SJC-13013

ORACLE USA, INC. vs. COMMISSIONER OF REVENUE
(and two consolidated cases[1]).

Suffolk. February 1, 2021. - May 21, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Wendlandt, & Georges, JJ.

Taxation, Sales tax, Abatement, Apportionment of tax burden, Commissioner of revenue. Practice, Civil, Abatement. Administrative Law, Regulations. Constitutional Law, Taxation, Separation of powers. Statute, Construction. Commissioner of Revenue.

Appeal from a decision of the Appellate Tax Board.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Richard S. Weitzel, Assistant Attorney General, for Commissioner of Revenue.
Richard L. Jones for the taxpayers.
Ben Robbins & Martin J. Newhouse, for New England Legal Foundation, amicus curiae, submitted a brief.
Karl A. Frieden & Michael E. Porter, for Council on State Taxation, amicus curiae, submitted a brief.

[1] Oracle America, Inc. vs. Commissioner of Revenue; and Microsoft Licensing, GP vs. Commissioner of Revenue.

WENDLANDT, J. At issue in these cases is whether G. L. c. 64H, § 1, provides taxpayers a statutory right to apportion sales tax on software transferred for use in more than one State, and, if so, whether the general abatement process, see G. L. c. 62C, § 37, is available to taxpayers seeking such an apportionment. The taxpayers -- Oracle USA, Inc. (Oracle USA); Oracle America, Inc. (Oracle America); and Microsoft Licensing, GP (Microsoft) -- are vendors who sold or licensed software to Hologic, Inc. (Hologic), a medical device company headquartered in the Commonwealth. The vendors and Hologic did not follow the regulations prescribed by the Commissioner of Revenue (commissioner) for collecting and remitting sales tax only on the portion of the value of the transferred software that was to be used in the Commonwealth; rather, at the time sales taxes were due (generally monthly), the vendors remitted tax payments to the Commonwealth based on the entire value of the transactions. Thereafter, when Hologic notified the vendors that only a portion of the software was to be used in the Commonwealth, the vendors applied for refunds through the general abatement process for the portion of the sales tax they had paid to the Commonwealth but which was attributable to out-of-State use of the software.

The commissioner denied the applications for abatement on the ground that the regulations for apportionment had not been

followed; the vendors appealed from the decision to the Appellate Tax Board (board). The board granted the requested abatements. Concluding that G. L. c. 64H, § 1, creates a statutory right to apportionment for software transferred for use in more than one State, and that the general abatement process is available to the vendors who paid sales tax in excess of that properly apportioned to sales in the Commonwealth, we affirm the board's decision.[2]

1. Background.[3] Between 2009 and 2012, Hologic purchased or licensed software from the vendors, Oracle USA, Oracle America, and Microsoft.[4] Hologic installed the software on its servers in the Commonwealth, and the vendors collected sales tax from Hologic based on the total value of the transactions. The

[2] We acknowledge the amicus briefs submitted by the New England Legal Foundation and the Council on State Taxation.

[3] The factual background is based on the parties' joint statement of agreed facts.

[4] As is common with enterprise software sales, the software that is the subject of this appeal was sold or licensed on a "quantity" or user basis. See, e.g., Oracle USA, Inc. v. Rimini St., Inc., 6 F. Supp. 3d 1108, 1112 n.2 (D. Nev. 2014) ("Enterprise Software is a type of computer software program that enables core operational tasks -- like payroll, human resource tasking, and inventory management -- across an entire organization. Instead of being tied to a specific computer, Enterprise Software is hosted on a server and provides simultaneous access and service to a large number of users over a computer network"). For example, one invoice from Oracle America included software described as "Human Resources Analytics Fusion Edition -- Enterprise Employee Perpetual," with "3,500" listed as the quantity or number of authorized users.

vendors timely remitted the sales tax to the Commonwealth on their monthly sales and use tax returns.

