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Client Alert

State Tax

Massachusetts Tax Developments

A Reed Smith Quarterly Update

Welcome to the latest Reed Smith Massachusetts State Tax Quarterly Update. In this update, we'll look at the most recent developments in Massachusetts corporate tax, provide some administrative updates, and discuss some hot topics for the second half of 2015.

Corporate Tax

The Appellate Tax Board decides two more "true debt" cases – MassMutual wins; Staples loses

Mass Mutual – The ATB treats intercompany notes as bona fide debt producing deductible interest.

In a major taxpayer victory, the Appellate Tax Board ("ATB") has put the brakes on the Department's efforts to continue to further expand its authority to deny interest deductions on intercompany obligations using a "true debt" analysis. On June 12, 2015, the ATB issued its findings of fact and report in the related cases of *Massachusetts Mutual Life Insurance Company and MassMutual Holding LLC v. Commissioner* and *MML Investor Services, Inc. v. Commissioner*[1], in which the ATB held that intercompany obligations between two MassMutual affiliates[2] was true debt. As true debt, interest paid on the obligations was deductible in computing the net income measure of the corporate excise tax. MassMutual was also able to prove that the interest payments qualified for an exception to add-back because the intercompany obligations were bona fide debt primarily entered into for a valid business purpose, were supported by economic substance, and reflected fair value or consideration.

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Corporate Tax

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One interesting note is that for both its "true debt" and add-back analysis, the ATB's opinion focused on MassMutual's valid business purpose for structuring the intercompany obligations as debt, which was to issue investment-grade debt to be held by a regulated insurance company in the group that would increase the insurance company's risk-based capital rating. This rating is prescribed to all insurance companies subject to regulatory oversight, and is a widely used metric. Accordingly, the ATB concluded that the intercompany obligations were issued for regulatory reasons, rather than to obtain a tax benefit. Therefore, the intercompany obligations were treated as bona fide debt, because they had a business purpose unrelated to taxes and also met the valid business purpose prong required to meet an exception to add-back.

Staples – The ATB treats cash management obligations as equity for purposes of computing net income and net worth.

While the *MassMutual* case is an encouraging win for taxpayers, the ATB reached the opposite result in its decision in appeals filed by Staples, Inc. Although the ATB has issued a decision denying the *Staples* appeals, the ATB still has not issued a full finding of facts and report.[3]

In *Staples*, the taxpayer participated in a cash management system with affiliated entities. For internal accounting purposes, obligations under the cash management system were classified as loans and recorded as liabilities on the books and records of the taxpayer. The taxpayer treated the debt as a liability that reduced its net worth for purposes of computing the non-income measure of the corporate excise tax. The taxpayer also deducted the interest paid to its affiliates from its net income.

The Department asserted that the taxpayer's intercompany obligations were not "true debt," and reclassified the intercompany loan as an equity contribution. The Department then assessed additional tax by denying the treatment of the loan as a liability for purposes of computing net worth, and denying an interest deduction for purposes of computing taxable income. The ATB has issued an order upholding the Department's adjustment, and our understanding is that both parties have requested that the ATB make findings of fact and report for this decision. Once the findings of fact and report are issued, the taxpayer will be able to appeal the ATB's decision.

For examples of the Department's previous attacks on interest deductions related to intercompany cash management systems, see our prior updates here, here, and here.

- *Taxpayers with cash management systems have additional arguments for challenging net worth adjustments:* Massachusetts courts have applied a "true debt" analysis to deny deductions for interest related to cash management systems in several cases involving the computation of net income; but the Staples case is the first appeal in which the principal issue was the application of a true debt analysis to cash management system obligations for purposes of determining a taxpayer's net worth.

  Taxpayers should be aware that there are additional grounds for challenging the Department's true debt analysis when used to increase a taxpayer's net worth. For example, there is a strong argument that if the taxpayer treats an obligation as debt for internal financial reporting purposes, the statute and case law interpreting the computation of net worth require the Department to respect that treatment.

