

830 CMR 64H.00: SALES AND USE TAX

Section

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64H.1.1: Service Enterprises

(1) Definition of Inconsequential. As a general guideline, the term "inconsequential", wherever it appears in 830 CMR 64H.1.1, means a value of less than 10% of the total charge, and the term "not inconsequential" means a value of greater than 10% of the total charge. This definition serves only as a guideline, and varies depending on the facts and circumstances of the transaction.

(2) General Application. 830 CMR 64H.1.1, applies to a transaction which a service enterprise undertakes. Some examples of a service enterprise are: repairers of motor vehicles, airplanes, boats, watches, televisions, radios, machinery, musical instruments or jewelry; a barber, beauty shop operator, launderer, cleaner, plumber, linen service, reupholsterer, or draper.

- (a) A service transaction is not subject to the sales tax where:
 1. The real object of the transaction is the service itself, and no transfer of tangible personal property occurs; or
 2. The real object of the transaction is the service itself, and an inconsequential transfer of tangible personal property occurs, and the service enterprise does not separately state the purchase price of the property on the bill to the customer. In this case the service enterprise pays the sales tax when the enterprise purchases the property from a vendor.
- (b) A service transaction is subject to the sales tax where:
 1. The transfer of tangible personal property occurs, and the charge for the property is stated separately from the charge for labor on the bill to the customer, whether or not the value of the property is inconsequential; or
 2. The transfer of tangible personal property occurs, and the value of the property is not inconsequential in relation to the total charge, and the charge for the property is not separately stated on the bill to the customer.

In 830 CMR 64H.1.1(2)(b)1., the service enterprise collects a sales tax from its customer based on the amount charged for the property; in 830 CMR 64H.1.1(2)(b)2., the service enterprise collects a sales tax from the customer based on the total amount charged.

Example 1: A sewing machine repair service, in the course of cleaning and overhauling a sewing machine for a customer, replaces a worn belt, worth approximately \$1.00. The sewing machine repairer charges \$21.00, which includes both the charge for labor and for the belt. Since, under 830 CMR 64H.1.1(2)(a)2., the value of the belt is inconsequential in relation to the total charge, and the charge for the belt is not separately stated on the bill to the customer, the service enterprise collects no tax from the customer.

Instead, the sewing machine repair service pays the sales or use tax on the belt when it purchases it from its vendor.

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Example 2: A plumber replaces a faucet on a sink for a customer, and separately states the charge for labor and the charge for the faucet on the bill to the customer. The cost of the faucet is \$15.00, and the labor charge is \$20.00. Since the charge for the faucet is stated separately on the bill to the customer, under 830 CMR 64H.1.1(2)(b)1., the sales tax applies to the charge for the faucet. The plumbing enterprise collects the tax from the customer, and may give a resale certificate to its own vendor when it purchases the faucet. Under 830 CMR 64H.1.1(2)(b)2., if the plumber *does not* state separately the charge for the faucet, the entire combined charge is taxable to the customer because the value of the property is not inconsequential in relation to the total charge.

(3) Fabrication. Any change in the form or substance of tangible personal property, or any substantial alteration in the form or shape of an existing article of tangible personal property where either party to the transaction furnishes the material, is a fabrication under 830 CMR 64H.1.1. A fabrication is a sale and is subject to the sales tax. Reupholstered furniture and custom made draperies are examples of a fabrication.

(4) Use of Resale Certificates. If, in addition to rendering a service, a service enterprise sells tangible personal property in the regular course of business, it is a retailer with respect to such sales and shall collect the sales tax from the customer. A service enterprise may give a resale certificate to its vendor when the service enterprise purchases property which it intends to resell, or when it is unable to ascertain at the time of purchase whether it will sell the property separately or use it in a service transaction.

If a service enterprise gives to a vendor a resale certificate for tangible personal property, subsequently uses the property in a service transaction or under a service contract (*See* 830 CMR 64H.1.1(5)(g)), and does not state separately to its customer the charge for the property, the service enterprise shall pay to the Commissioner a sales or use tax based upon the cost of the property to the service enterprise.

If a service enterprise pays the sales tax upon the purchase of the property and subsequently resells the property in the regular course of business, the service enterprise shall collect the tax from the customer. The service enterprise may then supply its vendor with a resale certificate and request that the vendor refund the sales tax paid on that property. The vendor may seek an abatement of the sales tax previously collected and remitted within the time limitations of M.G.L. c. 62C, § 37. With respect to sales or use tax paid on or after January 1, 2001, the service enterprise may not recover the tax by making an adjustment to its gross sales on its next sales tax return.

(5) Specific Applications.

(a) Repairers. A repair service shall collect a tax on parts or any materials which it furnishes in connection with repair work, where the value of the parts or materials is not inconsequential. This applies, for example, to the repairer of a motor vehicle, airplane, bicycle, machine, musical instrument, radio, television set, boat, or furniture. If the repair service does not separate on its customer invoices and in its records, the fair retail selling price of the parts or materials from the charge for labor, installation or other services, the Commissioner presumes that the entire charge represents the sales price of the property. (*See* 830 CMR 64H.1.1(2)(b)2.)

If the value of the property used in repair work is inconsequential and the repairer makes no separate charge for such property, the repair service enterprise is the consumer and pays the sales tax when it purchases the property. The repairer does not collect a tax from the customer. (*See* 830 CMR 64H.1.1(2)(a)1.) For example, a watch or a jewelry repair service enterprise pays a sales tax when it purchases a repair part such as a crystal, finding, or chain link.

A repairer is also a retailer of property which it sells in the regular course of business. Thus, when a watch repairer sells a wristwatch strap, metal band, watch or clock, the sale is taxable. In this case, the repairer gives a resale certificate to the vendor and collects the sales tax from the customer.

(b) Barbers, Beauty Shop Operators, Launderers and Cleaners. A barber, beauty shop operator, launderer or cleaner is a consumer of the supplies which such an enterprise uses in rendering its service. It does not collect a tax from its customer. However, if it sells any tangible personal property at retail, this service enterprise collects a sales tax from the customer.

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(c) Shoe Repairers. A shoe repair service consumes leather, rubber, heels, soles, thread, nails and other material which it uses in rendering its service. It does not collect a sales tax from its customer when it provides such an item of property as part of its service. If the repair service enterprise sells laces, polish, dye, a cleaner, or any other item of property which is part of a retail sale, the repairer collects a sales tax from the customer.

(d) Linen Services. A linen service is a consumer of linen supplies and of other tangible personal property, including towels, uniforms, coveralls, shop coats and laboratory coats which it rents to others. A linen service does not collect a sales tax from its customer because an essential part of the contract for rental of the property is that the linen service launder or clean the rented articles on a recurring basis.

(e) Reupholsterers. The reupholstering of furniture, including the making of a new slipcover, is a fabrication. A fabrication is subject to the sales tax. The reupholsterer shall collect the sales tax from the customer. The tax applies to the total amount which the reupholsterer charges the customer, whether or not the reupholsterer states the material charge and labor charge separately in the bill. This is also true if the customer furnishes the material. Where a reupholstering business performs a job which involves essentially a mechanical or structural repair, the transaction is a repair and is taxable as a repair, not as a fabrication.

(f) Draperies and Drapery Hardware. Custom-made draperies are a fabrication and the purchaser pays a sales tax in this situation. The customer pays the tax on the total amount of the bill, whether or not the retailer separately states the charge for material and for labor in the bill. This is also true if the customer furnishes material for the draperies.

A business which contracts to sell and install draperies, including drapery hardware such as brackets, rods and tracks, and other items, is a retailer of the items which it furnishes and installs. The tax applies to the entire contract price, including the charge for installation, unless the customer receives a separate statement of the installation charge.

(g) Service Contracts. The term "service contract" means, in 830 CMR 64H.1.1(5)(g), a contract for a specified period of time to repair, service or otherwise maintain tangible personal property which another person owns. Under the terms of a "service contract", the service enterprise also agrees to supply the necessary parts and material, as well as labor, for a specified contract price. The sale of a service contract is not subject to the sales or use tax.

A service enterprise is the consumer of parts, material and other tangible personal property which it purchases for use primarily under a service contract and such enterprise shall pay the sales tax upon its purchase of such property. A service enterprise does not collect the sales tax from its customer on property which the service enterprise provides under a service contract.

A service enterprise shall collect the sales tax on any tangible personal property which the original contract price does not include and for which the service enterprise makes a separate charge. This is true even though the service enterprise pays the sales tax when it purchases the property. In this case, the service enterprise may then supply its vendor with a resale certificate and request that the vendor refund the sales tax paid on that property. The vendor may seek an abatement of the sales tax previously collected and remitted within the time limitations of M.G.L. c. 62C, § 37. With respect to sales or use tax paid on or after January 1, 2001, the service enterprise may not recover the tax by making an adjustment to its gross sales on its next sales tax return.

If a service enterprise purchases tangible personal property which is primarily for resale, or if such enterprise customarily makes a separate charge for such property to its customer, the service enterprise may give a resale certificate to its vendor. If a service enterprise purchases any property under a resale certificate, such property is subject to the sales or use tax if the service enterprise subsequently uses the property under a service contract, and makes no separate charge for such property to the customer.

64H.1.2: Advertising Agencies and Graphic Design Firms(1) General.

(a) Statement of Purpose. 830 CMR 64H.1.2, is to provide guidelines as to the sales and use tax treatment of transactions engaged in by advertising agencies and graphic design firms.

(b) Outline of Topics. 830 CMR 64H.1.2, is organized as follows:

1. General.

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2. Definitions.
3. Sale transactions.
4. Purchase transactions.
5. Specific applications.
6. Specially commissioned tangible personal property.

(2) Definitions.

Advertising Agency. The term "advertising agency" or "agency" means a business which holds itself out as an advertising agency and which provides comprehensive professional services including, but not limited to, artwork, concept development, design, and any other creative services necessary to create, plan, and implement an advertising campaign.

Agency. The term "agency" means an advertising agency.

Collateral Advertising Campaign. The term "collateral advertising campaign" means the creation of graphic design work intended to market a client's goods or services through the incorporation of the work into collateral properties.

Collateral Properties. The term "collateral properties" means tangible personal property that incorporates graphic design work rendered as part of a collateral advertising campaign. Collateral properties serve a marketing function and typically are mass-produced and distributed. Some examples of collateral properties include fliers, brochures, business cards, stationary, product packaging, cups, and pins. For purposes of this regulation, the incorporation of graphic design work into the form of a composite, disk, or other "printer-ready" property is not the creation of a collateral property.

Firm. The term "firm" means a graphic design firm.

Graphic Design Firm. The term "graphic design firm" or "firm" means a business engaged, in whole or in part, in the creation of graphic design work to be incorporated into a client's advertising or marketing materials.

Graphic Design Work. The term "graphic design work" or "design work" means the creation of artwork or designs in two-dimensional, graphic form.

Inconsequential. In general, the term "inconsequential" means a value of less than 10% of the total charge for a given transaction, and the term "not inconsequential" means a value of 10% or more of such total charge. However, this definition is a general guideline and what percentage of a charge is inconsequential may vary depending upon the facts and circumstances in question.

Media Placement Advertising. The term "media placement advertising" means the development, production, and placement of advertising in media. Illustrative examples of media include newspapers and magazines; radio, television, and cable television programming; and billboards, buses, and other vehicles used in public transportation.

Tax. The term "tax" means the sales tax imposed under M.G.L. c. 64H or the use tax imposed under M.G.L. c. 64I.

(3) Sale Transactions. In general, tax applies to the retail sale of tangible personal property, but not the performance of a service. Therefore, when a transaction involves the performance of a service and there is no transfer of tangible personal property the transaction is not subject to tax.

Agencies and firms are generally engaged in the performance of service transactions in which tangible personal property may be transferred. In general, any such transfer will be presumed to be an inconsequential component of the overall transaction. A service transaction involving the transfer of tangible personal property as an inconsequential component is not subject to tax.

(4) Purchase Transactions.

- (a) General. An agency or firm is the consumer of tangible personal property used in its business, including computer equipment, stationary, ink, paint, pens, pencils, and other office supplies. Purchases of such property are subject to tax.

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(b) Agent or representative. When an agency or firm purchases tangible personal property as an agent or in a representative capacity on behalf of a client, the agency or firm shall pay tax with respect to such transaction unless an exemption applies. However, no tax will then apply to any subsequent transfer of the property from the agency or firm to the client.

It will be presumed that an agency or firm purchases tangible personal property as an agent or in a representative capacity on behalf of its client when it transfers title or possession of the property to the client in its purchased form and the purchase is for purposes of media placement advertising or a collateral advertising campaign. However, to secure this presumption as to any purchase of tangible personal property which is not inconsequential as compared to the services provided, the agency or firm shall retain a satisfactory record of the taxable transaction and of the tax paid by the agency or firm with respect thereto, and shall state on its invoice to the client that all applicable Massachusetts tax on the representative third-party transaction has been duly paid. In these situations, if the agency or firm does not pay the applicable tax, the client is liable for all taxes due.

(5) Specific applications.

(a) Consultation services. The performance of consultation or any other services in which no tangible personal property is transferred is not subject to tax.

Example. Market Associates does market research on behalf of its clients and provides consultation and advisory services based upon this research. Market does not transfer tangible personal property to its clients. Market's transactions are not taxable.

(b) Collateral advertising campaigns. In general, the performance of a collateral advertising campaign constitutes the performance of a service transaction in which tangible personal property is transferred, but in which this transfer is an inconsequential component. Therefore, in such instance, the performance of a collateral advertising campaign is not subject to tax.

Example 1. John Artist specializes in designing logos and complementary artwork that businesses will incorporate into their letterhead, business cards, and product packaging. Mr. Artist provides the logos and artwork to his client and the client seeks a printer or other vendor who will produce the letterhead, business cards, and product packaging. Mr. Artist's design transactions are not taxable, whether or not Mr. Artist provides his graphic design work to his client in the form of a composite, disk, or other "printer-ready" property.

Example 2. Mary Purchase designs annual reports on behalf of her clients and, on approval by the client, contracts with a printer for the mass-replication of these reports. Ms. Purchase's design transactions are not taxable. Moreover, it is presumed Ms. Purchase is purchasing the annual reports as an agent or in a representative capacity for her clients. Therefore, Ms. Purchase shall pay tax on the purchase of the annual reports, but is not required to collect tax upon the subsequent transfer of these reports to her clients. However, Ms. Purchase shall retain a satisfactory record of the taxable printing transaction and of the tax paid by her with respect thereto, and shall state, in her invoice to the client, that such tax was paid.

Example 3. Same facts as in Example 2, except that prior to approaching the printer, Ms. Purchase first contracts with a vendor who transforms her design work into a composite, disk, or other "printer-ready" product. Ms. Purchase plans to transfer this tangible personal property to the printer to print the annual reports. As in Example 2, it is presumed Ms. Purchase is acting as an agent or in a representative capacity as to this taxable transaction for printer-ready property.

Example 4. Concept Overhaul creates graphic designs on behalf of business clients which the clients will incorporate into their letterhead, business cards, and product packaging. In addition, Concept contracts with third-party vendors for signs and decorative materials that incorporate Concept's designs and which are to be placed at its clients' offices. Concept's design transactions are not taxable. Moreover, it is presumed that Concept is purchasing signs and decorative materials as an agent or in a representative capacity for its clients. Therefore, Concept shall pay tax on the purchase of signs and decorative materials, but is not required to collect tax upon the subsequent transfer of this property to its clients. However, Concept shall retain a satisfactory record of the taxable third-party vendor transactions and of the tax paid by it with respect thereto, and shall state, in its invoice to the client, that such tax was paid.

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(c) Media placement transactions. Media placement transactions constitute the performance of a service in which tangible personal property may be sold, but in which such a sale is an inconsequential component. Therefore, the performance of a media placement transaction is not subject to tax.

Example. Media Maker offers to create and place media advertisements in newspapers, television programs, and public transportation vehicles, including buses. Media develops a media placement plan with its client, then creates the advertisements necessary to implement this plan and contracts with media firms, such as newspapers and television stations, to place these advertisements in accordance with the placement plan. The advertisements created are the property of Media's client, and may or may not be physically transferred (since the advertisements are of de minimis value to the client apart from their media utilization). Media is required to pay tax on all equipment and materials purchased to create the advertisements. However, the placement transactions between Media and its clients, including any charge for the creation of the advertisements, are not taxable.

(d) Sale of collateral properties. In general, an agency or firm does not create collateral properties, though these businesses may create the graphic designs which are incorporated into such properties. However, if there is a transfer of collateral properties by an agency or firm to a client for consideration, such transfer would be a taxable retail sale.

Upon the completion of graphic design work, an agency or firm might contract with a third-party vendor on behalf of that agent or firm's client for the production of collateral properties that incorporate the graphic designs. In general, the agency or firm is acting as its client's agent or in a representative capacity in these transactions. Therefore, tax applies to the transaction by the agency or firm with the third-party vendor. However, no tax applies to the subsequent transfer of the collateral properties from the agency or firm to the client. If such transfer is not inconsequential as compared with the services provided, the transferor shall retain a satisfactory record of the taxable transaction and of the tax paid by the transferor with respect thereto, and shall state, in its invoice to the client, that such tax was paid.

Example. John Artist specializes in designing logos and complementary artwork that businesses will incorporate into their letterhead, business cards, and product packaging. However, Mr. Artist also owns an in-house copy machine and offers to copy fliers and other collateral properties that incorporate his designs. Mr. Artist's design transactions are not taxable. However, when Mr. Artist creates collateral properties on behalf of his clients he is acting as a vendor and must collect the applicable tax on these retail sales. For sales tax purposes, Mr. Artist's creation of collateral properties is treated separately from his design work. Mr. Artist's clients can and often do purchase such design work, then separately contract with a third-party vendor for the production of collateral properties utilizing these designs. The taxable sales price for Mr. Artist's sale of collateral properties includes only his cost of materials and applicable labor in producing these properties. On his client billings, Mr. Artist shall separately state the sales price for any sale of collateral property and also separately state the applicable tax.

(6) Specially commissioned tangible personal property. In general, the purchase of specially commissioned tangible personal property that is not created as part of a collateral advertising campaign or for purposes of media placement advertising, is a taxable retail sale (e.g., the purchase of a specially commissioned sculpture). However, in these cases there are a number of statutory exceptions which might apply. These exceptions include a sales tax exemption for:

- (a) the sale of tangible personal property for resale, M.G.L. c. 64H, § 1;
- (b) the sale of tangible personal property which becomes an ingredient or component part of tangible personal property to be sold (*i.e.*, which becomes physically incorporated into such property), M.G.L. c. 64H, § 6(r);
- (c) the sale of a motion picture film for commercial exhibition, M.G.L. c. 64H, § 6(m);
- (d) certain sales of composted type, film positives, film negatives, or reproduction proofs, M.G.L. c. 64H, § 6(gg);
- (e) certain sales of direct and cooperative mail promotional advertising distributed to residents of the commonwealth, M.G.L. c. 64H, § 6(ff); and

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- (f) the sale of preprinted advertising circulars to be inserted into newspapers, M.G.L. c. 64H, § 6(m).

64H.1.3: Computer Industry Services and Products

(1) Statement of Purpose; Effective Date; Outline of Topics.

(a) Statement of Purpose. The purpose of 830 CMR 64H.1.3 is to explain the application of the Massachusetts sales and use taxes to computer products and software.

(b) Effective Date. 830 CMR 64H.1.3, effective October 20, 2006, applies to transactions on and after April 1, 2006.

(c) Outline of topics. 830 CMR 64H.1.3 is organized as follows:

1. Statement of Purpose; Effective date; Outline of Topics
2. Definitions
3. General Rules
4. Sales, Leases, and Rentals of Computer Hardware
5. Sales, Leases, Licenses and Rentals of Masters Related to the Rights to Reproduce Computer Software
6. Sales, Leases, Licenses and Rentals of Custom Computer Software
7. Optional Software Maintenance Contracts
8. Furnishing of Information to Customers
9. Processing of Data Furnished by Customers
10. Additional Copies of Custom Software or Personal Reports
11. Training Services and Materials
12. Transmission of Data
13. Access to Database Services
14. Other Miscellaneous and Nontaxable Services
15. Multiple Points of Use Certificates

(2) Definitions. For purposes of 830 CMR 64H.1.3 the following terms have the following meanings:

Canned Software, *see* Prewritten Software.

Commissioner, the Commissioner of Revenue or the Commissioner's duly authorized designee.

Computer, an electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions.

Computer Equipment, computer hardware and any software loaded onto the hardware prior to sale.

Computer Hardware, the physical components of a computer system.

Computer Software, a set of coded instructions designed to cause a computer or automatic data processing hardware to perform a task.

Custom Software, a software program prepared to the special order of a customer that is not prewritten software.

Database, a collection of interrelated data in a form capable of being processed by a computer, organized to facilitate efficient and accurate inquiries and updates.

Delivered Electronically, delivered to the purchaser by means other than tangible storage media.

Department, the Department of Revenue.

Electronic, relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

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Engaged in Business in Massachusetts, *see* M.G.L. c. 64H, § 1.

Imprinted Magnetic Media, magnetic media which have computer-readable programs or data imprinted onto them.

Lease, a lease, rental, or any other temporary transfer of possession or control for consideration, regardless of how the transfer is characterized by the parties.

License, the right to use, copy, or access software, regardless of the location or ownership of any server on which the software may be installed. Unlike a lease, a licensing arrangement may or may not be time limited.

Load and Leave, delivery to the purchaser by use of tangible storage media where the tangible storage media is not physically transferred to the purchaser.

Magnetic Media, storage media, such as hard disks, floppy disks, diskettes, magnetic tape, cards, bar code, or any similar medium that is computer-readable.

Prewritten Computer Software (Prewritten Software), also Known as Canned Software and Standardized Software, computer software, including prewritten upgrades, which is not designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more prewritten computer software programs or prewritten portions thereof does not cause the combination to be other than prewritten computer software. Prewritten computer software includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the specific purchaser. Where a person modifies or enhances computer software of which the person is not the author or creator, the person shall be deemed to be the author or creator only of such person's modifications or enhancements. Prewritten computer software or a prewritten portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains prewritten computer software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement, such modification or enhancement shall not constitute prewritten computer software.

Printed Matter, human-readable information reproduced via printing, photocopying, or similar method of reproduction.

Processing of Data Furnished by Customers, the processing of raw data provided by customers into reports delivered in tangible form or delivered electronically that are not or may not be incorporated in reports furnished to other persons.

Program, the complete sequence of computer instructions necessary to solve a problem, including system and application programs and subdivisions such as assemblers, compilers, routines, generators, and utility programs.

Reports of Individual Information, reports or other information personal and individual in nature that may not be or is not substantially incorporated in reports furnished to any other purchaser, provided via printed matter or other tangible media.

Reports of Standard Information, reports or other information that are not reports of individual information, provided via printed matter or other tangible media.

Tangible Personal Property, personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. Tangible personal property includes electricity, gas, steam, and prewritten computer software. *See* M.G.L. c. 64H, § 1.

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(3) General Rules.

(a) Sales Tax. Sales in Massachusetts of computer hardware, computer equipment, and prewritten computer software, regardless of the method of delivery, and reports of standard information in tangible form are generally subject to the Massachusetts sales tax. Taxable transfers of prewritten software include sales effected in any of the following ways regardless of the method of delivery, including electronic delivery or load and leave: licenses and leases, transfers of rights to use software installed on a remote server, upgrades, and license upgrades. The vendor collects sales tax from the purchaser and pays the sales tax to the Commissioner.

(b) Use Tax. The Massachusetts use tax complements the Massachusetts sales tax and is imposed on the use, storage, or other consumption of computer hardware, computer equipment, and prewritten computer software, regardless of the method of delivery, and reports of standard information in tangible form purchased for use, storage, or other consumption in Massachusetts. Apportioned Massachusetts use tax will be imposed on prewritten software concurrently available for use in multiple jurisdictions within the meaning of 830 CMR 64H.1.3(15) without regard to any of the following:

1. The jurisdiction where the purchaser takes delivery;
2. The location or ownership of any server on which the software may be installed; or
3. Whether the purchaser gives the seller an MPU exemption form.

(c) Exceptions to the Massachusetts Use Tax. The Massachusetts use tax is not imposed if:

1. The vendor collected and paid the Massachusetts sales tax on the sale of the tangible personal property;
2. The transaction is exempt from the sales tax; or
3. The purchaser paid a tax or reimbursed the vendor for a tax imposed by another state or territory of the United States on the transaction, provided that:
 - a. The tax was legally due, without right to a credit or refund; and
 - b. The other state or territory allows a corresponding exemption for tax paid to Massachusetts.
 - c. If the tax paid to the other state or territory was less than 5%, the exemption does not apply and Massachusetts use tax is imposed on the difference between the two rates.

(d) Collection and Payment of the Massachusetts Use Tax.

1. Collection and Payment of Use Tax by Vendor Engaged in Business in Massachusetts. When a vendor that is engaged in business in Massachusetts sells taxable software, computer hardware, computer equipment or reports for use, storage, or other consumption in Massachusetts, the vendor shall collect the Massachusetts use tax from the purchaser and remit the tax to the Department. The Department will presume that tangible personal property sold by any vendor for delivery in Massachusetts is sold for use, storage, or other consumption in Massachusetts.

2. Payment of Use Tax by Purchaser. If the vendor does not collect either the Massachusetts sales tax or the Massachusetts use tax, the purchaser should pay the five percent use tax to the Department. *See* 830 CMR 62C.16.2. For software concurrently available for use in multiple jurisdictions, the purchaser must remit apportioned use tax to Massachusetts as provided in 830 CMR 64H.1.3(15).

(e) Non-taxable Sales. Sales of custom software, personal and professional services, and reports of individual information are generally exempt from Massachusetts sales and use taxes.

(4) Sales, Leases, and Rentals of Computer Hardware.

(a) Tax Treatment of Computer Hardware Sales. Sales, leases, rentals, and installment sales of new or used computer hardware are generally taxable. *See* 830 CMR 64H.1.3(3).

(b) Exemptions from the Sales Tax. The exemptions from the Massachusetts sales tax are contained in M.G.L. c. 64H, § 6.

