At a Special Term of the Albany County Supreme Court, held in and for the County of Albany, in the City of Albany, New York, on the 18th day of August 2020

PRESENT: HON. PATRICK J. McGRATH, JSC

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

VITAL RECORDS, INC.,

Petitioner/Plaintiff,

DECISION AND ORDER
INDEX NO. 900088-19

Hybrid Proceeding/Action For a Judgment Pursuant to Articles 78 and 30 of the CPLR and 42 USC 1983,

-against-

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and NONIE MANION, IN HER OFFICIAL CAPACITY AS EXECUTIVE DEPUTY COMMISSIONER OF THE NEW YORK DEPARTMENT OF TAXATION AND FINANCE,

Respondents/Defendants.

APPEARANCES: HODGSON RUSS, LLP
Attorneys for the Petitioner

HON. LETITIA JAMES
Attorney General for the State of New York
(Ryan L. Abel, of Counsel)
Attorneys for the Respondents

McGRATH, PATRICK J., J.S.C.

Petitioner ("petitioner" or "Vital") commenced this hybrid proceeding for declaratory, injunctive, and other relief pursuant to CPLR Articles 30 and 78, and 42 USC 1983/1988. Respondents/Defendants (hereinafter, "the Tax Department" or "respondents") submitted an

Answer.[1] Petitioner moves for Summary Judgment pursuant to CPLR § 3212. The Tax Department submitted opposition and petitioner submitted a reply.

Factual Background

Vital is a New Jersey corporation with its principal office in Flagtown, New Jersey. Vital specializes in the secure storage of critical corporate records on magnetic media. Vital operates two secure storage facilities, both in New Jersey. Vital does not maintain an office or other space in New York to store its customers' property. Vital offers customers "courier services" through which customers can have their property picked-up and transported to storage from their business locations, and vice versa. Vital's customers are billed on a monthly basis for storage services and incur additional charges for courier services, as well as for certain inventory management services performed on customers' stored property in New Jersey.

Vital's storage services are subject to New Jersey sales tax, which is presently imposed at a rate of 6.625 percent. Vital is also registered with the Tax Department as a New York sales tax vendor, as Vital makes minimal sales of taxable tangible personal property, including storage tape and tape cases, to New York customers upon request. Depending on the New York county and city to which the property is delivered, the New York State tax rate ranges from 7 to 8.875 percent.

Vital was selected for a routine audit by the Tax Department's Binghamton District Office for a period covering December 1, 2012 through August 31, 2015. It was subsequently selected for a second audit covering the period of September 1, 2015 through August 31, 2017. The Tax Department's auditors determined that Vital's initial charges to New York-based customers, including transportation, inventory management, and storage services, would be subject to full New York sales tax because the property was picked up in New York. This would apply to subsequent invoices issued to the customer, even if those charges related to storage and inventory management services provided exclusively in New Jersey. Vital also pays sales tax on the storage and inventory management services to the State of New Jersey.

Ultimately, the parties settled the audits, with neither side conceding on the merits. The New York auditors allowed a credit against the New York sales tax alleged to be due for the sales tax Vital had already collected and paid to New Jersey on the same transactions. Under the settlement, Vital paid New York the difference between the New York and New Jersey tax rates, which could be over two percentage points depending on the New York jurisdiction in which the tapes to be stored were picked up by Vital. The Tax Department did not agree to provide similar treatment in future periods.

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[1] The Tax Department previously moved to dismiss petitioner's claims, and in a Decision and Order of this Court, dated November 26, 2019, the Court dismissed Petitioner's second cause of action requesting a declaratory judgment that the Tax Department's directive to Vital to begin collecting New York sales tax was impermissible rule-making in violation of Section 202 of the State Administrative Procedures Act ("SAPA"). The Decision and Order also provided the Tax Department with leave to submit its Answer.

Upon conclusion of the audit, Vital's counsel, Mark Klein, sent a detailed email communication to respondent, Nonie Manion, the Tax Department's Executive Deputy Commissioner and Acting Commissioner, on August 23, 2018, outlining petitioner's view of taxable storage services in New York. Vital highlighted in its argument a 1996 Advisory Opinion ("AO"), Steven Buskin, CPA, TSB-A-96(70)S (Nov. 25, 1996) (hereinafter "Buskin AO").Vital's central argument in the email, and in the instant proceeding, is that New York authority holds that Vital's storage services should be sourced to New Jersey, where the taxable storage services are performed, and that the delivering and/or picking up of stored materials to or from a customer in New York as it relates to the storage services provided in New Jersey should not be subject to New York sales tax. Further, Vital's counsel argued to Ms. Manion that sourcing storage services to the location where the property is accepted creates a system of double taxation in violation of the dormant Commerce Clause.

Ms. Manion responded to Mr. Klein's email on September 5, 2018. She agreed that "AO's on this subject have been inconsistent in the past. However, our more recent guidance (e.g., TB-ST-340, TSB-A-17(10)S) is consistent with [20 NYCRR 527.6(c)] which sources storage services to the location where the property to be stored is accepted by the storage provider from the customer. We don't share your constitutional concerns, because we think New York has sufficient connection to the sale of a service to a New York customer that commences in this state." The instant action ensued.

New York State Law

Tax Law § 1105(c)(4) states that, "there shall be paid a tax of four percent upon: [t]he receipts from every sale, except for resale, of the following services: [s]toring all tangible personal property not held for sale in the regular course of business". A receipt is defined as, "[t]he amount of the sale price of any property and the charge for any service taxable under this article." Tax Law § 1101(b)(3). A sale is defined as, "[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume..., conditional or otherwise, in any manner or by any means whatsoever for consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration". Tax Law § 1101(b)(5).

20 NYCRR § 527.6 further outlines the storage of tangible personal property under Tax Law § 1105(c)(4), and states that, "[s]torage is the provision of a place for the safekeeping of goods". 20 NYCRR § 527.6(a). The regulation further provides that, "[t]he tax is imposed on the sale, except for resale, of the service of storing tangible personal property". 20 NYCRR § 527.6(b)(1). The regulation further addresses any exclusions such that, "[t]he storage of property held for sale in the regular course of business, and the sale of the service of storage for resale is not taxable." 20 NYCRR § 527.6(c). The regulation sets forth the following example:

> "A cleaning establishment offering clothing storage services to its customers has the articles stored in the facilities of a public warehouse. Since the storage service acquired by the

cleaning establishment is resold, no tax is due on the charge by the warehouse to the cleaning establishment. When billing the customer for storage services, the cleaning establishment must charge sales tax at the rate in effect *at the point where the clothing is accepted for storage* (either the customer's residence or location of the business) even though the storage facility may be located in an area having a different tax rate." (Emphasis added) (hereinafter "Example 2").

20 NYCRR § 526.5(g) deals with shipping or delivery receipts and states that, "charges by a vendor to its customer for picking up the customer's property upon which the vendor is to perform taxable services are part of the vendor's receipt from the sale of the service subject to tax."