- *Legislative correction proposed for net worth; could provide retroactive relief:* Several legislative proposals, including Senate Bills 1546, 1565, and 2548, would amend G.L. c. 63, § 30(8) to add an explicit presumption that a taxpayer's internal classification of the intercompany debt is controlling, unless the Commissioner establishes that the taxpayer's classification is contrary to the accounting standards the taxpayer uses for making financial reports to shareholders.4 This legislation is being supported by the Associated Industries of Massachusetts and is being proposed as a clarifying amendment, rather than as a substantive change in law. As a result, taxpayers with appeals on this issue for prior years should watch this legislation closely. If passed as proposed, taxpayers could argue that the clarifying language should be applied retroactively.

- *Increasing financial metrics is a valid business purpose:* In MassMutual's case, the taxpayer was diversifying its debt/equity investment portfolio to increase the rating assigned to a regulated insurance company in the group. However, what if a taxpayer issued intercompany debt to decrease its weighted average cost of capital ("WACC")? WACC is a metric that can be used by businesses to gauge the profitability of activities and to risk-weight internal business decisions. We would argue that reducing a corporation's WACC should be treated as a valid business purpose for issuing intercompany debt—just as increasing a regulated insurance company's risk-based capital rating was treated as a valid business purpose in *MassMutual*.

- *Should Massachusetts' "true debt" case law be reconsidered in light of add-back?* Numerous taxpayers have faced audit adjustments denying interest deductions on the basis that the taxpayer's intercompany debt is

not "true debt," and Massachusetts courts have now upheld those adjustments in a series of cases; and even in cases like *MassMutual* where the taxpayer prevails, the ATB still applies heightened scrutiny to intercompany obligations. We question whether the case law underpinning Massachusetts "true debt" analysis should be reconsidered for years after the adoption of add-back.

Massachusetts' "true debt" jurisprudence is founded on federal case law. The federal cases typically involved an obligation owed by a taxpayer to its majority owner.[5] In the federal cases, the courts would look through the form of the intercompany obligation, and instead consider the substance of the transaction, as well as the parties' actual intent, to determine whether the obligation constituted "true debt." If the substance of the obligation evidenced "true debt," the interest deduction would be allowed. Otherwise, the debt would be reclassified as an equity contribution and the deduction would be denied.[6]

Obviously, this heightened scrutiny does not apply in a case involving third-parties where the form of the transaction is typically followed. The rationale for applying greater scrutiny and focusing on substance over form in the case of obligations between related parties is based on a concern that related parties will disguise obligations akin to equity by adopting the formalities of debt, simply to obtain an interest deduction.[7] The ATB and the Massachusetts courts have followed this reasoning and have applied it to intercompany obligations for the same reason – to deny deductions for interest on intercompany obligations that do not, in substance, represent a fixed and determinable debt.[8]

This analysis makes sense in the context of a statutory scheme where taxpayers are allowed a full deduction for all interest paid on debts to related parties. In such a scheme, courts have justifiable concerns that related parties may manipulate the form of a transaction to cause payments to be deductible as interest rather than as nondeductible dividends.

But this rationale is inapplicable to a statutory regime that includes a provision that requires the add-back of related party interest payments, with only limited exceptions. Interest payments to related parties are no longer automatically deductible in Massachusetts. In fact, interest paid to related parties is presumed to *not* be deductible. To deduct intercompany interest, a taxpayer must show that add-back would result in significant double taxation, or that denying a deduction would be unreasonable.[9] A taxpayer with an intercompany obligation cannot claim a Massachusetts interest deduction without showing that a failure to permit the deduction would be unreasonable. Thus, the concerns that prompted the courts to develop the "true debt" analysis no longer exist when computing net income for Massachusetts purposes.

Market-based sourcing analysis: Sourcing pre-written software

With market-based sourcing now the law in Massachusetts for sales—other than sales of tangible personal property—we'll be taking a deeper dive into the application of the new rules to specific types of receipts over the next several updates. In this edition, we are taking a look at one of the areas where the new rules made significant changes—the sourcing of receipts from sales and licenses of pre-written software.

