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The Appeals Court Of Massachusetts Clarifies The Exemption For Direct Mail Advertising

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The Appeals Court of Massachusetts recently affirmed an Appellate Tax Board ruling that direct mail advertisements sent by Bloomingdale's, Inc. to customers in the Commonwealth of Massachusetts were exempt from use tax. See *Bloomingdale's, Inc. v. Commissioner of Revenue*, No. 03-P-1002, 2005 WL 840363 (Mass. Ct. App. Apr. 12, 2005). The appellate decision clarifies the direct mail promotional advertising exemption for periods prior to August 9, 2004 when the statute providing the exemption was modified. The *Bloomingdale's* decision stands in contrast to a recent decision of the Appellate Tax Board in *Verizon Yellow Pages v. Commissioner of Revenue*, No. C262642, 2004 WL 2218373 (Sept. 24, 2004), finding that telephone directories were not exempt as direct mail advertising materials.

The Bloomingdale's Decision

Background and Procedural History

Bloomingdale's Inc. ("Bloomingdale's") is a national retailer engaged in the sale of apparel, accessories, and other merchandise. To advertise its products and sales in its stores, Bloomingdale's sent advertising materials by United States mail to current and potential customers in the Commonwealth of Massachusetts ("Massachusetts") at no charge. The materials were printed and assembled in Wisconsin and included information on product prices, effective dates for prices, and product descriptions.

Massachusetts law levies a use tax on the storage, use or consumption in the Commonwealth of taxable personal property or services. Mass. Gen. Laws ch. 64I, § 2. A use tax exemption, however, was provided for "[s]ales of printed material . . . including sales of *direct and cooperative direct mail promotional advertising materials* which are manufactured both inside and outside the commonwealth and which are distributed to residents of the commonwealth from locations both inside and outside the commonwealth" (hereafter the "§ 6(ff) exemption"). *Bloomingdale's*, 2005 WL 840363, at *1 (quoting Mass. Gen. Laws ch. 64H, § 6(ff)) (emphasis added). *Direct and cooperative direct mail promotional advertising materials* was defined as "discount coupons, advertising leaflets and similar printed advertising including any accompanying envelopes and labels which are distributed with promotional advertising materials of one or more than one business in a single package to potential customers,

at no charge to the potential customer, of the business paying for the delivery of such material." *Id.*

The Audit And The Commissioner's Position

Bloomingtondale's filed its tax returns without including use tax for its promotional materials. Following an audit, the Commissioner assessed use tax on Bloomingtondale's advertising materials prompting the company to file a protest with the Appellate Tax Board (the "Board"). The Commissioner considered Bloomingtondale's direct mail advertising materials to be catalogs ineligible for the § 6(ff) exemption. See *Bloomingtondale's, Inc. v. Commissioner of Revenue*, No. C258696, 2003 WL 1949348, at *10 (Mass. App. Tax Bd. Apr. 24, 2003).

The Commissioner cited and relied upon Technical Information Release ("TIR") 96-5, which provided that the exemption did not apply to department store or mail order catalogs. *Id.* The Board, however, rejected the argument that Bloomingtondale's advertising materials were catalogs, as the term was used in TIR 96-5, and ruled that the booklets met all of the requirements of the § 6(ff) exemption as *advertising leaflets and similar printed advertising*. *Id.* Even assuming the materials were catalogs, the Board noted that TIR 96-5 was not entitled to the level of deference of a regulation because technical releases are not duly promulgated regulations. *Id.* The Board further determined that TIR 96-5 reflected a policy position of the Commissioner rather than an interpretation of the statutory language. *Id.* The Commissioner appealed the Board's decision.

The Board Did Not Err In Finding That Bloomingtondale's Booklets Were "Advertising Leaflets" and "Similar Printed Advertising" Exempt from Use Tax

The Commissioner enumerated three errors of the Appellate Tax Board to the Appeals Court of Massachusetts. First, the Commissioner contended that Bloomingtondale's advertising materials were not *advertising leaflets or similar printed advertising* under § 6(ff) because they were more than a few pages in length. *Bloomingtondale's*, 2005 WL 840363, at *3. The Appeals Court disagreed and reasoned that even if the Commissioner were correct that the materials were not advertising leaflets, they nonetheless qualified as *similar printed advertising*. *Id.* By amending the § 6(ff) exemption to add the broad category of *similar printed advertising*, the Massachusetts legislature "intended to exempt a broader category of advertising, such as the Bloomingtondale's materials in question." *Id.*

The Commissioner also asserted that the Board erred when it (1) failed to defer to the Commissioner's interpretation of the § 6(ff) exemption in TIR 96-5 and when it (2) considered the Department of Revenue's internal processes in drafting TIR 96-5. The Court of Appeals held that the Board was free to disagree with the TIR if it believed the Commissioner's interpretation of the exemption was contrary to the language of the statute. *Id.* The court, however, declined to "define the boundaries of the board's authority to consider and take evidence on the internal processes and opinions of the department with respect to its reasons for adopting TIR 96-5," noting instead that the

Board's analysis of the Commissioner's motives and purpose for issuing TIR 96-5 was unnecessary. *Id.* at *4.

