STATE OF MAINE
KENNEBEC, ss.

MAINE BOARD OF TAX APPEALS
DOCKET NO. BTA-2022-11

[CORPORATE TAXPAYER],

Petitioner

v.

DECISION

MAINE REVENUE SERVICES,

Respondent

[Corporate Taxpayer], ("Company") appeals from a decision on reconsideration issued by Maine Revenue Service's ("MRS") upholding the assessment of Maine sales tax and interest for the period between July 1, 2018, and December 31, 2019 (the "Period"). The Company argues that the assessment must be canceled for the reasons related to burden of compliance. After considering the parties' arguments and the evidence presented, we uphold the assessment in full.

I. Background

At all relevant times, the Company was an [state other than Maine] Corporation and seller of tangible personal property. For the period at issue, the Company made sales of tangible personal property into Maine and throughout the United States through various ecommerce platforms, and the Company maintained no physical presence within Maine.

Prior to the period at issue, longstanding United States Supreme Court precedent prevented states from requiring sellers to collect sales tax unless the sellers maintained a physical presence within the taxing state. *See National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967). However, as soon as the 1990's, the United States Supreme Court began to question

the wisdom of *Bellas Hess*. *See Quill Corporation v. North Dakota*, 504 U.S. 298 (1992) (upholding the physical presence nexus standard for sales tax on grounds of *stare decisis* but observing that contemporary Commerce Clause jurisprudence might not dictate the same result). More recently, in *Direct Marketing Association v. Brohl*, 575 U.S. 1 (2015), Justice Kennedy observed in his concurrence that the application of the physical presence nexus standard in conjunction with the growth of internet sales had resulted in "startling" revenue shortfalls in many states, "unfairness" to local retailers and their customers who pay taxes at the register, and concluding that "it is unwise to delay any longer a reconsideration of the Court's [physical presence nexus standard]." *Id.* at 17-18.

In response to Justice Kennedy's concurrence in *Direct Marketing Association*, several states adopted legislation requiring remote sellers to collect and remit sales tax. Other states adopted legislation that would require remote sellers to collect and remit sales tax in the event the physical presence nexus standard was overturned. Effective October 1, 2017, the Maine Legislature adopted 36 M.R.S.A. § 1951-B entitled "Collection of tax by remote sellers," which required the collection of sales tax by certain remote sellers in the event the physical presence nexus was overruled by the Supreme Court. To provide guidance on the 2017 legislation, MRS issued General Informational Bulletin No. 107 on October 1, 2017, which referenced the new responsibilities of remote sellers codified at 36 M.R.S.A. §1951-B(3). On November 1, 2017, MRS issued a revision of Bulletin No. 43, entitled, "Registration of Out-of-State Sellers and Other Persons," which detailed the mandatory seller registration requirements contained in 36 M.R.S.A. § 1951-B.

In short order, the issue reached the United States Supreme Court, resulting in considerable national media attention.[1] On June 21, 2018, the United States Supreme Court reversed the physical presence nexus requirement for collection of sales tax. *South Dakota v. Wayfair, Inc.*, 585 U.S. ___, 138 S. Ct. 2080 (2018). On August 7, 2018, MRS posted guidance online that provided, in relevant part, MRS would begin to enforce section 1951-B for sales occurring on or after July 1, 2018.[2]

In advance of the *Wayfair* decision, the Company did not take steps to adapt its ecommerce platform to anticipate collecting sales tax outside its home state. As a result, in the wake of the *Wayfair* decision, the Company found itself in a position where it had nine days to begin collecting sales tax on its Maine sales. Following the *Wayfair* decision, the Company's Chief Operating Officer ("COO") commenced protracted meetings with accountants and attorneys to confirm the Company's obligation to collect and remit sales tax. Thereafter the Company became mired in a lengthy contract dispute with its contractor which computes the sales tax rate. The Company did not register as a remote seller of tangible personal property in Maine until October 2019. The Company did not collect any amount in sales tax from Maine-based customers before the date of October 1, 2019.