It may surprise taxpayers that the new market-based sourcing rules impact the sourcing of pre written software at all. Beginning in 2006, Department regulations treated most sales of pre written software as the sale of tangible personal property – regardless of delivery method.[10] This treatment made sense from a policy perspective. It was consistent with the rules for sales tax sourcing and it resulted in sales of pre-written software being sourced in the same manner regardless of delivery method. Because market-based sourcing does not apply to sales of tangible personal property, there was little reason to think the sourcing of pre-written software would change significantly under the new market sourcing regime.

Yet, the amended apportionment regulations *do* change the sourcing of pre-written software. This is because the Department has reinterpreted the term "tangible personal property" to exclude pre-written software, unless it is delivered by a tangible medium. Thus, any software that is not delivered on a disk is now sourced under the market-based sourcing rules rather than the rules for sourcing tangible personal property.

The following are some examples of potential sourcing options for pre-written software under the new rules. The examples are not intended to be exhaustive, but instead to illustrate that the sourcing of receipts from pre-written software under the market sourcing regulations can vary widely depending on the manner in which software is delivered, and the amount of information that the vendor has regarding its customers' use of the product.[11]

> *Pre-written software delivered to customer by disk, load-and-leave, or other tangible medium:*

The rules for sales and licenses of pre-written software delivered by disk have not changed. Pre-written software delivered on a "tangible medium" is treated as a sale of tangible personal property. Therefore, the receipts from a sale of pre-written software on a disk are sourced to Massachusetts if the disk is delivered to a customer in Massachusetts.

For example, suppose a vendor sells 100 licenses to use pre-written software to a customer with a billing address in Texas and delivers the software on a disk to a customer location in Massachusetts. The customer then loads the software onto a server and gives 100 employees located around the United States access

to the software. Under the Department's regulation, the entire sale is sourced to Massachusetts—the location where the disk was delivered. Similar rules should apply to load-and-leave software that is loaded onto a server located in Massachusetts.

Electronically delivered pre-written software used by purchaser employees:

Unlike receipts from prewritten software delivered on a tangible medium, a license for pre-written software where the software is delivered electronically is now classified as a service or an intangible, depending on a taxpayer's particular facts. In some cases, this will result in different sourcing for pre-written software than under the rules for sourcing receipts from sales of tangible personal property. Consider the prior example, except let's now assume that the customer downloads the software onto a server located in Massachusetts rather than having a disk with the software shipped to the server location. If the vendor knows or can "reasonably approximate" that the software will be downloaded by the customer onto a server located in Massachusetts, the sourcing should be the same as if the software were delivered on a disk—100% sourcing to Massachusetts.[12]

The rules change, however, if the vendor does not know where the electronically downloaded software will be received by the customer and cannot reasonably approximate the location of delivery. If the vendor does not know and cannot reasonably approximate the location where the software is received, the vendor can source the entire receipt to Texas in many cases—based on customer billing address—as long as the requirements for applying the regulation's safe harbor rules are met. If the safe harbor requirements are not met, application of additional tiered sourcing rules is required to determine the sourcing location.

In addition, taxpayers should be aware that the regulation is somewhat ambiguous regarding the determination of where a customer "receives" electronically downloaded software. It is possible that the Department could argue that a customer actually receives the software where its employees use the software licenses (assuming the vendor can determine this location) rather than the location of the server where the software is downloaded. If the Department were to take this position, the vendor would be required to source receipts to Massachusetts based on the percentage of its customer's employees using the software in Massachusetts. We do not think this is a reasonable interpretation of the regulation, but the Department applies this "look-through" approach for sourcing receipts from certain analogous types of services, and could attempt to expand that approach to pre-written software.