Subsequently, Hologic notified the vendors that its employees located outside the Commonwealth also were using the software. Only approximately seventeen percent of Hologic's employees using Oracle USA and Oracle America software were located within the Commonwealth, and only about thirty percent of Hologic's employees using Microsoft software in the United States were located in the Commonwealth.[5]

The sales tax statute, G. L. c. 64H, § 1, states that the commissioner "may, by regulation, provide rules for apportioning tax in those instances in which software is transferred for use in more than one [S]tate." The regulations the commissioner issued pursuant to this authority provide, in part, that a permissible method of apportionment may be "based on [the] number of computer terminals or licensed users in each jurisdiction where the software will be used." 830 Code Mass. Regs. § 64H.1.3(15)(a)(3) (2006). Having been furnished the information about the percentage of licensed users in the Commonwealth, the vendors timely filed applications for abatement and refunds for the portions of the taxes they had

[5] Approximately five percent of Hologic's employees using Microsoft software during the relevant period were located outside the United States.

remitted on software that had been transferred for use outside the Commonwealth.[6]

The commissioner did not dispute that the vendors' abatement applications reflected the correct amount of sales tax that would have been due if the vendors had been permitted to apportion their remittances based on in-State use. Nonetheless, the commissioner denied the applications for abatement because the vendors had not complied with the regulations requiring that, to be entitled to apportionment, a purchaser must submit to the seller a "multiple points of use" certificate at the time of purchase or "no later than the time the transaction is reported for sales or use tax purposes." 830 Code Mass. Regs. § 64H.1.3(15)(a)(1), (2) (2006). In the transactions at issue here, Hologic had not presented such certificates to the vendors.

The vendors appealed from the commissioner's decision to the board on the ground that they had a right to apportionment under G. L. c. 64H, § 1. The vendors argued that the requirement of an exemption certificate was relevant only to determining whether they had a duty to collect the tax in the

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[6] "Vendors are responsible for collecting and remitting the sales tax and therefore are the party entitled to seek abatement." WorldWide TechServs., LLC v. Commissioner of Revenue, 479 Mass. 20, 29 (2018). As is required under G. L. c. 62C, § 37, the vendors agreed to credit Hologic any refunds they received from their applications for abatement.

first instance and to remit it at the time that the taxes were due but did not prohibit them from later seeking an abatement for the portion of taxes remitted to the Commonwealth that were attributable to out-of-State software uses.

In May 2017, the board decided in the commissioner's favor, and both sides requested findings of fact and a report from the board. See G. L. c. 58A, § 13. In March 2019, the board, on its own motion, reconsidered its decision and concluded that the vendors could seek apportionment by means of the general abatement process, despite not having received exemption certificates at the time of sale or when the tax initially had to be reported to the Commonwealth. The commissioner sought reconsideration. After a hearing and additional briefing, the board denied the commissioner's motion and granted the abatements in the amounts requested. The commissioner appealed, and we transferred the appeal to this court on our own motion.

2. Discussion. a. Statutory right to apportionment. General Laws c. 64H, § 1, provides that the commissioner "may, by regulation, provide rules for apportioning tax in those instances in which software is transferred for use in more than one [S]tate." The commissioner maintains that the provision does not create a statutory right to apportionment. Emphasizing the word "may" in the statutory language, the commissioner instead argues that the provision empowers him to determine

whether to allow apportionment of sales tax in circumstances where software is transferred for use in multiple States. The vendors, by contrast, contend that the statute creates a right of apportionment in such circumstances and authorizes the commissioner to decide only how to apportion the relevant sales tax. Concluding that the statute "grants taxpayers the right to apportion sales tax on a sale of taxable software that is transferred for use in more than one [S]tate," and that the commissioner's role is "to prescribe rules for that apportionment by regulation," the board agreed with the vendors and, accordingly, denied the commissioner's motion.

