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18-P-1317 Appeals Court

NEW CINGULAR WIRELESS PCS LLC vs. COMMISSIONER OF REVENUE.

No. 18-P-1317.

Suffolk. September 16, 2019. - September 4, 2020.

Present: Ditkoff, McDonough, & Hand, JJ.[1]

Taxation, Abatement, Sales tax: exemption, Internet service provider, Late entry of appeal. Practice, Civil, Abatement. Notice, Timeliness. Statute, Construction, Federal preemption. Words, "Offer."

Appeal from a decision of the Appellate Tax Board.

Cassandra Bolanos, Assistant Attorney General, for Commissioner of Revenue.

Margaret Wilson, of New Jersey (Michael Bogdanow also present) for the taxpayer.

Eric S. Tresh, of Georgia, Todd A. Lard, of the District of Columbia, & Kathleen S. Blaszak, for Broadband Tax Institute, amicus curiae, submitted a brief.

DITKOFF, J. With some exceptions not relevant here, Congress prohibits States from imposing taxes on the sale of

[1] Justice McDonough participated in the deliberation on this case while an Associate Justice of this court, prior to his reappointment as an Associate Justice of the Superior Court.

Internet access, but only where the Internet access provider "offers" its customers screening software designed to protect children from exposure to harmful materials. See Internet Tax Freedom Act (ITFA), codified at 47 U.S.C. § 151 note. Between November 1, 2005, and September 30, 2010 (the tax period), the taxpayer,[2] New Cingular Wireless PCS LLC (Cingular), a subsidiary of AT&T, collected sales taxes in the amount of nearly $20 million on its sales of Internet access (primarily through service plans) in Massachusetts and remitted those taxes to the Commonwealth. The Appellate Tax Board (board) found that the ITFA preempted the Commonwealth's sales tax and ordered an abatement of $19,938,368, to be refunded to the customers (through their class action counsel). Concluding that the taxpayer was required to offer screening software and did so by displaying and advertising at least some products designed to protect minors from harmful material, we affirm.[3]

1. Background. a. Statutory scheme. In 1998, Congress enacted the ITFA, which prohibited State and local governments

[2] As explained infra, the parties disagree whether the sales tax is imposed on the vendor or the customer. Because the vendor has "the legal responsibility for collecting and paying the taxes and seeking abatement," WorldWide TechServices, LLC v. Commissioner of Revenue, 479 Mass. 20, 29 (2018), and thus is the entity charged with paying the tax, we refer to New Cingular Wireless PCS LLC as the taxpayer.

[3] We gratefully acknowledge the amicus brief submitted by the Broadband Tax Institute.

from imposing any "[t]axes on Internet access" until October 21, 2001. ITFA, § 1101(a)(1), Pub. L. No. 105-277, Division C, Title XI, 112 Stat. 2681-719 (1998).[4] Congress extended the moratorium in 2001, Internet Tax Nondiscrimination Act, Pub. L. No. 107-75, § 2, 115 Stat. 703 (2001); 2004, Internet Tax Nondiscrimination Act, Pub. L. No. 108-435, § 2, 118 Stat. 2615 (2004); and 2007, Internet Tax Freedom Act Amendments Act of 2007, Pub. L. No. 110-108, § 2, 121 Stat. 1024 (2007). See j2 Global Communications, Inc. v. Los Angeles, 218 Cal. App. 4th 328, 331-332 (2013). Congress made the prohibition permanent in 2015. See Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, Title IX, § 922(a), 130 Stat. 122 (2015).

Congress's protection from taxation, however, did not come without strings attached. The ITFA's prohibition on State taxes on Internet access applies only if the Internet access provider offers screening software designed to protect minors from harmful content. ITFA, § 1101(e). This provision appeared in

[4] Under the ITFA, States that had taxed Internet access prior to 1998 could continue doing so. ITFA, § 1101(b). See Concentric Network Corp. v. Commonwealth, 897 A.2d 6, 15 (Pa. Commw. Ct. 2006). "Internet access services" became taxable telecommunications services in Massachusetts as of July 1999. St. 1997, c. 88, §§ 23, 114.

