Court pointed to factual findings of the ATB that the transfer of employees located in Massachusetts to the company "had no practical economic effect other than the creation of a tax benefit and that tax avoidance was its motivating factor and only purpose." The Massachusetts Supreme Judicial Court denied the taxpayer further review on August 1, 2014. Although this case is notable because the sham transaction doctrine rarely, if ever, has been applied to find that a company did not have *nexus*, a similar factual scenario likely would not occur today because Massachusetts adopted full unitary combination in 2009.

***First Marblehead Corp. v. Comm'r of Revenue*, 470 Mass. 497, 23 N.E.3d 892 (2015)**

In a case that attracted the attention of, and an *amicus* brief from, the Multistate Tax Commission, the Supreme Judicial Court addressed how the property factor of a taxpayer subject to the Financial Institution Excise Tax (FIET) should be apportioned. The taxpayer, Gate Holdings, Inc. (Gate), had its commercial domicile in Massachusetts and held interests in a number of Delaware statutory trusts that purchased student loan portfolios. Below, the ATB held that Gate's loans should be assigned to Massachusetts, resulting in a 100-percent property factor for apportionment purposes. The Supreme Judicial Court agreed and interpreted the Massachusetts sourcing provisions at issue, which are based on a model from the Multistate Tax Commission and incorporate the Solicitation, Investigation, Negotiation, Approval and Administration (SINAA) rules, as sourcing Gate's loans to Massachusetts where Gates had its commercial domicile. The Supreme Judicial Court's decision may be of interest in Massachusetts and other states because several states have adopted sourcing rules for financial institutions that are based on the Multistate Tax Commission's model.

***Genentech, Inc. v. Comm'r of Revenue*, Mass. App. Tax Bd., Docket No. C282905, C293424, C298502, C298891 (2014)**

The ATB held that Genentech, Inc., a biotechnology company, was engaged in substantial manufacturing and thus required to use single sales factor apportionment. Genentech is appealing the ruling.

***National Grid Holdings, Inc. v. Comm'r of Revenue*, Mass. App. Tax Bd., Docket No. C292287; C292288; C292289 (2014); National Grid USA Service v. Comm'r of Revenue, Mass. App. Tax Bd., Docket No. C314926 (2014)**

The ATB addressed whether an international utility corporation's deferred subscription arrangements constituted debt for corporate excise purposes. The ATB held that it did not. In reaching its decision, the ATB noted that for United Kingdom tax purposes, the arrangements constituted debt; but that for United States, federal tax purposes the arrangements did not constitute debt. The ATB followed the United States federal tax treatment, which resulted in the taxpayer's deduction of a liability against its net worth being disallowed. A few months later, in a related appeal, the ATB determined that by reporting federal changes to the Commissioner on a duplicative application for abatement, the taxpayer raised no new facts warranting a second application for abatement concerning the same assessment that was challenged earlier.

***Direct, LLC v. Dep't of Revenue*, SJC-11658 (Feb. 18, 2015)**

Two satellite television providers, DirecTV and Dish Network, challenged G.L. c. 64M, § 2, which imposes a five percent excise tax on satellite television services, as violating the dormant commerce clause since the tax does not apply to cable television services. The Supreme Judicial Court affirmed the Superior Court's grant of summary judgment to the Department of Revenue. The court determined that the excise tax was not discriminatory because cable companies are subject to a variety of local government franchise fees that can be imposed at a rate of up to five percent, and that the differences between the satellite television and cable television industries, especially the heightened federal and local regulatory requirements imposed on cable providers, were significant enough to permit

discrepancies in taxes imposed on the industries. The court noted that other courts have considered and rejected the satellite companies' challenges to similar laws in other states.

***Excel Orthopedic Specialists v. Comm'r of Revenue*, Mass. App. Tax Bd., Docket No. C318083 (2014)**

The ATB agreed with the taxpayer that braces sold by an orthopedic practice were exempt from use tax as artificial devices because the braces were individually designed, constructed or altered for the specific use of each of the taxpayer's patients.

***Regency Transportation, Inc. v. Comm'r of Revenue*, Mass. App. Tax Bd., Docket No. C310361 (2014)**

The ATB found a multi-state freight business liable for use tax on the full sales price of its vehicles that it stored and used in Massachusetts. In an interesting twist, the Department of Revenue attempted to assert penalties even though the taxpayer's position was based on a departmental ruling. The ATB held that penalties should be abated for multiple reasons, including: (i) the "taxpayer's prior successful reliance on the ruling and the fact that its vehicles are exempt from tax in every state of purchase"; and (ii) that the "Commissioner continues to publish [the ruling] in the official compendium of public written statements without any caveat or other signal to taxpayers that its content was erroneous and should not be relied on"; and (iii) that "the Department's own auditor with 30 years of experience came to a preliminary conclusion that [the ruling] was applicable to the [taxpayer's] use of vehicles in the Commonwealth."