(c) Installation Charges. Separately stated charges for installing computer hardware of any type are not taxable, so long as the charges are reasonable and set in good faith.

(d) Leases of Computer Hardware.

1. General. Leases of computer hardware are generally taxable in the state where the hardware is physically located.

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2. Collection and Payment of Sales Tax on Leases. Lessors of computer hardware will collect and pay sales tax on lease and rental payments as the payments become due. A lessor's gross receipts for any period are the amounts due during that period under the terms of the lease.
 3. Access to Computer Hardware on the Premises of Another.
 - a. Leases include agreements under which a person has access to computer hardware not on that person's premises, if that person or that person's employee operates, directs, or controls the computer hardware.
 - b. For rules applicable to access of prewritten software on the premises of another, *See* 830 CMR 64H.1.3(3).
- (e) Installment Sales of Computer Hardware.
1. Installment sales of computer hardware are generally taxable.
 2. Vendors under an installment sales contract for computer hardware should collect and pay sales tax on the total sales price of the hardware. The tax is payable on the return due date immediately following the date of the sale.
 3. Separately-stated interest charges under installment sales contracts are not included in the sales price subject to tax as long as the interest charges are set in good faith.
- (f) Discounts, Coupons, and Rebates. For the sales tax treatment of discounts, coupons, and rebates, *see* 830 CMR 64H.1.4.
- (g) Trade-ins of Computer Hardware.
1. Definition. For the purposes of 830 CMR 64H.1.3(4)(g), the following term has the following meaning:
Trade-in, a previously purchased item transferred to a vendor as full or partial consideration for the purchase of another item.
 2. Tax Treatment of Trade-in Transactions. The fair market value of traded-in computer hardware as of the date of the trade-in is ordinarily included in the sales price subject to sales tax as part of the consideration. If an item of computer hardware is returned to a vendor in connection with the purchase of computer hardware and that item has no value, the item is not part of the consideration for the purchase of computer hardware. The facts and circumstances will determine the value, if any, of an item of traded-in computer hardware.
- (h) Services Related to a Sale of Computer Hardware.
1. Mandatory Services. If computer hardware cannot be purchased without services such as training, maintenance, developing custom software, and testing, charges for the services are considered part of the sales price and are generally taxable even if separately stated. *See also* 830 CMR 64H.1.3(14).
 2. Optional Services. If the purchaser may purchase computer hardware without additional services, separately stated charges for the services are not considered part of the sales price for the hardware and are generally exempt. For purposes of 830 CMR 64H.1.3, separately stated charges must be clearly stated on the bill or invoice presented to the customer as well as on the vendor's books and records. *See also* 830 CMR 64H.1.3(11), (14).
- (i) Service Contracts.
1. Definition. For the purposes of 830 CMR 64H.1.3(4), the term Service Contract means an agreement for only service, repair, and maintenance (including consultation and technical assistance) of computer hardware, which may include an agreement to supply necessary parts and materials for repair. The agreement must be optional, as described in 830 CMR 64H.1.3(4)(h)2.
 2. Agreements to Provide Parts and Materials. If a service contract includes an agreement to supply necessary parts and materials for the repair of computer hardware, the charges for the service contract are not taxable under the following conditions:
 - a. The contractor should pay sales tax on purchases of parts and materials for use primarily in service contracts;
 - b. The contractor should not collect sales tax from the customers on parts and materials provided under the service contracts; and
 - c. The contractor should collect sales tax from the service contract customers for any tangible personal property not included under the service contract for which the contractor makes a separate charge.

64H.1.3: continued

3. Adjustment for Sales Tax Paid by Contractor. If the contractor paid sales tax on the purchase of tangible personal property for which the contractor later collects sales tax from a customer under 830 CMR 64H.1.3(4)(i)2.c., the contractor may then supply its vendor with a resale certificate and request that the vendor refund the sales tax paid on that property. The vendor may seek an abatement of the sales tax previously collected and remitted within the time limitations of M.G.L. c. 62C, § 37. With respect to sales or use tax paid on or after January 1, 2001, the contractor may not recover the tax by making an adjustment to its gross sales on its next sales tax return.

(5) Sales, Leases, Licenses and Rentals of Masters Related to the Rights to Reproduce Computer Software.

(a) Definitions. For the purposes of 830 CMR 64H.1.3(5), the following terms have the following meanings:

Master, a single unit of computer software, custom or canned, sold for use in the production of multiple copies of the software to be sold.

(b) Sales of Reproduction Masters as Part of a Sale of Rights. The sale of the right to reproduce a program is generally subject to Massachusetts sales tax, regardless of whether the transaction is characterized as a sale, lease, license or rental, unless an exemption applies.

(c) Examples.

Example 1: Acme Software Development Co. sells prewritten software to Bates Manufacturing, Inc. As part of the contract, Acme transfers a master of the software to Bates. The sale includes the rights for Bates to make 100 copies of the software for use by its employees. The total contract price is \$10,000. The sales price subject to tax is \$10,000.

Example 2: Acme Software Development Co. sells prewritten software to Copyrighted Software Corp., along with unlimited rights to copy and incorporate the software into a spreadsheet software package that Copyrighted will sell to its customers. The total contract price is \$10,000. The sale between Acme and Copyrighted is exempt under M.G.L. c. 64H, § 6(r), because the software will become an ingredient or component part of tangible personal property to be sold by Copyrighted.

Example 3: Acme Software Development Co. sells a master copy of prewritten software to Diligent Distributors Corp., along with unlimited rights to copy, market and sell the software to the public. The total contract price is \$15,000. The sale between Acme and Diligent may be a sale for resale, providing the requirements of M.G.L. c. 64H, § 8 or M.G.L. c. 64I, § 8 are met.

Example 4: Acme Software Development Co. sells a master copy of a word processing software package to Massachusetts Computer Company. Massachusetts Computer Company will copy and load the software package on to the hard drive of computers sold both inside and outside of Massachusetts. The contract provides that Acme is paid \$5,000 at the signing of the contract and \$250 for each copy of the software that is made by Massachusetts Computer Company. The sale between Acme and Massachusetts Computer Company is exempt under M.G.L. c. 64H, § 6(r), because the software will become an ingredient or component part of tangible personal property to be sold. Sales or use of the computer equipment in Massachusetts is taxable.

Example 5: Acme Software Development Co. sells prewritten software to On-Line Games, Inc., a Massachusetts company. The sales price is \$5,000. On-Line Games will incorporate the software into a product that will be marketed and sold on the Internet as a game. The game may be downloaded by the purchaser from the On-Line Games website for a cost of \$5. The sale between Acme and On-Line Games is exempt under M.G.L. c. 64H, § 6(r) because the software will become an ingredient or component part of tangible personal property to be sold. Sales of the game to purchasers in Massachusetts are taxable sales of prewritten software.

64H.1.3: continued

Example 6: Acme Software Development Co. sells prewritten software to On-line Products, Inc., a Massachusetts company. The sales price is \$12,000. On-line Products will incorporate the software into a digital product that is not software and is sold on the Internet. The digital product may be downloaded by the purchaser from the On-line Products website for a cost of \$5. The software becomes a part of a digital product that is not taxable when downloaded to customers in Massachusetts; the exemption in M.G.L. c. 64H, § 6(r) does not apply. Acme must collect sales tax on the \$12,000 sales price paid by On-line for the prewritten software.

(6) Sales, Leases, Licenses and Rentals of Custom Computer Software.

(a) Exemption for Sales of Custom Software. Sales of custom software are generally exempt from sales tax as professional service transactions regardless of the method of delivery.

(b) Professional Service Transactions. A professional service transaction for custom software is one in which the principal object of the purchaser is the professional and personal services of a programmer, systems analyst, or other person who imprints or has imprinted the result of the services on magnetic media, the cost of which is an inconsequential element of the cost of the entire transaction. The cost of the medium is the price paid for the medium by the programmer, regardless of any improvement made to the medium by the programmer.

(c) Definition of "Inconsequential Element". The term "Inconsequential Element" generally means a cost of less than 10% of the total contract price. The definition of "Inconsequential Element" is only a guideline and may vary depending on the facts and circumstances of a particular transaction.

(d) Custom Modifications to Prewritten Software. Sales of custom modifications to prewritten software are generally not taxable if the sales price of the prewritten software and the charges for the custom modification are separately stated. The charges must be reasonably allocated and determined in good faith. For purposes of 830 CMR 64H.1.3, separately stated charges must be shown on the bill or invoice presented to the customer as well as on the vendor's books and records. The sales price of the original prewritten software is taxable.

(e) Documentation Regarding Costs of Tangible Personal Property in Relation to Entire Transaction. The vendor or purchaser may state in transaction documents that the estimated cost of tangible personal property related to a custom modification transaction or any other service transaction described in 830 CMR 64H.1.3, is an inconsequential element of the entire transaction. This statement will not be considered a separate statement of the cost of the tangible personal property. The cost of the tangible personal property so estimated is not taxable solely because of this statement.

(f) Custom Software Sold to Subsequent Purchasers. If custom software sold to a single purchaser is later sold to others, the later sales are sales of prewritten software. The sale of custom software to a subsequent purchaser that meets the requirements for a custom modification under 830 CMR 64H.1.3(6)(d) is not taxable.

(7) Optional Software Maintenance Contracts.

(a) Definition. For the purposes of 830 CMR 64H.1.3(7), the term Computer Software Maintenance Contract means an agreement to furnish maintenance services, upgrades, enhancements or updates of prewritten software, which may include an agreement for service, repair, and maintain computer hardware. Maintenance services may include including technical assistance and consultation. The agreement must be optional, as described in 830 CMR 64H.1.3(4)(h)2.

(b) Tax Treatment of Optional Computer Software Maintenance Contracts. Charges for optional software maintenance contracts that do not include upgrades are generally not taxable. An optional contract is one that the customer is not obligated to purchase as a condition to acquiring the software. Charges for an optional maintenance contract must always be separately stated on the invoice to the customer.

(c) Computer Software Maintenance Contracts.

1. Charges for Upgrades and Services not Separately Stated. For transactions on and after January 1, 2007, if the charges for upgrades and services are not separately stated, tax applies to 50% of the sales price of the maintenance contract.

64H.1.3: continued

2. Charges for Upgrades and Services Separately Stated. If an upgrades plus service contract separately and reasonably states charges for the service and upgrades portions of the contract, charges for the upgrades portion are taxable, and charges for the service portion are not taxable.
 3. Cost of Upgrades to be Reasonable and in Good Faith. If the separately stated costs of upgrades to be supplied appear reasonable and are set in good faith, they will be accepted by the Commissioner. If the estimated costs of upgrades to be supplied do not appear reasonable, the Commissioner may assess additional sales tax using the method in 830 CMR 64H.1.3(7)(c)1.
- (d) Prior Relationship of Contractor to Vendor not Relevant. The rules set out in 830 CMR 64H.1.3(7) apply regardless of the fact that the contractor may have been a vendor who sold the customer an item of computer hardware.
- (e) Examples:
- Example 1: Faithful Computer Services, Inc., entered into an agreement with General Medical Professional Corporation to service personal computers General recently purchased from another vendor. For \$1,500 a year, Faithful will periodically check General's personal computers and will be available to correct any problems that arise. Faithful has also agreed to replace any worn-out parts at no charge during the term of the agreement. Faithful should pay sales tax on all parts it buys to service General's computers and should not charge General sales tax for the parts. Faithful's \$1,500 yearly charge to General is not taxable.
- Example 2: Floppy Disk Co. sold General Medical Professional Corporation a prewritten billing software package for \$1,500 for use on personal computers General purchased from another vendor. Floppy also entered into an optional agreement for \$600 with General to maintain the software package, replace defective disks, and provide any updates to the package if released. Floppy is unable to determine the value of any upgrades at the time of sale. Floppy must collect and remit tax on \$1,800 (\$1,500 plus 50% of \$600).
- (8) Furnishing of Information to Customers.
- (a) Tax Treatment of Sales of Reports of Standard Information. Sales of reports or other information on printed matter or magnetic media, sold or intended to be sold to two or more purchasers, are generally taxable. Such reports may reflect collection, compilation, or analysis of information. Examples include database files, mailing lists, market research, and surveys.
- (b) Exemption for Sales of Reports of Individual Information. The sale of a report of individual information, whether printed or on magnetic media, is not taxable if the report may not be or is not substantially incorporated into reports furnished to other persons.
- (9) Processing of Data Furnished by Customers.
- (a) Exemption for Processing of Data Furnished by Customers. Charges for processing data furnished by customers are generally exempt from sales tax, regardless of the method of delivery of the processed information to the customer. Processing data may include the following: summarizing data, computing data, extracting data, sorting files, and sequencing data as well as services that provide the customer or subscriber with additional, different, or restructured information. The following are examples of exempt data processing: charges automated teller machine (ATM) terminal driving services, electronic funds transfer services, or credit card or check verification services. Changes to the format, code or protocol of the subscriber's content or information solely for the purposes of transmission are not a data processing service. Telecommunications services consumed in the provision of data processing services are taxable.
- (b) Tax Treatment of Converting Information From One Medium to Another. If the necessary steps for processing data furnished by a customer have been completed and the customer pays a vendor to convert the data from one medium to another tangible medium, the separately stated charges for conversion are taxable, including charges for transferring data from a storage medium compatible with one computer system to a storage medium compatible with another.

NON-TEXT PAGE

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(c) Examples:

Example 1: Hasty Manufacturing Co. contracted with International Research Associates to process the results of a consumer market survey. Hasty sent the raw data, completed questionnaires, to International. International will enter the data into its computer, tabulate the results, and analyze the research. International will present Hasty with a printed report with its conclusions and a magnetic tape containing all the tables and graphs. International's charges are not taxable.

Example 2: Hasty Manufacturing Co. has a payroll software package that computes each employee's pay. Hasty processes its entire payroll on its own computer but pays International Banking Services Corp. to print the checks. International's charges for printing are taxable.

Example 3: Hasty Manufacturing Co. just bought a new word processing system. Hasty paid International Conversion Services, Inc., to transfer the information on the diskettes used on the old system to new diskettes. International's charges for the new diskettes are taxable.

(10) Additional Copies of Custom Software or Personal Reports.

(a) General. Where a vendor sells custom software or reports of individual information to a purchaser who requires multiple copies, separately stated charges for copying the custom software or report in tangible media are taxable, regardless of the exemptions of 830 CMR 64H.1.3(6) and 830 CMR 64H.1.3(8)(b).

(b) Tax Treatment of Charges for Replacement Copy Provided in Tangible Media. Separately stated charges for replacing custom software which has been rendered unusable are generally taxable. *See also* 830 CMR 64H.1.3(7)(b) through (f).

(11) Training Services and Materials.

(a) Training Services. Charges for training not provided as a mandatory part of the sale of computer hardware are not taxable. *See* 830 CMR 64H.1.3(4)(h)1., on charges for mandatory training.

(b) Training Materials. Charges for instruction books and manuals in tangible form and canned tutorial software are generally taxable.

(12) Transmission of Data. Taxable telecommunications services, such as telephone and telegraph services, include transmission, conveyance, or routing of voice, data, or any other information or signals to a point, or between or among points. The term "telecommunications services" includes, without limitation, such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code or protocol of the content for purposes of transmission, conveyance or routing without regard to whether such service is referred to as voice over Internet protocol services or is classified by the Federal Communications Commission as enhanced or value added. Charges for encryption services, security authentication and data monitoring provided with data transmission services are also subject to tax as telecommunications services. Changes to the format, code or protocol of the subscriber's content or information solely for the purposes of transmission are not a data processing service for purposes 830 CMR 64H.1.3(9).

(13) Access to Database Services.

(a) Exemption for Database Services. Charges for access by telephone or other means to databases stored in computer hardware not on the premises of the customer are generally not taxable.

(b) Retrieval of Data by Customer. In a database service transaction, the customer does not direct or control the entry of data into the database but merely selects data for retrieval.

(c) Tax Treatment of Printing Charges. Separate charges for the actual printing of retrieved data are generally taxable. Separate charges for transmitting retrieved data for a customer who will print the data on the customer's printer are not taxable.

(d) Tax Treatment of Related Computer Hardware Transactions. The sale of a computer terminal or other computer hardware used in retrieving data from a database is generally taxable.

64H.1.3: continued

(14) Other Miscellaneous and Nontaxable Services.

(a) General Rule. Generally, charges for the access or use of software on a remote server are subject to tax. However, where there is no charge for the use of the software and the object of the transaction is acquiring a good or service other than the use of the software, sales or use tax does not apply. *See, e.g.,* 830 CMR 64H.1.3(13).

Example 1: Bob goes to an Internet website that hosts auctions of various items of tangible personal property and places a bid for \$100 on an item of vintage clothing. Although Bob has accessed and used software on a remote server, the object of the transaction is acquiring the item on which he is bidding in the on-line auction. No tax applies to the access. If Bob's bid is the winning one, sales or use tax is due on any tangible personal property purchased at the on-line auction that is shipped to a Massachusetts customer, however the purchase of clothing in this example is exempt under M.G.L. c. 64H, § 6(k).

Example 2: Ann wants to acquire prewritten computer software to prepare her personal income tax return. The vendor of the software gives her the option of purchasing the software on a disk that will be mailed to her home or she can pay to securely access the software on the vendor's server through the Internet and use of a personal access code. In either case, the functionality of the software is the same. The object of the transaction here is the use of the software. Charges for the prewritten software will be subject to sales or use tax regardless of the method of delivery chosen by Ann.

(b) Tax Treatment of Miscellaneous Service Transactions. Charges for web site hosting, designing computer systems, designing data storage and retrieval systems, consulting services, feasibility studies, evaluations of bids, technical analysis, programming, and the like are generally not taxable if they are not part of a sale of computer hardware or prewritten software. If the miscellaneous services are a mandatory part of a taxable sale of computer hardware or prewritten software, the charges for the services are taxable. *See* 830 CMR 64H.1.3(4)(h).

(c) Standards for Determining Whether Services are Separate From a Sale of Computer Hardware or Prewritten Software. The following factors indicate, but do not determine, whether a particular service is separate from a sale of computer hardware or prewritten software.

1. Any association or affiliation of the service contractor with the vendor;
2. The separate statement and documentation of the charges in the vendor's books and records;
3. Whether the services are contracted for or provided before the sale; and
4. The language of the agreement.

(d) Location of Performance of Services. The place where services such as designing computer systems, consulting, analysis, and programming are performed is immaterial to the sales tax treatment of charges for the services.

(15) Multiple Points of Use Certificates.

(a) General Rule. A business purchaser that is not a holder of a direct pay permit that knows at the time of its purchase of prewritten computer software that the software will be concurrently available for use in more than one jurisdiction shall deliver to the seller in conjunction with its purchase an exemption certificate claiming multiple points of use, Form ST-12. Prewritten computer software, for purposes of 830 CMR 64H.1.3(15) includes, but is not limited to, computer software delivered or accessed electronically, regardless of the location of the server where the software is installed, software delivered by load and leave, or in tangible form. Computer software received in-person by a business purchaser at a retail business location of the seller is not included. Computer software for personal use is not included.

1. Upon receipt of an exemption certificate claiming multiple points of use, the seller is relieved of all obligation to collect, pay, or remit the applicable tax and the purchaser shall be obligated to collect, pay, or remit the applicable tax on a direct pay basis. Except as provided in 830 CMR 64H.1.3(15)(a)7., a certificate claiming multiple points of use must be received by the seller no later than the time the transaction is reported for sales or use tax purposes.

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2. A purchaser delivering an exemption certificate claiming multiple points of use may use any reasonable, but consistent and uniform, method of apportionment that is supported by the purchaser's books and records as they exist at the time the transaction is reported for sales or use tax purposes.
3. A reasonable, but consistent and uniform, method of apportionment includes, but is not limited to, methods based on number of computer terminals or licensed users in each jurisdiction where the software will be used. A reasonable, but consistent and uniform method of apportionment may not be based on the location of the servers where the software is installed.
4. A purchaser delivering an exemption certificate claiming multiple points of use shall report and pay the appropriate tax to each jurisdiction where concurrent use occurs. The tax due will be calculated as if the apportioned amount of the prewritten computer software had been delivered to each jurisdiction to which the sale is apportioned pursuant to 830 CMR 64H.1.3(15)(a)2.
5. A Multiple Points of Use Certificate may not be used for software received in person by a business purchaser at a retail store.
6. A Multiple Points of Use Certificate may not be used for software that is loaded on computer hardware prior to sale. In that situation, the sales tax sourcing rules for computer hardware determine the taxability of the transaction, regardless of whether the price for the prewritten software is separately stated.
7. The exemption certificate claiming multiple points of use will remain in effect for all future sales eligible for apportionment under 830 CMR 64H.1.3(15) by the seller to the purchaser, except as to the subsequent sale's specific apportionment that is governed by 830 CMR 64H.1.3(15)(a)2., until it is revoked in writing.
8. The purchase of software loaded onto a server located in a single state that will be available for access by a purchaser's employees in multiple jurisdictions is concurrently available for use in more than one jurisdiction within the meaning of 830 CMR 64H.1.3(15) if the purchaser knows at the time of its purchase that the software will be concurrently available for use in multiple jurisdictions.
9. Delivery of a copy of the software is not necessary for the software to be "concurrently available for use in more than one jurisdiction" within the meaning of 830 CMR 64H.1.3(15).
10. The purchase of a license that allows the licensee/customer to make copies of software that will be used in more than one jurisdiction by the customer is concurrently available for use in more than one jurisdiction within the meaning 830 CMR 64H.1.3(15) if the purchaser knows at the time of its purchase that the software will be concurrently available for use in multiple jurisdictions.
11. Examples:

Example 1: Prewritten software is installed on a server located in another state but concurrently available for use by purchaser's employees in Massachusetts as well as other states. The purchaser gives the seller a properly completed MPU form. Part of the sales price of the software will be apportioned to Massachusetts for sales/use tax purposes.

NON-TEXT PAGE

64H.1.3: continued

Example 2: Prewritten software is installed on a server located in Massachusetts but concurrently available for use by purchaser's employees in other states as well as Massachusetts. The purchaser gives the seller a properly completed MPU form. Part of the sales price will be apportioned to those other states for sales/use tax purposes.

Example 3: A business in Massachusetts purchases an enterprise license that allows the purchaser to make copies of software (either from a master disk or downloaded copy) and those copies will be concurrently available for use at the purchaser's business locations in various jurisdictions. The purchaser gives the seller a properly completed MPU form. For sales/use tax purposes, part of the sales price will be apportioned to the other states where the purchaser is using copies of the software.

Example 4: A sale of software eligible for MPU treatment includes a separately stated charge for a maintenance contract including upgrades and telephone support. The charges for upgrades and services provided under the maintenance contract are not separately stated. Both the sales price of the software and the taxable sales price of the service contract, determined under 830 CMR 64H.1.3(7)(c)1. are subject to MPU apportionment.

Example 5: Prewritten software concurrently available for use by the purchaser's employees in other states as well as Massachusetts is delivered in a tangible medium to the purchaser's offices in New Hampshire. New Hampshire does not impose a sales tax and the purchaser does not give the seller a properly completed MPU form. Apportioned use tax is due to Massachusetts.

Example 6: Prewritten software concurrently available for use by the purchaser's employees in other states as well as Massachusetts is delivered via a master copy in tangible medium to the purchaser's offices in Connecticut. The vendor collects and remits Connecticut sales tax. Providing that the conditions of 830 CMR 64H.1.3(3)(c) are met, no additional use tax may be due to Massachusetts.

(b) Seller Remittance of Apportioned Tax. Notwithstanding 830 CMR 64H.1.3(15)(a), when the seller knows that the prewritten software will be concurrently available for use in more than one jurisdiction, but the purchaser does not provide an exemption certificate claiming multiple points of use, the seller may work with the purchaser to produce the correct apportionment. The purchaser and seller may use any reasonable, but consistent and uniform, method of apportionment that is supported by the seller's and purchaser's business records as they exist at the time the transaction is reported for sales or use tax purposes. If the purchaser certifies to the accuracy of the apportionment and the seller accepts the certification, the seller shall collect and remit the tax to the appropriate jurisdictions as provided in 830 CMR 64H.1.3(15)(a)4. In the absence of bad faith, the seller is relieved of any further obligation to collect tax on any transaction where the seller has collected and remitted tax pursuant to the information certified by the purchaser, provided that the seller retains records of the methodology used to apportion the tax in addition to the purchaser's written certification.

(c) When the seller knows that the prewritten software will be concurrently available for use in more than one jurisdiction and the purchaser does not have a direct pay permit and does not provide the seller with an exemption certificate claiming multiple points of use exemption as required by 830 CMR 64H.1.3(15)(a) or the certification required by 830 CMR 64H.1.3(15)(b), the seller shall collect and remit the tax as provided by 830 CMR 64H.6.7, unless the purchaser is otherwise exempt.

(d) A holder of a direct pay permit shall not be required to deliver an exemption certificate claiming multiple points of use to the seller. A direct pay permit holder shall follow the provisions of 830 CMR 64H.1.3(15)(a)2. in apportioning the tax due on prewritten computer software that will be concurrently available for use in more than one jurisdiction.

(e) Nothing in 830 CMR 64H.1.3(15) shall limit a person's obligation for sales or use tax to any state in which the qualifying purchases are concurrently available for use, nor limit a person's ability under state, federal, or constitutional law, to claim a credit for sales or use taxes legally due and paid to other jurisdictions.

64H.1.4: Discounts, Coupons and Rebates

(1) Discounts. Cash discounts allowed and taken at the time of sale are excluded from the sales price of tangible personal property upon which the sales tax is based. Cash discounts which are given to customers after the time of sale are not excluded from the sales price. Any discount for early payment offered to customers who purchase tangible personal property on credit is included in the sales price.

Trade discounts allowed and taken at the time of sale on sales to certain customers of a business are excluded from the sales price of tangible personal property upon which the sales tax is based.