i. Standard of review. We consider the question whether G. L. c. 64H, § 1, creates a statutory right of apportionment de novo. See Citrix Sys., Inc. v. Commissioner of Revenue, 484 Mass. 87, 91 (2020) (Citrix) ("We review [the board's] conclusions of law, including questions of statutory construction, de novo" [citation omitted]). "Tax statutes are strictly construed, with ambiguity resolved in favor of the taxpayer." Id. at 92. "[B]ecause the board is an agency charged with administering the tax law and has expertise in tax matters, we give weight to its interpretation of tax statutes" (citation omitted). Shaffer v. Commissioner of Revenue, 485 Mass. 198, 203, cert. denied, 141 S. Ct. 819 (2020). Where the board's construction of a tax statute is reasonable, we will

defer to its interpretation. See AA Transp. Co. v. Commissioner of Revenue, 454 Mass. 114, 119 (2009). At the same time, principles of deference are not principles of abdication; "[t]he proper interpretation of a statute is a question of law for us to resolve" (citation omitted). Commissioner of Revenue v. Gillette Co., 454 Mass. 72, 76 (2009). "In doing so, '[t]he general and familiar rule is that a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.'" Id., quoting Commissioner of Revenue v. Dupee, 423 Mass. 617, 620 (1996).

ii. Statutory framework. General Laws c. 64H, § 2, provides that "[a]n excise is hereby imposed upon sales at retail in the [C]ommonwealth . . . of tangible personal property." Software, however, is not "tangible" within the plain meaning of that term. See America Online, Inc. v. St. Paul Mercury Ins. Co., 347 F.3d 89, 94-95 (4th Cir. 2003), quoting Webster's Third New International Dictionary 2337 (1993) (tangible means "capable of being touched; able to be perceived as materially existent [especially] by the sense of touch; palpable, tactile"). Software instead consists of a set of

instructions, directing a computer to perform specified functions or operations. See Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 447-448 (2007).

Prior to 2005, whether the sale or license of software was subject to sales tax depended on its method of delivery; software sold or licensed electronically was not taxed, while software delivered in a physical form (e.g., software loaded onto a compact disc) was. See Citrix, 484 Mass. at 92-94. In 2005, the Legislature amended G. L. c. 64H, § 1, in order to address this disparity by extending the statutory definition of "tangible personal property" to capture software that was transferred electronically. See St. 2005, c. 163, § 34. The statute currently provides:

> "A transfer of standardized computer software, including but not limited to electronic, telephonic or similar transfer, shall also be considered a transfer of tangible personal property."

G. L. c. 64H, § 1.

iii. Software used in multiple locations. Having permitted sales tax on software, even when transferred electronically, in 2005, the Legislature addressed another characteristic of software that makes it different from other types of personal property. Sales of personal property generally are "in the Commonwealth" if the purchaser takes possession of or title to the property in the Commonwealth.

G. L. c. 64H, § 1 (defining "sale"), § 2 (imposing sales tax on "sales at retail in the [C]ommonwealth"). If the purchaser does not take possession or title in the Commonwealth, the sale will not be subject to Massachusetts sales tax. See Citrix, 484 Mass. at 92-93.

This paradigm does not easily apply to software because, even though software has been deemed "tangible personal property," the place of transfer or possession often is not readily identifiable. Transfers of standardized software may not involve the actual transfer of title; rather, purchasers often will acquire a license or a right to use the software. See Rustad & Kavusturan, A Commercial Law for Software Contracting, 76 Wash. & Lee L. Rev. 775, 784, 826, 843 (2019). Moreover, standardized software can be (and often is) provided for use by multiple users within a business.[7] Such software may be accessed remotely from a server in one jurisdiction and made available concurrently to users in multiple jurisdictions.[8] See

[7] Oracle America's sale or license to Hologic of, for example, human resources software for 3,500 users, see note 4, supra, apparently was not meant to be used only by Hologic employees in the Commonwealth.