Further, 20 NYCRR § 525.2 discusses the nature of the sales tax as a "transaction tax" in that, "[e]xcept as specifically provided otherwise, the sales tax is a "transactions tax," with the liability for the tax occurring at the time of the transaction. 20 NYCRR § 525.2(a)(2). Generally, a taxed transaction is an act resulting in the receipt of consideration for the transfer of title to or possession of (or both) tangible personal property or for the rendition of an enumerated service. The time or method of payment is generally immaterial, since the tax becomes due at the time of transfer of title to or possession of (or both) the property or the rendition of such service". Id. Moreover, section (a)(3) addresses a sales tax as a "destination tax" in that, "[e]xcept as specifically provided otherwise, the sales tax is a "destination tax." The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser's designee, controls both the tax incidence and the tax rate." 20 NYCRR § 525.2(a)(3).

New Jersey State Law

New Jersey's sales tax for storage services is imposed on "[t]he receipts from every sale, except for resale" of "[s]toring all tangible personal property not held for sale in the regular course of business" and specifically, "the furnishing of space for storage of tangible personal property by a person engaged in the business of furnishing a space for such storage." N.J. Rev. Stat. § 54:32B-3(b)(3).

New York Tax Guidance

In 1996, the Tax Department issued the Buskin AO, which dealt with a New Jersey corporation that was located in the State of New Jersey and had no place of business in the State of New York. The company was in the business of storing and servicing stored materials owned by its customers, which were stored in the company's storage facility in New Jersey. New Jersey sales tax was collected on the company's monthly storage charge. In addition to the storage of customers' containers, the Company also performs deliver and pickup of customers' containers, which occurred in either New Jersey or New York. The Tax Department opined that the storage services should be sourced to New Jersey, where the taxable storage services are performed, and that delivering and/or picking up of stored materials to or from a customer in New York as it relates to the storage services provided in New Jersey should not be subject to New York sales tax. The Buskin AO states at the

bottom that, "[t]he opinions expressed in Advisory Opinions are limited to the facts set forth therein."

In 2011, the Tax Department issued certain policy guidance in a tax bulletin, which was later restated in 2015 (Household Movers and Warehousers - General (permanent) storage and portable storage containers, TB-ST-340 (dated Mar. 18, 2011, updated Feb. 19, 2015) (hereinafter the "Tax Bulletin")). The Tax Bulletin states that, "[w]hen storage services are delivered inside New York State, the charge for the storage service is taxable. Storage services delivered outside New York State are not subject to New York State or local sales tax." Tax Bulletin at 1. However, it also states that, "[s]torage services are considered to be delivered at the location where the storage service provider takes possession of the property to be stored, without regard to the location of the storage facility itself." Id. at 2. The Tax Bulletin further states that, "[a]s stated above, charges for transporting property to storage and returning it from storage are generally included in the taxable receipt for the overall storage service when the party providing the transport service is also the provider of the storage service. This is because the primary purpose of the transaction is the storage of the property and not transportation." Id. The Tax Bulletin contains Example 3, which indicates that, "[a] law firm is having its offices remodeled. It contracts with XYZ Storage to store its furniture and files during construction and to return the property when the work is completed. The charge by XYZ Storage for the storage is $2,000. In addition to the $2,000 charge for storage, XYZ Storage charges $250 to pick up and return the property being stored. The $250 charge is taxable as part of XYZ Storage's overall charge for storage." Id.

In 2017, the Tax Department issued an AO that dealt with New York State and local sales and use taxes as they relate to a New York-based company. Petition No. S140528A, TSB-A-17(10)S (Jul. 7, 2017) (hereinafter "2017 AO"). In the 2017 AO, the Tax Department states that, "[i]n general, sales tax is a destination tax, meaning that the incidence and rate of tax is controlled by where the taxable service or property is delivered to the customer. *See* 20 NYCRR 525.2(a)(3)." 2017 AO at p.3. The 2017 AO further states in a footnote that, "[t]o the extent that TSB-A-05(28)S states that storage services are taxable when the storage facility is in New York, this no longer reflects Department Policy. *See* TB-ST-340." Id. at p.4. The 2005 AO referred to in the 2017 AO stated that, "[p]etitioner's charges to customers for storage services provided at a location in New York State are subject to the sales tax imposed under section 1105(c)(4) of the Tax Law." Gilbert Displays, TSB-A-05(28)S (Jun. 24, 2005) (hereinafter "Gilbert AO"). The Tax Department did not address the Buskin AO in the 2017 AO.

AOs "are binding upon the Division of Taxation and upon the Commissioner of Taxation and Finance only with respect to the person to whom such an opinion is rendered and only with respect to the set of facts stated in the opinion. The person to whom an advisory opinion is rendered is not bound by that opinion nor may any other person rely upon or be bound by such opinion. However, although advisory opinions do not have true precedential value, they are indicative of the commissioner's position concerning the applicability of statutory and regulatory provisions to specific sets of facts as of the date the opinion is issued or for the specific time period at issue in the opinion." 20 NYCRR § 2375.5. With regard to publications, notices, and online tax information,

"[t]he division's publications, notices, and online tax information in themselves do not have any legal effect. This notwithstanding, publications, notices, and online tax information serve an essential role in expeditiously conveying pertinent information to taxpayers, tax practitioners, personnel of the division and members of the general public. As is the case with technical memoranda described in section 2375.6 of this Part, to the extent that the division's publications, notices, and online tax information are reasonable and consistent with the governing laws and regulations, they cannot be ignored without risking the violation of such laws and regulations." 20 NYCRR § 2375.9.

Petitioners' Arguments

In this hybrid proceeding, petitioner's first cause of action seeks a declaratory judgment that New York State sales tax does not apply to Vital's storage services rendered in New Jersey. In its third cause of action, petitioner seeks a judgment under Article 78 declaring that respondents acted in excess of their jurisdiction, and in an arbitrary and capricious manner in determining that petitioner's storage services are subject to New York State sales tax, and further enjoining and prohibiting the Tax Department from asserting the sales tax on Vital for the time period on or after September 1, 2017. In its fourth cause of action, petitioner asserts that respondents deprived petitioner of its civil rights under the Commerce Clause of United States Constitution and federal law. Finally, in its fifth cause of action, petitioner seeks attorney's fees pursuant to 42 U.S.C. §1988. Petitioner moves for summary judgment on its request for declaratory and injunctive relief.[2]

Declaratory Judgment

Petitioner first argues for a declaratory judgment pursuant to CPLR § 3001, that New York State sales tax does not apply to Vital's storage services rendered in New Jersey. Petitioner claims that the Tax Department confuses the fundamental principles of sales taxation for the sale of goods with the sale of services. Petitioner concedes that for out-of-state businesses, like Vital, all sales of tangible personal property delivered to New York customers are subject to sales tax, unless otherwise exempt. Petitioner argues, however, that sales of *services* are treated and sourced differently than sales of tangible personal property, and that sales of services are not subject to New York sales tax unless they are specifically enumerated by statute as taxable. Petitioner claims that sales of services, like the provision of storage, are typically sourced to the place the service is performed and rendered by the selling vendor. Petitioner points to the fact that New York Tax Law § 1105(c)(4) imposes sales tax on the service of "storing all tangible personal property not held for sale in the regular course of business" and argues that the New York State Legislature intended to tax the service of "storing all tangible personal property." Petitioner argues that the Tax Department's sales and use tax regulations agree with a plain reading of Tax Law § 1105(c)(4), and common dictionary definitions. Petitioner further points to the fact that the Tax Department's regulation 20

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Respondents submitted their Answer and supporting papers on January 3, 2020. Petitioner subsequently filed the instant motion for summary judgment on February 21, 2020. The motion for summary judgment and the Article 78 request have been fully briefed at this point, therefore this Decision and Order reflects the Court's determination on the petitioner's motion for summary judgment and request for Article 78 relief.

