

STATE OF MAINE
KENNEBEC, ss.

MAINE BOARD OF TAX APPEALS
DOCKET NO. BTA-2015-2

[CORPORATE TAXPAYER],

Petitioner

v.

DECISION

MAINE REVENUE SERVICES,

Respondent

I. Introduction

[Corporate Taxpayer] (the “Company”), a Maine business corporation, appeals from an assessment made against it by Maine Revenue Services (“MRS”) in the original amount of \$[amount].¹ The assessment, dated [date], is for Maine sales and use tax, interest, and penalties for the period [year one] through [year three].

The issues remaining on appeal are (1) whether certain items of tangible personal property, purchased by the Company and installed onto the Company’s vehicles outside Maine before being brought into and used in Maine by the Company, are subject to Maine use tax, and (2) whether the penalties contained in the assessment must be abated. We adjust the assessment of tax and cancel the associated penalties.

¹ MRS canceled a portion of the assessment in its Decision on Reconsideration dated [date], and has agreed to cancel an additional portion of the assessment following the Company’s filing of this appeal. The remaining, contested portion of the assessment relates to [number of specially outfitted trucks] (the “Trucks”) acquired by the Company during the period at issue.

II. Background

At all relevant times, the Company was engaged in the business of [business], and it maintained a fleet of [specially outfitted] trucks (the “Trucks”) for that purpose. During the period at issue, the Company purchased [a number of] motorized truck cabs and chassis (the “Vehicles”) outside Maine, registered them with the Maine Bureau of Motor Vehicles, and paid Maine use tax on the purchase price of each Vehicle at the time of registration. The Company then had the Vehicles delivered to a truck body manufacturer, also outside of Maine, for installation of truck bodies, and then to a non-Maine hydraulic lift manufacturer for installation of lifts. Following installation of the truck bodies and lifts (collectively, the “Equipment”), the Vehicles were delivered to the Company in Maine for use. The Company was invoiced separately for each truck body and each lift by the respective manufacturer (the “Dealers”), although the invoices did not separately state the charges for materials, installation, or any other services associated with the sales. Nevertheless, the Company did not pay sales or use tax to Maine or any other state regarding the invoice amounts.

The Company contends that incorporation of the Equipment into the Vehicles to produce [the finished] Trucks constituted a fabrication service, subject to Maine service provider tax (“SPT”) if performed in Maine but non-taxable if performed out-of-state, as here. The Company further contends that under Maine SPT law, neither the purchase price nor the installation price of the Equipment is subject to Maine tax. MRS determined that the Company was liable for use tax on the purchase prices of the [number of] truck bodies and lifts, and issued the assessment on that basis. Furthermore, because the Dealers’ invoices did not separately state any services that might have been excludable from the taxable sale price, MRS based the assessment on the total

invoice amounts. The Company requested that MRS reconsider the assessment and then appealed to the Board when MRS upheld the assessment on reconsideration. We review the matter *de novo* pursuant to 36 M.R.S. § 151(2)(G). It is the Company’s burden to show that it is more likely than not that MRS erred in making the assessment. 36 M.R.S. § 151-D(10)(F).

III. Applicable Law

1. Sales and Use Tax

Maine sales tax is imposed “on the value of all tangible personal property and taxable services² sold at retail in this State.” 36 M.R.S. § 1811. Value is generally measured by the “sale price,” that is, “the total amount of the retail sale valued in money, whether received in money or otherwise.” *Id.* §§ 1811, 1752. The charge for any services that are a “part of a retail sale” of the tangible personal property or services sold are included in the taxable sale price, and no deduction is allowed “on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses or any other expenses.” *Id.* § 1752(14)(A). However, charges for labor or services used in installing, applying, or repairing the property are excluded from the sale price if separately stated. *Id.* § 1752(14)(B)(4).

