COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13013

ORACLE USA, INC., ORACLE AMERICA, INC., and MICROSOFT LICENSING GP,

Plaintiffs-Appellees,

v.

COMMISSIONER OF REVENUE,

Defendant-Appellant.

On Sua Sponte Transfer from the Appeals Court for Review of a Decision of the Appellate Tax Board

BRIEF OF COUNCIL ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND FOR AFFIRMANCE OF THE APPELLATE TAX BOARD'S DECISION

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Council On State Taxation states, pursuant to Mass. R. App. P. 17(c)(1), that it is a 26 U.S.C. § 501(c)(6) nonprofit, professional trade association, formed in 1969, with its headquarters in Washington, D.C. The Council On State Taxation does not issue stock or any other form of securities and does not have any parent corporation. The Council On State Taxation is governed by a Board of Directors, who are employed by its member companies and serve solely in their personal capacities.

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INTEREST OF *AMICUS*[1]

I. Council On State Taxation

The Council On State Taxation ("COST") is a nonprofit trade association based in Washington, D.C. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce. Today, COST has an independent membership of over five hundred multistate corporations engaged in interstate and international commerce, many of which conduct substantial business in Massachusetts and employ many Massachusetts citizens. COST's mission is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities, a mission it has pursued since its inception.

Over the past fifty years, COST has advocated for fair and equitable taxation of multijurisdictional businesses by educating and informing its membership, state legislators, tax administrators, and others of state and local tax issues impacting businesses.[2] COST also actively files *amicus curiae* briefs in cases before the United

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[1] Pursuant to Mass. R. App. P. 17(c)(5), COST hereby certifies as follows: no party or party's counsel authored this brief in whole or in part; no party, or party's counsel, or other person or entity contributed money that was intended to fund preparing or submitting this brief; and neither COST nor its counsel represents or has represented one of the parties to this appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

[2] Since 2010, COST has submitted thirteen comments on Massachusetts laws and regulations to the Commonwealth's Legislature and/or the Commissioner of Revenue. *COST Comments And Testimony*, COST, https://www.cost.org/state-tax-resources/cost-comments-and-testimony/ (last visited Jan. 8, 2021).

States Supreme Court and state courts, including within the Commonwealth of Massachusetts. Notably, COST filed *amicus* briefs since 2008 addressing Massachusetts tax issues in *Raytheon Co. v. Commissioner of Revenue*, 455 Mass. 334 (2009), *Town Fair Tire Centers, Inc. v. Commissioner of Revenue*, 454 Mass. 601 (2009), and *Capital One Bank v. Commissioner of Revenue*, 453 Mass. 1 (2009).

II. Equitable Apportionment is Important to COST

Whether addressing the states' corporate income taxes, gross receipts taxes, or sales/use taxes, the tax imposed by a state should properly reflect a business's activity in the taxing state. The Appellate Tax Board ("ATB") was correct in allowing the taxpayers to apportion the sale of computer software used in and outside of Massachusetts through the abatement process under G.L. c. 62C, § 37. COST is concerned with laws and regulations that stifle taxpayers from accurately sourcing transactions for state tax purposes by failing to provide adequate time to make such determinations and to correct errors within a state's normal statute of limitations to request an abatement/refund of a tax. The ATB reached the correct decision by ensuring taxpayers can use the tax abatement process to fix sales tax sourcing errors after a tax return is filed with the Commissioner of the Department of Revenue ("Commissioner").

SUMMARY OF ARGUMENT

The sourcing of sales of electronically-delivered software for sales tax purposes is complex. Artificial barriers that restrict the ability of a taxpayer to correctly source

a transaction to Massachusetts run contrary to the Commonwealth's law and violate good tax administration principles. The ATB's decision reflects a solid understanding of these sourcing challenges and proper tax administration practices. The ATB's decision also furthers the Commonwealth's economic development environment as one of the leading states conducive to retaining and attracting high-technology businesses. Thus, the Court should affirm the ATB's decision.

ARGUMENT

I. The Rise of the Digital Economy Resulted in New State Tax Rules to Address the Complexities of Taxing Electronically-Delivered Software

Over the last two decades, the collision of innovative digital technology and traditional tax rules fostered some of the most challenging issues in state taxation. In particular, the cross-border sale of products and services provided by digital means and accessed and used simultaneously by anyone at anytime and anywhere has undermined the effectiveness of existing state tax rules. This is especially true with electronically-delivered software used by a business, which is expensive and often used at many locations simultaneously around the United States, if not the world.