NYCRR § 527.6(a) defines "storage" as "the provision of a place for the safekeeping of goods" and that regulation 20 NYCRR § 527.6(b) characterize the sales tax on storage services as one "imposed on the service of providing storage space."[3] Petitioner argues that New York's regulations' imposition of tax on "the service of providing storage space" makes clear that if such space is located outside of New York, then it is not taxable "storing" of property within the meaning of Tax Law § 1105(c)(4).

Petitioner further argues that the Tax Department has long agreed with companies like Vital that storage services are subject to tax where the storage —the provision of a place for the safekeeping of goods — is actually performed. Petitioner points to the fact that neither Section 1105(c)(4) of the Tax Law nor 20 NYCRR § 527.6(a) of the Tax Department's regulations have been altered or adjusted as to the definition or meaning of a taxable "storage" service since the Buskin AO was issued. Petitioner also notes that the Buskin AO has never been expressly superseded or altered in any subsequent policy statement, and points to the fact that it is still available on the Tax Department's website for consideration, guidance and use by taxpayers. Petitioner argues that the Tax Department's reliance on the Tax Bulletin is contrary to its opinion in the Buskin AO, but there is no mention of any prior guidance being incorrect or superseded.

Petitioner also argues that the Tax Department's reliance on Example 2 is misplaced as it does not address the imposition of sales tax on storage services, specifically those services at issue in this matter, and only deals with purchasing storage services in New York. Petitioner claims that Example 2 is about the local rate to be applied to the storage service. Petitioner argues this cannot control New York's taxation of ordinary storage services, which occur and are rendered at the place where space is provided for the safekeeping of goods. Petitioner argues that the Tax Department used to see this as obvious but has changed its course.

Petitioner next argues that the Tax Department's treatment of Vital's storage services impermissibly expands Tax Law § 1105(c)(4) and conflicts with the regulations governing storage. Petitioner notes that when a statute imposing a tax is at issue, "it must be narrowly construed and that any doubts concerning its scope and application are to be resolved in favor of the taxpayer" and therefore must be resolved in favor of Vital. Debevoise &Plimpton v New York State Dept of Taxation & Fin., 80 NY2d 657, 661 (1993); *see also* Bloomingdale Bros., Div. of Federated Dep't Stores, Inc. v Chu, 70 NY2d 218, 223 (1987); American Cyanamid & Chem. Corp. v Joseph, 308 NY 259, 263 (1955). Petitioner argues that the regulations make clear that the service subject to tax is not a service performed on the purchaser's property, but rather the provision of actual space for storage, and that analysis of the Buskin AO is consistent with the regulations and other Tax Department guidance on the sourcing of storage services. Petitioner argues that although pick up and delivery may have been offered as ancillary items to the service of storage, the service itself was not delivered to the customer in New York even if the items were retrieved there. Petitioner argues that

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The Court notes that petitioner quotes subdivision (2) of the regulation, while subdivision (1) of the regulation states that, "[t]he tax is imposed on the *sale*, except for resale, of the service of storing tangible personal property". 20 NYCRR § 527.6(b)(1) (emphasis added).

the Tax Bulletin inaccurately treats storage services as services performed on the customer's property. Petitioner further argues that the statement in the Tax Bulletin directly contradicts the regulations governing storage services, which define storage as the provision of space for the safekeeping of property. Petitioner notes that the Tax Department's argument that has a glimmer of merit is that this is a "transaction tax" and that a "taxed transaction" is an act that results in "the receipt of consideration for the rendition of an enumerated service". However, petitioner argues that when placed in context the rest of the Tax Department's argument falls apart. Petitioner argues that 20 NYCRR § 527.6(a) defines the "service" in question here as "the provision of a place for the safekeeping of goods" and that 20 NYCRR § 527.6(b) addresses "imposition," and states that "the tax is imposed on the service of providing storage space."[4] Petitioner argues that providing storage space, and safekeeping goods in that space, is the "service" being taxed and without it, the taxable event never occurs. Petitioner argues that the Tax Department's analysis completely ignores the definition and imposition of the tax, and thus the defining characteristic of the thing being taxed (e.g. the provision of a place for the safekeeping of goods), and petitioner points to the fact that its only two facilities for which they provide that service are located in New Jersey.

Petitioner further argues that the Tax Department's analysis of 20 NYCRR § 525.2 is inaccurate, and that this case does not involve a dispute over sales tax concerning the "retail sale of tangible personal property" as outlined in 20 NYCRR § 525.2. Petitioner notes that this case involves a dispute over the "rendition of a service," such as "storage" and that the language of Section 525.2(a)(2) provides that the tax liability for the rendition of that service does not arise until it is actually rendered, which petitioner argues is in New Jersey.

Petitioner next argues against respondents' "Maryland example", which is provided in respondents' Answer and states that, "[f]or example, a person or business from Maryland could contract with Petitioner for this service and have property retrieved in New York State that will eventually be taken to New Jersey. Under such a scenario, the retrieval of that property in New York is the taxable transaction, and its eventual storage location is irrelevant for purposes of the assessment of sales tax." Petitioner points out that based on respondents' example, a New York-based Vital customer that stores an item in one of Vital's New Jersey facilities for five years will be subject to storage tax for every month that the item remains in Vital's facility. Petitioner claims this is an illogical interpretation of the storage tax laws.

Petitioner notes in its Reply that New York State Senator, Anna M. Kaplan, introduced Bill Number S8590 on June 16, 2020, in an effort to clarify the applicability of Tax Law § 1105(c)(4). The justification in the Bill states that, "[t]hese facilities already pay sales tax for the state of which they are located[;] including a New York sales tax constitutes a double tax and is also just inconsistent with the law. This legislation seeks to clarify that regardless of who moves personal property from New York to a storage facility outside of New York that while sales tax is charged for

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Again, petitioner quotes subdivision (2) of the regulation, while subdivision (1) of the regulation states that, "[t]he tax is imposed on the *sale*, except for resale, of the service of storing tangible personal property". 20 NYCRR § 527.6(b)(1) (emphasis added).

the moving of these items, that no sales tax is charged for the storage of these items in another state."

