

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-131

JORDAN'S FURNITURE, INC.

vs.

COMMISSIONER OF REVENUE.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The Commissioner of Revenue (commissioner) appeals from a decision of the Appellate Tax Board (board) granting Jordan's Furniture, Inc. (Jordan's) an abatement of sales taxes assessed for the monthly periods ending August 31, 2010, August 31, 2011, and August 31, 2012. At issue in this case is whether Jordan's was liable for sales taxes on certain sales it believed qualified for the sales tax holiday created by the Legislature in fiscal years 2010, 2011, and 2012. Substantially for the reasons stated by the board in its well-reasoned decision, we affirm.

Background. a. Sales tax holiday weekends. We take the facts largely from the statement of agreed facts and the board's decision as the commissioner "neither challenges any of the facts found by the [b]oard nor the factual inferences drawn from

the evidence." In 2010-2012, the Legislature passed legislation creating sales tax holiday weekends for August 14-15, 2010, August 13-14, 2011, and August 11-12, 2012, such that sales of personal property costing \$2,500 or less were exempt from Massachusetts sales tax on those days. See St. 2010, c. 240, §§ 174-179; St. 2011, c. 86; St. 2012, c. 238, § 80. By statute, eligible sales were restricted to those transactions occurring on the designated holidays with transfer of possession or payment in full also occurring on the designated holidays. See St. 2010, c. 240, § 179; St. 2011, c. 86, § 6; St. 2012, c. 238, § 80 (f). "[P]rior sales or layaway sales" were ineligible. Id.

For each year the commissioner issued a "technical information release" (TIR) explaining the Department of Revenue's official position with regard to the sales tax holidays.¹ The TIRs provided that "[s]pecial order items such as

¹ "Massachusetts TIRs are issued by the commissioner of revenue in order to inform DOR personnel and the public of the department's policy and practice. They explain the Department of Revenue's official position in connection with changes in federal or Massachusetts tax laws or on court decisions interpreting federal or Massachusetts tax laws. The commissioner may issue, revoke or modify a TIR without notice or public hearing. The Department of Revenue will use a TIR as precedent in the disposition of cases unless it is revoked or modified." Massachusetts Bay Lines, Inc. v. Commissioner of Revenue, 72 Mass. App. Ct. 321, 325 n.5 (2008), quoting Neary, Handbook of Legal Research in Massachusetts § 8.2.3(e) (2002). See Commissioner of Revenue v. BayBank Middlesex, 421 Mass. 736, 739 (1996) ("Although courts give the force of law only to

furniture are eligible for the sales tax holiday so long as they are ordered and paid in full on the sales tax holiday weekend, and the cost of each item is \$2,500 or less, even if delivery is made at a later date. Generally, a customer pays for an item when the seller receives cash, a credit card number, a debit authorization, a check, or a money order or the buyer and seller enter into financing arrangements with a third party." TIR 10-10(III)(H) (Aug. 5, 2010). "A prior special order purchase with a deposit paid before [the tax holiday weekend] will not qualify for the holiday, even if the retail customer pays the entire remaining balance due on" the tax holiday weekend. Id. The TIRs also provided that all businesses that normally made taxable sales of tangible property must participate in the sales tax holiday. E.g., id. at (IV)(A). The "penalties" provision provided in the 2010 and 2011 TIRs specify that retailers that "back-date" or "forward-date" sales "in order to make them appear to qualify for the sales tax holiday or otherwise fail to follow the rules in the TIR in order to improperly avoid collecting and remitting sales or use tax may be subject to the tax evasion penalties of G. L. c. 62C, § 73." Id. at (IV)(E). See TIR 11-7(IV)(E) (Aug. 2, 2011). In 2012, for the first time, the commissioner's TIR added language in the "penalties"

formal agency regulations, administrative agencies must abide by their own internally promulgated policies").

section that provided: "[a] vendor may not void and rewrite a sale that has taken place before August 11, 2012 for the purpose of bringing the transaction under the sales tax holiday rules." TIR 12-5(IV) (E) (Aug. 7, 2012).

b. Jordan's cancellation policies and sales tax weekend procedures. Jordan's sells miscellaneous furniture including, among other things, mattresses, sofas, dining room sets, and bedroom sets. A minority of purchases are paid for in full and the customer takes them home on the same day. More typically, a customer places an order and either pays in full or pays a thirty percent deposit until delivery can be accomplished. At the time of the tax holiday weekends at issue, Jordan's had a generous cancellation policy of allowing cancellation of orders at any time prior to pickup or delivery. Special orders were allowed to be cancelled even to take advantage of internal promotions that occurred after a special order was placed.

