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Supreme Judicial Court of Massachusetts,
Suffolk.

U.S. AUTO PARTS NETWORK, INC.
v.
COMMISSIONER OF REVENUE.

SJC-13283
|
Argued November 4, 2022
|
Decided December 22, 2022

Synopsis

Background: Commissioner of Revenue appealed decision by Appellate Tax Board, 2021 WL 5930709, granting abatement to taxpayer, which was nondomiciliary seller, as to full amount of use tax, interest, and penalties. Taxpayer applied to the Supreme Judicial Court for direct appellate review, which was granted.

Holdings: The Supreme Judicial Court, Wendlandt, J., held that:

[1] Supreme Court decision eliminating in-state physical presence requirement did not apply retroactively to permit imposition of use tax pursuant to regulation governing internet vendors for periods prior to decision in absence of physical presence in state, and

[2] taxpayer's use of mobile applications, website cookies, and content delivery networks did not constitute "physical presence" in Massachusetts.

Affirmed.

West Headnotes (16)

[1] Taxation Judicial review and relief against assessments

The Supreme Judicial Court defers to the Appellate Tax Board's expertise with respect to the interpretation of tax laws in the Commonwealth.

[2] Taxation Judicial review and relief against assessments

The Supreme Judicial Court will not reverse a decision of the Appellate Tax Board if it is based on substantial evidence and on a correct application of the law.

[3] Taxation Judicial review and relief against assessments

The Supreme Judicial Court will defer to the Appellate Tax Board's interpretation of a tax law if it is reasonable.

[4] Taxation Judicial review and relief against assessments

Principles of deference to the Appellate Tax Board are not principles of abdication; the proper interpretation of a tax statute is a question of law for the court to resolve.

[5] Administrative Law and Procedure Plain language; plain, ordinary, or common meaning

The Supreme Judicial Court accords the words of a regulation their usual and ordinary meaning.

[6] **Taxation** Power to Impose
Taxation Statutory Provisions and Ordinances

The authority to tax must be plainly conferred and any ambiguity must be resolved in favor of the taxpayer.

[7] **Taxation** Judicial review and relief against assessments

On review of a decision by the Appellate Tax Board, the Supreme Judicial Court applies its independent judgment to constitutional issues.

[8] **Commerce** Taxation in General
Constitutional Law Taxation

The due process and commerce clauses of the United States Constitution limit the States' authority to tax. U.S. Const. art. 1, § 8, cl. 3; U.S. Const. Amend. 14.

[9] **Constitutional Law** Taxation

As it pertains to States' taxing authority, due process centrally concerns the fundamental fairness of the proposed taxing activity by focusing on whether a taxpayer's connections with the taxing State are substantial enough to legitimate the State's exercise of power over it. U.S. Const. Amend. 14.

[10] **Commerce** Taxation in General

Dormant commerce clause does not prohibit a state from taxing interstate commerce altogether; to the contrary, interstate commerce may be required to pay its fair share of state taxes. U.S. Const. art. 1, § 8, cl. 3.

[11] **Commerce** Preferences and Discriminations

State regulations may not discriminate against interstate commerce, and state regulations that do so discriminate face a virtually per se rule of invalidity. U.S. Const. art. 1, § 8, cl. 3.

[12] **Commerce** Powers Remaining in States, and Limitations Thereon

States may not impose undue burdens on interstate commerce. U.S. Const. art. 1, § 8, cl. 3.

[13] **Commerce** Taxation in General

Even-handed state regulations applicable to taxes will be upheld unless burden imposed on interstate commerce is clearly excessive in relation to putative local benefit. U.S. Const. art. 1, § 8, cl. 3.

[14] **Commerce** Taxation in General

A court will sustain a state tax challenged under the dormant commerce clause so long as it (1) applies 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 the state provides. U.S. Const. art. 1, § 8, cl. 3.

[15] **Courts** In general; retroactive or prospective operation

United States Supreme Court decision in *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, which eliminated in-state physical presence dormant commerce clause requirement for a state to impose sales or use tax on a nondomiciliary seller, did not apply retroactively to permit imposition of use tax on nondomiciliary seller pursuant to regulation governing internet vendors for periods prior to *Wayfair* decision in absence of physical presence in state, even if seller satisfied sales thresholds in regulation, since regulation, by its own terms, limited its reach to nondomiciliary internet vendors that satisfied in-state physical presence test. U.S. Const. art. 1, § 8, cl. 3; 830 Mass. Code Regs. 64H.1.7(1)(b)(2) (2017).

[16] **Commerce** Particular subjects and transactions
Taxation Territorial limitations; nonresidents

Use of mobile applications, website cookies, and content delivery networks by taxpayer, which was nondomiciliary seller, did not constitute "physical presence" in Massachusetts required under dormant commerce clause to impose use tax pursuant to regulation governing internet vendors; in-state physical presence standard required substantial nexus, not some minimal nexus, fact that United States Supreme Court found physical presence rule unsuitable for modern commerce in *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, strongly suggested that use of mobile applications, website cookies, and content delivery networks would not constitute requisite physical presence, and such ambiguity would be resolved in taxpayer's favor. U.S. Const. art. 1, § 8, cl. 3; 830 Mass. Code Regs. 64H.1.7(1)(b)(2)(a)-(b) (2017).

West Codenotes

Prior Version Held Unconstitutional
830 Mass. Code Regs. 64H.1.7(1)(b)(2)(a), 64H.1.7(1)(b)(2)(b)

Commissioner of Revenue. Internet. Taxation, Commissioner of revenue, Abatement, Sales and use tax. Administrative Law, Agency's interpretation of regulation. Practice, Civil, Retroactivity of judicial holding. Retroactivity of Judicial Holding. Constitutional Law, Taxation.

Appeal from a decision of the Appellate Tax Board.

The Supreme Judicial Court granted an application for direct appellate review.

Attorneys and Law Firms

The following submitted briefs for amici curiae:

Julie E. Green, Assistant Attorney General, for Commissioner of Revenue.

George S. Isaacson (Martin I. Eisenstein & David Swetnam-Burland, of Maine, & Jamie E. Szal also present) for the taxpayer.

Ben Robbins & Daniel B. Winslow for New England Legal Foundation.

Tyler L. Martinez, of the District of Columbia, & Karen A. Pickett, Boston, for National Taxpayers Union Foundation.

Frank J. Bailey, Selena Fitanides, John C. La Liberte, Matthew Schaefer, & Richard L. Jones, Boston, for PioneerLegal, LLC.

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

Opinion

WENDLANDT, J.