Petitioner next argues that the Tax Department's decision to source Vital's storage services to the customer's property pick up location, rather than the location of the storage facility creates double taxation that violates the dormant Commerce Clause of the United States Constitution. Specifically, petitioner argues that imposing sales tax on 100 percent of receipts for storage services occurring at an out-of-state facility creates the double taxation. Petitioner notes that it is directed to charge two separate state sales taxes, totaling sales tax in excess of 15 percent, to customers who have their items picked up in New York for storage in New Jersey. Petitioner notes that those same Vital customers would not face this compounded, multiple tax burden if they chose to store their property at a New York facility through a different vendor. Petitioner argues that this double tax unduly burdens interstate commerce, specifically Vital's storage transactions with customers who have property picked up in New York for storage in New Jersey. Petitioner argues that interstate commerce —the flow of goods and/or services across state lines — is unquestionably implicated in this matter and that Vital's customers in New York who purchase storage services in New Jersey are engaged in interstate transactions, as is Vital, a New Jersey-based company serving customers in, among other places, New York.

Petitioner argues that in determining whether a tax affecting interstate commerce is constitutional under the dormant Commerce Clause, at a minimum the tax must meet all four criteria set out by the United State Supreme Court in Complete Auto Transit v Brady, 430 US 274 (1977) (hereinafter "Complete Auto"). Petitioner argues that under the Complete Auto test, a tax will be upheld as constitutional, only if it: (1) is "applied to an activity with a substantial nexus with the taxing State;" (2) is "fairly apportioned;" (3) "does not discriminate against interstate commerce;"and (4) is "fairly related to the services provided by the state." *See* Complete Auto at 277-278. Petitioner argues that the Tax Department's application of sales tax to Vital's charges for storage services that occur exclusively in New Jersey violates prongs 1, 2, and 4 of the Complete Auto test.

Petitioner first addresses prong 2 - that the tax must be fairly apportioned - as it argues that this prong is the Tax Department's most obvious violation of the Complete Auto test. Petitioner quotes the Supreme Court which stated that, "the central purpose of the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." Goldberg v Sweet, 488 US 252, 260-262 (1989). Petitioner notes that the test for determining whether a tax satisfies the fair-apportionment prong looks to whether the tax is both internally and externally consistent. Id. Petitioner concedes that the Tax Department's policy on sourcing storage services passes the internal consistency test, however Petitioner argues that the constitutional problem with Vital's tax involves a lack of external consistency. Petitioner notes that the external consistency test looks specifically at whether the tax provision or scheme has the effect of taxing a greater portion of the revenues from interstate activity than reflected by the in-state component of the activity. Id. at 261. Petitioner argues that the Tax Department's determination to tax 100 percent of Vital's storage charges based on the retrieval of property in New York, regardless of Vital providing the actual storage service in New Jersey, is out of "appropriate proportions" to the business Vital transacts in New York, and is unduly burdensome on interstate commerce. Petitioner claims that a New York customer dealing with a New

York-based storage provider, instead of Vital, would not face the same double taxation. Petitioner argues that New York has determined to tax far more than "that portion of the revenues from interstate activity than which reasonably reflects the in-state component of the activity being taxed." Petitioner notes that due to the Tax Department's interpretation, Vital customers are subject to New York tax for the entire life of the storage agreement, even if Vital enters New York once to pick up an item, and that New York is entitled to sales tax on the sale of storage even if the ancillary charge for pickup amounts to only a fraction of the total charge for storage. Petitioner argues that there is no apportionment under New York's application of its sourcing methodology for Vital's storage services. Petitioner points to the Supreme Court's analysis in in Oklahoma Tax Comm. v Jefferson Lines, Inc., 514 US 175 (1995) (hereinafter "Jefferson Lines") to support its conclusion that external consistency cannot be met here, as it makes clear that under the dormant Commerce Clause, a state cannot tax value beyond its borders.

Petitioner next addresses prong 1 - that there must be a substantial nexus to New York as the taxing jurisdiction. Petitioner notes that to satisfy prong 1, New York's tax must be "applied to an activity with a substantial nexus with the taxing State" and there are two requirements: 1) there must be a 'rational relationship' between the income attributed to the taxing jurisdiction and the intrastate values of the business; and 2) there must be a 'minimal connection' or 'nexus' between the activity to be taxed, and the jurisdiction attempting to tax it. Container Corp. of Am. v Franchise Tax Bd., 463 US159, 165-66 (1983) (*citing* Exxon Corp. v Wisconsin Dept. Of Revenue, 447 US 219-220 (1980). Petitioner argues that Vital's institutional nexus with New York does not give New York the ability or authority to subject all of Vital's New Jersey sales transactions to its sales tax. Petitioner claims there is no dispute that the vast majority of the value provided by Vital to its customers occurs almost exclusively in New Jersey. Petitioner argues that New York lacks transactional nexus with Vital's charges for storage services as those services only ever take place at one of Vital's two New Jersey storage facilities.

Petitioner last addresses prong 4 - that the tax must be fairly related to services provided by the taxing state. Petitioner argues there is no question that substantially all relevant state support services for the custodial storage offered by Vital are provided in the State of New Jersey (e.g. New Jersey-based police, fire, and emergency services protect Vital's storage facilities and operations, and New Jersey water, sewer, refuse, and related services similarly allow the storage facilities and operations to function normally). Petitioner acknowledges that use of New York roads on occasion, minus highway tolls, are provided by New York State for the transportation related to the storage services. Petitioner argues that the levy of tax by New York State is entirely unrelated, and out-of-proportion, to services arguably provided by New York State.

42 U.S.C. § 1983 / 1988

Petitioner argues that in order to prevail on a summary judgment claim against a governmental instrumentality under section 1983 based on acts of a public official, it is required to prove: 1) an action taken under color of law; (2) deprivation of a constitutional or statutory right; (3) causation; (4) damages; and (5) that an official policy of the instrumentality caused the constitutional

injury. Roe v City of Waterbury, 542 F3d 31, 36 (2d Cir 2008), *citing* Monell v Dept of Soc. Servs., 436 US 658, 690-91 (1978). Petitioner argues that: 1) the Tax Department's action in determining that Vital's New Jersey storage services must be sourced to New York under Tax Law § 1105(c)(4) was taken under color of law; 2) the Tax Department's determination that Tax Law § 1105(c)(4) applies to Vital's New Jersey storage services based on the "location where the property to be stored is accepted by the storage provider from the customer" is unconstitutional under the Commerce Clause of the U.S. Constitution; and 3) it is entitled to an award of prospective relief under Section 1983 in the form of a declaration and prohibition preventing the Tax Department from imposing upon Vital the obligation to collect and pay sales tax under Tax Law § 1105(c)(4). Vital also argues that it is entitled to an award of its attorneys' fees under 42 U.S.C. § 1988, and requests the opportunity to submit its support for those fees in a separate motion.