The first sales tax holiday in 2004 created "chaos" in Jordan's stores with customers coming in to cancel orders to take advantage of the tax exemption. Per statute, Jordan's could not opt out. Instead, over the years, Jordan's tried different measures to both accommodate their customers and comply with the tax holiday statutes. In 2010 and 2011, for customers who had not yet taken delivery of their order, Jordan's created software to cancel prior orders and rewrite

them on the designated tax holiday. The cancellation and rewrites occurred only if the customer initiated a discussion of the tax holiday ahead of the designated weekend and had paid in full, exclusive of the sales tax. The amount paid for the original order was credited to the new order and a new invoice with a new order number was created. The new order was thereby paid in full. All of this was accomplished by computer, without the customer entering a Jordan's store.

In 2012, Jordan's did not collect taxes on rewritten sales but, in light of uncertainty created by the altered penalty provision in the 2012 TIR issued by the commissioner, Jordan's "self-assessed" taxes on rewritten sales.

c. Commissioner's response. The Department of Revenue conducted an audit of Jordan's monthly sales and use tax returns for the periods at issue and concluded that sales tax should have been assessed on the "rewritten" sales for all of the years at issue. The commissioner assessed sales taxes of \$847,370 for the period ending August 31, 2010; \$752,890 for the period ending August 31, 2011; and \$83,850 for the period ending August 31, 2012, in addition to the \$622,696 Jordan's had self-assessed. The commissioner also imposed penalties totaling \$2,646,757.

Jordan's filed an application for abatement, which the commissioner denied. Jordan's thereafter filed an appeal under

the formal procedure pursuant to G. L. c. 58A, § 7, and G. L. c. 62C, § 39.

d. The board's decision. Following a hearing, the board issued findings of fact and a report pursuant to requests from both parties. See G. L. c. 58A, § 13. The board found that Jordan's procedures of voiding prior orders and rewriting orders over the tax holiday weekends did not violate the sales tax holiday legislation. The board concluded that "[t]he sales at issue qualified as sales made during the Sales Tax Holidays, not prior sales or layaway sales, and payment in full occurred through the appellant's process of cancelling and rewriting the sales at issue during the Sales Tax Holidays." In response to the commissioner's argument that the sales were not "paid in full" on the requisite dates, the board found that the legislation did not dictate any particular method of payment and pointed to G. L. c. 64H, § 1, which defines "sales price" as "the total amount paid by a purchaser to a vendor . . . in money or otherwise," including "any amount for which credit is given to the purchaser by the vendor." The board found that the absence of a refund or recharging a credit card was not "unseemly," but rather more smoothly allowed the taxpayer to comply with the mandated sales tax holiday "while honoring [Jordan's] longstanding policy of permitting customers to cancel orders anytime prior to delivery or pickup." The board also

reasoned that the sales were not "prior sales" excluded from the legislation because G. L. c. 64H, § 1, requires either a "transfer of title or possession," id. (defining "sale"), neither of which had occurred prior to the sales tax holiday weekend. The board found that "[i]n light of [Jordan's] testimony about its experience and complications with in-person and phone re-orders on Sales Tax Holidays in prior years," Jordan's "procedures were reasonable and consistent with the Sales Tax Holiday Legislation."

Discussion. "Decisions of the board are final as to findings of fact," and "the sole question before us is whether the board erred as a matter of law" (quotation omitted).