Subsequently, MRS requested, and The Company provided sales figures for Maine for the review period, which reflected taxable sales into Maine of $[amount]. Based upon the information provided, MRS determined that the Company passed the 200-transaction threshold set forth in 36 M.R.S.A. § 1951-B(3)(B) triggering the requirement to begin collecting and

[1] *See, e.g.*, David J. Herzig, *States Pay the Price When You Buy Online*, N.Y. TIMES, Jan. 1, 2018; Brent Kendall & Richard Rubin, *Supreme Court to Consider Internet Sales Tax Collection*, WALL ST. J., Jan. 12, 2018; Jess Bravin, *Trump Administration Joins States in Push to Expand Online Sales-Tax Collections*, WALL ST. J., Mar. 6, 2018; Adam Liptak, *Supreme Court Divided on Sales Taxes for Online Purchases*, N.Y. TIMES, Apr. 17, 2018; Jess Bravin, *Supreme Court Weighs Internet Sales-Tax Case*, WALL ST. J., Apr. 17, 2018.

[2] We note that, MRS had previously issued guidance on the section 1951. *See* MRS General Informational Bulletins No. 107 (October 1, 2017) and No. 43 (November 1, 2017).

remitting sales tax to Maine on July 1, 2018. MRS then issued an Audit Assessment Notice dated [date], for the period July 1, 2018, through December 31, 2019, for $[amount] in sales tax, $[amount] in interest, and no penalties. The Company timely requested reconsideration. On reconsideration, MRS upheld the assessment in full.

On appeal, the Company does not challenge MRS's application of the relevant statutory scheme nor the correctness of MRS's computation. Instead, the Company argues that the assessed amounts must be canceled because imposition of the Maine sales tax statute is unequitable under the circumstances and creates an undue burden upon interstate commerce. It is the Company's burden to show that it is entitled to relief. 36 M.R.S. § 151-D(10)(F). We consider the matter de novo as to facts and law. *Id.* § 151(2)(G).

II. Discussion

A. Sales Tax.

For the period at issue, a remote seller of tangible personal property was required to collect and remit sales tax on their Maine sales if the seller's gross sales from delivery of tangible personal property into Maine in the previous calendar or current calendar year exceeded $100,000 or the seller sold tangible personal property into Maine in at least 200 separate transactions in the previous or current calendar year. *See* 36 M.R.S.A. § 1951-B(3) (repealed September 19, 2019); *see also id.* § 1754-B(1-B) (effective September 19, 2019).[3] Although sales tax is a levy on the consumer, it is required to be collected by the retailer. *Id.* §§ 1753, 1812.

[3] These economic thresholds are substantially similar to those in *South Dakota v. Wayfair, Inc. See* 585 US___, 138 S. Ct. 2080, 2099 (2018) (finding sufficient nexus where sellers "deliver more than $100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods and services into the State on an annual basis").

The Company argues the assessment should be cancelled because it made reasonable efforts to bring itself into compliance and because its failure to collect and remit sales tax was due, in part, to lengthy communications with attorneys to confirm liability as well as protracted negotiation of a contract dispute with a service provider. Under these circumstances, according to the Company, it would be unequitable to uphold the assessment.

Although we acknowledge the Company's significant efforts to bring itself into compliance with section 1951-B and the financial burden of paying a tax it did not collect, Maine courts have consistently found that, where taxation is concerned, equitable considerations cannot be invoked. *See, e.g., Fitzgerald v. City of Bangor,* 1999 ME 50, ¶ 15, 726 A.2d 1253. Moreover, the Company points to no statutory provision or other authority that would empower the Board to cancel or abate the tax on these grounds, and we are aware of none. Accordingly, we make no modification to the assessment on this basis.

We note, however, that where circumstances warrant, MRS may abate a tax liability "if justice requires." *Id.* § 142. Relief under section 142 may be granted "whenever a written request has been submitted by a taxpayer within 3 years of the date of assessment." *Id.* MRS also has the authority to settle a tax liability for a lesser amount "upon the grounds of doubt as to liability or doubt as to collectability, or both . . . ." *Id.* § 143. As provided by each of those sections, however, MRS's decision to deny relief thereunder is not subject to appeal to the Board. *Id.* §§ 142, 143

B. Interest

The Company also seeks abatement of the interest contained in the assessment. Interest accrues automatically on the amount of tax due but unpaid, calculated from the last date prescribed for payment and compounded monthly. 36 M.R.S. § 186. Interest may be waived or

abated if the failure to pay the tax at issue "is explained to the satisfaction" of MRS or, on appeal, to the Board. *Id.* §§ 186, 151(2)(G), *Victor Bravo Aviation, LLC v. State Tax Assessor*, 2012 ME 32, ¶ 12-15, 39 A.3d 65. The purpose of interest is "to assure that the investment value of money inures to the benefit of the party that should have been paid the money when the payment obligation arose." *Id.* ¶ 14.