State governments recognized the deficiencies of traditional tax systems by adopting new approaches that reflect the vast differences between the taxation of sales of tangible property and electronically-delivered software (as well as other digital products). One of the hallmarks of these new tax rules is prioritizing "reasonableness" and "flexibility" in sourcing multistate sales of digital products for

both state sales tax and income tax purposes. Because these issues are complex, it takes time for both sellers and their purchasers to coordinate determinations as to where electronically-delivered software is sourced for tax purposes.

A. Sourcing Sales of Business-to-Business Electronically-Delivered Software Creates Complex Tax Issues

Of the new tax issues arising from digital commerce, few have proved as problematic as the sourcing of electronically-delivered software sales to businesses for sales tax purposes. Prior to the advent of the Internet, sales taxation was primarily focused on the sale of goods purchased in tangible form (and a few services) delivered to consumers either in physical retail locations or shipped to their homes or business locations. The Internet, however, transformed the traditional supply chains for many goods and services, allowing both the content and delivery of products to occur by digital means outside the traditional retail and transportation infrastructure.

These changes have a dramatic impact on sales made by businesses to other businesses ("B-to-B Sales"). Sales made by businesses to household consumers (i.e., "B-to-C Sales") certainly raise novel issues, but these can more easily be addressed using the method applied to sales of wireless telecommunications services—defaulting to the customer's billing address. 4 U.S.C. § 124(8)(A). In contrast, there are several elements of B-to-B Sales of electronically-delivered software that create unique problems and challenges for state legislatures and state tax administrators.

First, with B-to-B Sales of electronically-delivered software, the business customer frequently utilizes the same product simultaneously at business locations in dozens of states (and nations). For instance, software that is utilized to track business operational and performance data can typically be accessed not just at the business purchaser's headquarters location, but also at its manufacturing, distribution, warehouse, sales and retail locations throughout the world. In contrast, B-to-B Sales of tangible property, such as automobiles and computers, may also have a wide geographic footprint, but the sale of these items can readily be sourced by the seller based on the "destination" or shipping address of each of the types of tangible property. With most electronically-delivered software used by businesses, however, the seller generally lacks knowledge of where the business purchaser will actually be using the software.

Second, the "sourcing" issue is exacerbated by the robust and diverse capacity of electronically-delivered software to perform a myriad of functions within a business purchaser's operations and supply chain. For instance, in the case at hand, the various software Oracle sold to Hologic included the following different applications and functionalities: risk management and compliance; customer relations management; human resource recruitment and analytics; database management and integration; financial consolidation and reporting; procurement, inventory, and supply chain management; product lifecycle management; and enterprise integration. SAF Exhibits 14 and 15. Similarly, the software Microsoft sold to Hologic provided support for the

purchaser's manufacturing, research and development, financial, sales and general administrative functions. SAF Exhibit 9. Hologic employees involved in disparate functions in its business used the electronically-delivered software purchased from Oracle and Microsoft simultaneously at multiple locations.

Third, these unique features of electronically-delivered software raise unprecedented questions related to where a B-to-B Sale is sourced. The possible locations to source the sale of the electronically-delivered software, depending on the design and delivery of the product, include: (1) the jurisdiction(s) of the remote server operated by the seller or a third party from which the software is accessed ; (2) the jurisdiction of the centralized server operated by the purchaser to which the software is electronically delivered; (3) the jurisdiction(s) of all of the purchaser's employees that utilize (or benefit from) the product; (4) the jurisdiction(s) of all the purchaser's employees' computers that have access to the product; (5) the jurisdiction(s) of all of the purchaser's customers that utilize (or benefit from) the product; and/or (6) the jurisdiction of the purchaser's primary business location or commercial domicile. Frequently, there is not a clear cut "destination" for sourcing the sales of such software similar to the one typically associated with sales of tangible personal property (i.e., the physical delivery location of the property). As a result, states are designing creative new statutory approaches which oftentimes lack uniformity. The new rules require taxpayers (both sellers and purchasers with a sales or use tax liability) to navigate complex laws and regulations to apply the appropriate sourcing rules for

sales taxes (and income taxes). This complexity, in turn, requires states to provide adequate time for those determinations to be reasonably made. The goal of a voluntary compliance system, especially related to such a novel and complex arena as digital taxation, is to "get it right," not to "get it quickly."