Finally, the Commissioner contended that the Board erred in relying on the legislative history of § 6(ff) and comparing the version adopted by the legislature to an earlier, vetoed version. The Court of Appeals was again satisfied that the Board's actions were appropriate. *Id.* The language of the statute did not indicate how broadly to interpret the phrase *similar printed advertising* and a review of the legislative history was useful in determining the legislative purpose in using the phrase.

The appellate court's decision in *Bloomingtondale's* adds substance to the statutory language of § 6(ff). The favorable decision for the taxpayer in *Bloomingtondale's* stands in contrast to the decision of the Appellate Tax Board in *Verizon Yellow Pages v. Commissioner of Revenue*, No. C262642, 2004 WL 2218373 (Sept. 24, 2004). Often citing its decision in *Bloomingtondale's*, the Board ruled that telephone directories were not included within the § 6(ff) exemption.

The Verizon Decision

Verizon Yellow Pages ("Verizon") is in the business of compiling and distributing printed telephone directories, known as the Verizon Yellow and White Pages (the "Directories"), to residents and businesses in Massachusetts. The yellow pages of the Directories contain advertising, which is solicited from Massachusetts businesses, and the white pages contain an alphabetical listing of telephone numbers and addresses for both residences and businesses in a particular geographic area, along with some advertising. Both the yellow pages and white pages are bound together or otherwise distributed in the same package. The Directories were printed in Pennsylvania, and virtually all of them were delivered by carrier or United States mail.

During the monthly tax periods beginning July 1, 1994 and ending December 31, 1999, Verizon filed use tax returns and paid use tax. On June 30, 2000, Verizon filed an application for abatement of use taxes that were paid on the Directories. The Massachusetts Department of Revenue denied the application, and the company appealed to the Board.

The Board Rejected The § 6(ff) Argument

The Board ruled that the Directories did not qualify as direct and cooperative *direct mail promotional advertising materials* under the § 6(ff) exemption for several reasons. Verizon, 2004 WL 2218373, at *2. First, the "primary purpose of the Directories was not to showcase certain items for sale by [Verizon] or its advertisers, but to provide a comprehensive listing of all published telephone numbers of Massachusetts residents and businesses. Accordingly, the Directories were not themselves advertisements but materials which contained advertisements." *Id.* at *4. Although the yellow pages did not list every business, they were bound together with the white pages and widely

distributed as a single volume or delivered in the same package.¹ In addition, the Board determined that while the legislative history of § 6(ff) revealed an intent to include a broad array of advertising materials, it was "unreasonable to infer that the Legislature intended to exempt from tax any and all materials which simply contained some advertisements and which were so comprehensive and voluminous." *Id.* at *5. As the Board reasoned, "[s]ection 6(ff) exempts only advertising materials, not materials which merely contain advertising." *Id.* at *6.

Even if the Directories were advertising materials, the Board ruled that the materials could not qualify for the § 6(ff) exemption because they were not discount coupons, advertising leaflets, or similar printed advertising. *Id.* The Directories' relatively small number of coupons could not transmute the voluminous Directories into nontaxable coupons. *Id.* The Board also acknowledged that its *Bloomingtondale's* decision did not require that a leaflet consist of only a single page, but that to include the Directories within the definition of a leaflet "would be a stretch beyond even the most generous dictionary definitions allowing leaflets to contain 'several' pieces of paper." *Id.* Because the Directories were not similar to discount coupons or leaflets, and thus not within the legislature's intended exemption, they were also not *similar printed advertising* eligible for an exemption. *Id.*

Finally, the Board concluded that the Directories were not *direct mail*, again referring to a description of the recipients of the direct mail materials in its *Bloomingtondale's* decision. *Id.* at *7. Verizon's Directories, in contrast to the advertising materials in the *Bloomingtondale's* decision, were widely distributed to *all* Massachusetts residents and businesses. *Id.* This general distribution of the Directories precluded their being direct mail since they were not sent to particular customers.² *Id.*

Postscript

It is noteworthy that the Massachusetts legislature amended the § 6(ff) exemption prior to the Appeals Court decision in *Bloomingtondale's*. The amended statute specifically excludes "mail order catalogs, department store catalogs, telephone directories, or similar printed advertising books, booklets or circulars greater than 6 pages in total length." St. 2004, ch. 262, § 50 (codified at Mass. Gen. L. ch. 64H, § 6(ff)). While the Appeals Court noted the change in its opinion, *see Bloomingtondale's*, 2005 WL 840363, at *1 n.1, the amendment had no impact on the taxpayer's victory. Mail order and store catalogs sent to a list of customers are exempt from use tax prior to the August 9, 2004 effective date of the amendment.

Following the Appellate Tax Board's determination that telephone directories did not qualify for the § 6(ff) exemption, Verizon appealed the decision to the Appeals Court of

¹ Verizon also argued that each individual telephone listing in the white pages was an advertisement, but the Board rejected this argument since individuals were not charged to have their number listed and, in fact, had to pay to keep a number unlisted. *Id.* at *5.

² The Board also determined that the Directories were not resold and, thus, exempt from tax. *Id.* at *8.

Massachusetts. See *Verizon Yellow Pages Company v. Commissioner of Revenue*, No. 2004-P-1704 (Mass. App. Ct. 2005). The Appeals Court has not rendered a decision, and the question of whether telephone directories are exempt from use tax prior to August 9, 2004 remains unanswered.■



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