Generally, where property is transferred from a vendor to a customer for no additional consideration, or for a nominal consideration, or for an amount substantially below cost, the property constitutes a promotional item for sales tax purposes, and the vendor is considered its consumer. In this situation, the vendor must pay a sales or use tax based upon the amount the vendor paid for the item. The vendor may claim a credit for any tax collected from the retail customer. An item sold by a vendor at 50% or less of the vendor's cost will be presumed to be a promotional item sold at substantially below cost. Situations in which this presumption may be rebutted include, but are not limited to, clearance sales, end-of-season sales, fire sales, going-out-of-business sales, and situations where the sales price paid by the retail customer is reduced by manufacturers's coupons or rebates to 50% or less of the vendor's cost.

Example 1: At the time of sale, Retailer A offers senior citizens a 20% discount on calculators usually priced at \$20.00. The sales price subject to tax is \$16.00. (\$20.00 less \$4.00 discount).

Example 2: At the time of sale, Retailer B offers customers a 10% discount on the usual price of light bulbs, if the customer purchases 50 light bulbs or more. A customer purchases 50 light bulbs, which usually sell for \$1.00 each. The sales price subject to tax is \$45.00. (\$50.00 less \$5.00 discount).

Example 3: Retailer C offers any customer who purchases a camera on credit a 2% discount for payment within ten days. A customer purchases a \$200.00 camera on credit. The sales price subject to tax is \$200.00, whether or not payment is made within ten days.

Example 4: At the time of sale, retailer D allows electricians a trade discount of 5% off list price on all purchases of electrical equipment. An electrician purchases electrical equipment which lists for \$30.00. The sales price subject to tax is \$28.50. (\$30.00 less \$1.50 trade discount).

Example 5: A cellular telephone carrier offers to sell a new cellular phone for \$19.95 to any customer who agrees to become and remain a subscriber for one year. The wholesale cost to the carrier of the cellular phone is \$200.00. The cellular phone is a promotional item within the meaning of 830 CMR 64H.1.4(1). The carrier may collect tax of \$1.00 from the retail customer (5% of \$19.95). In that event, the carrier must also remit use tax of \$9.00 (5% of \$200.00 less \$1.00 credit for tax collected from the retail customer). *See* DOR Directive 94-2.

Example 6: A hardware store purchases beach umbrellas at \$20.00 wholesale. The vendor begins selling the umbrellas on Memorial Day for a retail price of \$49.99 and marks them down as the season progresses. On Labor Day the remaining stock is marked down to \$9.99. The sales price subject to tax on the umbrellas sold on or after Labor Day is \$9.99. The beach umbrellas are not a promotional item within the meaning of 830 CMR 64H.1.4(1).

(2) Coupons.

(a) Manufacturer's and Retailer's Coupons. For purposes of 830 CMR 64H.1.4(2), a "manufacturer's coupon" is a coupon issued by the manufacturer, supplier or distributor of tangible personal property to be redeemed by a retail purchaser of that property. A "retailer's coupon" is a coupon issued by a retail vendor. Generally, manufacturer's coupons and retailer's coupons that entitle the retail customer to a reduction in the sales price at the time of the sale will be treated like cash discounts. *See* 830 CMR 64H.1.4(1). Other types of coupons will not be treated as cash discounts. *See* 830 CMR 64H.1.4(2)(c).

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If a vendor offers customers, upon presentation of a manufacturer's or retailer's coupon, a discount from the usual price of merchandise, the amount of such a discount is excluded from the sales price of tangible personal property upon which the sales tax is based, regardless of whether the retail vendor receives any reimbursement from the manufacturer, supplier or distributor.

If a vendor offers customers, upon presentation of a manufacturer's coupon, a discount on the usual sales price of tangible personal property at double the value of the coupon, the tax is levied on the discounted sales price of the property, regardless of whether the vendor receives any reimbursement from the manufacturer, supplier or distributor.

(b) Scan Cards. Manufacturer's and retailer's coupons in paperless form will generally be treated the same as paper coupons.

(c) Other Coupons. Coupons, certificates or vouchers issued in connection with "bundled transactions" are not manufacturer's or retailer's coupons and any resulting reduction in the amount paid by the retail customer will not be treated as a cash discount. A "bundled transaction" includes, but is not limited to, one in which a vendor transfers tangible personal property to a retail customer for a reduced price in exchange for the retail customer's agreement to purchase services for a minimum service period, either from that vendor or another party that has a contractual arrangement with the vendor of the tangible personal property.

(d) Coupons for Free Merchandise. If a vendor offers customers, upon presentation of a coupon, merchandise unconditionally free of charge, merchandise free of charge with the purchase of other merchandise, two items for the usual price of one, the sales price subject to tax is the amount the vendor charges the customer. If a vendor gives a customer an item unconditionally free of charge upon presentation of a retailer's coupon, the vendor is generally considered the consumer of that item and is responsible for the payment of a sales or use tax based upon the amount the vendor paid for the item.

Example 1: A manufacturer's coupon entitles retail customers to a 50¢ discount on Brand X detergent. Retailer E accepts the coupon and \$2.50 in payment for the detergent which the retailer would otherwise sell for \$3.00. The manufacturer of the detergent reimburses E 57¢, which includes 7¢ for handling, for the coupon. The sales tax is 13¢. (5% of \$2.50).

Example 2: Retailer F offers customers two hamburgers for the usual price of one, upon presentation of its retailer's coupon. Customers obtain these coupons free of charge either from the retailer or from a newspaper. Each hamburger usually sells for \$1.50. F is not reimbursed for the coupon. The sales tax on the two hamburgers is 8¢. (5% of \$1.50).

Example 3: Retailer G offers customers a 50¢ discount on all packages of paper plates priced at \$1.50 upon presentation of a retailer's coupon clipped from a newspaper and a purchase of \$10.00 or more. G is not reimbursed for the coupon. The sales price subject to tax is \$1.00. (\$1.50 less 50¢ discount).

Example 4: An internet service provider gives each new subscriber a coupon entitling the subscriber to \$100.00 off any computer purchased from Retailer J. The internet service provider buys the coupons from Retailer J for \$75. The subscriber purchases a computer from Retailer J costing \$600.00 and pays with \$500.00 in cash and the \$100.00 coupon. The sales price subject to tax is \$600.00 because the coupon is neither a retailer's coupon nor a manufacturer's coupon.

Example 5: Retailer K offers customers who present a manufacturer's coupon a discount at double the face value of the coupon. A soap manufacturer offers retail purchasers a coupon worth 20¢ off a bar of its soap which K sells for \$1.00. A customer presenting this coupon receives a discount of 40¢ from K. The manufacturer of the soap reimburses K 27¢ for each coupon. The sales tax on the soap bar is 3¢ (5% of \$.60).

NON-TEXT PAGE

64H.1.4: continued

Example 6: With the purchase of a \$40.00 pair of shoes (a nontaxable item), Retailer L offers customers a free bottle of shoe polish (a taxable item) upon presentation of his retailer's coupon. L is not reimbursed for the coupon. L's customer pays no sales tax on this transaction. L's purchase of the shoe polish is subject to tax.

Example 7: Retailer M mails each of his customers a coupon redeemable for one free bottle of detergent. M receives no reimbursement for the coupon. M must pay a use tax on each bottle he gives away based upon the amount he paid for the detergent.

Example 8: Grocery store N offers a "scan card" program, which entitles holders of the card to savings on certain advertised merchandise, which varies from week to week. N offers scan card holders a 40¢ savings on paper towels regularly priced at \$1.20. A scan card customer purchases the paper towels and also redeems a 30¢ manufacturer's coupon. N must collect tax of 3¢ (5% of 50¢). N has no use tax liability even though the towels are sold for 50% or less of the vendor's cost. The paper towels are not a promotional item within the meaning of 830 CMR 64H.1.4(1).

(3) Rebates. A rebate is a refund of an amount of money by the manufacturer of a product to the retail purchaser of the product.

If a vendor sells tangible personal property to a customer who applies a manufacturer's rebate to reduce the sales price at the time of the sale, such a rebate is generally treated like a cash discount and excluded from the sales price subject to tax.

However, if a vendor sells tangible personal property to a customer who will receive a rebate after the sale, the sales tax is based on the full purchase price of the property. Upon receiving the rebate, the customer is not entitled to a refund of taxes paid on the amount of the rebate.

If a vendor offers a customer a cash discount upon the purchase of tangible personal property and the customer also receives a rebate from the manufacturer of the property after the sale, the sales price subject to tax excludes only the cash discount given by the retailer. The amount of the manufacturer's rebate is not deducted from the sales price.

Example 1: Dealer O sells a truck for \$18,000 to a customer who will receive a rebate of \$2,000 from the manufacturer. At the time of the sale, the customer assigns his right to the rebate to the dealer as part of the downpayment on the truck. The \$2,000 is treated as a discount and excluded from the sales price subject to tax. The sales tax is \$800. (5% of \$16,000).

Example 2: Vendor P sells a vacuum cleaner for \$250.00 to a customer who will receive a rebate of \$50 from the manufacturer after the sale is completed by mailing-in proof of purchase and the warranty registration card to the manufacturer. The sales tax is \$12.50. (5% of \$250.00).

Example 3: At the time of sale, Retailer Q offers customers a cash discount of \$25.00, for which he is not reimbursed by any party, on purchases of dishwashers which usually sell for \$400.00. The customer will also receive a rebate of \$30.00 from the manufacturer of the dishwasher after the sale. The sales tax is \$18.75 (5% of \$375).

Effective Date. 830 CMR 64H.1.4 will be effective prospectively on May 1, 2000.

64H.1.6: Telecommunications Services

(1) Statement of Purpose; Effective Date; Outline of Topics.

(a) Statement of purpose. The purpose of 830 CMR 64H.1.6 is to explain the sales and use tax treatment of sales of telecommunications services under M.G.L. c. 64H and 64I, respectively.

(b) Effective date. 830 CMR 64H.1.6 applies to sales of telecommunications services on or after September 1, 1990 except that in the case of residential telecommunications services, as defined in 830 CMR 64H.1.6(5), the tax only applies to services that are provided on or after September 1, 1990, and that are billed in the regular course of the vendor's business on or after October 1, 1990. *See* St. 1990, c. 150, § 372.

64H.1.6: continued

(c) Outline of Topics. 830 CMR 64H.1.6 is organized as follows:

1. Statement of Purpose; Effective Date; Outline of Topics.
2. Definitions.
3. General Rule.
4. Sale or Use of Telecommunications Services in Massachusetts; Interstate Telecommunications.
5. Residential Telephone Service Exemption.
6. Sales for Resale of Telecommunications Services.
7. Services Sold in Conjunction with Telecommunications Services.
8. Collection of Tax.

(2) Definitions. For the purpose of 830 CMR 64H.1.6 the following terms have the following meanings, unless the context requires otherwise:

Commissioner, the Commissioner of Revenue or the Commissioner's duly authorized representative.

Home Service Provider, the facilities-based carrier or reseller with which the retail customer contracts for the provision of mobile telecommunications service.

Interstate Telecommunications Services, includes both telecommunications that cross state borders within the United States and telecommunications that cross international borders. The term "state," as used in 830 CMR 64H.1.6, includes both foreign states and states within the United States, as well as the District of Columbia, and U.S. territories, including Guam, Puerto Rico, and the U.S. Virgin Islands.

Local Access and Transport Area, a "local access and transport area" (LATA) is a geographic region in which a local telephone operating company provides services after the AT&T divestiture. As of the date of promulgation of 830 CMR 64H.1.6, Massachusetts is serviced by two LATAs, which cover the 413 and 617/508 area codes.

Mobile Telecommunications Service, commercial mobile radio service, as defined in 47 CFR § 20.3 in effect on June 1, 1999.

Person, an individual, partnership, trust or association, with or without transferable shares, joint stock company, corporation, society, club organization, institution, estate, receiver, trustee, assignee, or referee, and any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of individuals acting as a unit.

Place of Primary Use, the street address representative of where the customer's use of the mobile telecommunications service primarily occurs, which shall be the residential street address or the primary business address of the customer and which shall be within the licensed service area of the home service provider. The place shall be determined in accordance with 4 U.S.C. §§ 121 and 122.

Post-paid Calling Service, a telecommunications service obtained by making a payment on a call-by-call basis either through the use of a credit card or payment mechanism such as a bank card, travel card, credit card, or debit card, or by charge made to a telephone number that is not associated with the origination or termination of the telecommunications service.

Prepaid Calling Arrangement, the right to access exclusively telecommunications services, which must be paid for in advance and which enables the origination of calls using an access number or authorization code, whether manually or electronically dialed, and that is sold in predetermined units or dollars of which the number declines with use in a known amount.

Retail Sale, a sale of services or tangible personal property or both for any purpose other than resale in the regular course of business.

64H.1.6: continued

Service Address, a service address is the location of the telecommunications equipment from which a taxpayer originates or at which a taxpayer receives a telecommunication. In the event that this equipment may not be at a defined location, as in the case of mobile phones, paging systems, maritime systems, *etc.*, the service address is generally the location of the taxpayers' primary use of the telecommunications equipment as determined by the telephone number, authorization code, or location where the bills are sent. In the case of post-paid calling services, the service address is the origination point of the telecommunications service first identified by either the seller's telecommunications system or in information received by the seller from its service provider, where the system used to transport such signals is not that of the seller.

Tax, the excise tax imposed under M.G.L. c. 64H or c. 64I.

Telecommunications Services, any transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiber-optics, laser, microwave, radio, satellite, or similar facilities, but not including cable television. St. 1990, c. 121, § 42. In general, telecommunications include telephone and other transmissions between or among specific parties or specific locations, but do not include public broadcasts.

Vendor, a retailer or other person selling services or tangible personal property the gross receipts from the retail sale of which are required to be included in the measure of the tax imposed by M.G.L. c. 64H or c. 64I.

(3) General Rule. The sales tax on telecommunications services under M.G.L. c. 64H and 64I applies to the retail sale or use of telecommunications services in Massachusetts, by individuals or businesses, including small businesses, as defined in 830 CMR 64H.6.11. The tax on sales of telecommunications services under M.G.L. c. 64H does not apply to sales for resale within the meaning of M.G.L. c. 64H, § 8. Refer to 830 CMR 64H.1.6(6)(b) for rules pertaining to sales of telecommunications services for resale.

(4) Sale or Use of Telecommunications Services in Massachusetts; Interstate Telecommunications. The sales tax on telecommunications services applies to all telecommunications services provided between or among points in the Commonwealth. The sales tax on telecommunications services applies to interstate telecommunications services if the sale of the services occurred in Massachusetts. M.G.L. c. 64H, § 1, *as amended* by St. 1990, c. 121, § 42.

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(a) Sales Occurring in Massachusetts. Sales of interstate telecommunication services, except as provided in 830 CMR 64H.1.6(4)(c), 830 CMR 64H.1.6(4)(d) and 830 CMR 64H.1.6(4)(e), are deemed to occur in Massachusetts if the telecommunication either originates or is received at a location within Massachusetts and the service is charged to a service address in Massachusetts. However, if a particular telecommunication that originates or is received in Massachusetts is charged to neither the service address where the telecommunication originates nor a service address where the telecommunication is received, the telecommunication service is deemed to be sold within Massachusetts if it is paid for in the Commonwealth. In general, a telecommunication is paid for in the Commonwealth if it is billed to an address within the Commonwealth. However, the Commissioner will disregard a billing address that a taxpayer has adopted for the purpose of avoiding tax.

(b) Credit for Taxes Paid to Other States. In order to avoid the multi-state taxation of a sale of interstate telecommunications services that is subject to tax under M.G.L. c. 64H, any taxpayer that demonstrates that it has paid to another state a tax that was properly due on the sale may claim a credit against the tax imposed under M.G.L. c. 64H. The amount of the credit is the amount of the tax paid to the other state, provided that the credit may not exceed the tax imposed on the sale under M.G.L. c. 64H. M.G.L. c. 64H, § 1.

(c) Mobile Telecommunications Services. For customer bills issued after August 1, 2002, the sale of intrastate and interstate mobile telecommunications services, except as provided in 830 CMR 64H.1.6(4)(d) and 830 CMR 64H.1.6(4)(e), shall be deemed to be provided by the customer's home service provider and shall be considered a sale within the Commonwealth if the customer's primary place of use is located in the Commonwealth.

(d) Post-paid Calling Services. Sales of post-paid calling services on or after September 1, 2005, including air-to ground telecommunications services, are deemed to occur in Massachusetts if the origination point of the telecommunications service is in Massachusetts, as first identified by either:

1. The seller's telecommunications system, or
2. The information received by the seller from its service provider, where the system used to transport such signals is not that of the seller.

(e) Prepaid Calling Arrangements. Sales of prepaid calling arrangements on or after April 1, 2003 are deemed to occur in Massachusetts if the transfer for consideration physically takes place at a retail establishment in the commonwealth. In the absence of such physical transfer for consideration at a retail establishment, the sale or recharge shall be deemed a retail sale in Massachusetts if the customer's shipping address is in Massachusetts or, if there is no item shipped, if the customer's billing address or the location associated with the customer's mobile telephone number, as applicable, is in Massachusetts. The sale is deemed to occur on the date of the transfer for consideration. For purposes of reporting the sale or recharge of prepaid calling arrangements, the sale shall be considered a taxable sale of tangible personal property unless the vendor is otherwise required to report sales of telecommunications services.

(5) Residential Telephone Service Exemption.

(a) General Rule. The tax on telecommunications services under M.G.L. c. 64H and 64I extends to any retail sale to, or use of telecommunications services by individuals or businesses, including small businesses as defined in 830 CMR 64H.6.11, in Massachusetts. A limited exemption is available for residential telephone services under M.G.L. c. 64H, § 6(i), *as amended* by St. 1990, c. 150, § 360. The amount of the exemption is limited to \$30 per month. If the residential service exceeds the \$30 exemption limit, the amount over \$30 is subject to tax. The tax on residential telephone services, as defined in 830 CMR 64H.1.6(5)(b) applies only to services that are provided on or after September 1, 1990, and that are billed in the regular course of the vendor's business on or after October 1, 1990. *See* St. 1990, c. 150, § 372.

(b) Residential Telephone Service. Residential telephone service generally includes service provided to an individual for personal use at his or her residential address, including an individual dwelling unit such as an apartment. In the case of institutions where individuals reside, such as schools or nursing homes, telephone service is considered residential if it is provided to and paid for by an individual resident rather than the institution. Telephone service provided to a business is not residential service even if the business is located in an individual's home. If an otherwise residential telephone is used for business purposes, the business must file a use tax return and pay tax on the services that it used.

(c) Services Eligible for Residential Exemption. The residential exemption includes the following telephone services, when provided to a residential purchaser, up to a total of \$30 per month:

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1. recurring basic monthly service charges, including recurring end user common line charges imposed by the Federal Communications Commission and recurring charges for auxiliary services such as call waiting and touch tone service;
 2. message units or similar unitemized per message/per minute charges for calls placed within the purchaser's local calling area;
 3. recurring monthly charges for unlimited calling within all or a specified portion of the purchaser's LATA;
 4. recurring monthly charges for a pre-determined number of minutes of telephone service within all or a specified portion of the purchaser's LATA.
- (d) Services Not Eligible for Residential Exemption. Services that do not qualify for the residential telephone exemption include, but are not limited to:
1. any call to or from a point outside of the purchaser's LATA other than calls within the purchaser's local calling area;
 2. toll calls within the purchaser's LATA that are not billed on a recurring monthly basis, including charges for minutes in excess of any time limit on an intra-LATA calling plan, to the extent that such excess minutes are attributable to toll calls;
 3. non-residential telephone service, including service from mobile telephones and public telephones, and including service billed to a purchaser's residential account through a credit card, calling card, or similar device, if the service is not actually provided at the purchaser's residence;
 4. any residential telecommunications services other than exempt telephone services.
- (6) Sales for Resale of Telecommunications Services.
- (a) General Rule. The tax on sales of telecommunications services under M.G.L. c. 64H applies to retail sales and not to sales for resale within the meaning of M.G.L. c. 64H, § 8 *as amended* by St. 1990, c. 121, § 53. *See also* St. 1990 c. 150, § 372.
- (b) Criteria for Determining Which Services are Purchased for Resale. In general, a purchaser of telecommunications services purchases the services for resale only if both of the following criteria are met:
1. The purchaser does not itself use or consume the telecommunications services; and
 2. The purchaser sells such telecommunications services in the regular course of business.
- A purchaser consumes a telecommunications service if it is a participant in the telecommunication, such as the originator or recipient of a telephone call, or purchases telecommunications services in connection with the provision of information services or Internet access services not subject to tax under M.G.L. c. 64H, § 1, or M.G.L. 64I, § 1. *See* 830 CMR 64H1.6(7)(b).
3. Examples. The following examples include, but are not limited to, instances where purchasers may be in the business of reselling telecommunications services:
- a. Highlife Hotel, a large hotel with telephones located in each hotel room, separately charges guests for telephone calls placed by the guests while renting the rooms. Highlife Hotel is a purchaser of telecommunications services for resale, since it does not itself consume the services and because it regularly sells telecommunications services to others as part of its business. *See also* 830 CMR 64H.1.6(6)(e) for rules pertaining telecommunications services originally purchased for resale but subsequently consumed, in whole or in part, by a purchaser, rather than resold.
 - b. Now U See It, Inc. is a commercial facsimile transmission service that handles a large volume of facsimile transmission for its customers. Now U See It is a purchaser of telecommunications services for resale, since it does not itself consume the telecommunications services and because it regularly resells telecommunications services to its customers as part of its business. *See also* 830 CMR 64H.1.6(6)(e) for rules pertaining to telecommunications services originally purchased for resale but subsequently consumed, in whole or in part, by a purchaser, rather than resold.
 - c. Yack University is a major educational institution that purchases telecommunications services in bulk and resells those services to individual students, faculty members, and other retail purchasers for their personal use. Because Yack

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does not itself consume the services and because it regularly sells telecommunications services to others, it is a purchaser of telecommunications services for resale. *See also* 830 CMR 64H.1.6(6)(e) for rules pertaining to telecommunications services originally purchased for resale but subsequently consumed, in whole or in part, by a purchaser, rather than resold.

(c) Services not Purchased for Resale. In general, a purchaser of telecommunications services does not purchase the services for resale if the purchaser itself consumes the services and is not in the business of selling telecommunications services. A purchaser is also not in the business of selling telecommunications services and is therefore not a reseller of telecommunications services if its only sales of telecommunications services are casual and isolated sales within the meaning of M.G.L. c. 64H, § 6(c), and 830 CMR 64H.6.1.

1. Examples. The following examples include, but are not limited to, instances where purchasers of telecommunications services are not selling such services for resale.

a. Lawrence Law is an attorney who, while working on behalf of a client, uses the telephone to request information or to schedule a meeting. The attorney is the *consumer* of the telecommunications service and therefore does not purchase the service for resale, even if the attorney bills the client for the cost of the call.

b. Bob Badluck, whose automobile breaks down on a rural road, uses Sally Savior's telephone to make a long distance call to a repair service located 40 miles away. Upon leaving, Bob pays Sally \$2.00 for the cost of the telephone call. Sally is not in the business of reselling telecommunications services to visitors to her home. The sale of these services to Bob qualifies as a casual and isolated sale under M.G.L. c. 64H, § 6(c).

(d) Access Charges. The payment of access charges by a long distance carrier to a local operating company generally constitutes a sale for resale of telecommunications services, provided that the access charges are included in the amount that the long distance carrier bills its retail customer for long distance telecommunications service. A vendor of telecommunications services must presume that its sales are retail sales and must collect tax accordingly unless it takes a Resale Certificate (Form ST-4) in good faith from the purchaser.

(e) Reseller's Obligations. Any vendor that purchases telecommunications services for resale must provide its wholesale vendor with a resale certificate (Form ST-4) and must collect tax from its retail customers on the sales price that it charges those retail customers for the telecommunications services. If a purchaser that has given a resale certificate to its wholesale telecommunications vendor itself consumes some of the telecommunications services that it purchased tax free under the resale certificate, it must file use tax returns and pay tax on the sales price of the telecommunications that it consumes. For example, a hotel that gives a resale certificate to a telecommunications vendor must pay use tax on all telecommunications services that it purchases with the certificate but that it does not resell to its guests (or others).

(7) Services Sold in Conjunction with Telecommunications Services.

(a) General Rule. In general, any amount paid for services that are part of a sale of telecommunications services are included in the sales price subject to tax. M.G.L. c. 64H, § 1. Thus, where telecommunications services are purchased in conjunction with other services, the entire sales price is taxable as a sale or use of telecommunications services, *unless* the sales price of the telecommunications portion of the services is separately stated from the sales price of the other services being provided on the invoice or other evidence of the sale. If the two amounts are separately stated, the tax is assessed only on the sales price of the taxable telecommunications services, provided that such separately stated charges are: 1) determined in a manner that reasonably reflects the value of the telecommunications services in relation to the other services, 2) set in good faith, and 3) supported by records sufficient to document the charges. If all of these conditions are not met, the entire transaction is taxable.

(b) Information and Internet Access Services. The tax on the sale or use of telecommunications services under M.G.L. chs. 64H and 64I, is a tax on the "transmission" of messages or information by various electronic or similar means. Generally, it is not a tax on the sale or use of information itself. In some transactions, such as telephone calls to "900" number pay-per-call services, database or electronic information services available to

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multiple subscribers, or Internet access services, an information vendor or Internet access provider may purchase telecommunications services (*i.e.*, the telephone call or other transmission) from another vendor in order to provide non-taxable information services, database access, or Internet access to its retail customers. Under such circumstances, the telecommunications services purchased by the information vendor or Internet service provider are not purchased for resale and are subject to tax when they are sold in or purchased for use in Massachusetts. *See* 830 CMR 64H.1.6(4).

(c) Information Delivery Services. Charges for Information Delivery Services provided by a local telephone operating company within Massachusetts area codes are taxable when sold to customers in Massachusetts. Effective June 1, 2003, the local telephone company shall only collect and remit tax on the tariffed “transport charge” for the telecommunications service, not the total charge to the party making the call to a “976” or “940” pay-per-call number, regardless of whether the telecommunications charge is separately stated from the information charge on the invoice to the party making the call.