In the present case, the Company did not collect and remit sales tax during the period at issue because it was meeting with attorneys to confirm liability and because it was embroiled in a contract dispute. Although unfortunate, these circumstances do not change the fact that MRS was entitled to the time value of the tax from when it was due. No adjustment to the assessment on this point is warranted.

C. Undue Burden

As the question of whether enforcement of section 1951-B(3) created an "undue burden" upon interstate commerce is a constitutional one, we reach it last. *See, e.g., Dobbins v. Dobbins*, 2020 ME 73, ¶ 15, 234 A.3d 223. Generally, state taxing authority is limited by two constitutional principles. First, state taxation may not discriminate against interstate commerce; and second, states may not impose undue burdens on interstate commerce. See *South Dakota v. Wayfair, Inc.*, 585 US___, 138 S. Ct. 2080, 2090-91 (2018). We note, here, that the Company bears the heavy burden of proving unconstitutionality. *Goggin v. State Tax Assessor*, 2018 ME 111, ¶ 20, 191 A.3d 341).

The Company argues that the assessment must be canceled because the nine days between the announcement of the *Wayfair* decision and the enforcement of section 1951-B(3) was a time frame insufficient to allow remote sellers to implement collection of the Maine sales tax, thereby placing an undue burden on interstate commerce. We disagree.

We first consider whether Maine law, section 1951-B(3) provided sufficient notice so as not to unduly burden interstate commerce. The Maine Legislature adopted section 1951-B with an effective date of October 17, 2017.[4] Therein, the Legislature recognized that adoption of section 1951-B placed "remote sellers in a complicated position, precisely because existing constitutional doctrine calls the imposition of this requirement into question." 36 M.R.S.A. § 1951-B(1)(F). However, the Legislature clearly indicated that it intended the provisions of section 1951-B(3) to be immediately enforceable upon "a binding judgment, including, for example, a decision from the Supreme Court of the United States abrogating its existing doctrine." *Id.* § 1951-B(1)(F); *see also id.* §§ 1951-B(2), (7)-(8). The Company has not shown this notice to be insufficient.

The Company also argues, in effect, that implementation of the Maine law at issue placed too great a burden on a "small, family owned" business. We disagree. The South Dakota law considered by the *Wayfair* court "applies only to sellers that, on an annual basis, deliver more than $100,000 of goods or services into the State or engage in 200 or more separate transactions for the delivery of goods or services into the State." *See* 138 S. Ct. at 2089. The *Wayfair* court characterized businesses meeting these thresholds, not as small businesses, but as "large, national companies that undoubtedly maintain an extensive virtual presence." *Id.* at 2099. The Maine law at issue utilized the same thresholds as those considered in *Wayfair*. *See* 36 M.R.S.A. § 1951-B(3) (repealed September 19, 2019); *see also id*. § 1754-B(1-B). Accordingly, we cannot find that Company has shown the Maine law at issue imposes an undue burden on small businesses. Further, like the South Dakota law in *Wayfair*, the Maine law at issue provides "safe

[4] Article IV, Part three, Section 16, of the Maine Constitution, provides that acts become effective in 90 days after recess, except for emergency bills.

harbor" to sellers who transact only limited business in Maine. *Compare Wayfair,* 138 S. Ct. at 2100 *with* 36 M.R.S.A. § 1951-B(3).

The Company has not shown that the July 1, 2018 enforcement date of section 1951-B(3) imposed an unconstitutional burden on interstate commerce. No adjustment to the assessment is warranted on this basis. We uphold the assessment in full.

III. Decision

Based upon the evidence presented and the applicable law, we uphold the assessment of Maine sales and use tax and interest for the period at issue.

The Board may, in limited circumstances, reconsider its decision on any appeal. If either party wishes to request reconsideration, that party must file a written request with the Board within 20 days of receiving this decision. Contact the Appeals Office at 207-287-2864 or see the Board's rules, available at http://www.maine.gov/boardoftaxappeals/lawsrules/, for more information on when the Board may grant reconsideration. If no request for reconsideration is filed within 20 days of the date of this proposed decision, it will become the Board's final administrative action. If either party wishes to appeal the Board's decision in this matter to the Maine Superior Court, that party must do so within 60 days of receiving this decision. During the 60-day period in which an appeal may be filed with the Superior Court, the taxpayer may contact Maine Revenue Services at 207-624-9595 for a statement of the amount then due. After that 60-day period has expired, Maine Revenue Services will contact the taxpayer with an updated statement of the amount or amounts due at that time.

BY ORDER OF THE BOARD

Date: ________________ ______________________________, Chair/Member