Commissioner of Revenue v. Cargill, Inc., 429 Mass. 79, 81 (1999). "[A]n exemption from taxation 'is a matter of special favor or grace,' and . . . statutes granting exemptions from taxation are therefore to be strictly construed." South Boston Sav. Bank v. Commissioner of Revenue, 418 Mass. 695, 698 (1994), quoting State Tax Comm'n v. Blinder, 335 Mass. 698, 703 (1958). "[W]e give weight to the board's interpretation of tax statutes, because the board is an agency charged with administering the tax law and has expertise in tax matters" (quotation omitted). Citrix Sys., Inc. v. Commissioner of Revenue, 484 Mass. 87, 92 (2020).

The commissioner contends the rewritten sales did not qualify for the tax holiday because they were prior sales. The board reasonably concluded, however, that the rewritten sales were not prior sales; they were prior orders subject to cancellation at any time before delivery. Physical delivery is an element of a "sale" and triggers the requirement that a vendor include a "sale" in its gross receipts for tax purposes. G. L. c. 64H, § 1. Cf. G. L. c. 106, § 2-401. Indeed, the commissioner's brief acknowledges that "furniture sales are normally not considered complete until delivery." Here, it is uncontested that delivery had not yet occurred when the orders were voided and rewritten.

The commissioner argues that, given that no physical deliveries of furniture were to be made on the tax holiday weekends, it was only the TIRs' treatment of furniture orders as qualifying for the sales tax holiday if they were paid in full on the sales tax holiday that even allowed furniture orders to be "sales" eligible for tax relief.² Accordingly, the commissioner contends, the board should have applied the same definition of "sale" to the original orders that preceded the

² While it is true that the TIRs clarified how furniture orders would be handled, the statutes themselves provided that eligible sales included transactions where either "transfer of possession" or "payment in full" occurred on the holiday. E.g., St. 2010, c. 240, § 179.

tax holiday and should have concluded they were "sales," even though no delivery had been made and "full payment" had not been made because the sales tax had not been collected. The board, however, did not create the dichotomy between what was considered a sale for the sales tax holidays and what was considered a "prior sale" -- the Legislature did. The board cannot be faulted for applying the appropriate definitions to each category. Neither the statute nor the TIRs suggested that prior orders should be considered "sales."

We note that the TIRs specifically provide that the tax holiday legislation is not intended to change a seller's return policy and Internet sales paid for in full are eligible. In the absence of language in the statute that prohibited Jordan's from complying with its longstanding return policy and allowing cancellation of orders prior to delivery, we agree with the board that Jordan's practices did not violate the statutes. Jordan's did not predate or postdate any sales.

The commissioner similarly argues that despite the statutory provision that recognizes a credit for returned items as a form of "payment," G. L. c. 64H, § 1, the board should have applied the commissioner's interpretation that a credit is not "payment" in the circumstances of the sales tax holidays. However, the board correctly noted that the sales tax holiday legislation does not require a particular method of payment. We

add that nothing in the legislation creating the tax holiday weekends or the TIRs purport to modify other statutory provisions with regard to whether a credit constitutes "payment." There is no dispute that a credit was applied to the sales on the sales tax holiday such that full payment was made on the sales tax holiday. Moreover, the only days that prior payment made could be considered "payment in full" were the tax holidays, as otherwise, the amount of the sales tax would have remained owing.³

It is true, as the commissioner argues, that tax statutes should be interpreted to avoid absurd results. See Bridgewater State Univ. Found. v. Assessors of Bridgewater, 463 Mass. 154, 158 (2012). The commissioner contends the Legislature clearly intended to avoid the result here. We disagree. Rather, we agree with the board that Jordan's instituted reasonable

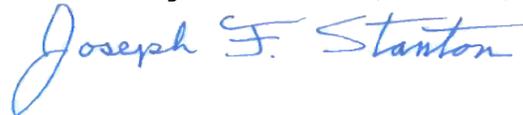
³ The commissioner does not pursue on appeal the argument that the prior orders were layaway sales.

procedures that honored its longstanding cancellation policy of furniture orders and the sales tax holiday legislation applicable to prior sales.

The decision of the board is affirmed.

So ordered.

By the Court (Meade,
Massing & Desmond, JJ.⁴),



Clerk

Entered: June 26, 2020.

⁴ The panelists are listed in order of seniority.