(8) Collection of Tax. For purposes of collection of the tax imposed by M.G.L. chs. 64H and 64I on telecommunications services, the sale of such services is deemed to occur on the date that the bill for such services is first issued by the vendor in the regular course of its business.

64H.1.8: Sales Tax Holiday

(1) Scope of Regulation; Background; Outline of Topics; Effective Date.

(a) Scope of Regulation. 830 CMR 64H.1.8 sets forth the rules for the exemption from the sales and use tax on retail sales of certain tangible personal property for the annual sales tax holiday.

(b) Background. M.G.L. c. 64H, § 6A provides for a Massachusetts "sales tax holiday weekend," *i.e.*, two consecutive days during which most purchases made by individuals for personal use will not be subject to Massachusetts sales or use taxes. The legislation provides that the sales tax holiday will occur annually, on a two-day weekend designated by the general court by joint resolution no later than June 15th. If the general court fails to adopt such a joint resolution, the Commissioner of Revenue shall, no later than July 1st, designate a two-day weekend in August of that year as the annual sales tax holiday.

For the purposes of the annual sales tax holiday, tangible personal property shall not include telecommunications services, tobacco products subject to the excise imposed by M.G.L. c. 64C, marijuana or marijuana products, as defined in M.G.L. c. 94G, § 1, alcoholic beverages, as defined in M.G.L. c. 138, § 1, gas, steam, electricity, motor vehicles, motorboats, meals or a single item the price of which is in excess of \$2,500.

(c) Outline of Topics. 830 CMR 64H.1.8 is organized as follows:

1. Scope of Regulation; Background; Outline of Topics; Effective Date;
2. Definitions;
3. Transactions Qualifying for the Sales Tax Holiday;
4. Excluded Sales;
5. Transactions Occurring Prior To or After the Sales Tax Holiday;
6. Internet Sales;
7. Responsibilities of Vendors;
8. Penalties.

(d) Effective Date. 830 CMR 64H.1.8 is effective for sales tax holidays occurring on or after January 1, 2019.

(2) Definitions. For the purposes of 830 CMR 64H.1.8, the following terms have the following meanings:

Commissioner. The Commissioner of Revenue or the Commissioner's duly authorized representative.

Retail Sale. Retail sale as defined in M.G.L. c. 64H, § 1.

Sale. Sale as defined in M.G.L. c. 64H, § 1.

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Sales Price. Sales price as defined in M.G.L. c. 64H, § 1.

Sales Tax. The sales tax imposed pursuant to M.G.L. c. 64H, § 2 or the use tax imposed pursuant to M.G.L. c. 64I, § 2.

Sales Tax Holiday. A Saturday and Sunday occurring concurrently in August, during which most purchases of tangible personal property made by individuals for personal use or consumption will not be subject to Massachusetts sales or use taxes.

Tangible Personal Property. Tangible personal property as defined in M.G.L. c. 64H, § 1.

Vendor. Vendor as defined in M.G.L. c. 64H, § 1 and M.G.L. c. 64I, § 1.

(3) Transactions Qualifying for the Sales Tax Holiday.

(a) General Rule. During the sales tax holiday, most purchases by individuals of single items of tangible personal property costing \$2,500 or less are exempt from sales and use taxes, subject to certain exclusions as explained in 830 CMR 64H.1.8. For all purchases of tangible personal property eligible for the sales tax holiday exemption, transfer of possession of or original payment in full for the property must occur on one of the designated days of the sales tax holiday. The following transactions shall be ineligible for the purposes of the annual sales tax holiday:

1. transactions where a deposit, prepayment or binding promise to pay is made before the designated days of the sales tax holiday;
2. prior sales; and
3. layaway sales.

Purchases exempt from the sales tax under M.G.L. c. 64H are also exempt from use tax under M.G.L. c. 64I. Therefore, eligible items of tangible personal property purchased on the sales tax holiday from out-of-state vendors for use in Massachusetts are exempt from M.G.L. c. 64I.

(b) Non-business Sales. The sales tax holiday exemption applies to sales of tangible personal property bought by individuals for personal use or consumption only. Purchases by corporations or other businesses and purchases by individuals for business use remain taxable.

(c) Sales Price Threshold for Exemption Eligibility. When the sales price of any single item is greater than \$2,500, sales tax is due on the entire price charged for the item. The sales price is not reduced by the threshold amount. For example, if an item is sold for \$3,000, the entire sales price of the item is taxable, not just the amount that exceeds \$2,500.

1. Clothing Exception. Under M.G.L. c. 64H, § 6(k) there is no sales tax on any article of clothing, unless the sales price exceeds \$175; in that case, only the increment over \$175 is subject to tax. If, on the sales tax holiday, the price of an article of clothing exceeds the threshold, the first \$175 may be deducted from the amount subject to tax. The \$2,500 threshold amount is not increased by \$175.

Examples:

- a. A customer buys a suit on the sales tax holiday for \$600. No tax is due.
 - b. A customer buys a wedding dress during the sales tax holiday for \$2,550. Tax is due on \$2,375 (\$2,550 - \$175).
2. Coupons and Discounts. If a store coupon or discount provided by a vendor reduces the sales price of the property, the discounted sales price determines whether the sales price exceeds the sales tax holiday price threshold of \$2,500. If a store coupon or discount applies to the total amount paid by a purchaser rather than to the sales price of a particular item and the purchaser has purchased both eligible property and taxable property, the vendor should allocate the discount on a *pro rata* basis to each article sold. Example: A furniture store customer has a coupon for 20% off his or her entire bill. He or she purchases a dining room table for \$1,800, and a sofa for \$3,500. The total discount available is \$1,060 (\$5,300 x .20), of which \$360 is attributable to the table (\$1,800 x .20), and \$700 is attributable to the sofa (\$3,500 x .20). No tax is due on the sale of the table. Tax of \$175 is due on the sales price of the sofa, \$2,800 (\$3,500 - \$700), as even its discounted price exceeds the \$2,500 threshold.

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3. Rebates. A rebate is a refund of an amount of money by the manufacturer of a product to the retail purchaser of the product. If a vendor sells tangible personal property to a customer who applies a manufacturer's rebate to reduce the sales price at the time of the sale, the rebate is generally treated as a cash discount and is excluded from the sales price. The discounted sales price determines whether the sales price exceeds the sales tax holiday price threshold of \$2,500.

If a vendor sells tangible personal property to a customer who will receive a rebate after the sale (*e.g.*, by mailing a coupon to the manufacturer), the full purchase price of the property determines whether the sales price exceeds the sales tax holiday price threshold of \$2,500, and tax must be charged on the full purchase price if it exceeds \$2,500.

If a vendor offers a customer a cash discount upon the purchase of tangible personal property, and the customer also receives a rebate from the manufacturer of the property after the sale, only the cash discount given by the vendor is excluded from the sales price for purposes of the sales tax holiday exemption. The amount of the manufacturer's rebate is not deducted from the sales price.

4. Multiple Items on One Invoice. Where a customer is purchasing multiple items in a single transaction on the sales tax holiday, separate invoices do not need to be prepared for each item. As long as each individual item is \$2,500 or less, there is no limit on the number of items each customer may purchase that will be entitled to the sales tax holiday exemption. However, any individual item purchased for \$2,500 or more is subject to the sales tax.

Example: In a single transaction on the sales tax holiday, a customer purchases a television costing \$1,500, a stereo receiver costing \$1,200, and a computer costing \$2,000. The three separate items can be rung up together, all tax-free.

5. Bundled Transactions. When several items are offered for sale at a single price, the entire package is exempt if the sales price of the package is \$2,500 or less. Items that are priced separately and are sold as separate articles will qualify for the sales tax holiday exemption if the price of each article is \$2,500 or less.

Example 1: A computer package including a CPU, keyboard, monitor, mouse, and printer with a single sales price of \$3,500 would not qualify for the sales tax holiday exemption because the single sales price of the package (\$3,500) exceeds the sales tax holiday price threshold of \$2,500.

Example 2: In a single transaction during the sales tax holiday, a customer purchases a personal computer for \$3,000 and a computer printer for \$200, each of which is priced separately. The purchase of the personal computer will not qualify for the sales tax holiday exemption because the sales price (\$3,000) is in excess of the sales tax holiday threshold amount of \$2,500. Since the sales price of the computer printer (\$200) is less than \$2,500, the printer would be exempt from tax.

Articles normally bundled together and sold as a single unit cannot be priced separately and sold as individual items in order to be eligible for the sales tax holiday exemption.

(d) Rentals. Generally, rentals for 30 days or less of tangible personal property other than motor vehicles and motorboats are eligible for the sales tax holiday exemption, even if the rental period covers days before or after the sales tax holiday, provided that payment in full in an amount less than \$2,500 is made during the sales tax holiday. The sales tax holiday does not apply to rentals or leases of tangible personal property of any type if the term of the rental or lease contract is longer than 30 days.

(4) Excluded Sales. All sales of motor vehicles, motorboats, meals, telecommunications services, gas, steam, electricity, tobacco products, marijuana or marijuana products, alcoholic beverages and of any single item whose price is in excess of \$2,500, do not qualify for the sales tax holiday exemption and remain subject to tax, as further provided in 830 CMR 64H.1.8(4)(a) through (h).

(a) Motor Vehicles. Sales of motor vehicles are not eligible for the sales tax holiday exemption. A "motor vehicle" means a motorized, self-propelled vehicle which is constructed and designed for transportation or travel over a land surface, including "low speed vehicles" and "limited use vehicles", but not including motorized bicycles. *See* M.G.L. c. 90. A "motor vehicle" also means "snow vehicle" and "recreation vehicle" as defined in M.G.L. c. 90B, § 20. *See* 830 CMR 64H.25.1: Motor Vehicles, and M.G.L. c. 64H, § 26. Rentals of motor vehicles are also not eligible for the sales tax holiday exemption; *see* 830 CMR 64H.1.8(3)(d).

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(b) Motorboats. Sales of motorboats, including jet skis, are not eligible for the sales tax holiday exemption. A “motorboat” is any vessel or watercraft propelled by machinery, such as an inboard or outboard motor, whether or not such machinery is the principal source of propulsion. *See* M.G.L. c. 90B, § 1. Rentals of motorboats are also excluded from the sales tax holiday exemption; *see* 830 CMR 64H.1.8(3)(d). Generally, the sales tax holiday exemption will apply to purchases of canoes, kayaks, rowboats, and other types of watercraft with no mechanical propulsion, provided that the sales price is \$2,500 or less.

(c) Meals. Sales of meals are not eligible for the sales tax holiday exemption. "Meals" are defined in M.G.L. c. 64H as "any food or beverage, or both, prepared for human consumption and provided by a restaurant, where the food or beverages is intended for consumption on or off the restaurant premises, and includes food or beverages sold on a 'take out' or 'to go' basis, whether or not they are packaged or wrapped and whether or not they are taken from the premises of the restaurant". M.G.L. c. 64H, § 6(h); 830 CMR 64H.6.5: Sales Tax on Meals.

(d) Telecommunications Services. Sales of telecommunications services are not eligible for the sales tax holiday exemption. Telecommunications Services are defined in M.G.L. c. 64H as "any transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiber optics, laser, microwave, radio, satellite or similar facilities, but not including cable television". *See* M.G.L. c. 64H, § 1. Sales of prepaid calling arrangements and cards are not eligible for the sales tax holiday exemption. Telecommunications equipment, such as a telephone or cell phone purchased for nonbusiness use, is eligible for the sales tax holiday exemption.

(e) Gas, Steam and Electricity. Sales of gas, steam and electricity are not eligible for the sales tax holiday exemption. Gas refers to natural gas and not gasoline.

(f) Tobacco Products. Sales of tobacco products are not eligible for the sales tax holiday exemption. Tobacco Products includes products subject to the excise under M.G.L. c. 64C such as cigarettes, cigars, smoking and smokeless tobacco, and electronic nicotine delivery systems.

(f) Marijuana or Marijuana Products. Sales of marijuana or marijuana products are not eligible for the sales tax holiday exemption. Marijuana includes all parts of any plant of the genus Cannabis, with certain exceptions, as defined in M.G.L. c. 94G, § 1. Marijuana also includes all "marijuana products" as defined in M.G.L. c. 94G, § 1, and 935 CMR 500.002: *Definitions*. Such Marijuana Products include edible products, beverages, topical products, ointments, oils and tinctures. *See* 830 CMR 64N.1.1: Marijuana Retail Taxes.

(h) Alcoholic Beverages. Sales of alcoholic beverages, as defined in M.G.L. c. 138, § 1, including alcoholic beverages sold as part of a meal provided by a restaurant are not eligible for the sales tax holiday exemption.

(h) Tangible Personal Property Sold for \$2,500 or More. Any single item of tangible personal property the price of which exceeds \$2,500 does not qualify for the sales tax holiday exemption and remains subject to tax.

(5) Transactions Occurring Prior To or after the Sales Tax Holiday.

(a) Prior Sales and Orders. A sale of tangible personal property is eligible for the sales tax holiday exemption only if transfer of possession of or original payment in full for the property occurs on one of the designated days of the sales tax holiday. Any transaction where a purchaser places an order and makes a deposit, prepayment or other binding promise to pay for an item of tangible personal property prior to the sales tax holiday is not eligible for the sales tax holiday exemption. A vendor may not rebook a prior sale that has taken place before the sales tax holiday, either manually or by use of software, in order to cause the prior sale to be eligible for the sales tax holiday exemption. If a purchaser pays 100% of the sales price for an item of tangible personal property on the sales tax holiday, the sale is eligible for the sales tax holiday exemption even where delivery of the tangible personal property occurs after the sales tax holiday, provided the provisions of 830 CMR 64H.1.8(5)(c) are met.

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Example 1: Jane is shopping for a new custom sofa at her local furniture store one day before the sales tax holiday. The cost of the sofa will be \$2,400.00. The store requires that the sofa be paid for in full before they will process the order. However, as an alternative to paying in full, the store offers Jane the option to pay the store a 20% deposit with her credit card with the remainder to be paid at a future date. Jane makes the 20% deposit and then returns the next day on the sales tax holiday and pays the remainder of the amount due. The custom sofa purchased by Jane will not qualify for the sales tax holiday exemption because she paid a deposit on the sofa prior to the holiday.

Example 2: Same facts as above, but Jane pre-orders the sofa the month before the sales tax holiday begins. As an alternative to paying in full or putting down a 20% deposit, the store allows Jane to sign a contract that provides for no down payment in exchange for her agreement to pay a financial penalty if she cancels the order at any time. Jane agrees and signs the contract. Since Jane signed a binding promise to pay on a date prior to the sales tax holiday, the purchase cannot qualify for the sales tax holiday exemption even if the full amount due on the purchase is paid on one of the designated days of the sales tax holiday.

(b) Layaway Sales. A layaway sale is a transaction in which property is set aside for future delivery to a customer who makes a deposit, agrees to pay the balance of the purchase price over a period of time and receives the property when the last payment is made. Layaway sales that are initiated prior to the sales tax holiday do not qualify for the exemption, even if the last required payment (or payments necessary to complete the transaction) is made on the sales tax holiday.

(c) Special Order Items; Transfer of Possession after Sales Tax Holiday. Special order items such as furniture are eligible for the sales tax holiday exemption so long as they are ordered and paid in full on the sales tax holiday, and the cost of an item is \$2,500 or less, even if delivery is made at a later date. Generally, a customer pays for an item when:

1. the vendor receives payment in the form of cash, a check, or a money order;
2. the vendor receives payment or authorization for payment through the processing of a debit card or credit card transaction; or
3. the buyer and vendor enter into financing arrangements with a third party, including an affiliated entity (but excluding seller financing where the seller extends credit to the customer).

A prior special order purchase with a deposit paid before the sales tax holiday will not qualify for the sales tax holiday exemption, even if the retail customer pays the entire remaining balance due on the sales tax holiday.

(d) Rain Checks. When a customer receives a rain check because an item on sale was not available, property bought with the use of the rain check will qualify for the sales tax holiday exemption regardless of when the rain check was issued if the rain check is used on the designated days of the sales tax holiday weekend. Property purchased after the designated days of the sales tax holiday using a rain check issued during the sales tax holiday weekend is not eligible for the sales tax holiday exemption.

(e) Exchanges. If a customer purchases an item of eligible property on the sales tax holiday, but later exchanges the item for an identical or similar eligible item for the same price ("an even exchange"), no tax is due even if the exchange is made after the designated days of the sales tax holiday.

(6) Internet Sales. If a customer orders an item of eligible property over the Internet, the item is exempt if it is ordered and paid for on the designated days of the sales tax holiday Eastern Daylight Time (EDT). A sale is deemed to be ordered and paid for on the sales tax holiday where the customer orders and pays for an item by authorizing the purchase on the vendor's website, *e.g.*, through the use of a credit card at the time the item is ordered. The actual delivery of the item can occur after the sales tax holiday.

Example: A customer orders a computer over the Internet with a sales price of \$2,000 and charges the sale to his credit card at 1:00 P.M. (EDT) on the Saturday of the sales tax holiday. The computer will be delivered 30 days after the sales tax holiday. The sale is exempt since the computer was ordered and paid for on the sales tax holiday.

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(7) Responsibilities of Vendors.

(a) Participation. All Massachusetts businesses normally making taxable sales of tangible personal property and that are open to conduct business on a designated day of the sales tax holiday must participate in the sales tax holiday. Out-of-state vendors registered to collect Massachusetts sales and use taxes are also required to participate in the sales tax holiday. Participation in the sales tax holiday is not voluntary.

(b) Erroneous Collection. Any sales or use tax erroneously or improperly collected by a vendor on a designated day of the sales tax holiday must be remitted to the Commissioner. Customers who are erroneously charged sales tax by a vendor for an exempt purchase should take their tax paid receipt to the vendor to obtain a refund. If the vendor has already remitted the erroneously collected tax to the Commissioner, the vendor may file an amended return upon satisfactory evidence that the vendor has credited or refunded the tax to the purchaser in accordance with the time limitations and other requirements in 830 CMR 62C.26.2, Amended Returns.

(c) Requirement of Nonbusiness Use by the Purchaser. To qualify for the sales tax holiday exemption, purchases made on the sales tax holiday must be for nonbusiness use or consumption. Purchasers paying for tangible personal property with business credit cards or checks must be charged tax on the items purchased. Vendors are required to maintain normal business records showing the date of sale, item or items purchased, and selling price for business purchases.

(d) Returns. Generally, sales tax may only be refunded to a retail customer on returns within 90 days of the sale. *See* M.G.L. c. 64H, § 1. For the 90-day period following the designated days of the sales tax holiday, when a customer returns an item that qualified for the sales tax holiday exemption, the vendor may not credit or refund sales tax to the retail customer unless:

1. the customer provides a receipt or invoice that shows the tax was paid; or
2. the vendor's records show that tax was paid.

Vendors may set their own return policies. 830 CMR 64H.1.8(7)(d) is not intended to change or extend a vendor's return policy.

(e) Recordkeeping. A vendor must maintain books and records in accordance with M.G.L. c. 62C, § 25, sufficient to substantiate taxable and tax-exempt sales made on the designated days of the sales tax holiday. *See* 830 CMR 62C.25.1: Record Retention.

(8) Penalties. Vendors that back-date sales occurring after the sales tax holiday or that forward-date sales that occurred before the sales tax holiday in order to make those sales appear to qualify for the sales tax holiday exemption, or otherwise improperly avoid collecting and remitting sales or use tax, may be subject to the tax evasion penalties of M.G.L. c. 62C, § 73. In addition, the Commissioner may apply the sham transaction doctrine under M.G.L. c. 62C, § 3A when determining whether vendors have properly followed the rules of 830 CMR 64H.1.8.

64H.1.9: Remote Retailers and Marketplace Facilitators(1) Statement of Purpose; Background, Outline of Topics; Effective Date.

(a) Statement of Purpose. The purpose of 830 CMR 64H.1.9 is to explain the Massachusetts sales and use tax registration and collection obligations of remote retailers, which include both remote marketplace sellers and remote marketplace facilitators. 830 CMR 64H.1.9 also includes an explanation of the registration and collection obligations of in-state marketplace facilitators.

(b) Background. A vendor making taxable sales in the Commonwealth or selling taxable tangible personal property or services for use in the Commonwealth is required to collect the sales or use tax when it is "engaged in business in the Commonwealth" within the meaning of M.G.L. c. 64H, § 1. In general, this statutory provision is construed to impose a collection duty to the fullest extent permitted by the U.S. Constitution and federal law.

Remote retailers that have no traditional in-state contacts (*i.e.*, generally, stores, employees, inventory, representatives, *etc.*) are generally required to collect sales or use tax as vendors when they exceed \$100,000 in Massachusetts sales in a calendar year. Such retailers may sometimes sell their products and services through intermediaries, known as "marketplace facilitators."

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Marketplace Facilitators facilitate sales on behalf of third-party vendors, or "marketplace sellers", and in some cases may also make direct sales on their own behalf. Marketplace facilitators that have no traditional in-state contacts are themselves "remote" retailers both as to their direct sales and the sales that they facilitate. Such remote marketplace facilitators are required to collect sales or use tax as vendors when they exceed \$100,000 in total Massachusetts sales in a calendar year. Such total Massachusetts sales includes the marketplace facilitator's direct Massachusetts sales and the Massachusetts sales that it facilitates on behalf of marketplace sellers.

Marketplace Facilitators that have traditional in-state contacts are required to collect sales or use tax on all of their direct sales. Such facilitators are also required to collect sales or use tax on the sales they facilitate when such sales exceed \$100,000 in total Massachusetts sales in a calendar year. Such total Massachusetts sales includes the marketplace facilitator's direct Massachusetts sales and the Massachusetts sales that it facilitates on behalf of marketplace sellers.

Marketplace Facilitators may facilitate sales on behalf of marketplace sellers that are either remote retailers or in-state retailers. In either case, when a marketplace facilitator is required to collect sales or use tax on behalf of a marketplace seller, the marketplace seller is generally relieved of the sales or use tax compliance obligation with respect to such sales when it takes in good faith a marketplace facilitator's collection certificate.

(c) Outline of Topics. The following is a list of sections contained in 830 CMR 64H.1.9:

1. Statement of Purpose; Background; Outline of Topics; Effective Date;
2. Definitions;
3. General Rules;
4. Marketplace Facilitator Exceptions;
5. Marketplace Facilitator Administrative Rules;
6. Applications for Waiver;
7. Tax Registration, Returns and Payments;
8. Marketplace Facilitator Liability Relief;
9. No Limitation on Other Authority; and
10. No Effect on Outstanding Tax Liability.

(d) Effective Date. 830 CMR 64H.1.9 is effective as of October 1, 2019. The rules that explain when a remote retailer, including a remote marketplace facilitator, or an in-state marketplace facilitator, is required to register, collect and remit sales or use tax are stated at 830 CMR 64H.1.9(3).

(2) Definitions.

Commissioner. The Commissioner of Revenue or the Commissioner's duly authorized representative.

In-state Marketplace Facilitator. A marketplace facilitator that is not a remote retailer.

In-state Vendor Contacts. Contacts, other than remote vendor contacts, that cause the vendor to be "engaged in business in the Commonwealth" within the meaning of M.G.L. c. 64H, § 1. Examples of in-state vendor contacts include the exploitation of the retail sales market within the Commonwealth through the use of in-state stores, employees, inventory or representatives.

Marketplace. A physical or electronic forum, including a shop, store, booth, television or radio broadcast, internet website, catalogue or dedicated sales software application, where the tangible personal property or services of a marketplace seller are offered for sale, regardless of whether, in the case of tangible personal property, such property is physically located in the Commonwealth.

Marketplace Facilitator. A person that contracts with a marketplace seller to facilitate sales of tangible personal property or services on behalf of the marketplace seller through a marketplace operated by such person if such person also, directly, or indirectly through one or more related persons, provides both:

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- (a) any of the following electronic commerce services:
 - 1. transmitting or otherwise communicating the offer or acceptance between a buyer and the marketplace seller;
 - 2. owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together;
 - 3. providing a virtual currency that buyers are authorized or required to use to purchase tangible personal property or services from the marketplace seller; or
 - 4. software development or research and development activities related to any of the logistical services described in 830 CMR 64H.19: Marketplace Facilitator(b) if such services are directly related to a physical or electronic marketplace operated by the person or a related person; and
- (b) any of the following logistical services, as provided with respect to the marketplace seller's tangible personal property or services; specifically:
 - 1. payment processing services;
 - 2. fulfillment or storage services;
 - 3. listing tangible personal property or services for sale;
 - 4. setting prices;
 - 5. branding sales as those of the marketplace facilitator;
 - 6. taking orders;
 - 7. advertising or promotion; or
 - 8. providing customer service or accepting or assisting with returns or exchanges.

A marketplace facilitator may also be a marketplace seller. In all cases a marketplace facilitator is a retailer.

Marketplace Seller. A person that makes retail sales through a marketplace operated by a marketplace facilitator. A marketplace seller may also be a marketplace facilitator.

Massachusetts Sales. All sales made by a vendor of tangible personal property or services delivered into the state, however consummated, including exempt sales.

Remote Marketplace Facilitator. A remote retailer that is a marketplace facilitator.

Remote Marketplace Seller. A remote retailer that is a marketplace seller. A remote marketplace seller may also be a remote marketplace facilitator.

Remote Retailer. A retailer, including a marketplace seller or marketplace facilitator, that is engaged in business in the Commonwealth only through remote vendor contacts.

Remote Vendor Contacts. A vendor's contacts exploiting the retail sales market within the commonwealth when such in-state contacts are limited to:

- (a) catalogs or other solicitation materials sent through the mail or otherwise;
- (b) billboards, advertisements or solicitations in newspapers, magazines or radio or television broadcasts;
- (c) the utilization of computer networks or any other similar communications medium, including the utilization of Internet websites, software or cookies distributed or otherwise placed on customers' computers or other communications devices, or a downloaded application; or
- (d) the availment of the substantial privilege of carrying on business within the commonwealth through virtual or economic contacts.

Retailer. A retailer as defined in M.G.L. c. 64H, § 1.

Sales. Sales as defined in M.G.L. c. 64H, § 1, including sales that are facilitated by a marketplace facilitator, whether or not such sales qualify for a sales tax exemption.