the 1998 version of the ITFA as § 1101(f), Pub. L. No. 105-277, Division C, Title XI, and has continued unmodified since.[5]

Massachusetts imposes sales tax on "telecommunication services," which are defined as "any transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiberoptics, laser, microwave, radio, satellite or similar facilities but not including cable television." G. L. c. 64H, §§ 1, 2. As Internet access services fall comfortably within this definition of "telecommunication services," a vendor is obligated to collect and pay sales tax on Internet access services sold in Massachusetts, unless the ITFA preempts the tax on those transactions.

b. Procedural history. As a general matter, when the taxpayer sells a customer a service plan, the charge includes various services, such as traditional voice communications, text messaging, data services, and the right to download certain software. The data services qualify as Internet access services. During the tax period, the taxpayer collected and paid to Massachusetts sales tax on the fees it charged

[5] In 2004, this provision was moved from § 1101(f) to § 1101(e). See Pub. L. No. 108-435, § 2(b), 118 Stat. 2615 (2004).

Massachusetts customers for services, failing to exclude the Internet access services from the taxable amount.

In October and November of 2009, AT&T customers sued AT&T and its subsidiaries, including the taxpayer, alleging that AT&T's collection of State and local sales tax on charges for Internet access violated certain State laws and the ITFA. See In re AT&T Mobility Wireless Data Servs. Sales Tax Litig., 710 F. Supp. 2d 1378, 1379-1380 (J.P.M.L. 2010); Sipple v. Hayward, 225 Cal. App. 4th 349, 353 (2014). The lawsuits were consolidated into a class action in the United States District Court for the Northern District of Illinois, and AT&T ultimately settled the suit with the members of the class, which included the taxpayer's Massachusetts customers.[6] See In re AT&T Mobility Wireless Data Servs. Sales Tax Litig., 789 F. Supp. 2d 935, 940-942 (N.D. Ill. 2011). As part of that settlement, AT&T agreed to stop collecting and remitting sales tax on charges for

[6] Massachusetts was not a party to the settlement agreement. Massachusetts, however, did join an amicus brief in the Federal court, arguing that the settlement agreement was barred by the Tax Injunction Act, 28 U.S.C. § 1341, and principles of comity; that the attorney's fees were "exorbitant"; and that the customers "would reap a greater benefit if they availed themselves of the states' existing mechanisms for recovering improperly collected taxes." In re AT&T Mobility Wireless Data Servs. Sales Tax Litig., 789 F. Supp. 2d at 951. In any event, the judge specifically noted that "[t]he Settlement is an agreement that, once approved by this Opinion, will only bind the private parties that are privy to it. The Settlement does not purport to dictate to any state or local authority the makeup of its applicable law." Id. at 983.

Internet access. See id. at 940, 942. More important, for our purposes at least, AT&T agreed to request refunds in the various States where it had collected sales taxes. See id.[7] AT&T agreed that it would not retain any refunds obtained but rather would remit them to the customers (after payment of attorney's fees and administrative expenses). See id. at 943. Accord Sipple, 225 Cal. App. 4th at 362.[8]

On November 15, 2010, in accordance with the settlement agreement, the taxpayer filed an application for an abatement of the sales tax that it had paid on Internet access charges during the tax period, claiming that the charges were exempt from Massachusetts sales tax under the ITFA. Following a hearing, the Commissioner of Revenue (commissioner) denied the abatement application.

On August 29, 2013, the taxpayer appealed the commissioner's decision to the board. The board first held proceedings to determine whether the tax period Internet access

[7] The aggregate refund claims exceeded $1 billion. See In re AT&T Mobility Wireless Data Servs. Sales Tax Litig., 792 F. Supp. 2d 1028, 1031 (N.D. Ill. 2011).