B. The Novelty and Lack of Uniformity of Sales Tax Rules for Sourcing Sales of Business-to-Business Electronically-Delivered Software Adds to the Complexity

A significant number of states have enacted special sales tax rules for sourcing B-to-B Sales of electronically-delivered software. For instance, in Massachusetts, the legislation and regulation at issue in this case for the first time provided for sales tax apportionment of a product that could be simultaneously used in more than one state. Previously, apportionment was a concept generally only associated with state corporate income taxes, where states provide a formula to divide the income of businesses operating in multiple states. The concept was not previously considered necessary or relevant to sales taxes because the sale of the property (or service) was generally determined to take place in just one state under rules that generally source sales of products to the "destination" state.

However, in 2005, Massachusetts enacted legislation (effective on April 1, 2006) that amended the definition of "tangible personal property" to impose sales tax on "a transfer of standardized computer software, including but not limited to electronic, telephonic, or similar transfer . . . ." St. 2005, c. 163, § 34, G.L. c. 64H, § 1. This amendment added the sales of electronically-delivered software to

Massachusetts' sales tax base.[3] Understanding such software could be utilized simultaneously by a business purchaser in more than one state, the Legislature also provided for apportionment of tax on sales of such software if used in multiple states and authorized the Commissioner to promulgate regulations to "provide rules for apportioning tax in those instances in which software is transferred for use in more than one state." St. 2005, c. 163, §§ 34, 61.

Subsequently, the Commissioner revised its sales and use tax regulation to provide for the apportionment of sales of software where a **purchaser** "knows at the time of its purchase of prewritten software that the software will be concurrently available for use in more than one jurisdiction." 830 C.M.R. 64H.1.3(15)(a). The Commissioner provided for a similar apportionment of sales where the **seller** "knows that the prewritten software will be concurrently available for use in more than one jurisdiction." 830 C.M.R. 64H.1.3(15)(b).

The revised regulation allows use of "any reasonable, but consistent and uniform, method of apportionment that is supported by … records as they exist at the time the transaction is reported for sales or use tax purposes." 830 C.M.R. 64H.1.3(15)(a). Paragraph (15)(a) further explains that:

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[3] Software delivered on a tangible medium (e.g., CD-Rom, magnetic tape, disc, etc.) to a customer in Massachusetts was already taxed as a sale of tangible personal property. *See* Massachusetts Letter Ruling 83-13 (Mar. 9, 1983); Massachusetts Letter Ruling 84-12 (Mar. 5, 1984); Massachusetts Letter Ruling 00-14 (Sept. 21, 2000).

> [a] reasonable, but consistent and uniform, method of apportionment includes, but is not limited to, methods based on number of computer terminals or licensed users in each jurisdiction where the software will be used. A reasonable, but consistent and uniform method of apportionment may not be based on the location of the servers where the software is installed.

The novelty of this new provision and the problem it addressed (simultaneous multistate use of a product or service) cannot be overstated. Never before had Massachusetts inserted an "apportionment" provision into its sales and use tax laws or regulations. Understanding businesses have different practices, the Commissioner adopted a rule that did not dictate the utilization of a particular formula by the seller (or purchaser), but rather allows for a range of formulas as long as they satisfied a "reasonableness" test. This alone, however, did not mitigate the complexity in sourcing the use of electronically-delivered software used by a purchaser in multiple states. Reasonably determining the proper locations to which to source such software requires intensive analysis by the purchaser of the use of the software by its employees within and without Massachusetts and continuous communication between the seller and purchaser. This is a process that takes time.

Massachusetts was not alone in recognizing that a transformative digital economy required new approaches to the sourcing of electronically-delivered software for sales tax purposes. The Massachusetts Multiple Points of Use ("MPU") approach is modeled on a former provision advanced by states participating in the development of the Streamlined Sales and Use Tax Agreement ("SSUTA"). The provision,

however, was ultimately removed from the SSUTA because of various administrative and political concerns raised by both businesses and states. While the concepts of the SSUTA MPU rule were also adopted in three other states (Minnesota, Ohio and Washington), there is still significant complexity because those state provisions are not entirely uniform. Other jurisdictions, including Indiana, New York, Pennsylvania, Tennessee, Texas, and Utah have differing provisions that also allow a seller to allocate or apportion the sales tax where the software (or other digital products) is used concurrently in multiple states.[4]

C. Novel and Complex Sales Tax Apportionment Rules Require Adequate Time for a Seller and Purchaser to Determine the Appropriate Method for Sourcing Sales of Software Used Simultaneously in Multiple States