***1** For more than half a century, the United States Supreme Court adhered to a "bright-line rule" as it pertained to the constitutional limits of a State's authority to impose an obligation on a nondomiciliary seller to collect and remit a sales or use tax when a consumer purchases its goods or services for use or consumption in the State. See National Bellas Hess, Inc. v. Department of Revenue of Ill., 386 U.S. 753, 758, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967) (Bellas Hess), overruled by South Dakota v. Wayfair, Inc., —— U.S. ——, 138 S. Ct. 2080, 201 L.Ed.2d 403 (2018) (Wayfair). See also Quill Corp. v. North Dakota, 504 U.S. 298, 317, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992) (Quill), overruled by Wayfair, supra. This rule, the Court maintained, was rooted in the dormant commerce clause of the United States Constitution, and it required the nondomiciliary seller to have some "physical presence" in the taxing State. Quill, supra at 314, 112 S.Ct. 1904. The rigid rule, the Court acknowledged, was somewhat arbitrary but had the benefit of encouraging settled expectations; a clear rule was necessary, the Court reasoned, so as to allow States and nondomiciliary sellers to conduct their affairs in reliance on the fixed constitutional test. Id. at 315, 112 S.Ct. 1904.

In 2018, urged by States, including Massachusetts, which argued that they were losing substantial tax revenues because the bright-line rule stifled their ability to tax the growing number of commercial transactions conducted over the Internet, see Brief for Colorado et al., as Amici Curiae Supporting Petitioner, at 5-12, Wayfair, 138 S. Ct. 2080 (Wayfair amicus brief), the Court altered course. In advocating for the change, the States represented to the Court that sellers' reliance interests were not a valid concern in its analysis whether to abrogate the decades old, bright-line test. Id. at 18-21. They assured the Court that any change to the constitutional test would not be applied retroactively to upset settled expectations. Id. at 19-20. States, they said, had either regulations that prohibited retroactive application, or procedures that would provide notice and a comment period before application, of any newly announced rule. Id. Accordingly, the Court concluded that the physical presence test no longer made economic sense and was no longer constitutionally required. Wayfair, supra at 2099.

Now, the Commissioner of Revenue (commissioner) asks us to construe a pre-2018 regulation -- namely, 830 Code Mass. Regs. § 64H.1.7 (2017), Vendors Making Internet Sales (regulation) -- to incorporate the Court's new rule retroactively so as to permit him to impose on a nondomiciliary seller the obligation to collect and remit a use tax for periods prior to the Court's decision. We decline to do so. Instead, we conclude that the regulation incorporates the bright-line rule set forth in the Court's pre-2018 jurisprudence and does not by its plain terms permit the commissioner to apply the Court's new rule to the tax period at issue in the present case. Further concluding that the existence of what the commissioner described as "electrons" in the Commonwealth does not satisfy the applicable physical presence test, we affirm the decision of the Appellate Tax Board (board) permitting the abatement requested by the nondomiciliary seller, U.S. Auto Parts Network, Inc. (U.S. Auto Parts).[1]

[1] We acknowledge the amicus briefs submitted by the National Taxpayers Union Foundation, the New England Legal Foundation, and PioneerLegal, LLC.

***2** 1. Background. a. U.S. Auto Parts. During the relevant tax period, U.S. Auto Parts was an online retailer that sold after-market automobile parts and accessories; it was headquartered in California.[2] U.S. Auto Parts did not own or lease any offices, facilities, inventory, or equipment in the Commonwealth. Nor did it have any employees or representatives in the Commonwealth. Instead, the company sold its products over the Internet through websites and mobile applications ("apps")[3] and sometimes by catalog, to customers throughout the United States, including consumers in the Commonwealth.[4]

[2] U.S. Auto Parts's competitors included auto parts retailers (like Advance Auto Parts, AutoZone, and NAPA Auto Parts), local independent retailers, and online retailers like Amazon.com.

[3] An app "is a program that facilitates performance of a task or retrieval of information"; it is "a data add-on for technology devices," commonly "handheld devices." Bell & Hughes, One Bad App Spoils the Bunch: Brand Protection in the App Era, 74 Tex. B.J. 218, 219 (Mar. 2011). Apps are, according to the commissioner's expert, "composed of bits -- electrons stored in charge traps on a silicon substrate" and "generally persist on a device until affirmatively and intentionally manually deleted." They can store data on the mobile device with the expressed or implicit permission granted by a user "when downloading and installing the app." The board found that "[t]he U.S. Auto Parts' apps were available for portable devices using either the iOS or Android operating systems" and that "[c]ustomers, including Massachusetts customers, could download U.S. Auto Parts apps from anywhere in the United States for use anywhere in the United States."

[4] U.S. Auto Parts sold its products through three primary

websites -- www.carparts.com, www.jcwhitney.com, and www.autopartswarehouse.com -- as well as secondary websites (collectively, U.S. Auto Parts's websites), and through the apps for the JC Whitney and Auto Parts Warehouse websites.

A customer could download an app onto a portable device from various locations with Internet connectivity, including from within the Commonwealth, for use anywhere with the requisite Internet access. The app would then be stored on the customer's portable device, including customer devices located in the Commonwealth. U.S. Auto Parts had its products delivered to customers by common carrier from locations outside of Massachusetts.

Like many online retailers,[5] U.S. Auto Parts used "cookies" on its websites.[6] After a customer accessed one of the company's websites, cookies were delivered to the Internet browser of the customer's digital device, and they recorded and maintained data about the customer's online activities.[7] U.S. Auto Parts used the customer information obtained through the cookies as part of its business.[8]

5 See Annot., Claims Concerning Use of "Cookies" to Acquire Internet Users' Web Browsing Data Under Federal Law, 36 A.L.R. Fed. 3d art. 5, § 2 (2018).

6 According to the commissioner's expert, "[t]he term 'cookie' is used in computer science to mean a piece of data (up to [four] kilobytes) that a computer receives at the time a website visitor downloads a web page from a web server, and automatically stores in [the computer's] long-term memory or 'hard drive.' " Cookies are comprised "of specific sequences of electric or magnetic charges, which humans have by convention agreed to interpret as alphanumeric characters based on character encoding schemes." "A cookie is held in a computer's hard drive by way of electrons stored in charge traps on a silicon substrate (on solid state hard drives), or magnetic charges stored in the magnetic alloy coating of a disk (on magnetic disk hard drives)." The "electric or magnetic charges persist on a computer's hard drive, even if the computer is not connected to any power source."

7 "Cookies are text files containing ... information about the user, such as the user's browsing history." Comment, Sharing More Than You Thought: Facebook Cannot Assert the Party Exception to Avoid Liability Under the Wiretap Act, 62 B.C. L. Rev. E. Supp. II-205, II-210 (2021). "A cookie text file stores content such as social media logins and passwords or online shopping data and saves information for when users visit the websites." Id. at II-210 n.24.

8 Cookies are placed either by the web page's host server (" '[f]irst party' cookies") or by "a different server than the one requested by the user, typically an unrelated advertiser or data processing provider, which gains access to a website visitor's computer through arrangements with the requested website's owner" (" '[t]hird party' cookies"). U.S. Auto Parts used both first party and third party cookies.

***3** U.S. Auto Parts also used content delivery networks (CDNs) operated and maintained by Akamai Technologies, Inc. (Akamai), and Cloudflare, Inc. (Cloudflare).[9] Copies of the computer code from U.S. Auto Parts's websites were placed onto Akamai's or Cloudflare's servers for delivery to website users, enabling these users to access the websites stored on those servers, rather than on the websites' host servers. U.S. Auto Parts did not control the location of servers used by Akamai and Cloudflare, but transactions on U.S. Auto Parts's websites have been traced to Akamai servers in Cambridge.