[8] Class counsel sought nearly a quarter billion dollars in attorney's fees. See In re AT&T Mobility Wireless Data Servs. Sales Tax Litig., 792 F. Supp. 2d 1028, 1032 (N.D. Ill. 2011). The judge awarded them twenty percent of the cash actually collected for the class members. Id. at 1035-1036. In addition, class counsel was permitted to withhold over $900,000 of the recovery as reimbursement for expenses. See id. at 1040.

charges were exempt from Massachusetts sales tax under the ITFA, reserving the question of the amount of the abatement for future proceedings.

c. Evidence concerning screening software. Kristen Leatherberry, a senior marketing manager responsible for customer-facing communications for AT&T, testified that information regarding screening software was contained in brochures made available to customers in stores, either on the counter or on a rack. All AT&T stores were required to display the brochures. These brochures advertised "MEdia Net" (essentially an Internet browser), available to customers for free, which was designed to work on Cingular phones with Internet access, and contained a parental controls feature. One brochure explained how to use MEdia Net parental controls and, further, how to restrict access to cellular video content. Information regarding MEdia Net parental controls was also widely available on the taxpayer's website. Later, the website also advertised a more sophisticated version called "AT&T Smart Limits for Wireless," which cost $4.99 per month.

Boxes containing Cingular phones purchased through the taxpayer included inserts both in English and Spanish that explained to customers how to use MEdia Net to restrict Internet access for their children. Customers who purchased phones with Internet access would be mailed a brochure that, among other

things, explained that they could use "AT&T's Parental Controls option" to "prevent kids from accessing age-inappropriate Websites."

At least by 2006 or 2007, the taxpayer mailed bills which also contained inserts instructing parents how to use MEdia Net (and encouraging them to upgrade to an advanced version for a fee). Furthermore, for much of the tax period, AT&T was the exclusive service provider for Apple devices. The taxpayer produced an Apple iPhone cell phone manual copyrighted in 2009 that explained the use of parental controls inherent to the iPhone's operating system.

The commissioner's expert, Mehran Nazari, essentially testified that "not all of their [devices] were" compatible with the taxpayer's parental control features. He explained that screening software, which filters content on the Internet, could work in one of three ways. The software could be embedded within the device itself through the operating system, the software could be installed onto a web browser from which a user accesses the Internet, or the software could "block[] or filter[] [content] at the network level before it reaches the [user]." Regarding the first type of screening software, Nazari testified that the iPhone's inherent parental controls were released in June or July 2008.

Regarding the other types of screening software, Nazari testified that MEdia Net is incompatible with "RIM devices, which are Blackberry, and the data card, PC card," and is incompatible with iPhones as well. Nazari testified that "[s]ome AT&T and Smart Limits for wireless features may not be compatible for some wireless connection and mobile internet browsing services." He opined that Smart Limits did not work with iPhones. He testified that Blackberries (which were marketed for work use) did not contain inherent parental control features either.

d. Board decision. After a five-day hearing in April 2015, at which four witnesses testified, the board ruled that the charges at issue in this appeal were not taxable, because the taxpayer met its burden of proving that it offered screening software to its customers in accordance with the requirements of the ITFA.[9] The parties then agreed that the amount of taxes at issue were $19,938,368. The board granted an abatement in that amount, and the commissioner filed a notice of appeal.

[9] Several other issues were litigated before the board. The board found that Massachusetts did not tax Internet access prior to October 1998, that the data services at issue in this case were Internet access services, that the taxpayer properly identified the portions of its charges that were for Internet access services, and that the Federal class action settlement mechanism was adequate to satisfy the requirements of Massachusetts law that any sales tax abatement be refunded to the customer. The commissioner does not challenge these rulings on appeal.

2. Appellate jurisdiction. We must first address the timeliness of the commissioner's notice of appeal. The board issued a two-page decision for the taxpayer on March 3, 2017. General Laws c. 58A, § 13, second par., states that (with two inapplicable exceptions), "the board shall make such findings and report thereon if so requested by either party within ten days of a decision without findings of fact." In accordance with this provision, the commissioner filed a timely request for findings of fact and report on March 13, 2017.

On June 21, 2018, the board issued its sixty-eight pages of findings of fact and report. The commissioner filed a notice of appeal on August 7, 2018. The question, therefore, is whether this was a timely notice of appeal. If the notice of appeal was not timely, it would be our duty to dismiss the appeal. See New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 458-459 (1981).

General Laws c. 58A, § 13, third par., states, "From any final decision of the board except with respect to [certain valuation determinations in estate tax cases], an appeal as to matters of law may be taken to the appeals court by either party to the proceedings before the board so long as that party has not waived such right of appeal. A claim of appeal shall be filed with the clerk of the board in accordance with the

Massachusetts Rules of Appellate Procedure which rules shall govern such appeal."