Sales or Use Tax, or Tax. The sales tax imposed under M.G.L. c. 64H or the use tax imposed under M.G.L. c. 64I, including, as relevant, the local option sales tax imposed under M.G.L. c. 64L and the state excise and local tax option imposed under M.G.L. c. 64N.

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Services. Services as defined in M.G.L. c. 64H, § 1, including telecommunications services, *see* 830 CMR 64H.1.6.

Tangible Personal Property. Tangible personal property as defined in M.G.L. c. 64H, § 1, including meals, *see* 830 CMR 64H.6.5 and standardized computer software, *see* 830 CMR 64H.1.3.

Vendor. A retailer or other person, including a remote retailer, selling tangible personal property or services, the gross receipts from the retail sale of which are required to be included in the measure of the sales or use tax.

(3) General Rules.

(a) Remote retailers, including remote marketplace facilitators. A remote retailer, including a remote marketplace seller or a remote marketplace facilitator, is required to register, collect and remit sales or use tax as a vendor with respect to its Massachusetts sales as follows:

1. October 1, 2019 through December 31, 2019. For the period beginning October 1, 2019 through December 31, 2019, as of October 1, 2019, if during the preceding 12 months, October 1, 2018 to September 30, 2019, it had in excess of \$100,000 in Massachusetts sales;

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2. Calendar Years Beginning with 2020 and Thereafter.
 - a. For each calendar year beginning with 2020 and thereafter, as of January 1st of that year, if during the preceding calendar year it had in excess of \$100,000 in Massachusetts sales, provided, however, that if the remote retailer passed \$100,000 in Massachusetts sales after November 1st of the prior year, the requirement is for the period beginning as of the first day of the first month beginning two months after the month in which the \$100,000 threshold is exceeded; or
 - b. If 830 CMR 64H.1.9(3)(a)2.a. does not otherwise apply, for each calendar year beginning with 2020 and thereafter, as of the first day of the first month beginning two months after the month in which the remote retailer first exceeds \$100,000 in Massachusetts sales for the calendar year.
3. Remote Retailer Becomes an In-state Retailer. If at any time the remote retailer becomes engaged in business in the state through in-state vendor contacts, for the tax period commencing as of that date, notwithstanding the provisions of 830 CMR 64H.1.9(3)(a)1. and 2.
 - (b) In-state Marketplace Facilitators. An in-state marketplace facilitator is required to register, collect and remit sales or use tax with respect to its Massachusetts sales made on its own behalf, regardless of the amount of such sales. In addition, an in-state marketplace facilitator is required to register, collect and remit sales or use tax with respect to the Massachusetts sales it facilitates on behalf of marketplace sellers as follows:
 1. October 1, 2019 through December 31, 2019. For the period beginning October 1, 2019 through December 31, 2019, as of October 1, 2019, if during the preceding 12 months, October 1, 2018 to September 30, 2019, it had in excess of \$100,000 in Massachusetts sales;
 2. Calendar Years Beginning with 2020 and Thereafter.
 - a. For each calendar year beginning with 2020 and thereafter, as of January 1st of that year, if during the preceding calendar year it had in excess of \$100,000 in Massachusetts sales, provided, however, that if the remote retailer passed \$100,000 in Massachusetts sales after November 1st of the prior year, the requirement is for the period beginning as of the first day of the first month beginning two months after the month in which the \$100,000 threshold is exceeded; or
 - b. If 830 CMR 64H.1.9(3)(b)2.a. does not otherwise apply, for each calendar year beginning with 2020 and thereafter, as of the first day of the first month beginning two months after the month in which the remote retailer first exceeds \$100,000 in Massachusetts sales for the calendar year.
 - (c) Massachusetts Sales of Marketplace Facilitators and Remote Retailers. For purposes of the rules set forth in 830 CMR 64H.1.9(3)(a) and (b), marketplace facilitators and remote retailers compute their Massachusetts sales in the following manner. The Massachusetts sales of a marketplace facilitator, whether the facilitator is remote or in-state, include both the facilitator's sales made on its own behalf and all sales that the facilitator facilitates on behalf of marketplace sellers irrespective of whether such marketplace sellers are otherwise subject to the sales or use tax collection duty. *See* 830 CMR 64H.1.9(6). The Massachusetts sales of a remote marketplace seller do not include sales made on behalf of such seller by a marketplace facilitator when the facilitator registers, collects and remits tax with respect to these sales. In the case of a remote retailer, including both a remote marketplace seller and a remote marketplace facilitator, Massachusetts sales include sales made by the remote retailer and any related remote retailer.
 - (d) No Application Where Sales for Resale. The marketplace facilitator rules do not apply to a person who is solely engaged in purchasing products for resale. Also, the marketplace facilitator rules do not apply to the extent that a person that is a marketplace facilitator is engaged in purchasing products for resale. Where a person, including a marketplace facilitator, buys products for resale and provides a resale certificate to its supplier, that person then becomes the seller of those goods who is the entity responsible for compliance with sales and use tax requirements with respect to its subsequent resales.
 - (e) Examples. The following examples illustrate the provisions of 830 CMR 64H.1.9. Assume for purposes of these examples that in the case of a remote retailer there are no sales made by a related remote retailer (*i.e.*, that would need to be attributed to the remote retailer). Also, assume, unless the context suggests otherwise, that none of the retailers referenced were previously subject to a Massachusetts sales or use tax collection duty.

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1. Example 1. A remote retailer, Company A, sells tangible personal property into the state. Company's A's Massachusetts sales for the period October 1, 2018 to September 30, 2019 were \$80,000, all of which were in calendar year 2019. In October of 2019, Company A reached \$100,000 in Massachusetts sales for calendar year 2019. Company A is required to register, collect and remit tax beginning as of January 1, 2020.
2. Example 2. A remote retailer, Company B, sells tangible personal property into the state. Company B's Massachusetts sales for the period October 1, 2018 to September 30, 2019 were \$60,000 and its Massachusetts sales for the period January 1, 2019 to December 31, 2019 were \$90,000. During calendar year 2020, Company B reaches \$100,000 in Massachusetts sales on May 15. Company B is required to register, collect and remit tax beginning as of August 1, 2020.
3. Example 3. A remote marketplace facilitator, Company C, facilitates the sale of tangible personal property on behalf of numerous marketplace sellers, some of which are remote marketplace sellers and some of which are engaged in doing business in Massachusetts through in-state contacts (and therefore are not remote marketplace sellers). Company C is also itself a remote retailer that sells taxable tangible personal property on its own behalf. Company C's Massachusetts sales for the period October 1, 2018 to September 30, 2019, including the sales that it makes on behalf of its marketplace sellers and on its own behalf, total \$110,000. Therefore, Company C is required to register, collect and remit tax beginning as of October 1, 2019 with respect to all of the Massachusetts sales that it either makes on its own behalf or facilitates on behalf of its marketplace sellers. Assuming Company C registers, collects and remits tax for the period beginning as of October 1, 2019, none of the marketplace sellers that sell through Company C are required to register, collect or remit tax with respect to such sales that are facilitated by Company C on their behalf. Moreover, for purposes of computing their Massachusetts sales for the period October 1, 2019 through December 31, 2019, each of the remote marketplace sellers that sell through Company C should exclude their sales as facilitated by Company C from their Massachusetts sales calculation for purposes of 830 CMR 64H.1.9(3)(a).
4. Example 4. Same facts as Example 3. Assume that one marketplace seller for which Company C facilitates Massachusetts sales is Company D. Company D only uses one marketplace facilitator, Company C, and otherwise directly makes sales into Massachusetts through its own remote vendor contacts. Company C facilitates \$30,000 in Massachusetts sales for Company D for the period October 1, 2019 to December 31, 2019. Assume Company D's Massachusetts sales for the period October 1, 2018 to September 30, 2019 were \$60,000 and its Massachusetts sales for the period January 1, 2019 to December 31, 2019 were \$120,000, but that, as mentioned, \$30,000 of those latter sales were sales facilitated by Company C. Because Company C begins to collect and remit tax on behalf of Company D as of October 1, 2019, Company D is not required to register, collect and remit tax with respect to these facilitated sales post-October 1. Further, Company D is not required to register, collect or remit tax with respect to its own direct Massachusetts sales for the period October 1, 2019 through December 31, 2019 or for the tax period January 1, 2020 to December 31, 2020 (although it may need to register, collect and remit with respect to its direct Massachusetts sales at some point during 2020 depending upon its volume of 2020 direct Massachusetts sales).
5. Example 5. Same facts as Example 3. Assume that one marketplace seller for which Company C facilitates sales is Company E. Company E uses only one marketplace facilitator, Company C, and otherwise directly makes sales into Massachusetts through its own remote vendor contacts. Company C facilitates \$30,000 in Massachusetts sales for Company E for the period October 1, 2019 to December 31, 2019. Assume Company E's sales for the period October 1, 2018 to September 30, 2019 were \$80,000 and its Massachusetts sales for the period January 1, 2019 to December 31, 2019 were \$150,000, but that, as mentioned, \$30,000 of those latter sales were sales facilitated by Company C. Because Company C begins to collect and remit tax on behalf of Company E as of October 1, 2019, Company E is not required to register, collect and remit tax with respect to these facilitated sales beginning as of October 1. However, Company E is required to register, collect and remit tax for the tax period January 1, 2020 to December 31, 2020 because Company E's direct Massachusetts sales for the period January 1, 2019 to December 31, 2019, after the subtraction of the \$30,000 in sales that were facilitated by Company C, were \$120,000.

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Example 6. An in-state marketplace facilitator, Company F, facilitates the sale of tangible personal property on behalf of numerous marketplace sellers, some of which are remote marketplace sellers and some of which are engaged in doing business in Massachusetts through in-state contacts (and therefore are not remote marketplace sellers). Company F is also itself a retailer that sells taxable tangible personal property on its own behalf. Company F's Massachusetts sales for the period October 1, 2018 through September 30, 2019, including the sales that it makes on behalf of its marketplace sellers and on its own behalf, total \$60,000 and its Massachusetts sales for the period January 1, 2019 to December 31, 2019, including the sales that it makes on behalf of its marketplace sellers and on its own behalf, total \$90,000. For the tax period beginning October 1, 2018 through December 31, 2019, Company F is required to collect and remit tax only with respect to the Massachusetts sales that it makes on its own behalf. Further, Company F is not required to collect or remit tax on behalf of the marketplace sellers for which it facilitates sales for the tax period beginning January 1, 2020. The in-state marketplace sellers for which Company F facilitates sales must themselves collect and remit tax on all of their Massachusetts sales, including those facilitated by Company F, for these periods. The remote marketplace sellers for which Company F facilitates sales may have to collect and remit tax on all of their Massachusetts sales, including those facilitated by Company F, for these periods, if they meet the thresholds stated in 830 CMR 64H.1.9(3)(a)1. and/or 2.

7. Example 7. Same facts as Example 6, except that during 2020, Company F reaches \$100,000 in Massachusetts sales on May 15th. For the tax period January 1, 2020 through July 31, 2020, Company F is required to collect and remit tax only with respect to the Massachusetts sales that it makes on its own behalf. However, beginning as of August 1, 2020 Company F is required to collect and remit tax with respect to the Massachusetts sales that it facilitates on behalf of its marketplace sellers. Assuming Company F does collect and remit tax on behalf of its marketplace sellers beginning as of August 1, 2020, none of the marketplace sellers for which it facilitates sales are required to collect or remit tax with respect to such sales. Some of the marketplace sellers for which Company F facilitates sales are engaged in doing business in Massachusetts through in-state contacts. Prior to August 1, 2020, these in-state marketplace sellers are required to collect and remit tax on all of their Massachusetts sales, including those facilitated by Company F. Starting as of August 1, 2020, these marketplace sellers must continue to collect and remit tax with respect to Massachusetts sales that are not made through Company F. Some of the marketplace sellers for which Company F facilitates sales are remote marketplace sellers. Prior to August 1, 2020, these remote marketplace sellers may have to collect and remit tax on all of their Massachusetts sales, including those facilitated by Company F, if they meet the thresholds stated in 830 CMR 64H.1.9(3)(a)1. and/or 2. Starting as of August 1, 2020, these marketplace sellers may exclude the Massachusetts sales facilitated on their behalf by Company F from their Massachusetts sales calculation for purposes of 830 CMR 64H.1.9(3)(a).

(4) Marketplace Facilitator Exceptions.

- (a) A marketplace facilitator does not include the following persons:
1. a person that is not related to a marketplace facilitator and whose sole activity with respect to marketplace sales is to provide payment processor services;
 2. a person that owns or operates a marketplace that exclusively provides advertising services, including listing products for sale, so long as the person, with respect to such marketplace, does not also engage, directly or indirectly through one or more related persons, in:
 - a. the transmission or communication of the offer and acceptance between third-party buyers and the marketplace sellers;
 - b. processing or collecting payments from such buyers and transmitting the payment to the marketplace sellers; or
 - c. entering into agreements or arrangements with third party commercial entities to perform such collection and transmission.
 3. pending the issuance of further guidance that would amend this rule, a person that facilitates the sale of meals, to the extent that the restaurants themselves are registered to collect and remit sales tax, provided, however, that persons that purchase meals for resale must provide a resale certificate to the restaurant and collect tax on the sale of the meal;

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4. pending the issuance of further guidance that would amend this rule, a person that facilitates the sale of marijuana or marijuana products, as defined in M.G.L. c. 94G, § 1, on behalf of marijuana retailers to the extent that the marijuana retailers themselves are registered to collect and remit sales and use tax and the state excise and local tax option imposed under M.G.L. c. 64N; or
 5. a person that facilitates rentals of motor vehicles with respect to those rentals to the extent that such facilitator's marketplace sellers (i.e., the persons that rent motor vehicles through the facilitator) themselves are registered to collect and remit sales or use tax. A person that facilitates rentals of motor vehicles that is subject to marketplace facilitator rules either in whole or part shall, to the extent that the person is a marketplace facilitator with respect to such sellers, collect and remit all applicable vehicular rental transaction contract surcharges. Such vehicular rental transaction contract surcharges include the police training surcharge imposed pursuant to M.G.L. c. 90, § 32⁷/₈, the surcharge imposed on such vehicular rental contracts in Revere pursuant to St. 2005, c. 92, and the surcharge imposed on such vehicular rental contracts in Boston pursuant to St. 1997, c. 152 § 9(e).
- (b) The Commissioner may, from time to time, issue further guidance to limit the application of the term marketplace facilitator to certain types of businesses on a case by case basis. A marketplace facilitator or marketplace seller may also seek a waiver from the rules as they would otherwise apply. *See* 830 CMR 64H.1.9(6).
- (5) Marketplace Facilitator Administrative Rules.
- (a) Rights and Responsibilities. When a marketplace facilitator is required to collect and remit tax with respect to the sales that it facilitates on behalf of a marketplace seller, it is considered a vendor for all purposes with respect to these sales. Therefore, for example, such marketplace facilitator must retain the sales and use tax records and other information as required by state law, *see* 830 CMR 62C.25.1: *Record Retention*, may accept resale and exempt use certificates with respect to its facilitated sales, and is entitled to seek reimbursement in connection with purchaser refund requests and bad debts.
 - (b) Marketplace Facilitator's Collection Certification.
 1. General Liability of Marketplace Seller. Except as otherwise provided in 830 CMR 64H.1.9(5)(b)3., a marketplace seller that makes sales through a marketplace facilitator is required to collect and remit tax with respect to such sales unless the marketplace facilitator collects and remits tax with respect to such sales;
 2. Required Tender of Collection Certification. When a marketplace facilitator is required to collect and remit tax with respect to the sales that it facilitates on behalf of marketplace sellers, it must certify this fact to such sellers in advance of the time of such collection. For purposes of providing this certification the marketplace facilitator must provide or reasonably make available to the marketplace seller a properly completed Form ST-16 in either physical or electronic form.
 3. Release of Marketplace Seller Liability. A marketplace seller that accepts or otherwise receives either physically or electronically a Form ST-16 collection certificate from an unrelated marketplace facilitator in good faith is not required to collect or remit tax with respect to the sales facilitated by the marketplace facilitator and may remove such sales from its Massachusetts sales calculation for purposes of 830 CMR 64H.1.9(3)(a).
 4. Exception for Related Persons. Notwithstanding the provisions of 830 CMR 64H.1.9(5)(b)3., a marketplace seller that accepts a Form ST-16 collection certificate from a related marketplace facilitator remains liable for the collection and remittance of tax in the event that a marketplace facilitator fails to collect and remit the tax.
- (6) Applications for Waiver.
- (a) General Rule. The Commissioner may, in his or her discretion, issue a waiver to:
 1. a marketplace facilitator relieving it of the requirement that it register, collect and remit sales or use tax with respect to some or all of the sales that it facilitates on behalf of marketplace sellers; or
 2. a marketplace seller that sells taxable telecommunications services allowing it to collect and directly remit sales or use tax with respect to such services.
 - (b) Marketplace Facilitator Waiver.
 1. A marketplace facilitator may request a waiver from the requirement that it register and remit tax with respect to sales that it facilitates on behalf of one or more of its marketplace sellers. To request such waiver the marketplace facilitator must submit an application that identifies the sellers for which it seeks such waiver and substantiate that,

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with respect to the sales for which the facilitator requests the waiver, the applicable taxes will be remitted by such sellers. The waiver request will be approved only if the marketplace sellers for whom the sales will be facilitated are:

- a. registered to collect sales or use tax;
- b. subject to the sales or use tax collection duty; and
- c. current in their tax reporting with respect to sales or use tax and all other state taxes. Each of the marketplace sellers for whom the waiver is requested must also agree to and sign the waiver application. A marketplace facilitator that seeks a waiver must agree to:
 - i. collect the applicable tax registration numbers of all marketplace sellers for which it facilitates sales;
 - ii. retain such registration numbers in its books and records; and
 - iii. allow the Commissioner to examine such books and records upon request.

The Commissioner may revoke a waiver if he or she determines that the marketplace seller is not remitting the required tax on sales to which the waiver relates.

2. When a waiver is granted to a marketplace facilitator, the sales or use tax with respect to the sales covered by the waiver shall be:
 - a. collected by the marketplace facilitator on behalf of the marketplace seller;
 - b. provided to the marketplace seller; and
 - c. remitted by the marketplace seller. In these cases:
 - i. the marketplace facilitator will not be required to remit the tax;
 - ii. the marketplace facilitator will be relieved of liability for the non-remittance of tax; and
 - iii. it is the marketplace seller that will be subject to audit in connection with the taxable sales. However, the facilitated sales shall count for purposes of the marketplace facilitator's Massachusetts sales calculation as set forth in either 830 CMR 64H.1.9(3)(a) or (b).

(c) Marketplace Seller Waiver.

1. A marketplace seller that sells taxable telecommunications services may request a waiver allowing it to collect and directly remit sales or use tax with respect to such services as sold on a marketplace where such collection and remittance would be otherwise due from the marketplace facilitator. To request such waiver the marketplace seller must be:

- a. registered to collect sales or use tax;
- b. subject to the sales or use tax collection duty; and
- c. current in its tax reporting with respect to sales or use tax and all other state taxes.

Further the application of the marketplace seller must explain why it and not the marketplace facilitator should be required to collect the tax. The waiver application must also indicate that the marketplace facilitator was given appropriate notice of the waiver request. Although the formal approval of the marketplace facilitator is not required, it is expected that the marketplace seller will work with the marketplace facilitator with respect to the practical application of the waiver. The Commissioner may revoke a waiver if he determines that the marketplace seller is not collecting and remitting the required tax on sales to which the waiver relates.

2. When a waiver is granted to a marketplace seller, the sales or use tax with respect to the sales covered by the waiver shall be either collected directly by the marketplace seller and remitted by the marketplace seller or collected by the marketplace facilitator and transferred to the marketplace seller for remittance, depending upon the agreement between the parties. If the marketplace seller is to collect and remit the tax:
 - a. the marketplace facilitator shall not be required to collect and remit the tax;
 - b. the marketplace facilitator is relieved of liability for the collection and remittance of tax; and
 - c. the marketplace seller shall be subject to audit in connection with the sales. If the marketplace facilitator is to collect the tax:
 - i. the marketplace facilitator shall not be required to remit the tax;
 - ii. the marketplace facilitator is relieved of liability for the remittance of tax; and
 - iii. it is the marketplace seller that shall be subject to audit in connection with the sales. In either instance, the facilitated sales shall count for purposes of the marketplace facilitator's Massachusetts sales calculation as set forth in either 830 CMR 64H.1.9(3)(a) or (b).

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(d) Approval Process. In determining whether to approve a marketplace facilitator or marketplace seller waiver application the Commissioner will consider whether the application meets the requirements set forth in 830 CMR 64H.1.9(6)(b)1. and 830 CMR 64H.1.9(6)(c)1. Further, the Commissioner will consider, *inter alia*, whether, with respect to the marketplace seller that would be ultimately required to remit the tax:

1. its tax filing history, including with respect to all taxes due from such marketplace seller and related persons;
2. its internal controls with respect to tax reporting and making tax payments;
3. the volume of its gross receipts and other financial resources; and
4. whether it is publicly traded or is controlled, directly or indirectly, by a publicly traded company.

(7) Tax Registration, Returns and Payments.

(a) Vendor Registration. A vendor subject to the registration requirement of 830 CMR 64H.1.9(3) must register to collect and remit tax on MassTaxConnect.

(b) Requirement to File Tax Return. A vendor subject to the collection and remittance requirements of 830 CMR 64H.1.9(3) must file a tax return in the form prescribed by the Commissioner and pay the tax due for each calendar month on or before the 20th day of the following calendar month. The tax return must be filed electronically through MassTaxConnect.

For tax periods ending on or after April 1, 2021, a vendor subject to the collection and remittance requirements of 830 CMR 64H.1.9(3) must file a tax return in the form prescribed by the Commissioner and pay the tax due for each calendar month on or before the 30th day of the following calendar month. A vendor may also be subject to the advance payment rules in 830 CMR 62C.16B.1. The tax return must be filed electronically through MassTaxConnect.

(c) Payment of Tax. A vendor must timely pay sales or use tax in the format and manner as specified by the Commissioner.

(d) Interest. Any portion of tax that is not paid on or before the due date of a return will have added to it interest from the due date of the return to the date the tax is paid at a rate prescribed by M.G.L. c. 62C, § 32.

(e) Penalties. A vendor may be subject to penalties under M.G.L. c. 62C if it fails to:

1. timely file a return;
2. pay the required tax; or
3. file a return and/or pay the required tax in the format required by the Commissioner. *See* 830 CMR 62C.33.1: *Interest, Penalties, and Application of Payments*. The Commissioner, however, may waive or abate each of these penalties if a taxpayer demonstrates that the failure to file or pay resulted from reasonable cause and not willful neglect. *See id.*

(8) Marketplace Facilitator Liability Relief.

(a) A marketplace facilitator shall be relieved from liability, including penalties, for the incorrect collection or remittance of sales or use tax on transactions it facilitates or for which it is the seller if the error is due to an exemption certificate taken in good faith. Also, a marketplace facilitator shall be relieved from liability, including interest and penalties, for the incorrect collection or remittance of sales and use tax on transactions it facilitates or for which it is the seller if the error is due to reasonable reliance on:

1. incorrect written guidance provided by the Commonwealth; or
2. incorrect written information provided by the marketplace seller or purchaser regarding the tax classification or proper sourcing of an item or transaction.

(b) For purposes of 830 CMR 64H.1.9(8)(a)1. and 2., reasonable reliance means that the marketplace facilitator acted with reasonable cause and in good faith and did not know or have reason to know that the written guidance or information was incorrect. The relief provisions of 830 CMR 64H.1.9(8)(a)1. and 2. apply only if the marketplace facilitator can show that its failure to remit the correct amount of tax was due to the incorrect written guidance or information.

(c) The relief provisions of 830 CMR 64H.1.9(8)(a)1. and 2. do not apply to direct sales made by an in-state marketplace facilitator.

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(d) For the relief provision set forth in 830 CMR 64H.1.9(8)(a)2. to apply the marketplace facilitator must demonstrate that it made a reasonable effort under the circumstances to obtain sufficiently detailed information from the marketplace seller or purchaser, which effort should consider the level of sophistication of such seller or purchaser. Further, the relief provision set forth at 830 CMR 64H.1.9(8)(a)2. does not apply to information provided by either a marketplace seller or purchaser when the marketplace facilitator and such seller or purchaser are related persons. The relief provision set forth at 830 CMR 64H.1.7(8)(a)2. also does not apply when there are contractual provisions entered into between the marketplace facilitator and such seller or purchaser that provide that the liability for such errors is assigned to the seller or purchaser. In any instance in which the marketplace facilitator is relieved from liability under 830 CMR 64H.1.7(8)(a)2. because it received incorrect written information from a marketplace seller the marketplace seller shall instead be responsible for the tax, including any interest and penalties, assuming that the marketplace seller is otherwise subject to tax.

(9) No Limitation on Other Authority. Nothing in 830 CMR 64H.1.9 shall be construed to limit or negate the Commissioner's authority to make adjustments as otherwise permitted under Massachusetts law. Further, in the event that a vendor within the meaning of 830 CMR 4A.1.9 fails to collect the required sales or use tax with respect to a particular transaction, nothing in 830 CMR 64H.1.9, shall limit the purchaser's use tax liability in connection with such transaction.

(10) No Effect on Outstanding Tax Liability. Nothing in 830 CMR 64H.1.9 shall affect tax liability that accrued prior to its effective date, including:

- (a) on the part of a marketplace seller that previously had in-state vendors contacts because it owned inventory in a Massachusetts warehouse as maintained by a marketplace facilitator, or
- (b) pursuant to 830 CMR 64H.1.7.

64H.3.1: Direct Payment Program

(1) Statement of Purpose, Effective Date, Outline of Topics.

(a) Statement of Purpose. The purpose of 830 CMR 64H.3.1 is to explain the requirements for receiving direct payment authority, the requirements for presentation and acceptance of direct payment certificates for sales of tangible personal property and taxable services, and the reporting and payment requirements for participating purchasers. The direct payment program is intended to allow certain large volume purchasers to purchase items without paying sales or use tax to the vendor at the point of sale and instead allowing the purchaser to pay the sales/use tax directly to the Department of Revenue on a monthly basis for all purchases made within that month. This program is intended to streamline the administration of these taxes for these large volume purchasers and for the Department of Revenue.