[8] Increasingly, software also is being sold "as a service," otherwise known as "software-as-a-service" (SaaS). Rustad & Kavusturan, 76 Wash. & Lee L. Rev. at 778-779. Through SaaS, a seller can deliver specific software applications to specific users on an on-demand basis. See id. at 779. Indeed, the "SaaS access contract is rapidly displacing licensing . . . because it enables user access through a provider hosted website, where the

id. at 837-839. Where software is used by multiple people in multiple States, it can be difficult to classify the location of the "sale" within the statutory scheme of G. L. c. 64H, § 2, which requires payment of sales tax for sales "in the [C]ommonwealth."

Recognizing that software may be used concurrently by individuals in different States, and that sales of software are often unaccompanied by a transfer of title, in 2005 the Legislature amended G. L. c. 64H, § 1, to provide:

> "The commissioner may, by regulation, provide rules for apportioning tax in those instances in which software is transferred for use in more than one [S]tate."

See St. 2005, c. 163, § 34. Given the focus of G. L. c. 64H, § 2, on sales "in the [C]ommonwealth," G. L. c. 64H, § 1, reasonably can be read, as the board concluded, to mean that the Legislature intended to allow taxpayers to apportion sales tax on software in situations in which software is transferred for use in more than one State, and that the method of apportionment would be based on the location of the software's use. Indeed, following the enactment of St. 2005, c. 163, § 34, the commissioner promulgated regulations setting forth such rules.

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customer does not need to install or maintain expensive [information technology] infrastructure to use and maintain the software." 1 M.L. Rustad, Computer Contracts § 2.07[1], at 2-631 (2020). The same sales tax classification issues posed by software licensing similarly are posed by SaaS. Compare Citrix, 484 Mass. at 88-89.

See, e.g., 830 Code Mass. Regs. § 64H.1.3(15)(a)(8) (2006) ("purchase of software loaded onto a server located in a single [S]tate that will be available for access by a purchaser's employees in multiple jurisdictions" is transaction eligible for apportionment); 830 Code Mass. Regs. § 64H.1.3(15)(a)(9) (2006) ("Delivery of a copy of the software is not necessary for the software to be 'concurrently available for use in more than one jurisdiction'"). "[B]ecause the board is an agency charged with administering the tax law and has 'expertise in tax matters,' . . . we give weight to its interpretation of tax statutes, and will affirm . . . [the board's] interpretation [if it] is reasonable." WorldWide TechServs., LLC v. Commissioner of Revenue, 479 Mass. 20, 26 (2018).

iv. Constitutional concerns. The commissioner focuses on the word "may" in the language added by St. 2005, c. 163, § 34, and argues that G. L. c. 64H, § 1, does not create a right to apportionment; rather, according to the commissioner, the statute affords him the discretion to decide not only how, but also whether, to apportion taxes on software transferred for use in more than one State. This interpretation, as set forth infra, raises separation of powers concerns and, thus, runs counter to the canon of constitutional avoidance. See Commonwealth v. Fremont Inv. & Loan, 459 Mass. 209, 213-214 (2011). When statutory language is susceptible of multiple

interpretations, a court should avoid a construction that raises constitutional doubts and instead should adopt a construction that avoids potential constitutional infirmity. See Jennings v. Rodriguez, 138 S. Ct. 830, 836 (2018); Chapman, petitioner, 482 Mass. 293, 305-306 (2019); Baird v. Attorney General, 371 Mass. 741, 745 (1977).

The Massachusetts Constitution vests the authority to tax exclusively in the Legislature. See art. 23 of the Massachusetts Declaration of Rights ("No subsidy, charge, tax, impost, or duties, ought to be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of the people or their representatives in the [L]egislature"); Part II, c. 1, § 1, art. 4, of the Constitution of the Commonwealth ("full power and authority are hereby given and granted to the said general court . . . to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the . . . [C]ommonwealth"). Article 30 of the Massachusetts Declaration of Rights prohibits the legislative, executive, and judicial branches from exercising the powers of the other branches. See Commonwealth v. Cole, 468 Mass. 294, 301 (2014). Thus, the Legislature may not delegate its constitutionally vested authority to tax to the commissioner. See art. 30; Commissioner of Revenue v. Molesworth, 408 Mass. 580, 581 (1990)

(determination of amount of tax is legislative function); Opinion of the Justices, 302 Mass. 605, 614 (1939) (legislative power to appropriate money cannot be delegated by Legislature).