If there is no request for findings of fact and report within ten days, the initial decision of the board becomes a final decision that may be appealed by filing a notice of appeal within the time set by Mass. R. A. P. 4 (a), as amended, 464 Mass. 1601 (2013).[10] In that situation, we would consider only "whether the [appellant] has raised a question of law apparent on the record." Ainslie Corp. v. Commissioner of Revenue, 38 Mass. App. Ct. 360, 362 (1995). Accord Supermarkets Gen. Corp. v. Commissioner of Revenue, 402 Mass. 679, 681-682 (1988).

Where, however, a party requests findings of fact and report, the initial decision is not the board's final decision; the findings of fact and report are the final decision. For that reason, the better reading of the statutory scheme is that the findings of fact and report become the "final decision of the board" within the meaning of G. L. c. 58A, § 13, third par. Accordingly, when findings of fact and report are requested, the filing of those findings and report by the board is the operative starting point for the timing of filing the notice of

[10] We cite to the Massachusetts Rules of Appellate Procedure in effect during the relevant time. The rules were wholly revised, effective March 1, 2019. The time periods relevant here have not changed.

appeal. See Forte Inv. Fund v. State Tax Comm'n, 369 Mass. 786, 787 n.1 (1976).

Here, because the commissioner, an officer of the Commonwealth, was a party to the proceeding before the board, Mass. R. A. P. 4 (a)[11] allowed either party sixty days to file a notice of appeal. Accordingly, the commissioner's notice of appeal, filed forty-seven days after the board filed its findings of fact and report, was timely. See Veolia Energy Boston, Inc. v. Assessors of Boston, 95 Mass. App. Ct. 26, 27 n.5 (2019) (noting that notice of appeal is timely when filed after board's findings of fact and report issued).

3. Screening software requirement. a. Standard of review. "A decision by the board will not be modified or reversed if the decision 'is based on both substantial evidence and a correct application of the law.'" Genentech, Inc. v. Commissioner of Revenue, 476 Mass. 258, 261 (2017), quoting Capital One Bank v. Commissioner of Revenue, 453 Mass. 1, 8, cert. denied, 557 U.S. 919 (2009). "Ultimately, however, the

[11] Because G. L. c. 58A, § 13, third par., does not state a statutory period of time in which to appeal but rather adopts the provisions of the rules of appellate procedure, the provisions of Mass. R. A. P. 4 (c), as amended, 378 Mass. 928, and Mass. R. A. P. 14 (b), as amended, 378 Mass. 939 (1979), apply as well. See Harvard Community Health Plan, Inc. v. Assessors of Cambridge, 384 Mass. 536, 537 n.2 (1981). Cf. Delucia v. Kfoury, 93 Mass. App. Ct. 166, 169 (2018) ("appeal period, set by statute, cannot be enlarged").

interpretation of a statute is a matter for the courts." Bank of Am., N.A. v. Commissioner of Revenue, 474 Mass. 702, 706 (2016), quoting Onex Communications Corp. v. Commissioner of Revenue, 457 Mass. 419, 424 (2010). Accord Tenneco Inc. v. Commissioner of Revenue, 57 Mass. App. Ct. 42, 44 (2003) ("errors of law are subject to full review by this court"). Ordinarily, "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, and will affirm its statutory interpretation if that interpretation is reasonable." Veolia Energy Boston, Inc. v. Assessors of Boston, 483 Mass. 108, 112 (2019), quoting AA Transp. Co. v. Commissioner of Revenue, 454 Mass. 114, 119 (2009). To the extent, however, that we are interpreting a Federal statute, rather than the State tax scheme, there is no reason to defer to the board on Federal tax matters.