Alternatively, Maine use tax is imposed “on the storage, use, or other consumption in this state of tangible personal property or a service” that would otherwise be subject to Maine sales tax if purchased in this state. *Id.* § 1861. As explained by the Maine Law Court, “[p]ersonal property purchased outside of Maine and brought into Maine for use is therefore subject to the

² The “taxable services” subject to sales tax, none of which are present in this case, are limited to:

the rental of living quarters in a hotel, rooming house or tourist or trailer camp; the transmission and distribution of electricity; the rental or lease of an automobile, a camper trailer, or a motor home . . . ; the rental or lease of a pickup truck or van with a gross vehicle weight of less than 26,000 pounds . . . ; the sale of an extended service contract on an automobile or truck . . . ; and the sale of prepaid calling service.

36 M.R.S. § 1752(17-B).

use tax, which serves as a complement to the sales tax.” *Blue Yonder, LLC v. State Tax Assessor*, 2011 ME 49, ¶ 8, 17 A.3d 667. Use tax is computed at the sales tax rate³ on the sale price or value that would be subject to sales tax, including any charges for services that are a part of the sale and excluding any charges for installation, application, or repair if separately stated. Pursuant to Maine tax law, liability for sales and use tax are levies on the purchaser. *Id.* §§ 1753, 1861.

2. Service Provider Tax on Fabrication Services

Separate and distinct from sales and use tax, Maine law also imposes a service provider tax (“SPT”)⁴ on the “value” of certain enumerated services⁵ *sold in this state*. *Id.* § 2552 (emphasis added). As with sales and use tax, the value subject to the SPT is measured by the sale price, which is defined as “the total amount of consideration . . . for which personal property or services are sold . . . valued in money, whether received in money or otherwise” *Id.* §§ 2552(2), 2551(15). Also as with sales and use tax, the sale price of the services subject to the SPT includes the cost of services that are “part of a sale,” and no reduction of the SPT taxable sale price is permitted “for the cost of materials used, labor or service cost, interest, losses *and any other expense of the seller.*” *Id.* § 2551(15) (emphasis added). Unlike sales and use tax, where the tax is a levy on the purchaser, liability for the SPT is on the seller. *Id.* § 2552(2).

³ Effective October 20, 2013, the sales tax rate increased from 5% of the sale price to 5.5%.

⁴ The rate of the SPT was 5% of the sale price of the services sold for all periods under appeal.

⁵ The “taxable services” subject to the SPT are limited to:

extended cable and satellite television services; *fabrication services*; rental of video media and video equipment; rental of furniture, audio media and audio equipment . . . ; telecommunications services; the installation, maintenance or repair of telecommunications equipment; private nonmedical institution or personal home care services; community support services for persons with mental health diagnoses; community support services for persons with intellectual disabilities or autism; home support services; ancillary services; and group residential services for persons with brain injuries.

36 M.R.S. § 2552 (enumeration omitted) (emphasis added).

Also, because use tax does not apply to SPT, there is no Maine tax liability for SPT taxable services performed outside Maine.

Fabrication services, which are subject to SPT under section 2552(1)(B), are defined as “the production of tangible personal property for a consideration *for a person who furnishes, either directly or indirectly, the materials used in that production.*” *Id.* § 2551(3) (emphasis added). For purposes of taxable fabrication services, the SPT law defines “production,” as

an operation or integrated series of operations engaged in as a business or segment of a business that transforms or converts personal property by physical, chemical or other means into a form, composition or character different from that in which it originally existed. . . . [and] includes manufacturing, processing, assembling and fabricating operations that meet the definitional requisites

Id. § 2551(3). Because the purchaser provides the materials used in production, only the *service* of fabrication is sold and is subject to tax.

In construing the statutory provisions relating to taxable fabrication services, MRS’s Sales Tax Instructional Bulletin No. 46 § 1 (“Bulletin 46”) clearly explains that fabrication services includes the assembly of components provided by the purchaser. Less clear, however, and without express statutory support, Bulletin 46 also states that “[f]abrication services [sic]⁶ does not include a charge for attaching, affixing, installing, or applying a completed item of tangible personal property to other tangible personal property or to real property as long as [sic]⁷ such services are separately stated *from the charge for tangible personal property sold in connection with the service.*” *Id.* § 3 (emphasis added). Section 3 of Bulletin 46 then provides examples of such services without reference to the sale of tangible personal property; Bulletin 46

⁶ Should probably read “The sale price of fabrication services does not include”

⁷ Should probably read “. . . as long as the charges for such services are separately stated”

does not directly address sales of tangible personal property in connection with sales of fabrication services.