At the same time, not all delegations of authority are improper. See Cole, 468 Mass. at 301 (rigid separation of powers is neither possible nor desirable). Delegation is constitutional so long as the legislative body provides an "intelligible principle" to direct the exercise of delegated authority. See Gundy v. United States, 139 S. Ct. 2116, 2123 (2019). "[T]he Legislature may delegate to an officer of the executive branch the working out of the details of a policy established by the General Court." Opinion of the Justices, 393 Mass. 1209, 1219 (1984). In so doing, the Legislature must provide clear standards to guide the exercise of delegated authority. See id. at 1220. "[N]o formula exists for determining whether a delegation of legislative authority is proper"; yet, it is clear that, while the Legislature may delegate "the implementation of legislatively determined policy," the Legislature may not delegate "the making of fundamental policy decisions" (citation and quotation omitted). Murphy v. Massachusetts Turnpike Auth., 462 Mass. 701, 710 (2012).

Under the commissioner's reading of G. L. c. 64H, § 1, the Legislature has delegated to the commissioner the ultimate

authority to decide whether to allow apportionment of sales tax on software sold in the Commonwealth and transferred for use outside the Commonwealth. Such a determination, however, represents a fundamental policy decision that cannot be delegated. See, e.g., Corning Glass Works v. Ann & Hope, Inc. of Danvers, 363 Mass. 409, 423-424 (1973) (improper delegation of price-setting power to private party where delegation did not provide governing policy or standard, participation of any public board or officer, notice, hearing, or judicial review); Opinion of the Justices, 334 Mass. 716, 720 (1956) (proposed bill that would have allowed fish and game board to appropriate funds among eleven categories within board's discretion would have been improper delegation); Attleboro Trust Co. v. Commissioner of Corps. & Taxation, 257 Mass. 43, 53 (1926) (tax statute providing that commissioner "may" grant abatement to taxpayer who paid illegal or excessive taxes was interpreted as requiring commissioner to grant abatement so as to avoid improper delegation). Compare Commonwealth v. Clemmey, 447 Mass. 121, 136-137 (2006) (no improper delegation of fundamental policy decision where legislative policy of balancing environmental protection and agriculture was clear, and delegation simply directed Department of Environmental Protection to work out details for implementation by defining "land in agricultural use" and "normal maintenance or

improvement"); First Fed. Sav. & Loan Ass'n of Boston v. State Tax Comm'n, 372 Mass. 478, 491 (1977) (no improper delegation where agency decision indirectly influenced amount of tax owed by savings and loan organization).

The commissioner relies on two other provisions of the tax code, G. L. c. 63, § 38, and G. L. c. 64H, § 8, both of which provide that the commissioner "may" exercise certain authority, to argue that the delegation he discerns in G. L. c. 64H, § 1, is permissible. Neither statute, however, supports the commissioner's position. Under G. L. c. 63, § 38 (j), the commissioner "may, by regulation, adopt alternative apportionment provisions" for the corporate income tax if the commissioner determines that the statutory apportionment provisions "are not reasonably adapted to approximate the net income derived from business carried on within this [C]ommonwealth by any type of industry group." In this statute, the Legislature has answered the policy question whether to apportion corporate income tax; the commissioner merely is authorized to construct, if he or she so chooses, alternative methods of apportionment consistent with the Legislature's policy. Thus, the statute does nothing to advance the commissioner's argument. The same is true regarding the second statute, G. L. c. 64H, § 8, on which the commissioner relies. Pursuant to that statute, the commissioner "may promulgate

regulations determining which services shall be deemed purchased for resale," and therefore not subject to the sales tax for "retail" sales. G. L. c. 64H, § 8 (i). Again, the Legislature has answered the policy question whether to exempt purchases for resale from the sales tax; the commissioner is authorized only to define, if he or she so chooses, the type of transaction that is considered a purchase for resale.