When construing a Federal statute, "we begin with the plain language used by the drafters." Green Valley Special Util. Dist. v. Cibolo, Tex., 866 F.3d 339, 342 (5th Cir. 2017), quoting United States v. Uvalle-Patricio, 478 F.3d 699, 703 (5th Cir. 2007). Accord Atlanticare Med. Ctr. v. Commissioner of the Div. of Med. Assistance, 439 Mass. 1, 6 (2003). Our analysis of the meaning of a Federal statute "includes 'the broader context of the statute as a whole.'" Carlson v. Postal Regulatory

Comm'n, 938 F.3d 337, 349 (D.C. Cir. 2019), quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997). Accord Reckis v. Johnson & Johnson, 471 Mass. 272, 284 (2015), cert. denied, 136 S. Ct. 896 (2016).

b. Applicability of the screening software requirement. Section 1101(e) of the ITFA states that the prohibition on taxes "shall also not apply with respect to an Internet access provider, unless, at the time of entering into an agreement with a customer for the provision of Internet access services, such provider offers such customer (either for a fee or at no charge) screening software that is designed to permit the customer to limit access to material on the Internet that is harmful to minors." The taxpayer argues that we need not determine whether the board erred in finding that the taxpayer complied with this requirement to offer screening software. The taxpayer maintains that (1) Massachusetts sales tax is imposed on customers, not Internet service providers, and, therefore, (2) the screening software requirement, which applies only "with respect to an Internet access provider," does not apply in Massachusetts at all.

As to the first point, we express some doubt. As a formal matter, sales tax "shall be paid by the vendor to the commissioner." G. L. c. 64H, § 2. The vendor is required to add the sales tax to the purchase price and collect it from the

customer. G. L. c. 64H, § 3 (a). Thus, "[v]endors are responsible for collecting and remitting the sales tax." WorldWide TechServices, LLC v. Commissioner of Revenue, 479 Mass. 20, 29 (2018). The vendor (and not the customer) may decide whether to calculate the sales tax on a per-item or per-invoice basis, G. L. c. 64H, § 4. With certain exceptions, it is the vendor (and not the customer) that has the burden of establishing that any sale, or part thereof, is exempt from the sales tax. G. L. c. 64H, § 8 (a). If the vendor fails to collect the sales tax, the vendor is nonetheless responsible for paying it. G. L. c. 64H, § 16. See WorldWide TechServices, LLC, supra at 30, quoting G. L. c. 64I, § 4 (same result where use tax is required to be collected by vendor). Although the vendor is required to pass any abatement on to the customer where the sales tax was collected from the customer, G. L. c. 62C, § 37, the vendor may recover for its own account any sales tax paid on a bad debt. G. L. c. 64H, § 33. Accordingly, the vendor has "the legal responsibility for collecting, paying, and abating the tax." WorldWide TechServices, LLC, supra at 31.[12]

[12] It is true, as the taxpayer states, that "the economic burden of the taxes" generally falls on the customer. WorldWide TechServices, LLC, 479 Mass. at 31. The economic burden, however, is not the issue. Most economists believe that the economic burden of corporate income taxes is shared by the corporate shareholders and the employees of the corporation.

In any event, the taxpayer's argument fails on its second point. The screening requirement exception applies to taxes "with respect to an Internet access provider," ITFA, § 1101(e)(1), not, as the taxpayer contends, to taxes "imposed on an Internet access provider." "By its ordinary meaning, the phrase 'with respect to,' like other similar phrases (e.g., 'relating to,' 'in connection with,' 'associated with,' 'with reference to'), suggests an 'expansive sweep' and 'broad scope.'" Acushnet Co. v. Beam, Inc., 92 Mass. App. Ct. 687, 695 (2018), quoting California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 324 (1997). We are not free to excise the expansive words "with respect to" chosen by Congress. See Nasrallah v. Barr, 140 S. Ct. 1683, 1692 (2020) ("it is not the proper role of the courts to rewrite the laws passed by Congress and signed by the President"). As the taxpayer, an Internet access provider,[13] collected and

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See generally Gentry, A Review of the Evidence on the Incidence of the Corporate Income Tax, Department of the Treasury Office of Tax Analysis Paper 101 (Dec. 2007), www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-101.pdf [https://perma.cc/BNK2-T7Q3]. Nonetheless, the tax is imposed on the corporation, not the shareholders or the employees.