Pre-written software hosted by vendor:

If a vendor hosts pre-written software on its own servers, another set of sourcing rules applies. Consider a situation in which a vendor hosts software on its own servers, which its customers located around the country then access over the Internet. For sales tax purposes, the Department has ruled that such a sale constitutes a license of the vendor's software.[13] (This determination is being challenged, *see* here for more detail.)

While no example explicitly governs this scenario in the corporate excise tax context, one reasonable interpretation of the regulation would result in the hosted software being treated as a service, resulting in the application of the following tiered analysis for sourcing the vendor's receipts:

1. If the vendor knows or can reasonably approximate the location from which the customer's employees will access the software/service: Apportion receipts based on percentage of employees accessing software from Massachusetts.[14]

2. If the vendor does not know and cannot reasonably approximate the location from which the customer's employees will access the software/service, and taxpayer qualifies for the regulation safe harbor for sourcing receipts to business customers: Source receipts 100% to billing address.[15]

3. If the vendor does not know and cannot reasonably approximate the location from which the customer's employees will access the software/service, but it cannot qualify for the regulation safe harbor for sourcing receipt to business customers: Follow the tiered sourcing rules for receipts from services provided to business customers in 830 CMR § 63.38.1(9)(d)4.c.ii(B)(2).

In our next update, we'll consider the application of the regulation to pre-written software sold for commercial reproduction and bundled transactions.

Additional Comments

- *Refund opportunity for software vendors subject to throwback pre-2014:* Because the Department previously characterized sales of pre-written software delivered electronically (and not for commercial reproduction) as sales of tangible personal property, software vendors were required to throwback sales of electronically delivered software sourced to states where they were not subject to tax. Throwback only applies to sales of tangible personal property.

  The Department has now reversed its position and has characterized electronically delivered prewritten software as not being tangible personal property. Any taxpayer that was subject to throwback on sales of

electronically delivered software for pre-2014 tax years may now have a refund opportunity.

- *"Tangible Personal Property" is a broader term than you might think:* The Department's rules for whether a sale of prewritten software is a sale of tangible personal property focus on the form of software delivery (disk vs. electronic download), rather than on the substance of the purchased software. The same pre-written software can change from tangible personal property to an intangible or service solely based on the method of delivery. This emphasis on form over substance could have surprising implications if applied to other types of receipts where a vendor can fulfill customer orders through either tangible or electronic means.

  For example, suppose an architect has a standard house design that it modifies for various development projects. The architect licenses that design to a developer in Connecticut for a building to be constructed in Massachusetts. If the architect sends a paper copy of the design to the developer, the Department's form-over-substance analysis would seem to treat the sale as a sale of tangible personal property sourced to Connecticut.

  The same drawings delivered electronically would likely be considered the sale of a professional service, and under the Department's regulation would be sourced to Massachusetts—the location where the building is expected to be built. *See* 830 CMR § 63.38.1(9)(d)4.d.iii.(B).

  Taxpayers should closely examine opportunities for applying alternative sourcing methods to receipts based on form of delivery when computing their Massachusetts sales factor.

- *Was this really what the Legislature intended?* The differing classification of pre-written software in the regulations based on the form of delivery may have effects beyond the sourcing of the software receipts. For example, suppose a vendor is not subject to income tax in Kansas and sells the same pre-written software product to two different customers in that state. One customer requests to receive the software on a disk; the other electronically. Under the Department's regulations, the vendor would have to throwback the sale of software shipped by disk and include the receipts in its Massachusetts numerator. Meanwhile, receipts from the sale of the same product delivered electronically would be thrown out and excluded from the sales factor completely.

  It is not clear that this disparate treatment of the exact same product based on method of delivery was intended by the Legislature and, in fact, it may violate standard rules of statutory construction. When enacting a statute, the Legislature is presumed to know the law as it currently exists.[16]

At the time the market sourcing statute was passed, pre-written software sold to a consumer was tangible personal property regardless of the method of delivery. If the Legislature had intended market-based sourcing to change the classification of pre-written software as tangible personal property, one would expect that it would have changed the statutory definition of tangible personal property to reflect this intent. But the Legislature did not. Thus, there is a question of whether the Department has properly reflected Legislative intent by implementing the market sourcing statute in a manner that reclassifies electronically delivered software as something other than tangible personal property.