(b) Effective Date. 830 CMR 64H.3.1 is effective as of January 1, 2001 and authorizes the use of direct payment certificates (Form ST-14) as of that date.

(c) Outline of Topics. 830 CMR 64H.3.1, is organized as follows:

1. Statement of Purpose, Effective Date, Outline of Topics.
2. Definitions.
3. General Rule.
4. Purchaser Qualification.
5. Bond Requirements.
6. Use of Direct Payment Certificates (Form ST-14).
7. Monthly Reporting and Payment of Tax.
8. Audit and Recordkeeping Requirements.
9. Term and Renewal.
10. Revocation, Termination and Penalties.

(2) Definitions. For the purpose of 830 CMR 64H.3.1, the following terms have the following meanings, unless the context requires otherwise:

Commissioner. The Commissioner of Revenue or the Commissioner's duly authorized representative.

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Purchases for Business Purposes. Purchases that are made by a qualified purchaser and used by the qualified purchaser in connection with the active conduct of a trade or business and not for any household or consumer use.

Qualified Purchaser. A purchaser that operates a business and acquires tangible personal property or services subject to sales/use tax, and has been granted direct payment authority under the requirements of 830 CMR 64H.3.1.

Sales Tax, Use Tax or Tax. The sales tax imposed by M.G.L. c. 64H and/or the use tax imposed by M.G.L. c. 64I.

Vendor. A retailer or other person selling tangible personal property or taxable services the gross receipts from the retail sale of which are required to be included in the measure of the tax imposed by M.G.L. c. 64H or M.G.L. c. 64I.

(3) General Rule.

(a) Collection of Tax. Vendors are generally required to collect tax on the retail sale of all tangible personal property and taxable services and to remit that tax to the Commissioner under the provisions of M.G.L. c. 64H, § 3(a). Under the direct payment program, the burden of proving that the vendor was not required to collect the tax is on the vendor unless the vendor takes a direct payment certificate (Form ST-14) from a qualified purchaser in good faith. The Form ST-14 is a two-part form issued by the Commissioner to qualified purchasers. The upper portion of the form is the direct payment permit, signed by the Commissioner, certifying that the holder of the permit has direct payment authority. The lower portion of the form is the direct payment certificate that is to be completed by the qualified purchaser for transactions with specific vendors. A qualified purchaser may reproduce the Form ST-14 as needed for transactions with vendors, but must retain the original in its possession. Once a Form ST-14 is accepted, in good faith, by a vendor, the liability for the payment of the sales or use tax and for the filing of all related returns is placed upon the qualified purchaser. The qualified purchaser will be required to file sales/use tax returns with and pay the appropriate tax directly to the Department of Revenue.

(b) Conditions of Use. The use of Form ST-14 will in no way affect the amount of tax due from any transaction. Form ST-14 may only be used for purchases for business purposes. Form ST-14 may not be presented for the purchase of motor vehicles, boats, airplanes, meals, alcoholic beverages, or any other goods or services specifically excluded by the Commissioner upon the Form ST-14.

(4) Purchaser Qualifications. Any purchaser meeting the qualification criteria listed in 830 CMR 64H.3.1(4)(a)1. through 6. may apply to the Commissioner for direct payment authority on the form prescribed by the Commissioner (Form DPP-1). Interested purchasers should send a completed Application for Direct Payment Authority, including all other required information, to the Audit Support Unit.

(a) Selection Criteria. To be considered for selection for direct payment authority, a purchaser must meet each of the following criteria:

1. The purchaser must operate a business that regularly acquires tangible personal property or taxable services;
2. The purchaser must reasonably expect and demonstrate that its purchases subject to Massachusetts sales/use tax will be of a sufficient dollar volume to allow the Commissioner to find that the purposes of the direct payment statute will be furthered by granting a direct payment permit to the applicant. The Commissioner anticipates that a dollar volume of \$1,000,000 of purchases subject to Massachusetts sales/use tax (\$50,000 of tax liability) per year or greater will be sufficient to satisfy this criterion;
3. The purchaser must register as a vendor under M.G.L. c. 64H and M.G.L. c. 64I, and must agree to file monthly sales/use tax returns and pay the Department of Revenue monthly on the purchases made;
4. The purchaser shall demonstrate to the satisfaction of the Commissioner that it maintains a viable automated accounting system that can track its taxable purchase transactions, produce written periodic reports, and accurately calculate the sales/use tax due;

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5. The purchaser shall identify the names and business addresses of all business locations from which the direct payment certificate, if granted, will be used, or to which goods will be sold and/or delivered. A Form ST-14 will be limited to use by the single legal entity to whom and in whose name the certificate is issued; and

6. The purchaser shall provide all additional information that the Commissioner believes necessary to verify the adequacy of the purchaser's self-assessment, collection and remittance procedures, and any other information necessary to substantiate any aspect of the purchaser's application.

(b) Notification of Acceptance or Rejection. The Commissioner will review the Application for Direct Payment Authority to determine if the selection criteria have been met. If the Commissioner determines that the selection criteria have been satisfied, he will grant direct payment authority to the purchaser. The granting of direct payment authority to a particular purchaser is solely at the discretion of the Commissioner. Notice of acceptance or rejection of a purchaser's request will be made in writing within 90 days of the Commissioner's receipt of a completed application. If the application is rejected, the notice will state the reason(s) for rejection. If no notice of acceptance or rejection is received within 90 days of the receipt of a completed application, the application will then be deemed to be denied and the applicant may appeal such denial pursuant to the provisions of 830 CMR 64H.3.1(4)(c). Each qualified purchaser granted direct payment authority will be sent an original Form ST-14 signed by the Commissioner. An applicant denied direct payment authority may reapply only after a sufficient change in the purchaser's circumstances that would warrant another review. The new request will be treated as a newly filed application and must contain complete documentation as required by 830 CMR 64H.3.1. Purchasers seeking direct payment authority may neither represent that they have such authority nor conduct business as if they have such authority while an application is pending.

(c) Appeal Process. A purchaser that has been denied direct payment authority may appeal the decision of denial in writing to the Appeal and Review Bureau. The decision of the Appeal and Review Bureau shall be the final determination of any administrative appeal. Purchasers denied direct payment authority on appeal may reapply as noted in 830 CMR 64H.3.1(4)(b).

(5) Bond Requirements. The Commissioner may require a purchaser to post a bond in an amount, and from a surety, acceptable to the Commissioner as a condition of receiving a Form ST-14 if, in the discretion of the Commissioner, it is in the best interest of the Commonwealth to require such security. The amount of the bond must be at least equal to the estimated yearly tax amount that will be due from the purchaser if direct payment authority is granted, but may be higher if the circumstances require.

(6) Use of Direct Payment Certificates (Form ST-14).

(a) Acceptance of Form ST-14. On each and every occasion when a qualified purchaser purchases tangible personal property or taxable services for use in the course of its business, the qualified purchaser must present its Form ST-14 to the vendor to certify that the qualified purchaser has direct payment authority. In lieu of presenting its Form ST-14 on each separate occasion when a qualified purchaser makes a purchase from a vendor, the qualified purchaser and vendor may agree that the delivery of the Form ST-14 shall serve as applying on a "blanket" basis to all sales made by the vendor to the qualified purchaser and covered by the direct payment certificate. A vendor that is presented with a valid Form ST-14 and that accepts same in good faith shall not collect the tax upon the purchaser's purchases and shall not include the sales covered by the Form ST-14 in its gross receipts for the purposes of collecting and remitting tax, and will be relieved of the return and payment obligations of M.G.L. c. 62C with respect to these sales. For each transaction in which the qualified purchaser uses its Form ST-14, all return, payment and other obligations of a vendor under M.G.L. chs. 62C, 64H and 64I shall rest with the qualified purchaser. A qualified purchaser shall not transfer, assign, loan or otherwise permit any other person or entity to use or possess its Form ST-14. A qualified purchaser shall not use its Form ST-14 to purchase tangible personal property or taxable services on behalf of any other person or entity. Either practice by a qualified purchaser shall be grounds for revocation and termination of its direct payment permit.

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(b) Good Faith Requirements for Form ST-14. The burden of demonstrating that the vendor was not obligated to collect a sales/use tax from a purchaser shall rest with the vendor. Acceptance of a Form ST-14 shall relieve the vendor from the requirement of collecting the tax only if the vendor accepts the form in good faith from a qualified purchaser who, at the time of purchasing the tangible personal property or taxable services, intends to use the property or services only for business purposes. A vendor may seek confirmation from the Commissioner prior to accepting a Form ST-14 as to whether the purchaser who tenders the certificate is a qualified purchaser. The vendor may make such inquiries of the qualified purchaser that the use of the Form ST-14 is proper as will reasonably satisfy the vendor that it is given in good faith. Form ST-14 may not be accepted for any types of transactions disallowed by 830 CMR 64H.3.1, or specifically disallowed by the Commissioner.

(c) Requirements for Proper Form ST-14. Each Form ST-14 must be in the form prescribed by the Commissioner and must contain the following information:

1. Name of qualified purchaser;
2. Address of qualified purchaser;
3. Qualified purchaser's registration number and permit number;
4. Effective date of the Form ST-14;
5. Expiration date of the Form ST-14;
6. Certification that the tangible personal property and services are being purchased only for business purposes; and
7. Any other information the Commissioner may require.

(d) Vendor Requirements. All vendors must retain the Forms ST-14 for the period of time required by the provisions of the record retention regulation, 830 CMR 62C.25.1. Upon written notice to a vendor, the Commissioner may require the vendor to produce any and all Forms ST-14 accepted by the vendor during any period for which a tax return has been filed or for which a return is due. The vendor must make the requested Forms ST-14 available for inspection by the Commissioner within 60 days of the date of the Commissioner's request. If the vendor does not produce the requested Form ST-14 within the 60-day period, the vendor must carry the burden of proving, by other evidence, that the vendor was not required to collect the tax based on the qualified purchaser's direct payment authority.

(7) Monthly Reporting and Payment of Tax. Qualified purchasers are required to file with the Commissioner a monthly sales and use tax return (Form ST-9), accompanied by payment of the tax due, by following each of the applicable provisions of 830 CMR 62C.16.2: *Sales and Use Tax Returns and Payments*. Each responsible person of a qualified purchaser may be held personally liable under the provisions of M.G.L. c. 64H, § 16, and M.G.L. c. 64I, § 17, as applicable for sales/use taxes not remitted to the Department of Revenue.

(8) Audit and Recordkeeping Requirements. Qualified purchasers shall maintain a list of all vendors to whom they have issued Form ST-14, including the date each was issued. Upon the request of the Commissioner a qualified purchaser shall produce this list, the original Form ST-14, or any other information required to verify the qualified purchaser's compliance with the requirements of 830 CMR 64H.3.1, or that the proper tax is being paid in a timely manner. All records must be retained for the period of time required by the provisions of the record retention regulation, 830 CMR 62C.25.1.

(9) Term and Renewal. Direct payment authority granted to a particular qualified purchaser will be valid for a term of not greater than five years, and will expire on December 31st of the final calendar year of the current term. Qualified purchasers must apply for renewal of direct payment authority no later than 120 days before the end of the current term. The Commissioner will review the purchaser's participation in the program as well as the selection criteria set forth in 830 CMR 64H.3.1(4)(a) to determine whether a renewal should be granted. Notification of the decision of renewal or termination will be given to the qualified purchaser no later than 30 days before the end of the current term. The qualified purchaser must notify the Commissioner within 30 days of any changes that occur to the form of legal organization of the qualified purchaser that would require a new federal FID number or department of revenue registration number for that purchaser. In such event, the existing direct pay permit (Form ST-14) shall be null and void and the new purchaser shall reapply for direct payment authority under the new organizational structure following the application process outlined in 830 CMR 64H.3.1. If any

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organizational change occurs, whether by merger, acquisition or otherwise, whereby the qualified purchaser entity no longer conducts an active trade or business or no longer has a legal existence, the direct payment authority shall automatically terminate.

(10) Revocation, Termination and Penalties.

(a) Revocation and Termination. Direct payment authority may be revoked by the Commissioner at any time upon 30 days written notice to the qualified purchaser, and may be revoked without notice if the Commissioner determines that the collection of any tax due from the qualified purchaser is in jeopardy. Any qualified purchaser whose direct payment authority is either forfeited voluntarily, revoked by the Commissioner, or has expired shall return the original Form ST-14 to the Commissioner and immediately notify all vendors from whom it has purchased taxable items that its Form ST-14 is no longer valid. In addition, the Commissioner has the discretion to disallow the qualified purchaser from using its direct payment authority for transactions with a particular vendor if in his discretion it is warranted.

(b) Penalties. A qualified purchaser that fails to give such notice shall be fined \$1,000 per vendor to which notification was required to have been given.

64H.6.1: Casual and Isolated Sales(1) Statement of Purpose; Outline of Topics.

(a) Purpose. 830 CMR 64H.6.1 describes the application of the Massachusetts sales and use tax to casual and isolated sales made by persons, groups, for-profit, and nonprofit organizations, and persons, groups, or organizations acting through or on their behalf. It also deals with the taxation of sales made to them. 830 CMR 64H.6.1 will apply retroactively to all open tax years.

(b) Outline of Topics. This regulation is organized as follows:

1. Statement of Purpose; Outline of Topics.
2. Definitions.
3. General Rules.
4. Special Rules for Fundraising Activities.
5. Sales in the Regular Course of Business.
6. Special Substantiation Requirements.
7. Examples.
8. Vendor Registration Requirements.
9. Revocation of Prior Policies, Rulings and Agreements.

(2) Definitions. For purposes of 830 CMR 64H.6.1, the terms below have the following meanings:

Casual and Isolated Sales, sales of tangible personal property originally acquired for use or consumption by a seller and later resold by that seller other than in the regular course of a business engaged in by that seller.

Government Organization, government organizations include the United States and its agencies, the Commonwealth of Massachusetts, and any of its political subdivisions and their respective agencies, and any organization that Massachusetts is prohibited from taxing under the Constitution or laws of the United States.

Nonprofit Organization, includes any organization falling within the provisions of the Internal Revenue Code (IRC) § 501(c) as amended and in effect for the applicable period, whether or not the organization has been classified as such by the Internal Revenue Service or the Department of Revenue.

Retail Establishment, any store or other medium or facility through which the business of selling services or tangible personal property at retail is regularly conducted. The presence of a retail establishment is a question of fact.

Sale at Retail or Retail Sale, a sale of services or tangible personal property or both for any purpose other than resale in the regular course of business.

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(3) General Rules.

(a) The sales or use tax does not apply to casual and isolated sales made by a person, group, or organization not regularly engaged in the business of selling tangible personal property. The casual and isolated sales exemption set forth in M.G.L. c. 64H, § 6(c) may apply to sales by a person, group or organization engaged in the business of making sales of tangible personal property, if the sales are of a type of property not ordinarily sold in the regular course of the person's, group's or organization's business. *See, e.g.,* 830 CMR 64H.6.1(7)(a)5. The use tax, however, does apply to the casual and isolated sale of a motor vehicle or trailer as defined in M.G.L. c. 90, § 1, or of a boat or airplane where the purchaser is not the spouse, parent, brother, sister, or child of the seller.

(b) Items not purchased for resale in the regular course of business are generally taxable. Whether or not the purchase of such property was taxable, any person, group, or organization may later make casual and isolated sales of such property. So long as the property sold at such sales was not originally acquired for resale, the number of these sales in a calendar year is immaterial.

(c) Sales to government organizations are exempt under M.G.L. c. 64H, § 6(d).

(d) Under M.G.L. c. 64H, § 6(e), sales to nonprofit organizations which are exempt from taxation under the Internal Revenue Code § 501(c)(3) or sales to nonprofit organizations that are in the process of obtaining exemption under § 501(c)(3), but have not yet obtained certification from the Internal Revenue Service (hereinafter "§ 501(c)(3) organizations") are exempt from sales tax if the following rules are met.

1. The tangible personal property or services sold to the § 501(c)(3) organization will be used to further its exempt purpose;

2. The § 501(c)(3) organization has obtained a certification (*i.e.* Form ST-2) from the Commissioner stating that it is entitled to the exemption. Organizations subject to the mandatory exceptions of the Internal Revenue Code § 508(c) are exempt from this requirement. Nonprofit organizations that have applied for, but not yet received, a certification from the Internal Revenue Service establishing their status as a § 501(c)(3) organization may be eligible for exemption for their purchases if they have obtained temporary certification from the Commissioner in accordance with the requirements of Technical Information Release 96-9;

3. The § 501(c)(3) organization gives the vendor a properly completed Exempt Purchaser Certificate (Form ST-5) certifying that the property purchased is for an exempt use. A copy of the organization's Form ST-2 must accompany the Form ST-5 given to the vendor;

4. The vendor keeps a record of the sales price of each separate sale, the name of the purchaser, the date of the sale, and the number of the Certificate of Exemption; and

5. The § 501(c)(3) organization in all other respects complies with the provisions of 830 CMR 64H.8.1: *Resale and Exempt Use Certificates.*

(e) Sales to persons, groups, or organizations not described in 830 CMR 64H.6.1(3)(c) or (d) are generally taxable, regardless of whether the property is to be used for fundraising, unless exempt under some other provision of law.

(f) Sales to persons, groups, or organizations acting through or on behalf of entities described in 830 CMR 64H.6.1(3)(c) or (d) are also exempt from taxation on purchases made through or on behalf of the exempt entity, provided that the substantiation requirements of 830 CMR 64H.6.1(6)(b) or (d) are met.

(4) Special Rules For Fundraising Activities.

(a) Sales of tangible personal property by a government organization for fundraising purposes are exempt from sales tax as casual and isolated sales if the organization does not make sales in the regular course of business of the same type of property. Sales of tangible personal property by a nonprofit organization for fundraising purposes are exempt from sales tax as casual and isolated sales if:

1. the organization does not make sales in the regular course of business of the same type of property; and

2. amounts derived from such casual and isolated sales are used to further the organization's exempt purpose. If these tests are met, the number of casual and isolated sales in a calendar year is immaterial.

(b) The Commissioner will generally presume that amounts derived from the sale of tangible personal property purchased for fundraising activities are used to further the organization's exempt purpose.

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(5) Sales in the Regular Course of Business. In general, whether a nonprofit or governmental organization conducts sales in the regular course of business is a question of fact, to be determined from an examination of the facts and circumstances surrounding the transactions and overall operations of the organization. The Commissioner will consider the following factors in deciding whether a sale is made in the regular course of an organization's business:

- (a) Whether the organization conducts sales from a retail establishment that it operates, as defined in 830 CMR 64H.6.1.
- (b) Whether the organization is required to hold a vendor's registration certificate pursuant to M.G.L. c. 64H, § 7, and is ordinarily engaged in making sales of the same type of property that it sells in its fundraising events.
- (c) Whether the proceeds from sales of meals or tangible personal property constitute unrelated business income within the meaning of applicable Internal Revenue Code provisions and the regulations promulgated thereunder.

(6) Special Substantiation Requirements.

(a) Sales Directly to Government Organizations. Government organizations are encouraged to obtain a Certificate of Exemption (Form ST-2) and submit to the vendor a properly executed Exempt Purchaser Certificate (Form ST-5) and a copy of its Form ST-2, if available, when making exempt purchases. Vendors must retain forms in the same manner as other sales tax records. *See* 830 CMR 62C.25.1: *Record Retention* for further recordkeeping requirements. If the government organization does not present Form ST-5, the vendor must maintain other adequate documentation verifying that the purchaser is exempt, *e.g.*, a copy of the organization's check or credit card.

(b) Sales to Entities Purchasing through or on Behalf of Government Organizations. Entities purchasing through or on behalf of government organizations must certify that they are doing so by presenting a properly executed Form ST-5 when making such purchases. Form ST-5 may be made out by the exempt organization or the purchaser, but must contain the name, address, and, if available, the exemption number of the government organization on whose behalf purchases are made, as well as a description of the property purchased. At the time of purchase, the purchaser must attach to the Form ST-5 submitted to the vendor, a copy of the government organization's Form ST-2 if it is available. Vendors must retain forms in the same manner as other sales tax records. *See* 830 CMR 62C.25.1: *Record Retention* for further recordkeeping requirements.

(c) Sales Directly to Organizations Exempt under I.R.C. § 501(c)(3). A § 501(c)(3) organization must first obtain a Form ST-2 (or temporary certification: *see* TIR 96-9) from the Commissioner certifying that it is entitled to exemption under M.G.L. c. 64H, § 6(e). When making purchases these organizations must submit to the vendor a copy of their Form ST-2 attached to a properly executed Form ST-5. Vendors must retain both forms in the same manner as other sales tax records. *See* 830 CMR 62C.25.1: *Record Retention* for further recordkeeping requirements.

(d) Sales to Entities Purchasing through or on Behalf of Organizations Exempt under I.R.C. § 501(c)(3). Entities purchasing property through or on behalf of organizations exempt under I.R.C. § 501(c)(3) must submit to the vendor a copy of the organization's Form ST-2 attached to a properly executed Form ST-5 from the organization on whose behalf it is making purchases. Vendors must retain both forms in the same manner as other sales tax records. *See* 830 CMR 62C.25.1: *Record Retention* for further recordkeeping requirements.

The provisions of 830 CMR 64H.6.1(6)(b) and (d) are illustrated by the following example:

Every year, the parent teacher organizations (PTO) at two different high schools conduct a "Spring Fling" for fundraising purposes to benefit their school. Each PTO hires a band, purchases flowers, and contracts with a local hotel for a banquet hall and the provision of 100 meals. Additionally, the PTO reserves a block of 30 rooms at the hotel for parents.

One high school in this example is a public school in Boston (Public High). The PTO for Public High holds no exemption itself, but would like to avail itself of the exemption which would be available to Public High under M.G.L. c. 64H, § 6(d) had Public High purchased the property directly. In order to substantiate a claim of exemption under M.G.L. c. 64H, § 6(d), Public High PTO must submit to the vendor a properly executed Form ST-5 and must attach a copy of Public High's Form ST-2 if the Form ST-2 is available. If Public High does

64H.6.1: continued

not present these forms to PTO, the PTO may itself fill out the appropriate sections of Form ST-5 and submit the form to vendors when making purchases through or on behalf of Public High.

The other high school is a local non-governmental high school (Private High) that has § 501(c)(3) status. The PTO for Private High does not itself have § 501(c)(3) status, but would like to avail itself of the exemption which would be available to Private High under M.G.L. c. 64H, § 6(e) had Private High purchased the property directly. In order to substantiate a claim of exemption under M.G.L. c. 64H, § 6(e), Private High PTO must submit to the vendor a properly executed and signed Form ST-5 and must attach a copy of Private High's Form ST-2 or temporary Form ST-2. If the PTO itself has applied for and received § 501(c)(3) status, the substantiation requirements in 830 CMR 64H.6.1(6)(c) apply.

Generally, if a customer rents a room for the purpose of serving a meal and the meal is provided by the operator of the room, the charge for the room is subject to sales tax whether or not the charge for the room is separately stated from the charge for the meal. *See* 830 CMR 64H.6.5(7)(b)2. Here, however, the rental of the banquet hall is exempt as a sale to an entity purchasing through or on behalf of an organization exempt under I.R.C. § 501(c)(3) or an entity purchasing through or on behalf of a government organization.

The rental of the 30 rooms in this example for sleeping and living purposes is subject to the Room Occupancy Excise under M.G.L. c. 64G, § 1. There is no exemption for room rentals under M.G.L. c. 64G corresponding to the exemption under the sales tax statute for purchases by governmental and § 501(c)(3) organizations and entities purchasing through or on their behalf.

(e) The substantiation requirements of 830 CMR 64H.6.1(6) are in addition to any other recordkeeping requirements imposed by law.

(7) Examples. Since the existence of a casual and isolated sale is a question of fact, the examples in 830 CMR 64H.6.1 are for illustrative purposes only.

(a) Exempt casual and isolated sales by persons, groups, or organizations.

1. A person selling his household furniture, a grocer selling his cash register, or an insurance agent selling his typewriter;
2. Sales by executors, administrators, trustees, receivers, and other fiduciaries, except when they continue the operation of a business as sellers;
3. Legal sales or executions pursuant to a court order or a court officer;
4. Sale of a business in its entirety by the owner, other than the sale of any motor vehicle, trailer, boat or airplane included therein;
5. Sales of used machinery, fixtures, equipment and like items by an owner who is engaged in a business or occupation such as manufacturing or farming, but who is not engaged in the selling of such items as a business;
6. Fundraising sales by nonprofit organizations. When a nonprofit organization uses an auctioneer to facilitate its fundraising sales the auctioneer's sales are casual and isolated only if the auctioneer receives no fee or other consideration in exchange for the auctioneer's services.

(b) Sales that are not casual and isolated.

1. Auctioneer sales, except as provided in 830 CMR 64H.6.1(7)(a)6.;
2. Sales of motor vehicles, trailers, boats or airplanes by any person other than the spouse, parent, brother, sister, or child of the purchaser;
3. Retail sales by manufacturers, wholesalers, processors, and jobbers even though such sales are infrequent and only comprise an insignificant fraction of their total business;
4. Sales that constitute an integral part of a business, such as the sale of repossessed fixtures or other property by a finance company, even though the sale of tangible personal property is not the primary function of such business;
5. Sales by a manufacturer who liquidates his business and sells his machinery, equipment, and other tangible property in a number of sales over a period of time to either the same or to different purchasers;
6. Sales of motor vehicles, trailers, boats, or airplanes in connection with the organization, reorganization, dissolution or partial liquidation of a business entity, except where the seller is the spouse, parent, brother, sister, or child of the purchaser; and
7. Sales by a museum shop of postcards, books, jewelry, games, chinaware, *etc.*

64H.6.1: continued

(8) Vendor Registration Requirements.