[13] The taxpayer argued before the board that it is not an Internet access provider, but does not renew that argument before us. See White Buffalo Ventures, LLC v. University of Tex. at Austin, 420 F.3d 366, 373 (5th Cir. 2005), cert. denied, 546 U.S. 1091 (2006) (entity is Internet access provider even if that is small portion of its business).

remitted the sales taxes in question, they are taxes "with respect to an Internet access provider." ITFA, § 1101(e)(1).

This plain meaning reading of the statute is confirmed by examining another portion of the ITFA. See Carlson v. Postal Regulatory Comm'n, 938 F.3d 337, 349 (D.C. Cir. 2019), quoting Delaware Dep't of Natural Resources & Envtl. Control v. Environmental Protection Agency, 895 F.3d 90, 97 (D.C. Cir. 2018) ("[I]n expounding a statute, we must not be guided by a single sentence . . . but look to the provisions of the whole law"). The statute defines "tax" as "any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes," as well as "the imposition on a seller of an obligation to collect and to remit to a governmental entity any sales or use tax imposed on a buyer by a governmental entity." ITFA, § 1105(8)(A).[14] This definition underscores Congress's intent to construe sales taxes broadly, without regard to the intricacies and idiosyncrasies of particular State sales taxing schemes.[15]

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[14] In the 1998 version, this section was in § 1104(8)(A). It was moved to § 1105(8)(A) in 2004. See Pub. L. No. 108-435, § 3(1), 118 Stat. 2616 (2004).

[15] Similarly, in 2004, Congress added a definition of "tax on Internet access" as "a tax on Internet access, regardless of whether such tax is imposed on a provider of Internet access or a buyer of Internet access and regardless of the terminology used to describe the tax." ITFA, § 1105(10)(A). See Pub. L. No. 108-435, §§ 2(b)(2), 3(1), 118 Stat. 2615-2616 (2004). This

c. Compliance with the screening software requirement. Having determined that the screening software requirement applies to the transactions in question, we must review the board's finding that the taxpayer complied with that requirement. At this point in the litigation, the dispute is mostly about what Congress meant by the word "offers" in the phrase, "offers such customer (either for a fee or at no charge) screening software that is designed to permit the customer to limit access to material on the Internet that is harmful to minors." ITFA, § 1101(e)(1).[16]

A customer during the tax period could obtain screening software from the taxpayer, and the taxpayer communicated this possibility to its customers. Through brochures, website pages, bill inserts, box inserts, and mailings, the taxpayer advertised its MEdia Net and Smart Limits parental control features. Furthermore, during some portions of the tax period, the iPhones for which the taxpayer was the exclusive access provider had built-in parental controls.

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definition further underscores Congress's intent to construe sales taxes broadly.

[16] Demonstrating Congress's lack of any aversion to repetition, the statute goes on to define "screening software" as "software that is designed to permit a person to limit access to material on the Internet that is harmful to minors." ITFA, § 1101(e)(2)(C).

Nonetheless, it is not seriously contested that these features were not compatible with every device sold through and serviced by the taxpayer, and iPhones with an inherent parental control feature did not exist at the beginning of the tax period. Furthermore, it appears undisputed that the taxpayer had no policy of requiring a salesperson to inquire specifically of each customer whether the customer wanted screening software at the time of purchase.

Accordingly, the commissioner urges that, for a vendor to "offer" software, it must affirmatively ask customers whether they would like the software. It is, of course, true that this is one meaning of offer, see Webster's Third New International Dictionary 1566 (2002) ("to present for acceptance or rejection"), and is the dominant meaning for contract law. See, e.g., Sea Breeze Estates, LLC v. Jarema, 94 Mass. App. Ct. 210, 215 (2018). There are, however, many other meanings, including "to make available or accessible." Webster's Third New International Dictionary, supra.

Here, the context informs the operative definition. The statute refers to the actions of a vendor. In that context, the latter definition is the most natural. It would be passing strange for one to assert that the local grocery store did not offer vegetables because, although it had an extensive vegetable section, no store employee asked the customer whether he wanted

to purchase some vegetables. Or, more to the point, if someone asserted that the local cell phone store did not offer iPhones, one would assume that it did not sell them at all. If, when confronted with the fact that the store does indeed sell iPhones, the declarant defended the assertion by pointing out that nobody asks whether you would like an iPhone when you purchase a different phone, one would be justified in thinking the declarant either deceptive or obtuse.