Major litigation, featuring cost of performance issues, appears headed towards hearing at the ATB

The Appellate Tax Board ("ATB") has tentatively scheduled an October trial date for 12 related appeals filed by a telecommunications company. These appeals involve a number of issues, including cost of performance sourcing. The taxpayer[17] filed refund claims revising its apportionment fraction under Massachusetts' cost of performance sourcing rules, and also appealed Department assessments involving a variety of audit adjustments.

The Department issued discovery requests in May 2014, and written discovery is underway. The Department also has indicated that it intends to conduct depositions. Discovery is currently set to close in the fall in advance of a hearing scheduled for October.

Reed Smith Comments

- *Cost of Performance Issues Still Alive for Open Periods:* Taxpayers with cost of performance sourcing issues should keep a close eye on this case. Taxpayers that did not properly apply cost of performance sourcing to receipts from services or intangibles for tax years beginning before January 1, 2014, still have time to file refund claims.

Reed Smith examines the Commissioner of Revenue's use of the sham transaction doctrine in *Tax Analysts*

In the May 4 edition of *Tax Analysts*, Reed Smith discussed the Department's use of its authority to disregard sham transactions under G.L. c. 63, § 3A. The column, titled "What a Sham: Massachusetts's Power to Attack Legitimate Tax Planning," includes a discussion on the lack of clear guidance given to Massachusetts taxpayers regarding the application of § 3A, and the potential for state tax officials to use § 3A to attack legitimate tax planning.

To read the full article, visit Tax Analysts. (Subscription required)

Superior Court litigation to decide whether not-for-profit entities can monetize Brownfields tax credits for years prior to 2006.

Last August, three Massachusetts universities filed a case in Superior Court in Suffolk County alleging that the Department wrongfully denied their Brownfields tax credit applications.[18] All three universities are not-for-profit educational institutions and, as such, are not generally subject to Massachusetts tax on their income. However, legislation was passed in 2006 that made not-for-profit entities eligible for Brownfields tax credits, based on certain costs incurred to remediate contaminated environmental areas.

The same legislation also provided nonprofits with a method to get value for those credits. Because nonprofits generally don't have any income tax liability to offset, the legislation allows nonprofits to sell Brownfields credits to other taxpayers. In the pending appeal, Northeastern University and two other institutions are challenging the Department's view that the 2006 legislation was prospective only; that is, that the credits can only be granted for remediation costs incurred after June 24, 2006. The institutions are seeking Brownfields credits based on remediation costs incurred prior to the effective date of the legislation.

Reed Smith Comments

- *Other nonprofits waiting to cash-in:* If the plaintiffs prevail in the pending case, it is expected to result in the award of $17.1 million in tax credits that nonprofits would be able to sell to Massachusetts taxpayers. However, the Treasurer estimates that the full impact of a decision in favor of the plaintiffs would be nearly twice that amount because it expects other nonprofits would file similar appeals, resulting in the recognition of more than $30 million in marketable tax credits.
- *Scope of Department's ability to reinterpret statute under fire:* In denying the plaintiffs' credit applications, the Department relied on its own guidance, Directive 13-4, which retroactively restricted the availability of credits for nonprofits to remediation costs incurred after the effective date of the 2006 legislation. This guidance was arguably contrary to the Department's prior guidance issued both before and after the 2006 legislation. Thus, the Department's authority to retroactively reverse or "clarify" prior policies is likely to play a pivotal role in the outcome of this case.

Administrative Updates

Mark Nunnelly named the new Commissioner of Revenue

Effective March 30, 2015, Mark Nunnelly, a former Managing Director of Bain Capital, replaced Amy Pitter as Commissioner of the Department of Revenue. Mr. Nunnelly was also named special advisor to Governor Baker for technology and innovation competitiveness. Upon the announcement of his appointment, Mr. Nunnelly stressed his goal of ensuring the tax laws were fairly administered in the commonwealth.