Article 78 Relief

Petitioner argues that should the Court determine that more than its Article 30 powers are necessary to adjudicate the parties' dispute, or if the Court is unable to summarily rule in Vital's favor on its Section 1983 and 1988 claims, that CPLR Article 78 provides an adequate alternative mechanism for the Court to find that the Tax Department's application of Tax Law § 1105(c)(4) is both arbitrary and capricious and in excess of its jurisdiction, and thus null and void. Petitioner argues that the Tax Department established no reasonable or legitimate basis for the determination reach by respondent, Ms. Manion, in her email of September 5, 2018, and that such determination is not consistent with the Tax Law, the Tax Department's Regulations, and prior authority issued to taxpayers. Petitioner claims that the Tax Department's reliance on the Tax Bulletin is an "about-face on the long-standing conclusion that storage services performed outside New York are not taxable." Petitioner requests that this Court enjoin and prohibit the Tax Department from assessing such a sales tax on Vital's charges for storage services in New Jersey for any period beginning on or after September 1, 2017. Petitioner requests restitution/damages for out-of-pocket expenses, attorneys' fees, costs and disbursement incurred to prosecute this claim.

Respondents' Arguments

Respondents object to petitioner's request for summary judgment and Article 78 relief and claim that petitioner's arguments mirror those arguments previously made by petitioner in its cross motion for summary judgment that this Court decided upon and denied on November 26, 2019, however the current motion also contains an affidavit from petitioner's Vice President, Andrew Rocco.

Respondents first argue that petitioner is not entitled to summary judgment on its request for a declaratory judgment that petitioner's charges for storing property in New Jersey are not subject to New York State sales tax since petitioner is incorrect in its interpretation of the law. Respondents argue that the primary issue here is the situs of the transaction at issue. Respondents note that petitioner focuses on the storage service itself, but respondents claims that the purchase of the storage services by New York customers is properly sourced to the State where the property to be

stored is accepted by the storage provider. Respondents also argue that petitioner misconstrues the nature of the tax and that it is not simply a tax on the act of storing records or other personal property, but that it is a sales tax - a tax on the sale of the storage service to that purchaser.

Respondents point to 20 NYCRR § 525.2(a)(2), since it states that, except where provided otherwise, the sales tax is a "'transactions tax', with the liability for the tax occurring at the time of the transaction" and a "taxed transaction" is an act that results in the receipt of consideration "for the rendition of an enumerated service. The time or method of payment is generally immaterial, since the tax becomes due at the time of transfer of title to or possession of (or both) the property or the rendition of such service". Respondents note that petitioner attempts to counter this point by referencing 20 NYCRR § 527.6(a), which defines the "service" as "the provision of a place for the safekeeping of goods" and 20 NYCRR § 527.6(b), which addresses the "imposition" of a sales tax on the "service of providing storage space." Respondents argue, however, that petitioner's service goes beyond solely providing storage space, and that the service consists of: 1) the retrieval of the purchaser's property at a location designated by the purchaser; 2) the storage of the property; and 3) the potential return of the property to the purchaser. Respondents argue that the service is effected in New York because it begins here and the transfer of the property occurs in New York, which is consistent with 20 NYCRR § 527.6(c) since respondents argue that this section of the regulation designates the situs of the transaction as the place where the property to be stored is turned over to the provider.[5]

Respondents further argue that the plain language of Tax Law § 1105 applies to the purchase of the storage services provided by petitioner. Respondents outline the definitions of "receipt" and "sale"under Tax Law §1105, which are further outlined herein, and respondents argue that petitioner renders storage services that are taxable under Tax Law § 1105(c)(4) and of which constitute a "sale" upon the transfer of possession of the records to petitioner in New York State. Respondents argue that petitioner's storage services are subject to New York State sales tax when petitioner takes possession in New York State of the property to be stored. Respondents point to the fact that petitioner's arguments about the location of its offices and its personnel do not address the fact that petitioner's retrieval of property from customers in New York State would be sourced here for sales tax purposes, and that a physical office or location in New York State is not necessary for the establishment of a substantial nexus necessary for the imposition of a sales tax. Respondents argue that petitioner's storage services are effected in New York State and sales tax on the purchase of those services is lawful and appropriate.

In regards to petitioner's arguments related to the dormant Commerce Clause, respondents point out that legislation is entitled to a presumption of constitutionality, and while this presumption is rebuttable, a petitioner must demonstrate a law's unconstitutionality "beyond a reasonable doubt (internal citation omitted)." National Assoc. of Independent Insurers v State of New York, 207 AD2d

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The Court notes this designation is specifically enumerated in Example 2, not in a subdivisuion of the regulation.

191, 199-200 (2d Dept 1994), *citing* Alliance of Am. Insurers v. Chu, 77 NY2d 573, 585 (1991). Respondents further note that, "(t)he Legislature has nearly unconstrained authority in the design of taxing measures unless they are utterly unreasonable or arbitrary" (internal citation omitted)." National Assoc. of Independent Insurers, 207 AD2d at 200, *citing* Ames Volkswagen v. State Tax Comm., 47 NY2d 345, 349 (1979).

Respondents argue that its assessment of sales tax to petitioner does not violate the dormant Commerce Clause, however respondents claim that the Court must first "identify the interstate market that is being subjected to discriminatory or unduly burdensome taxation" (*see* Tamagni v Tax Appeals Tribunal, 91 NY2d 530, 540 (1998) (hereinafter "Tamagni") and urges that the Court need not reach the analysis required by Complete Auto. "[I]f the tax at issue substantially affects 'interstate commerce' such that Congressional legislation limiting the State taxing power would be a valid exercise of its Commerce Clause powers, then the Commerce Clause is implicated." Tamagni, at 537, *quoting* United States v Lopez, 514 US 549, 559 (1995). Respondents argue that the sales tax here does not operate to serve a local preference for petitioner's competitors in New York State. Respondents claim that the Tax Law places petitioner in an identical situation to a competitor with a warehouse in New York State, since those purchases also would be sourced in New York State. Respondents contend that the regulations do not discriminate against storage providers located outside New York State.