9 "A CDN is an infrastructure placed on top of the Internet that pushes content close to users." Lin, Internet Jurisdiction: Using Content Delivery Networks to Ascertain Intention, 24 Va. J.L. & Tech. 1, 24 (2020). "It is a large distributed system of multiple servers deployed all over the world, sometimes called edge or cache servers." Id. "A CDN allows people and businesses ... to deliver content faster and more reliably to target locations." Id. at 25. Specifically, a CDN "accelerates the delivery of websites and applications by caching content, ... which means it stores replicas of text, images, audio, and videos so that when a user requests certain data, that request can be served by a nearby server rather than a far-off origin server." Id. See Narechania, Network Nepotism and the Market for Content Delivery, 67 Stan. L. Rev. Online 27 (2014), for a discussion of the CDN market.

During the twelve months preceding October 2017, U.S. Auto Parts earned more than $500,000 in Massachusetts Internet sales from more than one hundred online transactions. At oral argument, the commissioner described U.S. Auto Parts's connections to the Commonwealth -- the apps, cookies, and CDNs -- as "electrons" existing in the Commonwealth; we consider that representation as well as the more detailed, technical definitions set forth supra in our analysis.

b. The assessment. In September 2017, the audit division of the Department of Revenue (department) sent a letter to U.S. Auto Parts, explaining that the department promulgated the regulation, effective on October 1, 2017, which the department believed would apply to U.S. Auto Parts.[10] Pursuant to the regulation, beginning on October 1, 2017, a nondomiciliary vendor that employed, inter alia, apps, cookies, or CDNs in connection with its sale of goods or services in the Commonwealth would be required to "register, collect, and remit Massachusetts sales or use tax" for the three months from October 1, 2017, to December 31, 2017, "if during the preceding 12 months, October 1, 2016 to September 30, 2017, the vendor had in excess of $500,000 in Massachusetts sales completed over the Internet and made sales resulting in a delivery into Massachusetts in [one hundred] or more transactions." 830 Code Mass. Regs. § 64H.1.7(3). Other relevant provisions of the regulation are discussed infra.

10 The department sent similar letters to 282 other Internet retailers.

According to the department's estimates, the letter advised, U.S. Auto Parts would likely meet the regulation's thresholds, triggering its application. The letter directed U.S. Auto Parts to register as a vendor through the department's website, MassTaxConnect,[11] by October 1, 2017, and indicate that it was an Internet vendor with no in-State location.

11 During the relevant tax period, MassTaxConnect was a free web-based application through which taxpayers could file tax returns and forms and make payments. After a vendor registered and provided its sales information, including exempt sales, MassTaxConnect would perform calculations to determine the amount of sales and use taxes to be paid. The vendor could then file returns and make payments directly through the application.

***4** U.S. Auto Parts neither registered nor filed use taxes for the period from October 1, 2017, to October 31, 2017 (the tax period at issue). In March 2018, following notice to U.S. Auto Parts of its failure to register and of the commissioner's intent to assess use taxes pursuant to the regulation, the commissioner issued a notice of assessment in the amount of $60,139.81. The next month, U.S. Auto Parts filed an application for abatement, which the commissioner denied in September 2019.

c. Procedural history. U.S. Auto Parts timely appealed to the board. On the parties' cross motions for summary judgment, the board decided in favor of U.S. Auto Parts, granting it an abatement as to the full amount of the tax, interest, and penalties. The board rejected the commissioner's argument that the Supreme Court's 2018 decision in Wayfair, 138 S. Ct. 2080, which as discussed infra abrogated the "physical presence" rule, applied retroactively to the tax period at issue. Instead, the board concluded that the Court's prior jurisprudence, limiting States to imposing an obligation to collect and remit a sales or use tax only on nondomiciliary sellers with an in-State physical presence, see Quill, 504 U.S. at 314, 112 S.Ct. 1904, governed its analysis. The board also determined that U.S. Auto Parts's use of apps, cookies, and CDNs did not constitute the physical presence required under Quill. The commissioner timely appealed, and U.S. Auto Parts applied to this court for direct appellate review, which we allowed.

[1] [2] [3] [4] [5] [6] [7]2. Analysis. a. Standard of review. "We defer to the board's expertise with respect to the interpretation of tax laws in the Commonwealth." VAS Holdings & Invs. LLC v. Commissioner of Revenue, 489 Mass. 669, 674, 186 N.E.3d 1240 (2022) (VAS Holdings). See Oracle USA, Inc. v. Commissioner of Revenue, 487 Mass. 518, 522, 168 N.E.3d 349 (2021) ("Because 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 and alteration omitted]). "We will not reverse a decision of the board 'if it is based on substantial evidence and on a correct application of the law.' " Macy's E., Inc. v. Commissioner of Revenue, 441 Mass. 797, 800, 808 N.E.2d 1244, cert. denied, 543 U.S. 957, 125 S.Ct. 454, 160 L.Ed.2d 319 (2004), quoting Bill DeLuca Enters., Inc. v. Commissioner of Revenue, 431 Mass. 314, 315, 727 N.E.2d 508 (2000). If the board's construction of a tax law "is reasonable, we will defer to its interpretation." Oracle USA, Inc., supra. "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.' " Id., quoting Commissioner of Revenue v. Gillette Co., 454 Mass. 72, 76, 907 N.E.2d 629 (2009). "[W]e accord the words of a regulation their usual and ordinary meaning." Warcewicz v. Department of Envtl. Protection, 410 Mass. 548, 550, 574 N.E.2d 364 (1991). "[T]he authority to tax must be plainly conferred and ... any ambiguity must be resolved in favor of the taxpayer." Commissioner of Revenue v. Oliver, 436 Mass. 467, 473, 765 N.E.2d 742 (2002). Finally, as it pertains to constitutional issues, "we apply our 'independent judgment.' " VAS Holdings, supra, quoting WB&T Mtge. Co. v. Assessors of Boston, 451 Mass. 716, 721, 889 N.E.2d 404 (2008).

b. Legal framework. i. Use tax statute. The Commonwealth imposes an excise tax on tangible

personal property purchased from a vendor for storage, use, or other consumption in the Commonwealth. See G. L. c. 64I, § 2. Responsibility for payment of the use tax generally falls on the purchaser, see G. L. c. 64I, § 3; however, in certain instances, the Commonwealth places that burden on the vendor, which must collect and remit the use tax. During the tax period at issue,

> ***5** "[e]very vendor engaged in business in the commonwealth and making sales of tangible personal property or services for storage, use or other consumption in the commonwealth ... shall at the time of making the sales ... collect the [use] tax from the purchaser.... The tax required to be collected by the vendor shall constitute a debt owed by the vendor to the commonwealth."