IV. Analysis

1. The Equipment.

The Company seeks to avoid use tax on the Equipment—truck bodies and hydraulic lifts—that it purchased outside Maine and then brought into Maine for use following its installation into the Company’s Vehicles. The Company characterizes the installation of the Equipment as a fabrication service subject to SPT if sold in Maine but not subject to Maine tax if, as here, sold outside Maine.

A key element of “fabrication services” subject to SPT under section 2552(1)(B) is that the services must be provided “for a person who furnishes, either directly or indirectly, the materials used in that production.” *Id.* § 2551(3). Although the Company initially contended that it provided both the Equipment and the Vehicles for integration, *see* Company’s Brief dated [date] at page 7, the Company later takes the position that the Equipment was furnished by the Dealers. Company’s Reply Brief dated [date] at page 2-3. If, on the one hand, the Company purchased the Equipment and provided it to the Dealers for installation, following the language of section 2551(3), then the Company is liable for Maine use tax on the Equipment that it brought to Maine for use after installation into its Vehicles. If, on the other hand, the Equipment was furnished by the Dealers, then no fabrication services under section 2551(3) occurred because the Company was not “a person who furnishes, either directly or indirectly, the materials used in that production,” with the result that the Equipment was sold and installed by the Dealers outside Maine and subject to Maine use tax upon relocation to and use by the Company in Maine. Furthermore, under either scenario, because the cost of the installation services was not

separately stated from the price of the Equipment, the entire sale price stated on the Dealers' invoices was subject to use tax. *See id.* § 1752(14).

The Company argues that the definition of “fabrication services” under section 2552(1)(B) does not require the Company to provide *all* of the materials necessary for production of the Trucks. The Company contends that the Dealers may therefore provide some of the materials—the Equipment—for integration with the Company's Vehicles and still fall within the definition of fabrication services under section 2551(3). In support of its position, the Company points to the language of section 2551(15), which provides, in pertinent part, that the “*cost of materials used . . . and other expenses of the seller*” must not be excluded from the sale price of the fabrication services. (Emphasis added). Thus, the Company concludes, the cost of the Equipment may be a part of the sale price of fabrication services that it purchased outside Maine, and which are therefore not subject to taxation by Maine. The Company's interpretation of the applicable statutes is incorrect.

In construing a statute, we look first to its plain meaning. “In addition, we do not read exceptions, limitations, or conditions into an otherwise clear and unambiguous statute.” *Adoption of M.A.*, 2007 ME 123, ¶ 9, 930 A.2d 1088 (citations omitted). In considering the plain language defining “fabrication services” under section 2551(3), we have no occasion to add the limiting adjective “some” to the clear requirement that the customer—in this case the Company—furnish *the* materials used in production. *See Adoption of M.A.*, 2007 ME 123, ¶ 14, 930 A.2d 1088 (“As a general principal of statutory construction, if a statute does not contain ‘a limiting adverb such as ‘solely,’ we refuse to imply such a restriction.’”) (quoting *Eagle Rental, Inc. v. City of Waterville*, 632 A.2d 130, 131 (Me. 1993)). Furthermore, the Company's reliance on the definition of SPT sale price contained in section 2551(15) is misplaced. While it is true

that section 2551(15) requires that “the cost of materials used, labor or service cost, interest, losses and any other expense of the seller” be included in the sale price of services subject to SPT, fabrication services is only one of many such services subject to the tax. What distinguishes fabrication services from all other services subject to SPT is the requirement that, for fabrication, the purchaser must furnish, either directly or indirectly, the materials used in production. Thus, although the sale price of fabrication services must include all expenses of the seller, the materials used in production, having been provided by the purchaser, would not be one of those expenses.

