STATE OF MAINE
KENNEBEC, ss.

MAINE BOARD OF TAX APPEALS
DOCKET NO. BTA-2022-6

[CORPORATE TAXPAYER]

Petitioner

v.

DECISION

MAINE REVENUE SERVICES,

Respondent

[Corporate Taxpayer] (the "Company") appeals the assessment of Maine sales tax and interest issued by Maine Revenue Services ("MRS") for the period between July 1, 2018, and April 30, 2019. While the Company concedes that the computation and assessment of sales tax and interest made by MRS are correct, the Company argues that the assessment must be canceled for the reasons of impossibility 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 a [non-Maine] Corporation making remote sales of tangible personal property throughout the nation, including Maine. The Company maintained no physical presence in Maine and made Maine sales exclusively through its website.

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 question reached the United States Supreme Court, resulting in considerable national media attention.[1] On June 21, 2018, the United States Supreme Court

[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,

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 the wake of the *Wayfair* decision, the Company found itself in a position where it had roughly a week to begin collecting sales tax on its Maine sales. Despite significant efforts, which included adopting new software, the Company was unable to collect Maine sales tax until after the period at issue.

For the period at issue, the Company collected no Maine sales tax on its taxable Maine sales of $[amount]. In 2020, MRS requested the Company's sales figures for Maine for the period January 1, 2018, through April 30, 2019, which the Company provided. Because the Company's Maine sales passed the 200-transaction threshold set forth in 36 M.R.S.A. § 1951-B(3)(B), MRS determined that the Company was required to begin collecting and remitting sales tax to Maine on July 1, 2018. Accordingly, MRS issued an Audit Assessment Notice for the period July 1, 2018, through April 30, 2019, for $[amount] in sales and use tax, $[amount] in interest, and no penalties. The Company timely appealed.

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 for the reasons discussed below. It is the Company's burden

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 section 1951. *See* MRS General Informational Bulletins No. 107 (October 1, 2017) and No. 43 (November 1, 2017).

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.

According to the Company, it was impossible for it to implement collection of Maine sales tax on July 1, 2018, a mere week after the publication of the *Wayfair* decision. We cannot agree.

"A venerable legal Latinism, *lex non cogit ad impossibilia*, teaches that the law does not compel the impossible." *In re Grand Jury Proceedings*, 744 F.3d 211, 212 (1st Cir. 2014). We are aware that the courts have applied this maxim in various types of cases. However, regardless of its applicability to tax matters, we cannot find that the Company's compliance with section 1951-B was in fact impossible. In adopting section 1951-B, well in advance of *Wayfair*, the Legislature made its intent to require remote sellers of tangible personal property to collect and

[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").

remit Maine sales tax in the event the physical presence standard was abrogated or overturned. 36 M.R.S.A. § 1951-B(1)(F); (2). Further, the Legislature found that

> [g]iven modern computing and software options, it is neither unusually difficult nor burdensome for remote sellers to collect and remit sales and use taxes associated with sales into Maine.

Id. § 1951-B(1)(E). Accordingly, even if impossibility were a defense to the collection and remittance of the sales tax (an issue we do not consider), we cannot find, under the facts presented, that it was in fact impossible for the Company to comply with section 1951-B. Accordingly, we make no modification to the assessment on this basis.

Next, the Company argues that, because Maine imposes a use tax on individuals for "the use or other consumption in this State of tangible personal property. . . the sale of which would be subject to [the sales tax]," it should be relieved of its liability for the sales tax it did not collect. *See* 36 M.R.S.A. § 1861. Instead, the Company argues, MRS should seek to collect the use tax from the consumers of its goods. We cannot agree. Maine courts have long held that the legal incidence of the sales tax, that is the obligation to collect it, is on the retailer and not on the consumer. *See Harvey F. Gamage, Shipbuilder, Inc. v. Halperin*, 359 A.2d 72, 76-77 (Me. 1976). Accordingly, we make no modification to the assessment on this basis.

Finally, the Company argues that the assessment should be canceled because the Company made reasonable efforts to bring itself into compliance with section 1951-B, and that the assessment unreasonably penalizes the Company for the delay in its collection. 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." *Victor Bravo,* 2012 ME 32, ¶ 14, 39 A.3d 65.

In the present case, the Company did not collect and remit sales tax on its Maine sales because of difficulties upgrading its ecommerce platform. 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. 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 from July 1, 2018, to April 30, 2019.

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.

Issued: April 28, 2023.