G. L. c. 64I, § 4, as amended through St. 2009, c. 166, § 26.

Amended in 1988, St. 1988, c. 202, § 19 (1988 amendment), the version of the statute applicable to the tax period at issue, and relevant to the issues in this case, defined a vendor "[e]ngaged in business in the commonwealth" as one

> "regularly or systematically soliciting orders ... for the sale of tangible personal property for delivery to destinations in the commonwealth; [or] otherwise exploiting the retail sales market in the commonwealth through any means whatsoever, including, but not limited to ... solicitation materials sent through the mails or otherwise ... [and] advertising ... in ... computer networks or in any other communications medium."

G. L. c. 64H, § 1 (made applicable to use tax pursuant to G. L. c. 64I, § 1, as amended through St. 1990, c. 121, § 57).

In response to the 1988 amendment, the commissioner issued Technical Information Release (TIR) 88-13, explaining that the 1988 amendment purported to expand the Commonwealth's jurisdiction to enable collection of sales and use taxes from nondomiciliary vendors "that regularly solicit orders for sales from Massachusetts customers, ... but that do not maintain a business location in the Commonwealth." See TIR 88-13 (Dec. 8, 1988). However, the commissioner advised the public that the department would "refrain from enforcing" the newly expanded taxing authority "until [F]ederal statutory or case law specifically authorizes each [S]tate to require foreign mail order vendors to collect sales and use taxes on goods delivered to that [S]tate." Id., citing Department of Revenue, 1988 Legislative Recommendations of the Commissioner of Revenue, at 134, 907 N.E.2d 629 (Nov. 1987).

[8] [9] [10]ii. Pre-2018 constitutional limitations regarding nondomiciliary sellers. The due process and commerce clauses of the United States Constitution limit the States' authority to tax.[12] This case implicates the limitations grounded in the commerce clause, which expressly authorizes Congress to "regulate Commerce ... among the several States." Art. I, § 8, of the United States Constitution. "It has been construed as having a negative sweep, referred to as the 'dormant' commerce clause, which prohibits States from levying 'taxes that discriminate against interstate commerce or that burden it by subjecting activities to multiple or unfairly apportioned taxation.' " VAS Holdings, 489 Mass. at 675 n.8, 186 N.E.3d 1240, quoting MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Dep't of Revenue, 553 U.S. 16, 24, 128 S.Ct. 1498, 170 L.Ed.2d 404 (2008). It is founded on structural concerns about the effects of a State's tax on the national economy; it reflects

> "a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."

Wayfair, 138 S. Ct. at 2089, quoting Hughes v. Oklahoma, 441 U.S. 322, 325-326, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979). Still, the commerce clause does not prohibit a State from taxing interstate commerce altogether; to the contrary, "interstate commerce may be required to pay its fair share of [S]tate taxes." D.H. Holmes Co. v. McNamara, 486 U.S. 24, 31, 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988).

12 The due process clause prohibits the taking of property without due process of law. Fourteenth Amendment to the United States Constitution, § 1. As it pertains to States' taxing authority, due process centrally concerns the fundamental fairness of the proposed taxing activity; it focuses on whether a taxpayer's connections with the taxing State are substantial enough to legitimate the State's exercise of power over it. See VAS Holdings, 489 Mass. at 675, 186 N.E.3d 1240, quoting MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Dep't of Revenue, 553 U.S. 16, 24-25, 128 S.Ct. 1498, 170 L.Ed.2d 404 (2008) (broad inquiry is "whether the [S]tate has given anything for which it can ask return"). On appeal, U.S. Auto Parts contends that retroactive application of the regulation would raise due process concerns. We need not reach this argument in view of our resolution infra.

***6** [11]Instead, two principles bind a State's authority to regulate interstate commerce. First, "[S]tate regulations

may not discriminate against interstate commerce." Wayfair, 138 S. Ct. at 2091. See, e.g., Philadelphia v. New Jersey, 437 U.S. 617, 618, 628, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978) (law prohibiting importation of most "solid or liquid waste which originated or was collected outside the territorial limits of the State" was unconstitutional because it "impose[d] on out-of-[S]tate commercial interests the full burden of conserving the State's remaining landfill space"). State regulations that do so discriminate face "a virtually per se rule of invalidity." Wayfair, supra, quoting Granholm v. Heald, 544 U.S. 460, 476, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005).

[12] [13]Second, "States may not impose undue burdens on interstate commerce." Wayfair, 138 S. Ct. at 2091. See, e.g., Kassel v. Consolidated Freightways Corp. of Del., 450 U.S. 662, 671, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981) (Iowa truck-length limitations unconstitutionally burdened interstate commerce because they significantly impaired Federal interest in efficient and safe transportation, and State's safety interest was illusory). Even-handed State regulations applicable to taxes will be upheld "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefit." Wayfair, supra, quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

[14]In view of these two principles, the Supreme Court has set forth a four-prong framework that governs the limits of State taxation of interstate commerce. Specifically, "[t]he Court will sustain a tax so long as it (1) applies 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 the State provides." Wayfair, 138 S. Ct. at 2091. See Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977).

Until 2018, the Supreme Court concluded that the "substantial nexus" requirement (prong one of the commerce clause framework) was satisfied only if a nondomiciliary entity had a "physical presence" in the taxing State. Compare Quill, 504 U.S. at 302-303, 112 S.Ct. 1904 (State precluded from imposing obligation to collect and remit use tax on nondomiciliary seller engaging "in regular or systematic solicitation of a consumer market in th[e] [S]tate" but lacking in-State physical presence), and Bellas Hess, 386 U.S. at 758, 87 S.Ct. 1389 (State regulation obligating nondomiciliary vendor to collect and remit use tax unconstitutional where vendor, which sent flyers and catalogs into State and used common mail carriers to deliver orders to in-State customers, otherwise lacked in-State physical presence), with Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 364, 61 S.Ct. 586, 85 L.Ed. 888 (1941) (commerce clause not violated where nondomiciliary seller had in-State retail stores), and Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62, 68, 59 S.Ct. 376, 83 L.Ed. 488 (1939) (commerce clause not violated where nondomiciliary seller had local agents).

For more than half a century, the Court drew a sharp distinction between "sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." Bellas Hess, 386 U.S. at 758, 87 S.Ct. 1389. See Goldberg v. Sweet, 488 U.S. 252, 263, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989) (fact that interstate telephone call terminated in State failed to provide substantial nexus absent physical presence of seller); D.H. Holmes Co., 486 U.S. at 26, 32-33, 108 S.Ct. 1619 (use tax permissible where nondomiciliary company had " 'nexus' aplenty" comprised of catalogs printed at company's direction outside State and shipped to prospective customers within State, and where company had stores and over $100 million in annual sales in State); Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981) (State levying severance tax on coal mined in State was permissible because it had obvious nexus); National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551, 559-600, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1977) (use tax on nonprofit soliciting advertising for monthly magazine had sufficient nexus because nonprofit had two offices in State, even if those offices played no part in taxed activity).

***7** Indeed, in 1992, approximately four years after the Commonwealth adopted the 1988 amendment, the Court considered a similar statute adopted by North Dakota that also purported to impose an obligation on nondomiciliary sellers that systematically transacted business in North Dakota to collect and remit a use tax despite not having a physical presence in the State. Quill, 504 U.S. at 301, 112 S.Ct. 1904. The Court declined to abrogate "the bright-line rule" that physical presence was required to satisfy the substantial nexus requirement of the commerce clause. Id. at 317, 112 S.Ct. 1904.