Last year, Mr. Nunnelly retired from Bain Capital after 15 years as a managing director at the investment firm. Before joining Bain Capital, Mr. Nunnelly worked at Bain & Company, a consulting firm, and at Procter & Gamble in product management. According to the *Boston Globe*, Mr. Nunnelly has taken on his new roles without pay.

Legislature enacts early retirement incentive program; potential for significant impact on Department of Revenue

On May 4, 2015, Governor Charlie Baker signed into law a bill creating an early retirement incentive program for Massachusetts state employees. Under the incentive plan, employees choosing to retire effective June 30, 2015, will be eligible to add up to five years to either their age or years of service, with corresponding increases to their pensions. The program would allow up to 5,000 state employees to retire June 30 if their application to participate in the program is accepted. Despite the increased pension costs resulting from the program, it is expected to generate $172 million in budget savings by reducing the state's payroll. This program is expected to have significant impact on the Department; hundreds of Department employees are eligible to apply and many eligible employees play key roles in the audit and appeal process. This may result in a substantial loss of institutional knowledge that the Department may find difficult to replace. At a minimum, we expect the turnover to cause a delay in handling pending audits and appeals as the Department adjusts.

More Things You Should Know

- *Non-filer amnesty program passes in House and Senate budget bills:* As part of his budget proposal for fiscal year 2016, Governor Baker announced his intention to enact legislation authorizing a tax amnesty program for nonfilers. *See* prior coverage. Both the House and Senate included a provision for a nonfiler amnesty in their versions of the FY 2016 budget. As of the date of publication, the final budget has yet to be presented to the governor, but we expect that any final budget will include an amnesty program in some form.

- *First Marblehead requests U.S. Supreme Court* review in SINAA sourcing appeal: First Marblehead Corporation and Gate Holdings, Inc. have requested United State Supreme Court review of a recent determination of the Massachusetts Supreme Judicial Court ("SJC"). The petition for review can be found here. The case involves the sourcing of securitized loans for property factor purposes under Massachusetts' apportionment rules for financial institutions. For property factor purposes, Massachusetts sources loans held by financial institutions based on the location of five factors, referred to as the SINAA factors (solicitation, investigation, negotiation, approval and administration). However, in the case of the taxpayer in the

First Marblehead case, which is an entity formed to hold securitized loans, the court found that it had no SINAA factors because it neither originated nor serviced its loan portfolio (as is typical for a securitization entity).

For more on the SJC's decision in this case and opportunities the decision may create for taxpayers in Massachusetts and other states that have adopted the MTC model statute for financial institutions, see our previous alerts here, here and here.

- *Massachusetts Supreme Judicial Court agrees to hear Regency Transportation appeal:* The Massachusetts Supreme Judicial Court has agreed to accept jurisdiction and hear the taxpayer's appeal in *Regency Transportation, Inc. v. Commissioner*. The ATB upheld the Department of Revenue's assessment of use tax on trucks that, although stored and serviced in Massachusetts, were purchased outside of Massachusetts and used for transportation and distribution services throughout the Eastern United States. On March 19, 2015, Regency appealed the ATB's decision to the Massachusetts Appeals Court. Subsequently, Regency filed an application for direct appellate review that was granted May 21, 2015. Regency's first brief is due June 26, 2015. For additional coverage, see our blog post here.

- *The Department plans for further rollout of its new online system:* The Department plans to roll out its new online system, MassTaxConnect, by the end of 2015. Under MassTaxConnect, taxpayers will be able to file all returns online. In addition, taxpayers will have online access to all Department notices and communications.

About Reed Smith State Tax Reed Smith's state and local tax practice is composed of more than 30 lawyers across seven offices nationwide. The practice focuses on state and local audit defense and refund appeals (from the administrative level through the appellate courts), as well as planning and transactional matters involving income, franchise, unclaimed property, sales and use, and property tax issues. Click here to view our State Tax team.