There are several important commonalities between the Commissioner's rule on electronically-delivered software and other states' laws and regulations. First, the rules typically use the word "reasonable" to emphasize the flexibility and customization permitted in determining the appropriate sourcing rule. Second, these rules break new ground by replacing outdated sourcing concepts used to source tangible personal property with sourcing procedures that address products that can be simultaneously used in multiple locations. For sales tax purposes, some states have adopted an MPU rule (although not uniformly) to allow the apportionment of sales

[4] Harley Duncan, Brad Ashby & Angie Snaza, *Navigating Multiple Points of Use-A Practical Guide for Software Purchases*, 26 J. OF MULTISTATE TAX'N INCENTIVES, No. 10, Feb. 2017.

between states. This is similar to actions taken by states for corporate income tax purposes, authorizing the use of a "reasonable approximation" sourcing rule to address the complexities of sourcing digital products used in multiple states. That sourcing rule allows a taxpayer to choose a particular sourcing methodology that provides a "rough justice" rather than an exact division of its sales among jurisdictions.

A recent study of "reasonable approximation" corporate income tax rules in different states concluded:

> States that have implemented reasonable approximation rules have generally kept the rules intentionally broad to apply on a case-by-case basis…To be clear, the **broad and flexible nature of a reasonable approximate rule** is not a symptom of the rule being underdeveloped or in need of specific definitions later. Instead, it is reflective of the need to have a rule that can be applied to as many circumstances as possible when more rigid rules, such as looking straight to a customer's billing address, fall short of capturing the taxpayer's actual market for its sales of other than tangible personal property.

Carley A. Roberts, Robert P. Merten III, & Malcolm A. Brudigam, *How to Be Reasonable When Reasonably Approximating the Market: Part I*, 99 TAX NOTES ST. 7, 13 (2021) (emphasis added).

The Commissioner's attempt, through his regulation, to impose a short time limit for determining the appropriate sales tax methodology for sourcing B-to-B Sales of electronically-delivered software, however, runs afoul of any attempt to be reasonable or flexible. Placing a time constraint of 20 days following the end of a seller's sales tax reporting period in which the invoice is received by a purchaser is

inconsistent with the basic purposes of being reasonable and providing flexibility. Given how many different software invoices and applications there are in this case (and how many different state sales tax rules there are for apportioning B-to-B Sales) it is highly unrealistic and unfair to think the taxpayers (jointly, both the seller and purchaser) can make near-instantaneous judgments on where and how such software is utilized by the business purchaser. Denying the use of the abatement process here, to make an initial request for apportioning multistate use or to make an adjustment to a methodology previously chosen, undermines the foundation of the Commissioner's rule to provide for flexibility and reasonable approaches to complex sourcing issues with electronically-delivered software.

II. The Appellate Tax Board's Decision Is Consistent with the Purposes of Massachusetts' Rule for Apportioning Electronically-Delivered Software

The Commissioner is limited by the authority granted to it by the Legislature and cannot use his regulatory powers to limit other protections and remedies taxpayers have to seek redress for an erroneous overpayment of tax. The ATB's decision comports with good tax administration by fairly allowing the abatement procedure to be utilized in a manner similar to the Commissioner's ability to assess additional tax due on a taxable sales tax transaction.

A. The Commissioner's Prohibition of the Taxpayer's Utilization of the Abatement Process Goes Beyond His Statutory Authority

The Commissioner asserts that when the Legislature amended its sales tax law in 2005 to impose a tax on electronically-transferred software, and to allow for the apportionment of such sales, it also empowered the Commissioner to eviscerate the Commonwealth's tax abatement law, G.L. c. 62C, § 37. The legislation does state "[t]he commissioner may, by regulation, provide rules for apportioning tax in those instances in which software is transferred for use in more than one state." G.L. c. 64H, § 1. This authority to promulgate rules for the apportionment of software used in more than one state, however, does not sanction the Commissioner's attempt to bar or cut-off a taxpayer's right to utilize existing abatement procedures provided for in G.L. c. 62C, § 37. Allowing the Commissioner to provide guidance on apportionment does not also simultaneously grant the Commissioner the ability to abrogate other independent administrative provisions in the Commonwealth's tax laws.