The Court acknowledged that the physical presence requirement "appears artificial at its edges," and that "[w]hether or not a State may compel a vendor to collect a sales or use tax may turn on the presence in the taxing State of a small sales force, plant, or office." Id. at 315, 112 S.Ct. 1904. Nevertheless, the Court concluded that that "artificiality" was "more than offset by the benefits of

a clear rule." Id. The rule, the Court reasoned, "firmly establishe[d] the boundaries of legitimate [S]tate authority to impose a duty to collect sales and use taxes and reduce[d] litigation concerning those taxes." Id.

Additionally, the bright-line rule "encourage[d] settled expectations and, in doing so, foster[ed] investment by businesses and individuals." Id. at 316, 112 S.Ct. 1904. The bright-line physical presence rule, the Court acknowledged, already had "engendered substantial reliance and ha[d] become part of the basic framework of a sizeable industry"; adherence to settled precedent, the Court reasoned, advanced the "stability and orderly development of the law," in keeping with the underpinnings of the doctrine of stare decisis. Id. at 317, 112 S.Ct. 1904, quoting Runyon v. McCrary, 427 U.S. 160, 190, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) (Stevens, J., concurring). Additionally, overruling the bright-line rule "might raise thorny questions concerning the retroactive application of ... taxes and might trigger substantial unanticipated liability." Quill, supra at 318 n.10, 112 S.Ct. 1904.

iii. Commissioner's response to Quill. In response to the Court upholding the physical presence rule in Quill, the commissioner revoked TIR 88-13; there was no authority, at that time, permitting imposition of an obligation to collect and remit use taxes on nondomiciliary sellers without a physical presence in the State. See TIR 96-8 (Oct. 16, 1996). Contemporaneous with the revocation, the commissioner affirmed that he would enforce the definition of "engaged in business in the commonwealth" contained in the 1988 amendment only "to the extent allowed under constitutional limitations." Id.

Nevertheless, twenty-five years after Quill was decided and with no Federal statute or Supreme Court decision abrogating Quill or the physical presence bright-line test, the commissioner adopted the regulation.[13] 830 Code Mass. Regs. § 64H.1.7. Not surprisingly, the commissioner tied the scope of the regulation to the then-existing Federal limitations on States' taxing authority as set forth in Quill -- namely, the requirement of the bright-line physical presence rule.[14] Specifically, the regulation provided:

> "Dormant Commerce Clause. The provisions of [G. L. c. 64H, § 1,] are enforced to the extent allowed by the 'physical presence' dormant Commerce Clause standard as set forth in Quill Corp. v. North Dakota, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), where a [S]tate sought to impose a use tax collection duty on an out-of-[S]tate mail order vendor on sales of tangible personal property shipped into the [S]tate. Unlike the mail order vendor at issue in Quill, Internet vendors with a large volume of Massachusetts sales invariably have one or more of the following contacts with the [S]tate that function to facilitate or enhance such in-[S]tate sales and constitute the requisite in-[S]tate physical presence...."

***8** 830 Code Mass. Regs. § 64H.1.7(1)(b)(2). The regulation set forth the commissioner's view that nondomiciliary Internet vendors with a certain threshold volume of sales to Massachusetts customers "invariably have one or more" contacts with Massachusetts that, in the commissioner's view, constituted in-State physical presence satisfying Quill. These contacts included the use of apps, cookies, and CDNs. See 830 Code Mass. Regs. § 64H.1.7(1)(b)(2)(a)-(b).[15] Such contacts satisfied the physical presence rule, the commissioner concluded, even though sending catalogs and taking and delivering orders via the post office or common carrier did not. See Quill, 504 U.S. at 317, 112 S.Ct. 1904; Bellas Hess, 386 U.S. at 758, 87 S.Ct. 1389.

13 Prior to the regulation, the commissioner attempted to impose an obligation to collect and remit a use tax on nondomiciliary sellers through an administrative directive with substantially the same provisions as the regulation. See Department of Revenue Directive 17-1 (Apr. 3, 2017). The directive distinguished the "business and activities of Internet vendors" from those of the mail order vendors analyzed in Quill because "Internet vendors do not limit their contacts with the state to mail and common carrier." Id. at § IV(b)(ii)(B). Two national retail trade associations sought to enjoin enforcement of the directive on constitutional, statutory, and administrative procedural grounds. American Catalog Mailers Ass'n vs. Heffernan, Mass. Super. Ct., No. 2017-CV-1772 BLS1 (Suffolk County June 28, 2017). The injunction was granted on administrative procedural grounds in June 2017. Id. The commissioner then revoked the directive. See Department of Revenue Directive 17-2 (June 28, 2017).

14 In the department's "Notice of Public Hearing" on the proposed regulation in the Massachusetts Register, the department also tied the proposed regulation to Quill. Specifically, the notice stated:

> "A vendor that is engaged in making taxable sales in the [C]ommonwealth or that sells taxable tangible personal property or services or a combination of both for use in the [C]ommonwealth is subject to a sales or use tax collection duty when it is 'engaged in business in the [C]ommonwealth' within the meaning of [G. L. c. 64H, § 1,] and it meets the constitutional requirements as discussed in Quill Corp. v. North Dakota, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992). The provisions of [G. L. c. 64H, § 1,] are to be 'enforced to the extent allowed under the constitutional limits.' "

1344 Mass. Reg. 37-39 (July 28, 2017).

[15] The regulation specified one other category of contacts constituting physical presence: "contracts and/or other relationships with online marketplace facilitators and/or delivery companies resulting in in-[S]tate services including, but not limited to, payment processing and order fulfillment, order management, return processing or otherwise assisting with returns and exchanges, the preparation of sales reports or other analytics and consumer access to customer service." 830 Code Mass. Regs. § 64H.1.7(1)(b)(2)(c). The parties agreed that "U.S. Auto Parts had no contracts or other relationships with Internet marketplace facilitators or delivery companies resulting in in-[S]tate services performed in Massachusetts." Accordingly, we limit our analysis to whether the use of apps, cookies, and CDNs constitutes the requisite physical presence.

Assuming that a nondomiciliary Internet vendor had one or more of these contacts with the Commonwealth, the regulation purported to impose on the vendor an obligation to collect and remit a use tax for the period October 1, 2017, through December 31, 2017, if, during the preceding twelve months, the vendor "had in excess of $500,000 in Massachusetts sales from transactions completed over the Internet and made sales resulting in a delivery into Massachusetts in [one hundred] or more transactions." 830 Code Mass. Regs. § 64H.1.7(3)(a).[16]

[16] Thereafter, Internet vendors would be required to "register, collect and remit" the taxes "[f]or each calendar year beginning with 2018, if during the preceding calendar year [the Internet vendor] had in excess of $500,000 in Massachusetts sales from transactions completed over the Internet and made sales resulting in a delivery into Massachusetts in [one hundred] or more transactions." 830 Code Mass. Regs. § 64H.1.7(3)(b).