The board's construction of G. L. c. 64H, § 1, avoids the constitutional problems presented by the commissioner's proposal. In the board's view, the Legislature has determined the policy question whether to allow apportionment of the sales tax on software transferred for use in more than one State and delegated only the manner of implementation of the legislatively determined policy.[9] Because the commissioner's construction presents constitutional concerns, and because the board's does not, the board's construction is preferred. See Commonwealth v. McGhee, 472 Mass. 405, 413 (2015).

[9] The commissioner incorrectly relies on 15 W. 17th St. LLC v. Commissioner of Internal Revenue, 147 T.C. 557, 578 (2016), where the United States Tax Court mentioned the "hundreds, if not thousands" of permissive grants of authority in the Federal tax code that provide the Commissioner of Internal Revenue with the discretion to implement tax policy. Under the commissioner's interpretation of G. L. c. 64H, § 1, however, the commissioner would have the authority to decide tax policy, not merely to implement it.

Finally, to the extent that there is doubt as to whether G. L. c. 64H, § 1, created a statutory right to apportionment, we resolve that doubt in favor of the taxpayer. See Dupee, 423 Mass. at 622; DiStefano v. Commissioner of Revenue, 394 Mass. 315, 326 (1985). Where a statute does not plainly confer an authority to tax, we do not read in one that the Legislature chose not to include. See Commissioner of Revenue v. Oliver, 436 Mass. 467, 470-471 (2002). Accordingly, we conclude that G. L. c. 64H, § 1, creates a statutory right to apportionment for software transferred for use in multiple States.

b. Availability of abatement. The board determined that the vendors could exercise their statutory rights of apportionment under G. L. c. 64H, § 1, by seeking a refund for sales tax paid to the Commonwealth for software transferred for use outside the Commonwealth through the general abatement process, see G. L. c. 62C, § 37, despite the vendors' failure to follow the apportionment regulations. The commissioner contends that the vendors' noncompliance with the regulations precludes apportionment altogether.

i. Regulatory framework. Pursuant to G. L. c. 64H, § 1, the commissioner has established regulations for apportioning tax in those instances in which software is transferred for use in more than one State. "[A] properly promulgated regulation has the force of law and must be given the same deference

accorded to a statute." Global NAPs, Inc. v. Awiszus, 457 Mass. 489, 496 (2010). The commissioner's regulations allow purchasers and sellers to use "any reasonable, but consistent and uniform, method of apportionment that is supported by the purchaser's books and records as they exist at the time the transaction is reported for sales or use tax purposes." 830 Code Mass. Regs. § 64H.1.3(15)(a)(2). See 830 Code Mass. Regs. § 64H.1.3(15)(b) (2006). "A reasonable, but consistent and uniform, method of apportionment includes, but is not limited to, methods based on [the] number of computer terminals or licensed users in each jurisdiction where the software will be used." 830 Code Mass. Regs. § 64H.1.3(15)(a)(3).

The regulations set forth three procedures for payment of apportioned taxes. It is undisputed that none of them was followed by Hologic and the vendors. Under the first method, a purchaser who, at the time of purchase, knows the software will be available for use in more than one jurisdiction, may deliver to the seller an exemption certificate claiming multiple points of use. See 830 Code Mass. Regs. § 64H.1.3(15)(a) (2006). The certificate may be delivered at the time of purchase and "must be received by the seller no later than the time the transaction is reported for sales or use tax purposes." 830 Code Mass. Regs. § 64H.1.3(15)(a)(1). This shifts the burden of collecting, paying, or remitting the applicable sales tax from

the seller to the purchaser. See id. The purchaser then must remit the apportioned tax to the appropriate jurisdictions. See 830 Code Mass. Regs. § 64H.1.3(15)(a)(4). Hologic did not provide the vendors with an exemption certificate at the time of purchase.