Repair to other clues in the statutory text confirms this common sense view. Congress imposed no requirement that the screening software included be free, or even affordable. Rather, the statute specifically allows the screening software to be "for a fee." ITFA, § 1101(e)(1). Similarly, Congress placed no demands for any particular functionality or effectiveness.[17] Rather, the statute merely requires that the software be "designed to permit the customer to limit access to material on the Internet that is harmful to minors" (emphasis added). ITFA, § 1101(e)(1), (e)(2)(C). Thus, it is evident that Congress's intention was to create an expectation that screening software would be available to those customers who sought it. Requiring that a vendor display for sale software

[17] Any parents who have tried to use even modern parental controls know how easily those controls can be circumvented by their children.

intended to function with at least some devices provided by the vendor is sufficient to allow a concerned customer to obtain parental controls and to meet Congress's objective. As Congress explained two years earlier, "[i]t is the policy of the United States-- . . . to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; [and] to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(3)-(4), inserted by Pub. L. No. 104-104, Title V, Subtitle A, § 509, 110 Stat. 137 (1996).

Similarly informative is 47 U.S.C. § 230(d), which was enacted at the same time as the ITFA. Pub. L. No. 105-277, Division C, Title XIV, § 1404(a), 112 Stat. 2681-739 (1998). Under § 230(d), a provider of computer server access to multiple users must "notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors." Again, Congress opted to ensure that customers were aware of the existence of screening software, but left it

entirely to the customer to decide whether to pursue that option.

Moreover, the commissioner's view would make little practical sense. Many Internet access devices are purchased by persons without young children, and many other Internet access devices are not intended to be given to unsupervised children. In such situations, requiring a vendor to ask the customer whether the customer would like screening software would not serve the protective purposes of the ITFA's screening provisions. Accordingly, we conclude that the availability and advertising of screening software by the taxpayer complied with the screening software requirement of the ITFA.

d. Factual support. The commissioner argues that the taxpayer failed to demonstrate that the screening software offered by the taxpayer was compatible with any device it sold during the tax period. "[O]ur review of the board's factual findings is limited to whether, as a matter of law, the evidence is sufficient to support them." Syms Corp. v. Commissioner of Revenue, 436 Mass. 505, 511 (2002). "Our review of the sufficiency of the evidence is limited to 'whether a contrary conclusion is not merely a possible but a necessary inference from the findings.'" Olympia & York State St. Co. v. Assessors of Boston, 428 Mass. 236, 240 (1998), quoting Kennametal, Inc.

v. Commissioner of Revenue, 426 Mass. 39, 43 (1997), cert. denied, 523 U.S. 1059 (1998).

It is evident that, at least from July 2008, parental controls were inherent in new iPhones serviced by and sold through the taxpayer. The taxpayer introduced in evidence the iPhone User Guide for iPhone OS 3.1 Software (guide). The guide described parental controls embedded in the operating system. The guide was copyrighted in 2009, but the commissioner's own expert witness testified that parental controls were available to iPhone users in June or July 2008.

Regarding the tax period from November 2005 to July 2008, the taxpayer identified promotional materials for MEdia Net and Smart Limits inferably dating from the very beginning of the tax period. Again, the commissioner's own expert acknowledged that these controls would block content, though he stated that they were not compatible with certain devices. It was hardly a stretch to infer from this testimony that the taxpayer's screening software was designed to function on at least some of the devices the taxpayer serviced. Accordingly, the board reasonably concluded that the taxpayer established that it offered screening software designed to function on at least some of its devices throughout the tax period. As this was all that Congress required for an Internet service provider to satisfy

the screening software requirement, the board correctly concluded that the taxpayer had demonstrated its compliance.

4. Conclusion. The taxpayer met its burden of showing that it offered screening software designed to permit its customers to limit access to material on the Internet that is harmful to minors at the time of the taxed transactions in question. Accordingly, the ITFA preempted Massachusetts sales tax on the taxpayer's sale of Internet access services. The decision of the Appellate Tax Board is affirmed.

So ordered.