The Commissioner asserts compliance with its MPU certificate rule, 830 C.M.R. 64H.1.3(15)(a)(1), precludes the ability for a taxpayer to use the abatement process, G.L. c. 62C, § 37. However, this is not the authority the Legislature provided to the Commissioner, nor is it explicitly addressed in the Commissioner's rule.[5] The

[5] The MPU certificate rule, 830 C.M.R. § 64H.1.3(15)(a)(1), states in part "a certificate claiming multiple points of use must be received by the seller no later than the time the transaction is reported for sales or use tax purposes." The rule only puts a limitation on

legislation only authorized the Commissioner to promulgate rules to address the apportionment of software used in more than one state. The Commissioner is not authorized to go beyond that scope to impose time limitations on when a taxpayer can provide evidence that electronically-delivered software was purchased for use in multiple states and restrict Massachusetts' tax abatement law. COST does not seek to undermine the ability of the Commissioner to promulgate rules addressing such apportionment. Instead, we strongly dispute the Commissioner's powers to limit or preclude a taxpayer's right to correctly apportion the sales tax through the abatement process.

Confusing matters, the Commissioner raises *AA Transportation Co., Inc. v. Commissioner of Revenue*, 454 Mass. 114 (2009), as apparent authority where this Court held the abatement process under G.L. c. 62C, § 37 could not be used. Brief of the Defendant-Appellant at 42-43. That fact pattern, however, is quite different from the situation at hand. In *AA Transportation*, it was noted that a taxpayer was required to hold a certificate from another agency (Department of Telecommunications and Energy) as a prerequisite for eligibility for a sales tax exemption pursuant to G.L. c. 64H, § 6(aa). *Id.* at 116. The issue was not an apportionment of tax on software used within and outside the Commonwealth, but whether the taxpayer was, at the time of

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the time period for an MPU certificate, it does not reference the tax abatement law nor does it prohibit apportionment altogether when established after the MPU deadline.

purchase, a holder of a certificate from another agency and thus an exempt entity. Denial of the taxpayer's abatement was held proper in *AA Transportation* because the taxpayer did not satisfy the prerequisite conditions that it be certified before it could claim an exemption. There is no such requirement in the case at hand.

The Commissioner's position is not only contrary to the statutory authority granted to it to provide for sales tax apportionment but is also inconsistent with the purposes of the new rules for apportioning B-to-B Sales of electronically-delivered software. As discussed above, the hallmark of the new approach to digital commerce is to provide for reasonableness and flexibility in addressing the complexities of sourcing the sale of these products. To that end, severely restricting the time within which a seller and purchaser can determine the need for, and means to achieve, apportionment of the multistate utilization of B-to-B Sales of electronically-delivered software is unreasonable and serves no legitimate tax policy purpose. In fact, quite the opposite, it completely undermines the original intent of the statute to replace outdated sourcing rules that apply to tangible property sales with more innovative and flexible sourcing rules that should apply to electronically-delivered software.

B. The Appellate Tax Board's Decision Applied an Even-Handed Approach to Abatement and Assessment

In furtherance of COST's mission, COST began issuing a scorecard on the states' administrative tax practices in 2001, which was last updated in December 2019.[6] The scorecards do not focus on subjective evaluations of a revenue agency, but on objective laws and regulations that guide state administrative revenue agencies. *Id.* at 5. Overall, Massachusetts did not fair badly; its overall grade was a "B-." *Id.* at 8. One of the measurements consistently reviewed in the COST scorecard is even-handed statutes of limitations for refunds and assessments. Fortunately, Massachusetts was noted in the COST scorecard as generally having even-handed statutes of limitations—three years for both assessments, G.L. c. 62C, § 26(b), and refunds (abatements), G.L. c. 62C, §§ 26, 37. Reflecting the importance of the states having even-handed statutes of limitations, COST also has a "Fair, Efficient, and Customer-Focused Tax Administration" policy position approved by its Board of Directors which provides in part:

> Statutes of limitation should apply equally to assessments and refund claims. Requiring taxpayers to meet one statute while the tax administrator is granted additional time is unfair and should not be tolerated in a voluntary tax system. Extension of the statute of limitations for federal adjustments should apply equally for assessments and refunds. Claims for

[6] Douglas L. Lindholm & Fredrick J. Nicely, *The Best and Worst of State Tax Administration*, COST (Dec. 2019), https://www.cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-studies-articles-reports/admin-scorecard-final-may-2020.pdf.

refund based on constitutional challenges should not be singled out for discriminatory treatment by shortening the statute of limitations.[7]

The ATB's holding that use of the abatement process under G.L. c. 62C, § 37 is allowed in connection with the apportionment of sales of electronically-delivered software is consistent with good tax administration. Even-handed statutes of limitations for assessment of additional tax due and for refunds (abatement) of overpaid tax is only fair—as the saying goes, "what's good for the goose is good for the gander." If there is an error in a taxpayer's apportionment of software used within and outside the Commonwealth for sales tax purposes, the Commissioner is authorized to issue an assessment to the taxpayer within the normal three-year statute of limitations period pursuant to G.L. c. 62C, § 26(b) to correct the error. Similarly, a taxpayer that incorrectly understates its use of software outside of the Commonwealth should be permitted to use the abatement process to correct an overpayment of sales tax.