If the Court were to reach the Complete Auto test, respondents argue that its taxation of petitioner's storage services does not unduly burden interstate commerce, and that the sales tax satisfies each of the four prongs of the Complete Auto test. Respondents first argue that petitioner's storage of records received from places located in New York State has the requisite substantial nexus with New York State so as to justify the imposition of sales tax for such services. Respondents note that the Court of Appeals in Orvis Co. v Tax Appeals Trib., 86 NY2d 165 (1995) (hereinafter "Orvis") held that "the substantial nexus portion of the Complete Auto test requires the physical presence within the state of the entity being taxed (internal citation omitted)." Moran Towing Corp. v Urbach, 99 NY2d 443, 449 (2003) (hereinafter "Moran"), *citing* Orvis at 178. Respondents further note that such a physical presence "need not be substantial", only "demonstrably more than a 'slightest presence'" (internal citations omitted)." Orvis at 178, *quoting* National Geographic Socy. v California Bd. of Equalization, 430 US 551, 556 (1977). Respondents argue that the nexus between New York State and petitioner is clear as petitioner's employees enter New York State and provide a service in New York. Respondents argue that the hypothetical Maryland Example demonstrates that a substantial nexus exists in the instant case, and even under those circumstances, it is the location at which the subject property is retrieved that is the basis for the establishment of a substantial nexus, and thus for the imposition of the sales tax. Respondents again note that this is rooted in the fact that the sales tax is a transaction tax. Respondents claim that petitioner's argument that the substantial nexus prong cannot be met because "the vast majority of the value provided by [Petitioner] to its customers – i.e., storage services and protection of their information and data – occurs almost exclusively in New Jersey..." understates the extent of the services provided by petitioner. Respondents argue that a nexus exists by reason of petitioner's taking possession of the property in New York State, and that no direct nexus need be shown between the taxed transaction

and the seller's activity within the taxing state. National Geographic Socy. v California Bd. of Equalization, 430 US at 560.

Respondents next argue that the sales tax is fairly apportioned and that fair apportionment has been said to be a "principle of fair share ... which is threatened whenever one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed." Jefferson Lines at 184. Respondents cite the requirements of internal and external consistency, as petitioner had also outlined, and asserts that the sales tax is internally consistent, which petitioner has already conceded. Respondents then argue that the sales tax is externally consistent, and that an inquiry into external consistency is a practical one. Zelinsky v Tax Appeals Tribunal of State, 1 NY3d 85, 91 (2003). Respondents argue that petitioner has the burden to demonstrate 'by clear and cogent evidence' that 'the income attributed to the State is in fact out of all appropriate proportions to the business transacted ... in that State, or has led to a grossly distorted result'". Jefferson Lines at 195, *quoting* Moorman Mfg. Co. v Bair, 437 US 267, 274 (1978). Respondents argue that petitioner has failed to meet its burden of providing such clear and cogent evidence and that there is an economic justification for New York State to assess sales tax on a transaction that occurs, and thus is sourced, within its borders. Respondents rely on Jefferson Lines, which states that, "[t]he taxable event here comprises agreement, payment, and delivery of some of the services in the taxing State. No other State can claim to be the site of the same combination, and these combined events are commonly understood to suffice for a sale." Jefferson Lines, at 190. Respondents contend that the combination of those events is what New Jersey does not have. Respondents quote Jefferson Lines, in that "taxation of sales has been consistently approved without any division of the tax base among different States and has been found properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future." Id. at 186.

Respondents next argue that the sales tax on petitioner does not discriminate against interstate commerce and notes that petitioner does not argue that the sales tax violates this element of the Complete Auto test. Respondents note that the sales tax applies equally to all storage services commenced by transfer of the property in New York to the service provider, regardless of the location of storage facilities inside or outside New York State.

Respondents further argue that the sales tax is fairly related to the services provided by the taxing state and that petitioner's argument that the Tax Department's imposition of sales tax is unrelated and disproportionate to services provided by the State of New York does not reflect the point of the fair relation element. Respondents note that this prong of the Complete Auto test, "requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity." Jefferson Lines, at 199. Respondents argue that so long as the event itself is taxable, then the proceeds therefrom "may ordinarily be used for purposes unrelated to the taxable event." Id. Respondent argues that the sales tax here is applied to sales sourced in the State of New York, with such tax being measured by the value of the service purchased. Respondents note that New York State taxes pay for the municipal services, including roads, that allow petitioner to retrieve and return

stored property to its customers in New York State. Respondents emphasize that the real issue is whether the sales tax is reasonably related to the fact that the transaction at issue is consummated in New York State.

Respondents next address petitioner's claim that it is entitled to summary judgment on its causes of action under Article 78. Respondents contend that petitioner's causes of action under CPLR Article 78 are fully before this Court and that respondents have filed and served their Answer, the administrative record and supporting Memorandum of Law. Respondents argue that a decision from this Court would fully address these causes of action, and no further arguments regarding petitioner's Article 78 claims are necessary on this motion. Respondents further argue that they did not act arbitrarily or capriciously, nor did they act contrary to the law. Respondents contend that in matters such as the instant Article 78 proceeding, the scope of judicial review "is severely limited"; the standard to be applied when reviewing a determination is whether it was arbitrary and capricious, i.e., whether there was no rational basis for the decision (internal citation omitted)." Johnson v Ambach, 74 AD2d 986 (3d Dept 1980), *citing* Matter of Strongin v Nyquist, 44 NY2d 943 (1978). Respondents argue that its actions were completely consistent with the relevant regulation. Respondents point to the fact that petitioner's legal position is premised almost entirely upon the Buskin AO and but that AOs are issued at the request of a person who is or may be subject to either a tax or liability under the Tax Law. 20 NYCRR §2376.1(a). Respondents note that the regulations concerning AOs specifically indicate that AOs are only binding upon the Division of Taxation and upon the Commissioner of Taxation and Finance with respect to the person to whom the opinion is rendered, and only with respect to the set of facts stated in the Opinion. 20 NYCRR §2375.5. Further, respondents note that "[t]he person to whom an advisory opinion is rendered is not bound by that opinion nor may any other person rely upon or be bound by such opinion." 20 NYCRR §2375.5. Finally, respondents emphasize that AOs do not have true precedential value, and they are only "indicative of the commissioner's position concerning the applicability of statutory and regulatory provisions to specific sets of facts as of the date the opinion is issued or for the specific time period at issue in the opinion." 20 NYCRR §2375.5.

Respondents further argue that petitioner's reliance on the Buskin AO, which was issued fifteen years prior to the Tax Bulletin, is misplaced and that the Tax Bulletin is a restatement of what has already been codified in 20 NYCRR §527.6. Respondents argue that an AO only applies to the specific circumstances of one taxpayer, whereas bulletins, such as the Tax Bulletin, apply to the public at large. Respondents further argue that when such a contradiction exists between the Buskin AO and the Tax Bulletin, it is the interpretation and policy set forth in the subsequent Tax Bulletin (as well as the regulation upon which it is based) that controls, not the earlier AO. Respondents note that if certain regulations or policies subsequently change after an AO is issued, then the validity of that AO also changes accordingly.

Respondents lastly argue that petitioner is not entitled to summary judgment relief under either 42 U.S.C. §1983 or 42 U.S.C. §1988. Respondents note that the basis for petitioner's claims under these statutes are essentially the same as those set forth in petitioner's cause of action under Article 78, and therefore incorporates their arguments as set forth above.