(a) Any person, group, or organization, including § 501(c)(3) organizations certified by the Commissioner as exempt, making sales of tangible personal property in the regular course of business must register as a Massachusetts vendor and collect and remit sales taxes whether or not the property is to be sold at fundraising events. The person, group, or organization should present a resale certificate to its vendors when it purchases property for resale.

(b) Nonprofit organizations and government organizations making sales of tangible personal property for fundraising purposes in casual and isolated sales need not register as vendors with the Commissioner and collect sales tax.

(9) Revocation of Prior Policies, Rulings and Agreements. 830 CMR 64H.6.1 supersedes any and all prior policy statements, Letter Rulings, Directives and Technical Information Releases addressing the sales and use tax treatment of casual and isolated sales. All such prior policy statements, Letter Rulings, Directives and Technical Information Releases are hereby revoked in their entirety. This includes, without limiting the foregoing, Directive 91-1.

64H.6.2: Printing

(1) General.

(a) Statement of Purpose. The purpose of 830 CMR 64H.6.2 is to explain the sales tax treatment of persons who for consideration are engaged in printing in the normal course of business.

(b) Outline of Topics. 830 CMR 64H.6.2 is organized as follows:

1. General.
2. Definitions.
3. Sales of Printed Materials.
4. Production Costs.
5. Mailing Costs.
6. Shipments.
7. Machinery.
8. Prepress Items.
9. Effective Date.

(2) Definitions. For the purpose of 830 CMR 64H.6.2, the following terms have the following meanings:

Prepress Items, materials used prior to, but in connection with, the operation of a printing press, including a printing plate, composed type, film positives and negatives, photographs, artwork, flats, and reproduction proofs.

Printing, the process of reproducing a design or image on a surface that is the end product of the production process, including lithography, multilithing, multigraphy, photocopying, and laser printing.

Sales Tax or Tax, the sales tax imposed by M.G.L. c. 64H or, if the context permits, the use tax imposed under M.G.L. c. 64I.

(3) Sale of Printed Materials. A printer shall collect sales tax when it sells printed materials at retail. A sale at retail occurs when a printer sells printed matter such as cards, catalogues, invitations, books, letterhead or photocopies to its customer, who either uses or consumes this printed material, or distributes this material free of charge. A printer is not required to collect sales tax when it makes a sale for resale, *i.e.*, the printer sells printed matter to its customer, who will resell that printed matter in the normal course of business. In these latter cases, the printer shall not be obligated to collect the sales tax on printed matter sold provided the printer accepts a resale certificate in good faith from its customer.

(4) Production Costs. When a printer charges its customer a fee for services that are a part of the production of printed matter, such as overtime, set up charges, embossing, or binding operations, the printer shall collect a sales tax on the total fee without any deduction for that part of the fee attributable to these services.

64H.6.2: continued

(5) Mailing Costs.

(a) When a printer charges its customer for postage used in mailing materials purchased by its customer, it shall not collect a sales tax on the postage fee, provided the fee is stated separately on the invoice and in the printer's accounting records.

(b) When a printer provides the envelopes, either plain or printed with a logo type, return-address, self-address or any other type of imprint for the purpose of mailing, it shall collect a sales tax on the total fee charged for the envelopes.

(6) Shipments. In general, a printer shall collect sales tax on the retail sale of printed matter. However, a printer is not required to collect sales tax in either of the following two circumstances.

(a) A printer is not required to collect sales tax on the sale of printed matter that it is obligated by agreement to deliver to either a purchaser located outside the state or to a designee located outside the state of a purchaser located outside the state. For purposes of the preceding sentence, the term "deliver" includes a direct delivery by the printer and also a delivery effected through the use of an interstate carrier.

(b) A printer is not required to collect sales tax on the sale of printed matter that is manufactured in the state to the special order of a purchaser to the extent such matter is delivered to an interstate carrier, a mailing house or a United States post office for delivery or mailing to a purchaser located outside the state or to a purchaser's designee located outside the state.

Example 1: A printer receives an order from an out-of-state customer who requests that the printer deliver the purchased printed matter to a designee in the state. This transaction is subject to tax.

Example 2: A printer manufactures greeting cards to a customer's special order and mails these greeting cards to a list of persons designated by the customer, primarily outside the state. This transaction is not subject to tax to the extent that the persons to whom the greeting cards are mailed are located outside the state.

Example 3: An in-state customer purchases greeting cards from a printer that the printer does not manufacture to the customer's special order but rather pulls from its stock in trade. The printer mails these greeting cards to a list of persons designated by the customer, primarily outside the state. This transaction is subject to tax in its entirety.

(7) Machinery. A printer's purchase of machinery or equipment is exempt from sales tax if the operation, function or purpose of the item is an integral or essential part of a continuous production flow or process of manufacturing printed matter to be sold and the item is used exclusively for that purpose.

Example 1: A printer purchases a machine that photoprocesses or engraves a blank printing plate that the printer will use exclusively, as part of a press run, to imprint printed pages to be sold. The purchase of the machine is exempt from sales tax even though it is used prior to the press run that actually manufactures the printed pages to be sold.

Example 2: A printer purchases an integrated computer system that it will use exclusively to produce artwork and other prepress items that the printer will incorporate into or use to create printed matter to be sold. The purchase is exempt from sales tax even though the machine is used prior to the actual manufacture of the printed matter to be sold.

(8) Prepress Items. A printer's purchase of a prepress item is exempt from sales tax if the item is used exclusively as part of a continuous production flow or process of manufacturing printed matter to be sold.

(9) Effective Date. This regulation repeals and replaces the prior version of 830 CMR 64H.6.2. 830 CMR.64H.6.2(7) and (8), shall apply to transactions occurring on or after July 1, 2000.

64H.6.4: Research and Development

(1) Statement of Purpose; Outline of Topics.

(a) Purpose. The purpose of 830 CMR 64H.6.4 is to explain the requirements for an entity to qualify for exemption from Massachusetts sales tax under M.G.L. c. 64H, § 6(r) and (s) on its purchases of tangible personal property used directly and exclusively in research and development. This exemption applies to a research and development corporation or a manufacturing corporation as defined under M.G.L. c. 63, § 38C or 42B. In the instance of a research and development corporation the entity must meet either a receipts or expenditures test as further explained in 830 CMR 64H.6.4(5) and (6). In addition, 830 CMR 64H.6.4 explains the eligibility of research and development corporations and manufacturing corporations for certain credits and other exemptions. 830 CMR 64H.6.4 does not address eligibility for the Massachusetts research credit provided by M.G.L. c. 63, § 38M, the rules for which are provided in 830 CMR 63.38M.1.

(b) Outline of Topics. 830 CMR 64H.6.4 is organized as follows:

1. Statement of Purpose; Outline of Topics
2. Definitions
3. General Rule
4. Qualification Requirements for Research and Development Corporations
5. Receipts test
6. Expenditures test
7. Examples
8. Qualification Requirements for Manufacturing Corporations
9. Eligibility for Sales Tax Exemptions under M.G.L. c. 64H, § 6(r) and (s)
10. Credits and Other Exemptions

(2) Definitions. For purposes of 830 CMR 64H.6.4, the following terms have the following meanings unless the context requires otherwise:

Code. The Internal Revenue Code of the United States in effect for the taxable year, except as otherwise provided.

Domestic Corporation. An entity that is either a corporation organized under or subject to M.G.L. c. 156D that is taxable under M.G.L. c. 63, § 30 *et seq.*, or a limited liability company organized under M.G.L. c. 156C that is not classified as a partnership and that has elected to be taxed as a corporation separate from its members for federal income tax purposes.

Foreign Corporation. An entity that has a usual place of business in the Commonwealth and that is either:

- (a) a corporation, association or organization established, organized or chartered under laws other than those of the Commonwealth that is taxable under M.G.L. c. 63, § 30 *et seq.*; or
- (b) a foreign limited liability company taxed as a corporation separate from its members for federal income tax purposes and for purposes of M.G.L. c. 63, § 30 *et seq.*

Research and Development. Research and development is experimental or laboratory activity having as its ultimate goal the development of new products, the improvement of existing products, the development of new uses for existing products or the development or improvement of methods for producing products. Research and development does not include testing or inspection for quality control purposes, efficiency surveys, management studies, consumer surveys or other market research, advertising or promotional activities, or research in connection with literary, historical or similar projects. Research and development is complete when the product, process, technique, formula, invention, or software can be reliably reproduced for sale or commercial use.

64H.6.4: continued

(3) General Rule. An entity that qualifies under the provisions of M.G.L. c. 63, § 38C or 42B as a research and development corporation or a manufacturing corporation is eligible to claim the sales tax exemptions in M.G.L. c. 64H, § 6(r) and (s) on its purchases of materials, tools, fuel, machinery and replacement parts used directly and exclusively in research and development. In addition, such entities may be eligible for certain credits and other exemptions. The determination of whether an entity qualifies as an eligible research and development corporation or manufacturing corporation must be made on an annual basis for the applicable taxable year. A corporation that is not a research and development corporation solely because it was not in existence in the previous tax year may utilize current information and reasonable projections of its business activity for its first year of existence. In calculating an entity's receipts or expenditures for purposes of 830 CMR 64H.6.4, a taxpayer must use the same taxable year and method of accounting used for federal income tax purposes.

(4) Qualification Requirements for Research and Development Corporations. To qualify as a research and development corporation, an entity must meet four separate requirements. First, it must be either a domestic or foreign corporation. Second, it must be engaged in research and development in the Commonwealth. Third, its principal activity in the Commonwealth must be research and development. Fourth, for purposes of claiming the sales tax exemptions in M.G.L. c. 64H, § 6(r) and (s), it must meet either a receipts test or an expenditures test, as provided in 830 CMR 64H.6.4(5) or (6), respectively; for other purposes, such as claiming investment tax credit, it must meet the receipts test (*see* 830 CMR 64H.6.4(10)). For purposes of the third requirement, principal activity means the predominant activity of a corporation in Massachusetts relative to its other activities in Massachusetts. The determination of a corporation's principal activity is based on the facts and circumstances surrounding the corporation's operations. An entity having a majority of its Massachusetts based employees engaged in research and development will be presumed to meet this requirement. For a corporation qualifying as a research and development corporation by virtue of meeting the fourth requirement's expenditures test, the exemptions from sales tax in M.G.L. c. 64H, § 6(r) and (s) apply only to purchases made on or after November 26, 2003.

(5) Receipts Test.

(a) General. In order to qualify under the receipts test, more than $\frac{2}{3}$ of a corporation's Massachusetts receipts must be derived from research and development during the taxable year. For purposes of this computation, the numerator is the corporation's gross receipts derived from research and development performed in Massachusetts and the denominator is the corporation's gross receipts derived from all activities in Massachusetts.

(b) Definitions. For purposes of 830 CMR 64.H.6.4(5)(a), the following definitions apply.

1. Receipts means the total amount, as determined under the taxpayer's method of accounting, derived by the taxpayer from all its activities and from all sources, including but not limited to interest, dividends, and other investment income, subject to the following exclusions. Receipts do not include the following:

- a. proceeds from returns or allowances;
- b. proceeds from repayments of loans or similar instruments;
- c. reimbursements from affiliated companies for third party charges for administrative expenses that the taxpayer reasonably incurred and charged out to affiliates;
- d. receipts from a transaction not in the ordinary course of business, such as the sale of an entire business;
- e. contributions to the capital of an enterprise, including amounts paid for stock or other equity instruments; or
- f. amounts paid for debt instruments issued by an enterprise.

2. Massachusetts receipts are receipts that are received in consideration for or on account of a taxpayer's activities in Massachusetts.

64H.6.4: continued

3. Receipts derived from research and development means gross receipts, as determined by the taxpayer's method of accounting used for federal income tax purposes, realized from the provision of research and development, as defined in M.G.L. c. 63, §§ 38C, 42B, and 830 CMR 64H.6.4(6)(2) and royalties or fees derived from the licensing of patents, know-how or other technology developed from the taxpayer's research and development activities in Massachusetts. Amounts received under any grant, contract, or otherwise for research and development are included within this definition regardless of whether activities conducted under such grants are excluded from the definition of "qualified research" under Treasury Code § 41(d)(4)(H). Receipts derived from a corporation's administrative functions including financial, personnel, legal, tax, accounting, or planning services are generally not receipts derived from research and development.
- (6) Expenditures Test.
- (a) General. In order to qualify under the expenditures test, more than $\frac{2}{3}$ of a corporation's Massachusetts expenditures must be allocable to its research and development activities during the taxable year. For purposes of making this computation, the numerator is the corporation's total Massachusetts expenditures that are allocable to research and development activities and the denominator is the corporation's total Massachusetts expenditures, provided, however, that neither the numerator or denominator is to include the corporation's manufacturing expenses or administrative expenditures, as further described in 830 CMR 64H.6.4(6)(c).
- (b) Definitions. For purposes of 830 CMR 64H.6.4(6)(a), the following definitions apply.
1. Expenditures means any expenditure paid or incurred in the course of conducting the taxpayer's business during the taxable year, including but not limited to expenses related to sales and distribution activities.
 2. Except as otherwise provided in 830 CMR 64H.6.4, Massachusetts expenditures allocable to research and development activities are expenditures that are paid or incurred for research and development performed in Massachusetts.
 3. Expenditures are allocable to research and development activities if they are paid or incurred, as determined by the taxpayer's method of accounting used for federal income tax purposes, for research and development conducted or to be conducted by the taxpayer and that are treated as research and experimental expenditures under Treasury Code § 174 and the applicable regulations promulgated thereunder. The following expenditures are examples of expenditures that are allocable to research and development activities.
 - a. Funded Research Expenditures. Expenditures incurred by a corporation conducting research and development, within the meaning of 830 CMR 64H.6.4, to the extent funded by any grant or contract, or otherwise by another person or governmental entity, are considered to be expenditures allocable to research and development activities.
 - b. Costs Incident to Research and Development. Costs incident to the development or improvement of a product are considered to be allocable to research and development activities. Such costs include, for example, the costs of obtaining a taxpayer's own patent, such as attorney's fees expended in making and perfecting a patent application. However, costs allocable to research and development activities do not include legal expenses, patent fees or other costs associated with the acquisition of another's patent, model, production or process.
 - c. Depreciable and Amortizable Property. Expenditures paid or incurred for the acquisition of depreciable property that is subject to an allowance for depreciation under Treasury Code §§ 167 and 168, amortization under Treasury Code § 197, or depletion under Treasury Code § 611 are not deductible under Treasury Code § 174, irrespective of whether the property or improvements may be used by the taxpayer in connection with research and development activities. Nevertheless, allowances for depreciation, amortization, or depletion of property are considered research and development expenditures for purposes of Treasury Code § 174, to the extent that the property to which the allowances relate is used in connection with research and development in Massachusetts. Accordingly, for purposes of 830 CMR 64H.6.4, such allowances are allocable to research and development.

64H.6.4: continued

- d. Development of Computer Software. Expenditures that relate to the research and development of computer software may constitute expenditures allocable to research and development, depending on the facts and circumstances surrounding the research and the use to which the software is put. However, the development and sale of standardized computer software may constitute manufacturing activity, and effective for taxable years beginning on or after January 1, 2006, the development and sale of standardized computer software as defined in 830 CMR 64H.1.3(2) is considered a manufacturing activity, without regard to the manner of delivery of the software to the customer including electronic delivery. *See* M.G.L. c. 63, §§ 38C and 42B.
- (c) Non-includable Expenditures.
1. Administrative Expenditures. Expenditures related to a corporation's administrative functions, such as personnel, legal, tax and accounting expenses are not includable in either the numerator or the denominator of the expenditures fraction.
 2. Manufacturing Expenditures. A corporation that is engaged in research and development that also conducts manufacturing activities must exclude expenditures relating to its manufacturing activities from the numerator and denominator of its expenditures fraction, regardless of whether the manufacturing activities are substantial. The development and sale of standardized computer software may constitute manufacturing activity, and effective for taxable years beginning on or after January 1, 2006, the development and sale of standardized computer software shall be considered to be a manufacturing activity without regard to the manner of delivery of the software to the customer, including electronic delivery. Accordingly, to the extent that a corporation's development and sale of such software is a manufacturing activity, expenditures relating to such activity must be excluded from both the numerator and denominator of the corporation's total expenditures for purposes of calculating its expenditures allocable to research and development activities.
- (d) Specific Expenditures. The following expenditures are either included or excluded from the numerator or denominator, as noted.
1. Supplies. Amounts paid for supplies used or consumed in conducting research and development in Massachusetts are included in the numerator and denominator.
 2. Payroll Expenditures. Payroll expenditures paid or incurred for research and development performed in Massachusetts are included in the numerator and denominator.
 - a. If an employee performs qualified research and development activities and also performs other activities in Massachusetts, only the wages proportionate to the time spent on qualified research and development activities are allocable to research and development and therefore included in the numerator (*i.e.*, assuming the activities are performed in Massachusetts). The employee's entire wages are included in the denominator.
 - b. If an employee performs research and development activities both in and outside of Massachusetts, only the wages proportionate to the time spent on qualified research and development in Massachusetts are included in the numerator and denominator.
 - c. The wages of employees who supervise or are supervised by persons performing qualified research and development are included in both the numerator and the denominator to the extent the work of those supervising or being supervised constitutes research and development performed in Massachusetts.
 3. Third Party Expenditures. Certain expenditures paid or incurred for research and development performed by third parties on a corporation's behalf at a research facility located in Massachusetts are included in the numerator and the denominator. These include expenditures allowed in Treasury Reg. § 1.174-2(a)(8) and "contract research expenses" as described in Treasury Code § 41(b)(3), provided that these expenses are incurred for research and development performed in Massachusetts. Other third party Massachusetts expenditures unrelated to research and development are included in the denominator. In order to claim third party expenditures, a taxpayer must maintain sufficient documentation substantiating the identity of any parties conducting the research on the corporation's behalf, the nature of the research, and the locations where such contract research was conducted.

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4. Clinical Trials. Expenditures paid or incurred in conducting clinical trials performed by the corporation itself, or for services provided by third parties performing such trials on its behalf, in Massachusetts are included in the numerator and the denominator. Generally, expenditures incurred in conducting clinical trials outside Massachusetts are not included in the numerator or denominator, even if the corporation is headquartered in Massachusetts, and even if the clinical trials are initiated, managed, and directed from within Massachusetts. However, the in-state costs of employees actually supervising, managing and directing clinical trials are includable in the numerator and denominator even if the trials themselves are conducted outside of Massachusetts.

5. Shared Expenditures. Research and development expenditures that are shared across multiple locations of a corporation will be attributed to Massachusetts using a proration allocation as provided in 830 CMR 63.38M.1(4)(b)4, without regard to the 65% limitation imposed by Treasury Code § 41(b)(3) for purposes of calculating the credit for increasing research activities. When such expenses relate to amounts paid for research and development services performed both within and without Massachusetts, the amount of the expense must be prorated between Massachusetts and non-Massachusetts activity based on the ratio of days the service provider or tangible personal property was employed in research and development in Massachusetts to the total number of days the service provider or tangible personal property was employed in research and development both within and without Massachusetts.

6. Computer Expenses. Expenditures for the use of computers and information technology to store, collect, manipulate, translate, disseminate, produce, distribute or process data or information, or expenditures for similar uses of computers and information technology are included in the numerator and denominator if they are Massachusetts expenditures and are deductible as research and development expenditures. In general, unless otherwise provided in 830 CMR 64H.6.4, amounts paid for the right to use computers in the conduct of a corporation's research and development in Massachusetts are includable expenditures to the extent that they are treated as in-house expenses under Treasury Code § 41(b)(2)(A)(iii). Depending on the facts and circumstances, eligible computer expenses may include the lease, rental, or repair of equipment used in research and development at a research facility located in Massachusetts. In addition, amounts paid to another person for the right to use computers are included in the numerator and the denominator to the extent the computer is used in the conduct of performing research and development that takes place in Massachusetts.

(7) Examples. The following examples illustrate the application of the various requirements for qualification as a research and development corporation.

Example 1: Company A is a venture-backed start-up corporation that will be engaged in the research and development of a product constituting tangible personal property. During the taxable year, the company raises \$5,000,000 intended to finance its research and development activities. It does not receive any other funds from performing research and development. For purposes of 830 CMR 64H.6.4, such financing, whether in the form of a contribution to capital or a loan, is not a receipt derived from research and development and may not be used for purposes of determining whether Company A has a sufficient amount of receipts from research and development. However, Company A may qualify as a research and development corporation if it has the requisite percentage of Massachusetts expenditures allocable to research and development for the taxable year, provided that it meets the other requirements for qualification as a research and development corporation.

64H.6.4: continued

Example 2: Company C is organized as a partnership. It has two incorporated partners. Company C does not qualify as a research and development corporation. However, the activities of the partnership are allowed to flow through on a *pro rata* basis to corporate partners. If the *pro-rata* share of the corporate partners' Massachusetts receipts allocable to research and development exceed the $\frac{2}{3}$ threshold, and the corporate partners otherwise qualify, the sales tax exemptions in M.G.L. c. 64H, § 6(r) and (s), are available to the corporate partners. However, while purchases of materials and machinery may qualify for the exemption from sales tax under M.G.L. c. 64H, § 6(r) and (s) when purchased by the corporate partners, such purchases do not qualify if purchased by the partnership itself.

Example 3: Company D is a limited liability company (LLC) organized under M.G.L. c. 156C. In order to qualify for exemption as a research and development corporation, it must elect to be treated as a corporation for federal income tax purposes and file federal Form 1120 and a Massachusetts corporate excise return as a separate entity for all periods for which an exemption is claimed. For 2004, 2005 and 2006, Company D filed as a corporation for federal and state tax purposes under the "check-the-box" rules. It can qualify for exemption as a research and development corporation in the same manner as an incorporated entity for those years. If Company D does not "check-the-box" to be treated as a corporation for those years, it does not qualify regardless of any other facts.

Example 4: E Corporation enters into an agreement under which F Corporation will perform research on E's behalf. E's contract research expenses paid or incurred in connection with F's research done on its behalf are includable for purposes of calculating whether $\frac{2}{3}$ of E's expenditures are incurred in research and development in Massachusetts, if the research is performed in Massachusetts. To the extent that E has contract expenses for other third party Massachusetts expenditures unrelated to research and development, those are included in the denominator of the expenditures test.

Example 5: E Corporation developed a particular technology in Massachusetts. E Corporation grants F Corporation a license to use this technology. The amounts paid by F to E in connection with F's use of the technology are includable for purposes of determining whether $\frac{2}{3}$ of E's receipts are from research and development in Massachusetts.

(8) Qualification Requirements for Manufacturing Corporations. An entity qualifies as a "manufacturing corporation" entitled to the sales tax exemption on purchases of tangible personal property used directly and exclusively in research and development if it:

- (a) is a domestic or foreign corporation within the meaning of the definitions set forth in 830 CMR 64H.6.4(2); and
- (b) is either classified as a manufacturing corporation by the Commissioner pursuant to M.G.L. c. 58, § 2 or has manufacturing corporation status under 830 CMR 58.2.1(5) and (6). See 830 CMR 58.2.1: *Manufacturing Corporations*.

(9) Eligibility for Sales Tax Exemptions under M.G.L. c. 64H, § 6(c) and (s).

- (a) General Rule. Under M.G.L. c. 64H, § 6(r), the sales tax does not apply to the sale or use of materials, tools and fuel, or any substitute therefor, which are consumed and used directly and exclusively in research and development by a manufacturing corporation or a research and development corporation. Materials, tools and fuel are "consumed and used" only if their normal useful life is less than one year or their cost is allowable as an ordinary and necessary business expense for federal income tax purposes. Nuclear fuel and nuclear fuel assemblies are regarded as consumed and used even if they do not meet this test. Under M.G.L. c. 64H, § 6(s), the sales tax does not apply to the sale or use of machinery, or replacement parts thereof, used directly and exclusively in research and development by a manufacturing corporation or a research and development corporation.

64H.6.4: continued

(b) Directly and Exclusively. For purposes of 830 CMR 64H.6.4, the exemptions in M.G.L. c. 64H, § 6(r) and (s) apply only to sales of materials, tools, fuel, machinery and replacement parts used directly and exclusively in research and development by a research and development corporation or manufacturing corporation. An item is not considered used directly and exclusively merely because it is essential to research activities or because its use is required by law. Tangible personal property, machinery and replacement parts or equipment used in managerial or sales activities is not directly and exclusively used in research and development and is therefore subject to tax.

1. Directly. Tangible personal property, including materials, tools, fuel, machinery and replacement parts, is used “directly” in research and development only if it is used in experimental or laboratory activity that qualifies as research and development under 830 CMR 64H.6.4. In determining whether any property is “directly” used, the fact that a particular item of property may be integral and necessary to the conduct of the activity because its use is required either by law or practical necessity does not, in and of itself, mean that the property is directly used in research and development. The following is a non-exhaustive list of machinery and materials which are not directly used in research and development:

- a. Machinery and materials used exclusively for the comfort of worker. Examples are air conditioning and ventilation systems.
- b. Machinery and materials used in support operations, such as a machine shop, in which R&D machinery is assembled, maintained, or repaired.
- c. Machinery and materials used by the administrative, accounting, and personnel departments.
- d. Machinery and materials used by plant security, fire prevention, first aid, and hospital stations.
- e. Machinery and materials used in plant communications and safety.

Example 1: Laboratory supplies for use in a research laboratory are exempt but supplies, desks and chairs used by clerical personnel are not exempt.

Example 2: Test tubes, flasks, reagents, microscopes and slides purchased by a chemical manufacturer for its research laboratory for developing new pesticides are exempt from sales tax.

Example 3: Technical books and journals purchased for a research and development laboratory for use in doing background research are used directly in research and development.