Because the Company has not shown that the Equipment is excluded from Maine use tax, no adjustment to the assessment on this basis is warranted.

2. Installation Charges.

Although the sale price of the Equipment subject to Maine use tax includes the sellers’ labor and service costs, the installation charges are excluded “if separately charged or stated.” 36 M.R.S. § 1752(14)(B). Because the invoices for the Equipment did not break out the installation labor from other labor and materials, MRS included all expenses of the Sellers in the sale price subject to use tax. Following the date of assessment, the Company provided MRS with statements (the “Statements”) from the Sellers, separately stating the cost of the Equipment and the associated labor costs. Upon finding the Statements inadequate, however, MRS refused to recompute the assessment to allow for credit against the sale price. We have reviewed the Statements provided by the Sellers and we adjust the assessment as follows.

The Company supplied Statements from four Sellers: [Seller #1], [Seller #2], [Seller #3], and [Seller #4]. We find the Statements from [Seller #1] and [Seller #2] provide insufficient evidence to warrant adjustment to the sale price of the associated Equipment. Contrariwise,

however, we find that [Seller #3]’s itemization of labor and materials, in conjunction with the following language, constitutes a sufficient basis for subtracting the listed labor charges from the sale price of the respective Equipment: “In [date], [Seller #3] up fit a total of [number] trucks for [the Company]. [Number] of these trucks were upfit with [Type A lifts] and [number] were upfit with [Type B lifts].” Similarly, we find that [Seller #4]’s representation that it “assembled the [Type C lift] onto [the Company’s Vehicle]” sufficiently supports the subtraction of its subsequently listed labor charge from the sale price of the associated Equipment. On the evidence presented, no further adjustment to the assessment on this basis is warranted.

3. Penalties.

The Company also argues that the penalties contained in the assessment should be abated on the ground that the Company had substantial authority for its position that no Maine use tax was due. *See* 36 M.R.S. § 187-B(7)(F). Substantial authority for a tax position may consist of a well-reasoned construction of the statutes at issue. *See* Treas. Reg. §§ 1.6662-4(d)(2),(3) (cited by *John Swenson Granite, Inc. v. State Tax Assessor*, 685 A.2d 425, 429 n.3 (Me. 1996)). “The substantial authority standard is less stringent than the ‘more likely than not’ standard . . . but more stringent than the reasonable basis standard.” *Id.*

Here, although we find that the Company did not purchase fabrication services from the Sellers, we do not think that it was entirely unreasonable for the Company to have come to the conclusion that it had. Even though, as we have stated, it is not necessary for the definition of fabrication services under 36 M.R.S. § 2551(3) to state expressly that the purchaser is required to furnish *all* of the materials used in production, the Company’s erroneous position might well have been avoided if the definition of SPT sale price under section 2551(15)—which expressly includes “the cost of materials used” by the Seller—were to clarify that this is so *except in cases*

of fabrication services, where the materials used in production must be furnished by the purchaser. Furthermore, while attempting to clarify the issues surrounding fabrication and installation services, MRS's Bulletin 46 § 3 clouds them with an apparently extraneous reference to charges associated with the sale of tangible personal property. We also find that the examples used by MRS in its guidance bulletin are simplistic and misleading generally.

With these factors in mind, we find that the Company had substantial authority for its position that, by having the Equipment installed on its Vehicles outside Maine prior to their relocation and use in Maine, it did not incur a use tax liability in Maine, even though that position was incorrect. Accordingly, we abate the substantial understatement penalties contained in the assessment.

V. DECISION

Based on the evidence presented, we adjust the assessment of use tax with respect to the installation charges included in the sale price of the subject tangible personal property, and we abate the associated penalties in full. The assessment is upheld in all other respects.

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 motion 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 Company may

contact Maine Revenue Services at 207-624-9747 for the amount of tax that is currently due, together with any interest or penalties owed. After that 60-day period has expired, Maine Revenue Services will contact the Company with an updated amount of tax and any interest or penalties due at that time.

Issued by the Board: October 27, 2015