***9** iv. Abrogation of physical presence rule. In 2018, after the regulation was adopted, the Supreme Court altered its half-century course and overruled its decisions in Bellas Hess and Quill. Wayfair, 138 S. Ct. at 2099. In light of "far-reaching systemic and structural changes in the economy," id. at 2097, quoting Direct Mktg. Ass'n v. Brohl, 575 U.S. 1, 18, 135 S.Ct. 1124, 191 L.Ed.2d 97 (2015) (Kennedy, J., concurring), physical presence, the Court concluded, no longer was required to satisfy the "substantial nexus" prong of the requisite four-prong commerce clause analysis,[17] Wayfair, supra at 2099. Instead, "[s]uch a nexus is established when the taxpayer or collector avails itself of the substantial privilege of carrying on business in that jurisdiction" (alteration and quotation omitted). Id., quoting Polar Tankers, Inc. v. Valdez, 557 U.S. 1, 11, 129 S.Ct. 2277, 174 L.Ed.2d 1 (2009).

[17] As discussed in part 2.b.ii, supra, in addition to the substantial nexus prong, the commerce clause requires State tax laws to be fairly apportioned, nondiscriminatory against interstate commerce, and fairly related to the services the State provides. See Complete Auto Transit, Inc., 430 U.S. at 279, 97 S.Ct. 1076.

After reviewing the dramatic developments in the national economy resulting from the widespread use of the Internet for commercial transactions, the Court disavowed the physical presence test, reasoning that the test itself created market distortions exacerbated by the Internet revolution,[18] resulted in State budget shortfalls because it prevented States from reaching commercial sales from many online vendors, and had proved unworkable.[19] Wayfair, supra at 2097. "Each year, the physical presence rule [became] further removed from economic reality and result[ed] in significant revenue losses to the States." Id. at 2092.

[18] The Supreme Court explained that "[i]n effect, Quill has come to serve as a judicially created tax shelter for businesses that decide to limit their physical presence and still sell their goods and services to a State's consumers -- something that has become easier and more prevalent as technology has advanced." Wayfair, 138 S. Ct. at 2094. "If the Commerce Clause was intended to put businesses on an even playing field, the [physical presence] rule is hardly a way to achieve that goal," id., quoting Quill, 504 U.S. at 329, 112 S.Ct. 1904 (White, J., concurring in part), because "Quill puts both local businesses and many interstate businesses with physical presence at a competitive disadvantage relative to remote sellers," Wayfair, supra. "[I]t is certainly not the purpose of the Commerce Clause to permit the Judiciary to create market distortions." Id.

[19] See Wayfair, 138 S. Ct. at 2093, quoting Quill, 504 U.S. at 308, 112 S.Ct. 1904 ("it is an inescapable fact of modern commercial life that a substantial amount of business is transacted with no need for physical presence within a State in which business is conducted" [alterations omitted]); Wayfair, supra at 2097 ("The Quill Court did not have before it the present realities of the interstate marketplace.... The Internet's prevalence and power have changed the dynamics of the national economy").

Having abrogated the bright-light test for the "substantial

nexus" requirement, the Court declined to determine that the State regulation at issue passed constitutional muster under the remaining three prongs of the commerce clause framework; because the second and third prongs had not been litigated, the Court remanded for consideration to the State court for it to consider, in the first instance, "[t]he question ... whether some other principle in the Court's Commerce Clause doctrine might invalidate" the State tax at issue. Id. at 2099.

***10** The Court noted approvingly that the South Dakota law at issue "include[d] several features that appear[ed] designed to prevent discrimination against or undue burdens upon interstate commerce." Id.[20] Among them, the Court stated, the State law at issue by its expressed terms did not apply retroactively and its application had been stayed pending the decision by the Court whether to abrogate the physical presence requirement. Id. at 2089.

[20] The features were (1) the act's "safe harbor to those who transact only limited business in South Dakota"; (2) the provision ensuring that no obligation to remit the tax would be applied retroactively; and (3) South Dakota's adoption of the Streamlined Sales and Use Tax Agreement. Wayfair, 138 S. Ct. at 2099. The Streamlined Sales and Use Tax Agreement "standardizes taxes to reduce administrative and compliance costs" by "requir[ing] a single, [S]tate level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules." Id. at 2100. Additionally, it "provides sellers access to sales tax administration software paid for by the State." Id.

As discussed supra, a coalition of States, including Massachusetts, advocated for the Court to abrogate the physical presence test. See Wayfair amicus brief, supra at 3, 18-21. They disputed that "the possibility of retroactive tax liability constitute[d] a valid reason for maintaining the physical-presence rule," id. at 3, because States either had "regulations or other administrative guidance in place that [would] bar imposing collection obligations on remote retailers that [fell] within Quill's ambit," id. at 19, or had "normal procedures for implementing regulatory changes -- including advance notice -- [that would] provide adequate safeguards to abate any surprise that might accompany a new Supreme Court rule," id. at 3. The States assured the Court that retroactivity was not a concern because "[i]f South Dakota prevails here, there is no reason to suspect that the amici States will deviate from their normal administrative procedures -- including advance notice -- when implementing this Court's new post-Quill precedent." Id. at 20.

The States represented that "other legal and pragmatic safeguards" would prevent them from applying any new rule retroactively. Id. at 19. "For one, many States have regulations or other administrative guidance in place that bar imposing collection obligations on remote retailers that currently fall within Quill's ambit." Id. Additionally, States have "incentives to ensure that large-scale regulatory changes are implemented carefully and fairly," id.; providing ample notice of tax changes "benefits the States by giving them time to prepare intake procedures, increasing taxpayers' compliance, and satisfying potential State and [F]ederal due process requirements," id. at 20, citing Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 100, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993). The States represented that they were "well equipped to structure their tax laws to both comply with due process and avoid unconstitutional retrospective applications of new rules." Wayfair amicus brief, supra. Thus assured, the Court abrogated Quill. See Wayfair, 138 S. Ct. at 2099.

Notwithstanding the States' representations to the Court, the commissioner asks us to construe the regulation to incorporate the new Wayfair rule retroactively to permit him to impose on nondomiciliary sellers the obligation to collect and remit a use tax for periods prior to the Wayfair decision.[21]

[21] After the Wayfair decision, the Legislature superseded the regulations by statute, see St. 2019, c. 41, §§ 31-35, 106 (amending G. L. cc. 64H and 64I), and the commissioner issued a new regulation, see 830 Code Mass. Regs. § 64H.1.9 (2019). Pursuant to both the statute and the new regulation, remote retailers who are engaged in business in the Commonwealth using means including, inter alia, brick-and-mortar locations, catalogs, newspaper advertising, and computer networks, are required to collect and remit use taxes. See Internet Tax Freedom Act, 47 U.S.C. § 151 note (requiring same tax treatment of Internet and brick-and-mortar stores). See also G. L. c. 64H, § 1, as amended by St. 2019, c. 41, § 31 (defining "[e]ngaged in business in the commonwealth" to include, inter alia, "exploiting the retail sales market within the commonwealth through ... catalogs or other solicitation materials sent through the mails," or "computer networks or in any other communications medium, including through the means of an Internet website, software or cookies distributed or otherwise placed on customers' computers or other communications devices, or a downloaded application"); 830 Code Mass. Regs. § 64H.1.9(1)-(3) (2019) ("engaged in business in the Commonwealth" will be "construed to impose a collection duty to the fullest extent permitted by the U.S. Constitution and [F]ederal law," so that use of apps, cookies, CDNs, catalogs, billboards, or newspaper advertising, etc., will be considered contacts triggering use tax collection and remittance obligations).