Declaratory Judgment

In its hybrid action, petitioner has raised a number of claims in which declaratory relief is sought. CPLR § 3001 provides that "[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." "The primary purpose of [a] declaratory judgment[] is to adjudicate the parties' rights before a 'wrong' actually occurs in the hope that later litigation will be unnecessary". Subdivisions, Inc. v Town of Sullivan, 75 AD3d 978, 980 (3d Dept 2010), *quoting* Klostermann v Cuomo, 61 NY2d 525, 538, (1984) (internal citations omitted); *see also* Siegel, NY Prac § 436, at 705-706 (3d ed 1999) (a declaratory judgment action "contemplates a judgment that will merely declare the rights of the parties in respect of the matter in controversy … [where] a mere judicial declaration of the rights vis-a-vis the other side will do the job").

Petitioner filed a motion for summary judgment on its declaratory actions and "under appropriate circumstances, summary judgment may lie within the confines of a declaratory judgment action". Subdivisions, Inc. v Town of Sullivan, 75 AD3d at 980; *see also* Russell v Town of Pittsford, 94 AD2d 410, 412, (1983). It is well settled that summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of triable issues of fact. Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986). Here, the facts are not disputed and the questions before this Court pertain to the interpretation of New York State Tax Law and its application to petitioner's storage services located in the State of New Jersey.

New York Tax Law

The Court will first address the Buskin AO, which is raised throughout petitioner's papers. Petitioner claims that its position does not rise or fall on the notion that the Buskin AO is controlling, however petitioner asserts that the Buskin AO is persuasive and it offers the Court ample basis to decide this matter in Vital's favor. Although the facts of the Buskin AO are similar to those herein (e.g. a New Jersey based company, New York based customers, storage services in New Jersey and pickup services in New York), the Tax Department's regulations are clear in that AOs "are binding upon the Division of Taxation and upon the Commissioner of Taxation and Finance only with respect to the person to whom such an opinion is rendered and only with respect to the set of facts stated in the opinion....nor may any other person rely upon or be bound by such opinion." 20 NYCRR § 2375.5. Consistent with the regulations stated herein, petitioner may not rely upon the Buskin AO. However, the Court must determine if the Buskin AO is persuasive in the instant matter. As respondents pointed out, the Tax Department issued the Tax Bulletin subsequent to the Buskin AO and the Tax Bulletin applies to the public at large, compared to the Buskin AO which only applies to a specific individual and set of facts. Petitioner focuses on the fact that the Tax Bulletin appears to contradict the Buskin AO, but the Court does not give petitioner the "benefit from authorities they cite ... for the proposition that agencies deserve less deference when they issue regulations inconsistent with positions they have previously formally taken." Lorillard Tobacco Co. v Roth, 99 NY2d 316, 322 (2003). The Tax Department, "in all procedural respects properly issued the [Tax Bulletin], a document 'advisory

in nature ... merely explanatory' and without 'legal force'. Id., *citing* 20 NYCRR 2375.6(c). The Court recognizes that the Tax Department's interpretation of its own laws and regulations may have changed from the time the Buskin AO was issued up until the time the Tax Bulletin was disseminated. The Court finds that the Tax Bulletin is the controlling precedent issued by the Tax Department on the subject matter herein. However, just because the Tax Department adopted a regulation (*see* 20 NYCRR § 527.6) authorizing the taxation of the sale of storage services outside the State of New York based on the pickup location occurring in New York, does not mean the Tax Department is entitled to deference in its interpretation, when, as here, "the issue is one of pure statutory construction". Debevoise & Plimpton v New York State Dep't of Taxation & Finance, 80 NY2d at 664.

Turning to the merits of the case, in construing a tax statute a court must "apply the basic rule that words 'of ordinary import in a statute are to be given their usual and commonly understood meaning, unless it is clear from the statutory language that a different meaning was intended'". Id. at 661, *quoting* We're Assocs. Co. V Cohen, Stracher & Bloom, 65 NY2d 148, 151 (1985). As petitioner notes, when a statute imposing a tax is at issue, it is well settled that "it must be narrowly construed and that any doubts concerning its scope and application are to be resolved in favor of the taxpayer". Debevoise, *supra*.

This Court's decision depends entirely on the construction to be given Tax Law § 1105(c)(4), which provides that "there shall be paid a tax of four percent upon: [t]he receipts from every sale, except for resale, of the following services: [s]toring all tangible personal property not held for sale in the regular course of business and the rental of safe deposit boxes or similar space." A sale is defined as, "[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume..., conditional or otherwise, in any manner or by any means whatsoever for consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration". Tax Law § 1101(b)(5). As noted herein, the Tax Department issued regulation 20 NYCRR § 527.6, which further outlines the storage of tangible personal property under Tax Law § 1105(c)(4) in that, "[s]torage is the provision of a place for the safekeeping of goods". 20 NYCRR § 527.6(a). The regulation further provides that, "[t]he tax is imposed on the sale, except for resale, of the service of storing tangible personal property". 20 NYCRR § 527.6(b)(1).

There is no dispute here that a sales tax may be imposed on the sale of the service of storing tangible personal property. Petitioner argues that the interpretation boils down to the location of where the service of storing the items is being provided, which is in New Jersey, and that the Court should not take into account the location of the customer or where the items for storage are picked up as the ultimate destination and storage services are provided in New Jersey. Respondents argue that the focus should be on the situs of the *transaction* at issue and that the purchase of the storage services by New York customers is properly sourced to New York since the property to be stored is accepted by the storage provider in New York. Respondents emphasizes that this is not simply a tax on the act of storing records or other personal property,

but that it is a sales tax.[6] The Court agrees with this argument. The sale in question here is the sale of the storage service and as part of the storage service, petitioner is offering pickup services, which may occur in New York State for New York based customers. The act of picking up and dropping off the storage items as part of the overall storage services are not incidental to the act of the storage itself. *Compare* Debevoise at 663 ("[t]he Department would broaden the reach of section 1105 (b) and read into it by implication the authority to impose a tax not only on sales of utilities and utility services but also on rent paid when HVAC services are supplied by the landlord to the tenant purely as an incident to a lease of premises"). In fact, the pickup services are necessary to initiate the storage of those items. *See* Rochester Gas & Electric Corp. v New York State Tax Com., 128 AD2d 238, 240 (3d Dept 1987) (transportation services, which are exempt from sales tax or not included in the statutory definition of taxable services, were deemed part of the trash removal service - a maintenance service under Tax Law - and therefore the entire service was subject to sales tax); *see also* Matter of Island Waste Sers., Ltd. v Tax Appeals Trib. Of the State of N.Y., 77 AD3d 1080, (3d Dept 2010) (the Court deemed petitioner's third party transportation services to be maintenance services within the meaning of the Tax Law, wherein the waste material transported was generally shipped to facilities out of state); Cecos Int'l, Inc.. v State Tax Comm'n, 126 AD2d 884, 885 (3d Dept 1987). The Court finds that the total charges to the customer for the *initial* sale of storage services, which include pickup in New York State, are subject to the sales tax since the purpose of the service that is taxable is the storage of such items that are picked up.