Reed Smith's Massachusetts tax practice is built on more than 15 years of experience in Massachusetts state tax planning and controversy matters, focusing on income and sales and use taxes. The Massachusetts tax team writes and speaks frequently on Massachusetts tax issues, and handles significant Massachusetts tax appeals for some of the nation's largest companies. For more information, visit our website at www.reedsmith.com/matax and look for updates posted on our blog at www.MassachusettsSALT.com.

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Upcoming Speaking Engagements

Members of our State Tax team are presenting at the following upcoming events:

- Stephen Blazick and Alexandra Sampson, "The Post-*Gore* World: Get the Inside Story with the Comptroller of Maryland's Director of Compliance," Webinar (June 23, 2015)
- Kyle Sollie and Lee Zoeller, IPT 39th Annual Conference (June 28-July 1, 2015)
- Kelley Miller, "The Wynnes Won: State and Local Tax Refund Opportunities, including in Pennsylvania and Philadelphia," Pennsylvania Bar Institute (June 30, 2015)
- Sara Lima, "Unclaimed Property - What You Don't Know Can Hurt You," Webinar (July 9, 2015)
- Robert Weyman, "Supporting Transfer Pricing Positions in a Multi-State Environment and Preparing for ALAS," Strafford Publications CPE Webinar (August 26, 2015)
- Aaron Young and Lee Zoeller, IPT Sales Tax Symposium (September 27-30, 2015)
- Mike Shaikh, California Tax Policy Conference (November 4-6, 2015)
- Michael Jacobs, New England State and Local Tax Forum (November 16, 2015)

For more information, click here.

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1. Mass. App. Tax Bd., Docket nos. C305276 and C305277 (June 12, 2015).
2. We have used the name MassMutual to refer to the various affiliate companies collectively.
3. *Staples, Inc. and Staples Contract & Commercial, Inc. v. Commissioner*, Mass. App. Tax Bd., Docket nos. C310639 and C310640 (April 29, 2014).
4. *See, e.g.*, S.1546.
5. *See, e.g.*, *Fin Hay Realty Co. v. United States*, 398 F.2d 694 (3rd Cir. 1968).
6. See, e.g., *Kimberly-Clark Corp. v. Commissioner*, Mass. App. Tax Bd., Docket nos. C282754; C295077; and C299008 (January 31, 2011).
7. *See Fin Hay*, 398 F.2d. 694.
8. *The New York Times Sales, Inc. v. Commissioner*, Mass. App. Tax Bd., Docket no. 161857 (May 16, 1995).
9. G.L. c. 63, § 31J.
10. There was an exception for pre-written software sold to a customer that would use the software in commercial reproduction. In that circumstance, software sales were treated as sales of an intangible.
11. For all of our examples, we assume that the vendor is eligible to apportion its receipts and is subject to tax in any state where the sale at issue might be sourced. We also assume that the software is not being sold for commercial reproduction by the purchaser.
12. The regulations treat sales of pre-written software delivered electronically as sales of services. *See* 830 CMR § 63.38.1(9)(d)5.e.i. Under these rules, if the vendor knows that the software is going to be downloaded onto a Massachusetts server, the software is delivered to where the customer "receives" the software. 830 CMR § 63.38.1(9)(d)4.c.ii(B).
13. *See* Letter Ruling 12-10 (September 25, 2012).
14. 830 CMR §§ 63.38.1(9)(d)6; 63.38.1(9)(d)4.c.ii(B).
15. 830 CMR § 63.38.1(9)(d)4.c.ii(B)(2)(d).
16. *See Condon v. Haitsma*, 325 Mass. 371 (1950).
17. We use the word taxpayer to refer collectively to the related entities named as Appellant in all 12 related petitions.
18. *Northeastern University, et al. v. Comm'r*, Superior Court Suffolk County Docket No. SUCV2014-02617 (August 18, 2014).