***11** [15]c. The regulation incorporates the Quill physical presence requirement. There is no dispute that U.S. Auto Parts used apps, cookies, and CDNs to facilitate its Massachusetts sales during the tax period at issue; it also is undisputed that U.S. Auto Parts's volume of Massachusetts sales over the Internet and deliveries to Massachusetts customers satisfied the thresholds specified in the regulation. And the board noted that the parties agree that, having forgone imposition of a use tax on nondomiciliary vendors for more than thirty years following the Legislature's passage of the 1988 amendment, the commissioner could not rely on the amendment's broad "engaged in business" definition in the absence of the regulation. U.S. Auto Parts Network, Inc. vs. Commissioner of Revenue, App. Tax Bd. No. C339523, ATB 2021-385, 399 (Dec. 7, 2021). Accordingly, the principal issue before the board was whether the commissioner could by regulation impose a collection and remittance obligation on U.S. Auto Parts where its only in-State contacts were its use of apps, cookies, and CDNs.

The commissioner contends that the Court's decision in Wayfair permits him to impose the obligations set forth in the regulation to Internet vendors, like U.S. Auto Parts, so long as their sales meet the thresholds set forth therein; he argues that whether or not the use of apps, cookies, and CDNs constitutes a physical presence in the Commonwealth is not relevant to the application of the regulation because the Court's decision in Wayfair applies retroactively to permit him to saddle nondomiciliary vendors with the regulation's obligations for tax periods preceding the Supreme Court's decision in Wayfair. Relying on the Court's statement in Harper, 509 U.S. at 97, 113 S.Ct. 2510, that its decisions on issues of Federal law "must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the Court's] announcement of the rule," the commissioner contends that the Wayfair standard applies to U.S. Auto Parts because its case was pending when Wayfair issued. We disagree with the commissioner.

As set forth supra, the regulation, by its own terms, limited its reach to nondomiciliary Internet vendors that satisfied the physical presence test set forth in Quill. The regulation specifically stated:

> "The provisions of [G. L. c. 64H, § 1,] are enforced to the extent allowed by the 'physical presence' dormant Commerce Clause standard as set forth in Quill Corp. v. North Dakota, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), where a [S]tate sought to impose a use tax collection duty on an out-of-[S]tate mail order vendor on sales of tangible personal property shipped into the [S]tate."

840 Code Mass. Regs. § 64H.1.7(1)(b)(2). The regulation then posited that, "[u]nlike the mail order vendor at issue in Quill, Internet vendors with a large volume of Massachusetts sales invariably have one or more of the following contacts [(e.g., the use of apps, cookies, and CDNs)] with the [S]tate that function to facilitate or enhance such in-[S]tate sales and constitute the requisite in-[S]tate physical presence." Id. Thus, the regulation, by its own terms, cabined its enforcement to the parameters of Quill, which in turn limited States' ability to tax out-of-State sellers to only those with physical presence within the State. See Warcewicz, 410 Mass. at 550, 574 N.E.2d 364 ("we accord the words of a regulation their usual and ordinary meaning").

[16]d. The use of apps, cookies, and CDNs does not constitute physical presence. Consequently, we find ourselves embroiled in precisely the kind of "technical and arbitrary dispute[ ] about what counts as physical presence" that the Supreme Court sought to avoid in abrogating the now-defunct bright-line test. Wayfair, 138 S. Ct. at 2098. We thus turn to consider whether the use of apps, cookies, and CDNs constitutes physical presence in Massachusetts under Quill.

We begin our analysis with the board's conclusion that the use of apps, cookies, and CDNs does not constitute in-State physical presence as required by the regulation. U.S. Auto Parts Network, Inc., App. Tax Bd. No. C339523, ATB 2021 at 406-408. As set forth in part 2.a, supra, "[w]e defer to the board's expertise with respect to the interpretation of tax laws in the Commonwealth," VAS Holdings, 489 Mass. at 674, 186 N.E.3d 1240, so long as its construction is "reasonable," Oracle USA, Inc., 487 Mass. at 522, 168 N.E.3d 349. See id. (in view of its expertise in administering tax matters, "we give weight to [the board's] interpretation of tax statutes [and regulations]" [citation omitted]).

***12** In determining whether the board's conclusion is reasonable, the Supreme Court's decisions in Quill and Wayfair are instructive. In Quill, the Supreme Court considered contacts similar to those at issue here. Specifically, the nondomiciliary seller in Quill had licensed its computer software program to in-State consumers; the software, like the apps at issue here, enabled consumers to check the seller's inventories and prices and to place orders with the seller. Quill, 504 U.S. at 302 n.1, 112 S.Ct. 1904. In addition, the seller retained title to "a few floppy diskettes" that were present in the taxing State. Id. at 315, 112 S.Ct. 1904 n.8. The Court held that, while licensed software and diskettes might

constitute "some minimal nexus," id., such a slight presence did "not comprise the 'substantial nexus' required by the Commerce Clause," id. at 302, 112 S.Ct. 1904 n.1.

In Wayfair, 138 S. Ct. at 2095, the Supreme Court specifically referenced the use of modern technologies (such as, the use of apps, cookies, and CDNs) by remote sellers; far from concluding that such technologies constituted the required physical presence under Quill's bright-line test, the Court identified the ambiguity as to whether such technologies would satisfy the physical presence rule as a reason for abrogating the rule.

Indeed, the Court strongly suggested that such contacts would not constitute the requisite physical presence in the taxing State. The Court stated that it is an "inescapable fact of modern commercial life that a substantial amount of business is transacted with no need for physical presence within a State in which business is conducted" (alterations omitted). Wayfair, supra at 2093, quoting Quill, 504 U.S. at 308, 112 S.Ct. 1904. This is because remote sellers can employ apps, cookies, and CDNs that permit them to conduct such business. The Court recognized that, in the context of "the modern economy with its Internet technology" in which remote sellers can employ apps, cookies, and CDNs, the physical presence rule resulted in the anomaly of "a business with one salesperson in each State [needing to] collect sales taxes in every jurisdiction in which goods are delivered ... but a business with 500 salespersons in one central location and a website accessible in every State [not needing to] collect sales taxes on otherwise identical nationwide sales." Wayfair, supra.