Under the second method, where the seller knows that the software will be available for use in more than one jurisdiction but the purchaser has not provided the exemption certification required under the first method, the seller can work with the buyer to produce the correct apportionment. See 830 Code Mass. Regs. § 64H.1.3(15)(b). If the buyer certifies the accuracy of the apportionment and the seller accepts the certification, then the seller must remit the apportioned tax to the appropriate jurisdictions. See id. Hologic did not certify the accuracy of the apportionment, as would have been required under this method.[10]

Under the third method, a purchaser that holds a "direct pay permit" need not deliver an exemption certificate to the seller. Instead, the purchaser must remit the apportioned tax directly to the appropriate jurisdictions. See 830 Code Mass.

[10] The commissioner, however, does not dispute the accuracy of the apportionment.

Regs. § 64H.1.3(15)(d) (2006).[11] Hologic is not a direct pay permit holder.

Because Hologic and the vendors followed none of the three enumerated methods, the vendors collected from Hologic and timely remitted the sales tax owed on the full amount of the transactions; the vendors maintain, however, that they are not precluded from seeking apportionment through the abatement process now that Hologic has informed them that the software it purchased is available concurrently for use in multiple States. The board agreed with the vendors, and it concluded that "while the provisions of the Regulation set out methodologies for apportionment and relief of vendor liabilities, they do not prohibit apportionment through the abatement process."

ii. General abatement process. General Laws c. 62C, § 37, creates a general abatement remedy for taxpayers who have paid excessive taxes. See id. ("Any person aggrieved by the assessment of a tax . . . may apply in writing to the commissioner . . . for an abatement thereof . . . . [I]f the commissioner finds that the tax is excessive in amount or

[11] "The direct payment program is intended to allow certain large volume purchasers to purchase items without paying sales or use tax to the vendor at the point of sale and instead allowing the purchaser to pay the sales/use tax directly to the Department of Revenue on a monthly basis for all purchases made within that month." 830 Code Mass. Regs. § 64H.3.1(1)(a) (2019).

illegal, he shall abate the tax, in whole or in part, accordingly"); Electronics Corp. of Am. v. Commissioner of Revenue, 402 Mass. 672, 677 (1988). The burden to prove that the tax paid was excessive or illegal is on the taxpayer. See Boston Professional Hockey Ass'n v. Commissioner of Revenue, 443 Mass. 276, 285 (2005). Where a taxpayer is not able to prove overpayment, the taxpayer is not entitled to an abatement. See AA Transp. Co., 454 Mass. at 120-121.

In analyzing whether the regulations preclude the vendors from using the abatement process to seek refunds for the excessive taxes they paid, we draw a comparison to the certification procedures outlined in G. L. c. 64H, § 8. As mentioned, G. L. c. 64H, § 2, imposes an excise tax on "sales at retail in the [C]ommonwealth." General Laws c. 64H, § 8, in turn, establishes a presumption "that all gross receipts of a vendor from the sale of . . . tangible personal property are from sales subject to tax until the contrary is established." The burden is on the vendor to overcome the presumption of taxability "unless [the vendor] takes from the purchaser a certificate to the effect that the . . . property is purchased for resale" and timely makes the certificate available to the commissioner. See G. L. c. 64H, § 8 (a), (e); 830 Code Mass. Regs. § 64H.8.1(3), (4) (1993). Where a seller receives a certificate from the purchaser, the commissioner is not bound by

the presentation of the certificate and may verify by audit the accuracy of the tax return. See G. L. c. 62C, § 26 (b). By contrast, where a seller does not obtain a certificate from the purchaser, the seller may pursue a refund of excessive taxes paid through the general abatement process, if the seller shows that the items were purchased for resale, because such purchases are not subject to the sales tax. See D & H Distrib. Co. v. Commissioner of Revenue, 477 Mass. 538, 545-546 & n.8 (2017). We see no reason why the same would not be the case where a purchaser does not provide a vendor with a certification of multistate use of software as described in 830 Code Mass. Regs. § 64H.1.3(15) (2006). As with a vendor who may seek a refund for excessive taxes paid for sales that were destined for resale, but where the purchaser did not provide the requisite certification, a software vendor is not precluded by the purchaser's failure to provide a certification that software is to be used in multiple States from seeking an abatement.[12]