Importantly, use of the abatement procedure is not without a cost to the taxpayer—a "heavy burden" is imposed on a taxpayer to establish it is exempt from the tax. *New England Legal Found. v. City of Boston*, 423 Mass. 602, 613 (1996). This

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[7] *Fair, Efficient, and Customer-Focused Tax Administration*, COST, https://www.cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-policy-positions/fair-efficient-and-customer-focused-tax-administration.pdf (last visited Jan. 8, 2021) (articulating COST's comprehensive policy position on fair, efficient, and customer-focused tax administration).

additional burden, however, does not authorize the Commissioner to completely strip a taxpayer's rights to utilize the abatement procedure in connection with its new rules for sourcing the sales of electronically-transferred software. Clearly, if that is to be done at all, it must be by the Legislature. In sum, the DOR's authority to issue assessments for up to three years to correct taxpayer errors should be fairly intertwined with a taxpayer's ability to correct an error for a similar time when a taxpayer realizes it overpaid the tax. The ATB's decision affirms these principles, while the Commissioner's stance is contrary to good tax administration and inconsistent with the statutory authority granted to him in this instance.

III. The Appellate Tax Board's Decision Promotes Massachusetts' Leadership as a High-Technology State

Upholding the ATB's decision is also consistent with Massachusetts' leadership as a top high-tech state. *See* Kevin Klowden et al., *State Technology and Science Index*, MILKEN INST. (2020), http://statetechandscience.org/State-Technology-and-Science-Index-2020.pdf (ranking Massachusetts #1 in its overall rankings since 2002 for its high levels of research and development funding, a strong biotech sector, a high concentration of computer and information science experts, and a well-funded higher education system). When the Legislature expanded its sales tax base to include non-tangible transfers of software, it appropriately put in an apportionment safeguard to ensure the tax was only imposed on software destined to be used in Massachusetts—not the location of a server that hosts the software or other out of state locations.

The Commissioner is attempting to water down this safeguard, which could negatively impact the Commonwealth's leadership as a high-tech state. The utilization of advanced software applications is a cornerstone of the ability of Massachusetts technology and biotechnology companies to maintain their leading-edge status in domestic and international commerce. The Legislature clearly understood this and enacted a statute to ensure that electronically-delivered software purchased by a business is subject to Massachusetts sales tax only to the extent that the software is actually used in the Commonwealth (and not to the extent used in other jurisdictions). This is sensible, prudent tax policy and aligns the taxation of sale of software purchased for business use with the taxation of sale of tangible personal property (which is generally subject to sales tax in Massachusetts on a "destination" basis).

CONCLUSION

The Commissioner is not authorized to use an apportionment rule to restrict when a taxpayer can seek an abatement of overpaid tax. To do so would run counter to the Legislature's intent to fairly impose the tax only on software that is used in Massachusetts. The legislative purpose was to allow certain software purchases to be apportioned based on the use of the software in the Commonwealth versus other locations. The Legislature did not authorize the Commissioner to impose an artificial time limit to preclude a taxpayer from correcting a software apportionment error by using the abatement procedure. The ATB correctly decided this case and this Court should affirm its decision.

Respectfully submitted,

COUNCIL ON STATE TAXATION

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Dated: January 11, 2021

CERTIFICATE OF SERVICE

I, Michael E. Porter, hereby certify that on January 11, 2021, I caused this brief to be filed electronically with the Supreme Judicial Court's e-filing system, and that all counsel of record are shown as receiving electronic notice.

/s/ Michael E. Porter
Michael E. Porter

CERTIFICATE OF COMPLIANCE

PURSUANT TO MASS. R. APP. P. 16(k)

I, Michael E. Porter, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of amicus briefs, including, but not limited to, the requirements imposed by Mass. R. App. P. 16 and Mass. R. App. 20. I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. App. P. 20 because it is produced in the proportional Garamond font at size 14 point, and contains 4623 total non-excluded words as counted using the word count feature of Microsoft Word.

/s/ Michael E. Porter
Michael E. Porter