The Court also lamented that the physical presence rule "treats economically identical actors differently, and for arbitrary reasons." Id. at 2094. In support of this conclusion, the Court relied on the example of two businesses that sell furniture online. Id. The first vendor "stocks a few items of inventory in a small warehouse" in the taxing State; under the physical presence rule, it would have to collect and remit a use tax on all of its sales, even those having nothing to do with the goods in the warehouse. Id. The second vendor "maintains a sophisticated website with a virtual showroom accessible in every State"; yet, under the physical presence rule, it escapes the use tax on the sale of the same goods despite its "pervasive Internet presence." Id.

In explaining the unsuitability of the physical presence rule for modern commerce, the Court noted:

> "[I]t is not clear why a single employee or a single warehouse should create a substantial nexus while 'physical' aspects of pervasive modern technology should not. For example, a company with a website accessible in South Dakota may be said to have a physical presence in the State via the customers' computers. A website may leave cookies saved to the customers' hard drives, or customers may download the company's app onto their phones.... Between targeted advertising and instant access to most customers via any internet-enabled device, 'a business may be present in a State in a meaningful way without' that presence 'being physical in the traditional sense of the term.' "

***13** Id. at 2095, quoting Direct Mktg. Ass'n, 575 U.S. at 18, 135 S.Ct. 1124 (Kennedy, J., concurring). "[T]he continuous and pervasive virtual presence of retailers today is, under Quill, simply irrelevant. This Court should not maintain a rule that ignores these substantial virtual connections to the State." Wayfair, supra. The Court's analysis, leading it to abrogate the physical presence rule, suggests its view that any "physical aspects" of technologies such as the use of apps, cookies, and CDNs would not satisfy the Quill standard.[22]

[22] In D & H Distrib. Co. v. Commissioner of Revenue, 477 Mass. 538, 540, 79 N.E.3d 409 (2017), we also suggested that nondomiciliary sellers, presumably using technologies such as apps, cookies, and CDNs to reach Massachusetts customers, would not satisfy Quill's physical presence requirement. We stated that, "[i]n light of the Supreme Court's physical presence requirement," in Quill, "if [an] out-of-State retailer of [an item] purchased online by [a] Massachusetts consumer had no physical business presence [in the State], it could not be compelled to collect Massachusetts sales tax." Id.

In fact, the Court presaged that States' efforts to "defin[e] physical presence in the Cyber Age," highlighting Massachusetts's regulation, id. at 2097, citing 830 Code Mass. Regs. § 64H.1.7, would lead to "arbitrary disputes about what counts as physical presence," Wayfair, supra at 2098. To the extent that the Court wavered on the issue whether the " 'physical' aspects of pervasive modern technology," like the use of apps, cookies, and CDNs, were sufficient physical contact under Quill, the board correctly resolved the ambiguity in favor of the taxpayer. See Oracle USA, Inc., 487 Mass. at 522, 168 N.E.3d 349, quoting Citrix Sys., Inc. v. Commissioner of Revenue, 484 Mass. 87, 92, 139 N.E.3d 293 (2020) ("Tax statutes are strictly construed, with ambiguity resolved in favor of the taxpayer"); Dental Serv. of Mass., Inc. v. Commissioner of Revenue, 479 Mass. 304, 310, 94 N.E.3d 802 (2018) ("we construe the use of 'covered persons' in [G. L. c. 176I, § 11,] 'strictly against the taxing authority' if the statute is ambiguous" [citation omitted]). See also Gould v. Gould, 245 U.S. 151, 153, 38

S.Ct. 53, 62 L.Ed. 211 (1917) ("In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt[s,] they are construed most strongly against the Government, and in favor of the citizen"); Lowell Sun Publ. Co. v. Commissioner of Revenue, 397 Mass. 650, 654, 493 N.E.2d 192 (1986) ("the 1982 [tax] regulations are hardly entitled to the deference we may grant an agency's interpretations of its own enabling statutes"). Cf. D & H Distrib. Co. v. Commissioner of Revenue, 477 Mass. 538, 545, 79 N.E.3d 409 (2017) ("In the absence of supporting evidence for a tax assessment, a taxpayer will be entitled to an abatement").[23,24]

23 Because the contacts identified in the regulation do not constitute physical presence under Quill, discovery into the extent of U.S. Auto Parts's placement of apps and cookies on Massachusetts customers' devices or the number of CDNs located in Massachusetts is unnecessary. The cases that the commissioner cites for the proposition that "physical presence" is a "term of art" requiring "a highly fact-driven inquiry" do not involve the virtual contacts at issue here. See Scholastic Book Clubs, Inc. v. Commissioner of Revenue Servs., 304 Conn. 204, 232-234, 38 A.3d 1183, cert. denied, 568 U.S. 940, 133 S.Ct. 425, 184 L.Ed.2d 255 (2012); Scholastic Book Clubs, Inc. v. Farr, 373 S.W.3d 558, 564 (Tenn. Ct. App.), cert. denied, 528 U.S. 1028, 133 S.Ct. 663, 184 L.Ed.2d 462 (2012).

24 The parties do not cite, nor are we aware of, any cases in our sister jurisdictions analyzing whether the use of apps, cookies, or CDNs constitutes physical presence under Quill. See, e.g., Overstock.com, Inc. v. New York State Dep't of Taxation & Fin., 20 N.Y.3d 586, 597, 965 N.Y.S.2d 61, 987 N.E.2d 621, cert. denied, 571 U.S. 1071, 134 S.Ct. 682, 187 L.Ed.2d 549 (2013) (relying on presence of in-State agent to conclude commerce clause does not bar New York's click-through nexus law); America Online, Inc. vs. Johnson, No. M2001-00927-COA-R3-CV, 2002 WL 1751434 (Tenn. Ct. App. July 30, 2002) (same).
Where sellers have not had agents in the taxing State, tax authorities in other jurisdictions have concluded that a nondomiciliary seller's use of another company's in-State servers to store and manipulate data, without more, is not enough to satisfy the physical presence requirement. See, e.g., Missouri Department of Revenue, Private Letter Ruling No. LR3819 (Apr. 11, 2007) (declining to find nexus when out-of-State company's only connection with Missouri was "data storage, data manipulation, or data processing at facilities within Missouri"); Texas Comptroller of Public Accounts, Policy Letter Ruling No. 201107220L (July 1, 2011) ("if the out-of-[S]tate company purchases Internet hosting services from an unrelated seller located in Texas who provides the service by use of servers that the seller owns or leases in Texas, and that is the only contact the out-of-[S]tate company has with Texas, no nexus is created"); Virginia Department of Taxation, Ruling of the Tax Commissioner No. 12-36 (Mar. 28, 2012) (suggesting that presence of company's "several [in-State] Internet servers" "would appear to create nexus" for State corporate income tax purposes); Virginia Department of Taxation, Ruling of the Tax Commissioner No. 00-53 (Apr. 14, 2000) (concluding that no nexus exists to tax nondomiciliary online auto parts retailer that contracts with in-State web hosting company, which "provide[s] power and bandwidth connections [and] other web hosting services, and Internet servers").

***14** Accordingly, we defer to the board's reasonable conclusion that the use of apps, cookies, and CDNs does not constitute in-State physical presence as required by the regulation.

Decision of the Appellate Tax Board affirmed.

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