However, the Court finds that after the initial sales transaction, the storage services provided by petitioner should not be subject to the New York State sales tax as the service provided therein is solely a storage service which is isolated in an out-of-state storage facility in New Jersey. As petitioner notes, if the State of New York continues to collect sales tax on the entire sales receipt, year after year, while the item sits in a facility located in New Jersey, the State of New York is collecting a sales tax on services that are not occurring in New York State. This is outside of the Tax Department's scope. *See* Debevoise at 663 ("[t]he Department's position that all of the overtime services are subject to tax leads to the taxation of services that are clearly outside of its scope"); *see generally* Bloomingdale Bros., Div. of Federated Dep't Stores, Inc. v Chu, 70 NY2d at 222 (New York sales tax did not apply when a transaction occurred wholly within another State and the sale was deemed completed and control of the merchandise had changed hands). Respondents misconstrue the Tax Law by applying the sales

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The Court agrees with petitioner that respondents seem to argue that the sales tax is properly sourced to New York because the transfer of the property occurs in New York, which confounds the definition of a sales tax as a transactions tax. The regulation provides that "the sales tax is a "transactions tax," with the liability for the tax occurring at the time of the transaction. Generally, a taxed transaction is an act resulting in the receipt of consideration for the transfer of title to or possession of (or both) tangible personal property ***or*** for the rendition of an enumerated service." 20 NYCRR § 525.2(a)(2) (emphasis added). Here, the Court is examining the sales tax on the rendition of an enumerated service, and the transfer of possession of tangible personal property is a separate clause of the definition to examine, which is not applicable here. The Court addresses the pick up of the items in New York as a factor to consider in reviewing the transaction as a whole.

tax to all of petitioner's gross receipts for the storage services when those services are provided well after the items had been picked up in New York and remain in storage in New Jersey. The Court does not find that respondents' application of such sales tax to be evident in a strict and narrow reading of the Tax Department's regulations.

Commerce Clause

Respondents contend that the Court must first "identify the interstate market that is being subjected to discriminatory or unduly burdensome taxation" (*see* Tamagni at 540) and urges that the Court need not reach the analysis required by Complete Auto. "[I]f the tax at issue substantially affects 'interstate commerce' such that Congressional legislation limiting the State taxing power would be a valid exercise of its Commerce Clause powers, then the Commerce Clause is implicated." Tamagni, at 537, *quoting* United States v Lopez, 514 US at 559. The Tamagni case, which is relied upon by respondents, dealt with the application of New York's resident income tax to statutory residents of New York State who, as domiciliaries of New Jersey, were subject to resident income tax in New Jersey on certain income also taxed by New York State. Tamagni, at 532-533. The petitioners in Tamagni claimed that the tax was discriminatory because it allegedly subjected statutory New York residents to double taxation, unlike New York domiciliaries who reside solely in New York. Id. at 536. The Court found that the "tax at issue does not operate to the disadvantage of any identifiable interstate market, but rather simply taxes residents based on their status as residents". Id. at 540. The Tamagni Court stated that the New York income tax "is based upon a taxpayers' resident status, without regard to any specific commercial or reconomic transaction or activity." Id. At 538.

In contrast, in City of New York v State, the Court of Appeals dealt with a New York City "commuter tax" that was originally applied to the wages and self-employment net earnings of every nonresident individual working in New York City, including both in-State and out-of-State residents who did not live in the City. City of New York v State, 94 NY2d 577, 587 (2000). In 1999, the Legislature attempted to rescind the commuter tax for in-State residents while retaining the tax for out-of-State residents and the Court held this to be in violation of the Commerce Clause. Id. The Court noted, as do respondents, that the first step in Dormant Commerce Clause analysis is to address whether the statute discriminates against interstate commerce or if it "regulates evenhandedly with only "incidental" effects on interstate commerce". Id. at 596, *quoting* Oregon Waste Sys. v Department of Envtl. Quality, 511 US 93, 99 (1994). The Court emphasized that "[d]iscrimination means differential treatment on in-State and out-of-State economic interests that benefits the former and burdens the latter." City of New York v State, 94 NY2d at 596-597.

In the instant matter, the Court agrees with respondents that it must first determine if the sales tax as it applies to petitioner's storage services in New Jersey is discriminatory, or if it "regulates evenhandedly with only "incidental" effects on interstate commerce". Id. at 596, *quoting* Oregon Waste Sys. v Department of Envtl. Quality, *supra*. The Court finds that it need not reach the analysis required by Complete Auto as the sales tax applied by the Tax Department to petitioner's storage services in New Jersey does not serve a local preference for petitioner's competitors in New York State. Specifically, the sales tax does not differentiate a tax between in-

State storage companies versus an out-of-State storage company. Therefore, the sales tax in question here is not on its face discriminatory.

In light of the foregoing, the Court need not reach the merits of the petitioner's claims under 42 U.S.C. § 1983 and 42 U.S.C. § 1988.

Article 78

In reviewing an administrative action under CPLR Article 78, judicial review is narrowly circumscribed and a court must ascertain whether there is a rational basis for the agency's decision or whether the decision is arbitrary and capricious. *See* Matter of Pell v Bd. of Educ., 34 NY2d 222, 231 (1974). Typically, an agency's reasonable interpretation of the statutes and regulations it administers is entitled to substantial deference. Matter of Cortlandt Nursing Care Ctr. v Whalen, 46 NY2d 979, 980 (1979); Matter of Sigety v Ingraham, 29 NY2d 110, 114 (1971). However, if the issue is one of pure statutory interpretation, agency deference is unwarranted. Matter of O'Brien v Spitzer, 7 NY3d 239, 242 (2006); Lorillard Co. v Roth, 99 NY2d at 322.

For the reasons further outlined above, the Court finds that the initial charge of New York State sales tax for petitioner's storage services with pick ups occurring in New York are not arbitrary and capricious. However, the Court finds there to be no rational basis for the Tax Department's decision to apply sales tax to petitioner's storage services in New Jersey after the initial sale and pick up of the items in New York, and that such decision is arbitrary and capricious.

Therefore in accordance with the foregoing, it is hereby

ORDERED, that petitioner's motion for summary judgment is GRANTED in part on its first cause of action, and it is further

ORDERED, that petitioner's request for relief pursuant to Article 78 is GRANTED in part on its third cause of action, and it is further

ORDERED, that petitioner's motion for summary judgment is DENIED on its fourth and fifth causes of action.

This shall constitute the decision, order and judgment of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the County Clerk's Office. Counsel for the Respondents is not relieved from the applicable provisions of CPLR § 2220 and § 202.5-b (h) (2) of the Uniform Rules of Supreme and County Courts insofar as they relate to service and notice of entry of the filed document upon all other parties to the action/proceeding, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.

Dated: August 18, 2020
Albany, New York

PATRICK J. McGRATH
Supreme Court Justice

Papers Considered:

1. NYSCEF Documents: 40-46, 53-57.

08/19/2020