In support of his argument to the contrary, the commissioner purports to rely on 830 Code Mass. Regs. § 64H.1.3(15)(c), which provides that, if the requirements of none of the three methods for delivery of a multiple points of

[12] By the same token, where a seller receives a certificate from the purchaser, the commissioner may verify by audit the accuracy of the tax return. See G. L. c. 62C, § 26 (b).

use certificate have been met, the vendor must collect and remit the tax as provided under 830 Code Mass. Regs. § 64H.6.7 (2017). Title 830 Code Mass. Regs. § 64H.6.7(3)(a)(1), in turn, provides that, "[i]f the purchaser or the purchaser's agent takes possession of the property within Massachusetts, whether or not for redelivery or use outside Massachusetts, the sale is taxable." Nowhere in the language of 830 Code Mass. Regs. § 64H.1.3(15)(c), however, is there a statement that the tax cannot be apportioned through abatement. Rather, the provision requires the seller to pay the tax, when due, as if there were no apportionment. This requirement does not preclude the seller from later seeking a timely abatement, see G. L. c. 62C, § 37, once the apportionment between software users in various States has been determined.

The commissioner also argues that the time limits set forth in the regulations imply that apportionment through the abatement process "years later" is not available.[13] Two of the three methods the commissioner points to, however, have no express temporal component. Title 830 Code Mass. Regs.

[13] A taxpayer may file an application for abatement "at any time: (1) within [three] years from the date of filing of the return . . . ; (2) within [two] years from the date the tax was assessed or deemed to be assessed; or (3) within [one] year from the date that the tax was paid, whichever is later." G. L. c. 62C, § 37. Here, the vendors' applications for abatement were filed within the statutory limits.

§ 64H.1.3(15)(b) provides only that the seller may work with the buyer to produce the correct apportionment and to make a certification to that effect. The section does not demarcate expressly a point at which a purchaser and a seller no longer may work together to produce an apportionment. Indeed, a direct pay permit holder need not deliver an exemption certificate at all, and, in such cases, the purchaser must pay the apportioned tax itself. See 830 Code Mass. Regs. § 64H.1.3(15)(d). The provision does not state that a direct pay permit holder is precluded from seeking an abatement if an error related to apportionment happened to arise in one of the purchaser's monthly returns. Compare Raytheon Co. v. Commissioner or Revenue, 455 Mass. 334, 335 (2009) (allowing direct pay permit holder to seek abatement two years after purchase on ground that purchases were exempt from sales tax because they were purchased for resale).

Contrary to the commissioner's suggestion, interpreting the regulations as providing nonexclusive ways in which a taxpayer may obtain apportionment does not render the regulations meaningless. The regulations provide simple, efficient processes for taxpayers to use in seeking apportionment at the time the sales tax is due. If a taxpayer wants to avail itself of the benefits of paying only the apportioned tax when the tax is due, then the procedures set forth in the regulations must be

followed. Otherwise, the presumption that the full amount is taxable applies, and the seller must pay tax on the entirety of the sale when the tax becomes due. See G. L. c. 62C, § 16 (h) (vendors must report sales for tax purposes each month). Allowing a vendor later to seek an abatement for the apportioned amount does not render the regulations meaningless. We conclude, as did the board, that the regulations do not preclude taxpayers from achieving apportionment through the abatement process.

Decision of the Appellate Tax Board affirmed.