Example 4: Worcester Widgits, Inc. is a manufacturing corporation that maintains a chemical laboratory for exclusive use in developing new heat-resistant plastics. It purchases the following items for exclusive use in its research and development activities: a computer that will only be used to process data relating to the heat resistance of the plastics, test tubes, flasks and reagents, soap for cleaning laboratory equipment, smocks and gloves for laboratory personnel, an autoclave for sterilizing laboratory equipment, cleaner and wax for laboratory floors, and pencils, pens, paper and a typewriter for use in the office of the laboratory’s director. Its purchases of the cleaner and wax for laboratory floors, and the pencils, pens, paper and typewriter for use in the office of the laboratory’s director, are subject to tax because the items are not used directly in research and development. Its purchases of the test tubes, flasks, reagents, soap for cleaning laboratory equipment, and smocks and gloves for laboratory personnel are exempt from tax if the normal useful life of the items is less than one year or their cost is allowable as an ordinary and necessary business expense for federal income tax purposes. Worcester Widgits’ purchase of the computer to be used exclusively in processing data relating to the heat resistance of the plastics and the autoclave is exempt from tax.

2. Exclusively. Materials, tools, fuel, and machinery and replacement parts are used exclusively in research and development if 100% of their use is in such function. However, for purposes of 830 CMR 64H.6.4, a *de minimis* use will not defeat the exclusivity requirement of the exemptions in M.G.L. c. 64H, § 6(r) and (s). Whether a use is *de minimis* shall be determined by the Commissioner based on the facts and circumstances of a taxpayer’s overall operations.

64H.6.4: continued

Example 1: A company purchases a computer system which it uses directly for research and development. However, on two separate days during the year the computer is used to generate management reports that include information with respect to research projects but also address many other issues facing the company. No other taxable usage is made of the computer. Although the generation of management reports may be a taxable usage of research equipment, this use of the computer is *de minimis*.

Example 2: Facts are the same as Example 1, except that instead of generating the two management reports, the computer is used to generate weekly payroll and employment tax return reports. The generation of these reports on a regular basis is not a *de minimis* taxable usage of the computer. Therefore, the computer is not considered used exclusively for research and development, and is taxable.

Example 3: Marblehead Microchips, Inc. is a manufacturing corporation that maintains a laboratory containing machinery used 75% of the time for research and development of new products and 25% of the time for quality control purposes. The machinery is not considered used exclusively for research and development. Therefore, the corporation's purchases of the materials and machinery are subject to tax.

Example 4: Company D, a foreign corporation, performs research and development in Massachusetts. It purchased computers, other hardware, printers and software for its use in its research and development department. The computers, other hardware, printers, and software products were used in data analysis and for documentation of testing results.

The equipment and software were also used in other applications for purposes related to the conduct of research and development. Word processing applications were used to generate technical reports, notebook records, and monthly reports. E-mail applications were used for data acquisition and calculation programs as well as communication among research colleagues. Graphics and spreadsheet software played a role in the activities of the research and development department. Software also supported technical information storage, retrieval, and dissemination operations for the use of the research and development staff.

The software required a computer system and its hardware components to perform these functions. The printers were similarly indispensable to the effective utilization of the computers in the ways described in this example. Software, hardware and printers generally function as a single, interconnected system. Assuming that the computer system is used solely for exempt purposes or non-exempt purposes that are *de minimis*, the computers, hardware, printers, and software qualify as being used directly and exclusively in research and development.

Example 5: A research and development corporation purchases gas, electricity, refrigeration and steam which is used in bulk or in a continuous flow at its research and development facility in Massachusetts. The electricity is used in all areas of its facility, including the areas in which its administrative functions are performed. The corporation may present an Exempt Use Certificate with respect to the exempt portion of the energy, (e.g., the portion use directly and exclusively in research and development) if known at the time of purchase. If the exempt portion is not known at the time of purchase, the taxpayer may present its vendor with an Exempt Use Certificate and pay use tax on the non-exempt portion of the energy purchased. If a taxpayer either did not provide a certificate at the time of the purchase or subsequently determines that all or a portion of its purchases were exempt from tax, it may subsequently request its vendor to provide a refund or credit for the tax paid on the portion used directly and exclusively in research and development. The vendor may apply for an abatement of the portion of the tax paid in accordance with the rules of the Abatement regulation, 830 CMR 62C.37.1. The user must maintain adequate records with respect to the allocation of gas, electricity, refrigeration and steam used directly and exclusively in research and development from that used for non-exempt purposes.

64H.6.4: continued

(10) Credits and Other Exemptions. Research and development corporations and manufacturing corporations may be eligible for certain other tax benefits, as follows:

(a) Investment Tax Credit (ITC) under M.G.L. c. 63, § 31A. Corporations treated as manufacturing corporations and those research and development corporations qualifying as such by virtue of meeting the receipts test in 830 CMR 64H.6.4(5) may claim the ITC against the Massachusetts corporate excise for qualifying property to the extent allowed by M.G.L. c. 63, § 31A. Such corporations should refer to 830 CMR 58.2.1, Manufacturing Corporations, and the Commissioner's public written statements interpreting it for rules that apply to claiming the ITC. However, research and development corporations qualifying as such solely on the basis of the expenditures test in 830 CMR 64H.6.4(6) are ineligible to take the ITC credit.

(b) Local Property Tax Exemption for Machinery under M.G.L. c. 59, § 5(16)(3). Corporations that are properly classified by the Commissioner as manufacturing corporations, are eligible for the exemption from local property tax under M.G.L. c. 59, § 5(16)(3) on their machinery. *See* M.G.L. c. 58, § 2; 830 CMR 58.2.1(4)(a). *See also* M.G.L. c. 59, § 5(16)(3). Corporations that are not so classified are not eligible for this local property tax exemption even if they are engaged in manufacturing. Research and development corporations that have been properly classified as such and that have machinery situated in a locality that has adopted the exemption from local property tax for research and development corporations provided under M.G.L. c. 59, § 5(16)(3) are also eligible for the local property tax exemption on such machinery.

64H.6.5: Sales Tax On Meals

(1) General, Outline.

(a) General. The Massachusetts sales tax is imposed on sales of meals by a restaurant. The tax is levied on the sales price of the meal. The sale of food products for human consumption is exempt from the sales tax.

(b) Outline. 830 CMR 64H.6.5(1)(b) lists the sections contained in 830 CMR 64H.6.5.

1. General, Outline.
2. Definitions.
3. Nontaxable Sales.
4. Food Products.
5. Restaurant Meals.
6. Store Sales.
7. Sales Price.
8. Nonreturnable Containers, Purchases by Vendors.
9. Sales of Meals Exempt when Sold to Certain Organizations.
10. Special Rules for Fundraising Activities.
11. Exempt Organizations - Sales of Meals in the Regular Course of Business.
12. Special Substantiation Requirements.
13. Sales of Meals Exempt when Sold by Certain Other Institutions and Organizations.
14. Food Stamps.
15. Liquor License Holder.
16. Recordkeeping.

(2) Definitions. The definitions included in various sections, subsections, divisions, or subdivisions of 830 CMR 64H.6.5, apply where appropriate throughout the regulation.

Commissioner, the Commissioner of Revenue or the Commissioner's duly authorized representative.

Vendor, as defined in M.G.L. c. 64H, § 1.

(3) Nontaxable Sales. If an establishment has taxable and nontaxable sales, it must comply with the record keeping requirements in 830 CMR 64H.6.5(16). If a vendor's records do not substantiate nontaxable sales, all sales will be considered taxable.

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(4) Food Products. The sale of food products for human consumption is exempt from the sales tax unless the food products are prepared for human consumption and provided by a restaurant. The term "food products" includes but is not limited to:

Cereals and cereal products;
 Flour and flour products;
 Milk and milk products, including ice cream;
 Oleomargarine;
 Meat and meat products;
 Fish and fish products;
 Eggs and egg products;
 Vegetables and vegetable products;
 Fruit and fruit products;
 Soft drinks;
 Herbs and spices;
 Salt;
 Sugar and sugar products;
 Candy and confectionery;
 Coffee and coffee substitutes;
 Tea;
 Cocoa and cocoa products;
 Food substitutes;
 Ice when used for household consumption; and
 Water.

The term "food products" does not include: Alcoholic beverages which contain $\frac{1}{2}$ of 1% or more of alcohol by volume at 60° F; Dietary supplements and adjuncts; and Medicines, tonics, and preparations in liquid, powder, granular, tablet, capsule, lozenge, and pill form sold as dietary supplements or adjuncts. Medicines prescribed by a registered physician are exempt from sales tax. M.G.L. c. 64H, § 6(1).

(a) Definitions.

1. Candy. Food products with a sugar or confection base, including breath fresheners, gum, mints, and health foods which consist primarily of sugars, but excluding dietary supplements and adjuncts.
2. Dietary supplements or adjuncts. Sales of dietary supplements or adjuncts are subject to sales tax. Dietary supplements or adjuncts include items such as alfalfa tablets, vitamins and minerals, herb laxative tablets, lecithin capsules, chewable lecithin tablets, powdered proteins, fiber wafers, aloe vera juice, baking enricher, and brewer's yeast.
3. Ice. Ice sold for uses other than household consumption is subject to tax. The sale of ice to restaurants and bars for use exclusively as crushed ice in drinks is a sale for resale and is not subject to sales tax if the restaurant presents a resale certificate to the vendor of the ice as required by M.G.L. c. 64H, § 8. If ice is sold both for refrigeration and for sale in iced drinks, the charges may be segregated. If the charge is segregated both on the bill to the customer and in the vendor's books and records, only the sale of ice for refrigeration is subject to tax. If the charges are not segregated, the entire sale is subject to tax. Ice sold from a vending machine is presumed to be ice used for household consumption and is therefore not taxable.

The following examples illustrate the provisions of the foregoing 830 CMR 64H.6.5(4):

Example 1: A powdered preparation containing eggs, sugar, cocoa and various minerals is to be mixed with water and eaten in lieu of meals. This preparation is exempt from sales tax as a food substitute, unless it is sold by a restaurant.

Example 2: A health food store sells a protein energy bar which contains vitamins and minerals. The bar is carob-coated, cocoa-flavored and consists primarily of sugar and other sweeteners. Other ingredients include vegetable oils and peanut butter. The energy bar is candy exempt from sales tax unless it is sold by a restaurant.

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(5) Restaurant Meals.(a) General. The sales tax is imposed on all meals sold by a restaurant or a restaurant part of a store.(b) Restaurant.

1. A restaurant is any eating or drinking establishment that is primarily engaged in the business of selling meals for which a charge is made, including but not limited to: a cafe; lunch counter; private or social club; cocktail lounge and bar; hotel and motel dining room; catering business; tavern; diner; snack bar including theater snack bar; dining room; coffee shop; vending machine which sells food items with a sales price of \$3.50 or more; ice cream or other food product stand; canteen truck or wagon; street wagon or cart; salad bar; and any other establishment primarily engaged in the business of selling meals, whether stationary or mobile, temporary or permanent.

2. The following are not ordinarily considered restaurants: industrial commissaries which make no retail sales; vending machines which sell only food items with a sales price of less than \$3.50; fraternities, sororities, and other student societies, with members residing at a common location and jointly sharing household expenses, including costs of preparing meals, and that prepare and serve meals to members; and bed and breakfast establishments or homes, as defined in M.G.L. c. 64G when the value of the breakfast is included in the rent.

(c) Store. A "store" is any establishment that is not primarily engaged in the business of selling meals. A "restaurant part" is an area, section, or counter, *etc.*, within a store from which meals are sold. Examples of establishments that may be stores with a "restaurant part" include but are not limited to: bakeries, delicatessens, grocery stores, markets, or supermarkets.(d) Meals. A meal is any food or beverage, or both, served or presented by a restaurant or restaurant part in a manner that is reasonably and commonly considered a meal. A meal includes food or beverages sold on a "take out" or "to go" basis, whether or not they are packaged or wrapped, and whether or not they are taken from the premises.(e) Tax Free Restaurant Sales. Certain food and beverages are not considered meals when sold by a restaurant for off-premises consumption, and their sales are not subject to the sales tax. These include:

1. Food sold by weight, liquid or dry measure, count, or in unopened original containers or packages, including, but not limited to, meat products sold by the pound, a loaf of bread, a quart of milk, and a pint, quart, half gallon, *etc.* of ice cream, provided that such foods are commonly sold in the same manner in a retail food store which is not a restaurant.

2. Beverages in unopened, original containers or packages when sold as a unit with a capacity of at least 26 fluid ounces.

3. Bakery products when sold in units of six or more. Baked goods in units of six or more includes any variety of items totaling six or more servings, for example: two bagels, three muffins and one danish; or one whole pie, cake, loaf of bread, *etc.*

Prepared meals, snacks, sandwiches, food platters, poultry, fish or meat items, or other food combinations, to the extent that such items are sold by a restaurant whose principal business is the preparation or sale of such items in such form as to be available for immediate consumption without further significant preparation, whether for on or off premise consumption, are not to be excluded under 830 CMR 64H.6.5(5)(e)1. through 3.

Example 1: Restaurant A sells all types of meals including desserts. Many of its desserts are kept in a cooler, available for take-out. Items in the cooler include: gallons, half gallons, quarts, and pints of ice cream; individual sundaes, ice cream sandwiches, and ice cream cake rolls. Nontaxable sales include: a pint, quart, half gallon, *etc.* of ice cream and the ice cream cake roll. Taxable sales include: an individual sundae and an ice cream sandwich. The sale of ice cream hand packed for the customer is taxable regardless of container size.

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Example 2: Restaurant B sells all types of meals including pasta dishes. B sells quart jars of spaghetti sauce to customers for off-premises consumption. The sale of jars of sauce is not taxable unless sold heated.

Example 3: Restaurant C sells sandwiches, pizza, snack and family bags of chips, cans, and 1 liter and 2 liter containers of soda. The sale of sandwiches, pizza, snack bags of chips or cans of soda is taxable. The sale of a family bag of chips or 1 or 2 liters of soda for off premises consumption is not taxable.

Example 4: Restaurant D sells all types of meals including sandwiches. This restaurant sells meals for customers to consume on premises and also sells these meals for take-out from a counter. Specifically, customers may purchase from the counter the following items for take out: sandwich meats or cheeses; shrimp salad; pizza; soup; sandwiches; snack size bags of chips; cold soda cans; and whole cooked meat poultry or fish with or without the fixings.

Because the establishment is primarily in the business of selling meals it is a restaurant and most of its sales are taxable except those sales a restaurant may make tax free. A restaurant may not claim a store part. The counter is considered a convenience for take out meals and is not considered a delicatessen. Therefore, the rules for restaurant sales apply. See 830 CMR 64H.6.5(5)(e). In this example, the sale of sandwich meats or cheeses for off premises consumptions is not taxable. The sale of the other items mentioned are taxable.

The rules are different for a delicatessen counter in a grocery store or a delicatessen store that is not primarily in the business of selling meals. For these businesses the rules in 830 CMR 64H.6.5(6)(b)3. apply.

Example 5: Restaurant E sells all types of meals. At the register is a display of candy and mints. The sale of individual snack size candy or mints by a restaurant is taxable. The sale of a multipack of candy bars or mints for off premises consumption is not taxable.

Example 6: Restaurant F sells all types of meals including pastries. Many of the pastries are kept in a cooler available for take-out. The sale of pastries by a restaurant in units of five or fewer are taxable. Its sales of pastries in units of six or more are not taxable.

(f) Caterers.

1. Definition. Caterer, a person engaged in the business of preparing or serving meals, whether on the premises of the caterer, premises of the caterer's customers, or premises designated by the customers. A caterer is a restaurant.

2. Caterer does not Own Food. When a caterer prepares or serves food owned by a client, the caterer's charges for its service are not taxable. If the meals are sold to the client's customers or employees the amount charged to the customer or employee is subject to tax. Food may be purchased by the caterer and still owned by the client if the caterer acts as the client's agent and purchases food on the client's behalf.

3. Caterer Owns Food. When a caterer prepares or serves food it owns to a client's employees or customers, the amount charged the employees or customers is subject to tax. Any additional management fee or operating expense paid by the client to the caterer is not subject to tax. When a caterer prepares or serves food it owns to the client's employees for a charge paid by the client, rather than selling meals directly to the employees, the charge for the meals paid by the client is subject to tax. For rules regarding caterers acting through or on behalf of exempt organizations see 830 CMR 64H.6.5(9)(a)4.

Example 1: The Whimsy Company provides low cost meals to its employees. Whimsy pays Quick Caterers to purchase the food and prepare and serve the meals to Whimsy's employees. Only the amount charged the employee for the meals is subject to tax. The additional operating expense paid by Whimsy to Quick is not subject to tax.

64H.6.5: continued

Example 2: The Whimsy Company provides free meals to its employees. Whimsy pays Quick Caterers to purchase the food and prepare and serve the meals. The food is owned by Quick. Quick is selling meals to Whimsy and these sales are subject to tax.

Example 3: The Whimsy Company provides free meals to its employees. Whimsy pays Quick Caterers to prepare and serve food owned by Whimsy. Since no sale of meals takes place, no taxable event occurs.

(g) Vending Machines. A vending machine which sells food such as candy, snacks or sandwiches is generally not considered a restaurant and the sales are not taxable, providing that the vending machine only sells items with a sales price of less than \$3.50 per item. If any single food item sold from a vending machine has a sales price of \$3.50 or more, all sales from the vending machine are taxable.

(h) Industrial Commissaries. An industrial commissary is not a restaurant if it prepares items only for sale to other vendors. However, if an industrial commissary prepares meals for retail sale, the industrial commissary is a restaurant with respect to its retail sales. The commissary must collect and pay over the sales tax on those sales.

(6) Store Sales.

(a) General Rules. A "store" is any establishment that is not primarily in the business of selling meals. A "restaurant part" is an area, section, or counter, etc., within a store from which meals are sold. An establishment may use the term store, bakery, delicatessen, convenience store, market, etc. in its name, but if it is primarily engaged in the business of selling meals it is a restaurant for purposes of the sales tax. The following general rules apply to sales by a store.

Taxable Store Sales

1. Beverages. The sale of a poured beverage, such as a cup of coffee or a fountain soda, is taxable.
2. Snacks/Unpackaged. The sales of unpackaged baked goods or other snacks by a store are taxable unless specifically exempt under the bakery rules. *See* 830 CMR 64H.6.5(6)(b)1. for bakery rules.
3. Hot Foods. The sale by a store of any prepared food item *heated* is taxable.
4. Entrees. The sale by a store of single portion size entrees such as lasagna, eggplant parmesan, or quiche prepared for human consumption is taxable if heated (*see* 830 CMR 64H.6.5(6)(a)3.) but also taxable if refrigerated if the store provides heating units (typically microwave) in which customers may heat the entrees. Such entrees are taxable whether or not prepackaged. Entrees sold frozen are not taxable.
5. Combination Plates. The sale by a store of prepared foods sold as a unit in a manner reasonably and commonly considered a meal is taxable whether or not heated. The sale by a store of prepared foods that are otherwise not taxable do not become taxable simply because they are purchased together. The sale of a ½ pint of potato salad and a ½ pint of tuna salad by a store for off-premises consumption is not taxable unless they are presented or served as a unit in a manner that is reasonably and commonly considered a meal, such as sold as a plate or packaged as a dinner for a single price.

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6. Quick Meals. The sale by a store of quick meals prepared for immediate human consumption such as hot dogs, hamburgers, pizza slices, or soup, is taxable if heated (*see* 830 CMR 64H.6.5(6)(a)3.) but also taxable if refrigerated if the store provides heating units (typically microwave) in which customers may heat the quick meal. Such quick meals are taxable as described above, whether or not prepackaged. Quick meals sold frozen are not taxable. The sale of sandwiches is taxable whether or not prepackaged and whether or not heated.

Nontaxable Store Sales

7. Beverages. Beverages sold by a store in unopened original containers for off-premises consumption are not taxable, whether purchased separately or in combination with other foods.

8. Snacks/prepackaged. The sales by a store of prepackaged baked goods or other snacks such as a prepackaged pastry, popcorn, chips, candy, ice cream novelties, etc., for off-premises consumption are not taxable. Prepackaged connotes packed in a sealed, unopened original container intended and manufacturer marked for individual sale.

9. Party Packs and Party Platters. "Party pack, party platter" is an assortment of meats, poultry, or cheeses sold by weight or count, cut and arranged on platter(s), sold with other foods, and designed to serve a number of people. The sale of party packs or party platters by a store is not taxable. Nonfood items sold as part of a party pack or party platter, such as paper plates and plastic cutlery, are subject to the sales tax. If the vendor does not separately state the charge for these items, and collect and pay over the tax, the vendor must pay the use tax on the cost to the vendor of the nonfood items.

(b) Store sales by type. If an establishment is not a restaurant, that is, it is not primarily engaged in the business of selling meals, the basic rules announced above, under store sales, apply. The following provisions focus on rules as they affect a particular type of store since the activity and concerns of these stores vary.

1. Bakery.

a. Baked goods in units of six or more. Bakery products (baked goods) sold in units of six or more for off-premises consumption are not subject to tax wherever sold. Baked goods in units of six or more includes any variety of items totaling six or more servings, for example: two bagels, three muffins, and one danish; or a whole pie, cake, loaf of bread, etc.

b. Bakery without restaurant sales. When a bakery sells only baked goods, its sales of baked goods for off-premises consumption are not subject to tax regardless of the number of baked goods sold.

c. Bakery as restaurant. When a bakery sells food items commonly sold at snack bars, coffee shops, or luncheon counters, such as taxable beverages or sandwiches, the entire bakery is considered a restaurant. Its sales of all baked goods for consumption on the premises are subject to tax, and its sales of baked goods sold for consumption off-premises are subject to tax, except when sold in units of six or more.

d. Bakery with restaurant part. When the bakery in some way segregates the restaurant part of the store, the bakery part remains a store and only the restaurant part is considered a restaurant for tax purposes. A separate restaurant part cannot be established if taxable beverages or other meals must or may be purchased from the area, section, counter, etc. from which baked goods are sold. Some separation of space and function is necessary.

Example 1: Establishment A is engaged in the sale of baked goods but also sells coffee and juice for its customers' convenience. All of A's sales are made from the same counter. Establishment A is a restaurant because it sells meals (beverages and baked goods) and has made no effort to establish a restaurant part. Its sales of beverages and baked goods in units of five or fewer are taxable even when the sale is made without a beverage.

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Example 2: Establishment B is engaged in the sale of baked goods but also sells coffee and juice for its customers' convenience. B has a "Breakfast Express" line from which it sells baked goods in combination with beverages. Beverages may be purchased only from this line. B has effectively created a restaurant part within its bakery. The sales from the restaurant part are taxable except baked goods in units of six or more. The sales of baked goods from the bakery are exempt regardless of the number sold since the rest of the bakery maintains its status as a store.

2. Convenience store.

- a. A convenience, or other store's, sales of the following items *are taxable*.
 - Beverages, poured or fountain type;
 - Combination plates sold as a unit reasonably and commonly considered a meal whether or not heated;
 - Entrees (single portion) such as lasagna, eggplant parmesan, or quiche, heated, but also if refrigerated if the store provides a heating unit (entrees sold frozen are not taxable), and whether or not prepackaged;
 - Heated, prepared foods;
 - Quick meals, such as hot dogs, hamburgers, pizza, or soup, heated, but also taxable if refrigerated if the store provides a heating unit (quick meals sold frozen are not taxable) and whether or not prepackaged;
 - Sandwiches whether or not prepackaged and whether or not heated; and
 - Snacks unpackaged including, for example, unpackaged baked goods in units of less than six, or fresh popped popcorn.
- b. A convenience or other store's sales of the following items for off-premises consumption *are not taxable*:
 - Beverages in unopened, original containers;
 - Food products, such as a can of coffee or loaf of bread;
 - Party packs and party platters; and
 - Snacks prepackaged including, for example, baked goods, candy, ice cream novelties, or chips in sealed, unopened, original containers intended and manufacturer marked for individual sale.

3. Delicatessen.

- a. A delicatessen or other store's sales of the following items *are taxable*:
 - Beverages, poured or fountain type;
 - Combination plates sold as a unit reasonably and commonly considered a meal whether or not heated;
 - Entrees (single portion) such as lasagna, eggplant parmesan or quiche prepared for immediate human consumption, heated, but also if refrigerated if the store provides a heating unit (entrees sold frozen are not taxable), and whether or not prepackaged;
 - Heated prepared foods;
 - Quick meals, such as hot dogs, hamburgers, pizza, or soup, heated, but also if refrigerated if the store provides a heating unit (quick meals sold frozen are not taxable), and whether or not prepackaged;
 - Salads sold as a unit in a manner reasonably and commonly considered a meal such as on a plate or otherwise packaged as a meal;
 - Salads from a salad bar;
 - Sandwiches, whether or not packaged, and whether or not heated; and
 - Snacks unpackaged including, for example, baked goods in units of less than six.
- b. A delicatessen or other store's sales of the following items for off-premises consumption *are not taxable*:
 - Beverages in unopened, original containers;
 - Condiments and spreads;
 - Meat, poultry, or fish items, for example, fried chicken or barbecued spare ribs, if sold unheated;

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- Party packs and party platters;
 - Salads except salads from a salad bar and salads sold in a manner reasonably and commonly considered a meal;
 - Sandwich meats or cheeses, sliced or whole;
 - Snacks prepackaged including, for example, baked goods, candy, ice cream novelties, or chips in sealed, unopened original containers intended and manufacturer marked for individual sale; and
 - Whole, cooked meat, poultry, or fish sold unheated.
4. Grocery store, supermarket. A grocery store or supermarket's sales from its bakery or delicatessen are taxed as described above in 830 CMR 64H.6.5(6)(b)1. and 3. The sales of salads from a salad bar within a store are taxable.

Example 1: Establishment A is a section within a supermarket that sells only baked goods and no beverages or other meals. The section is a bakery and its sales of baked goods are not taxable regardless of the number sold.

Example 2: Establishment B is a section within a supermarket that sells baked goods. Taxable beverages may be purchased from the same counter. The bakery section is a restaurant for sales tax purposes and its sales of baked goods are taxable except those sold in units of six or more. The sales of poured or fountain beverages are subject to tax.

5. Market. A "market" is an establishment that specializes in the sale of raw meat, poultry, or fish. These establishments are commonly referred to as meat markets, farm stores, or fish markets. Generally, the sale of prepared meat, poultry, or fish items heated or in a combination plate is taxable. When the sales of heated prepared meat, poultry or fish items constitute less than 15% of a single store's total gross receipts from sales from all of its activities *and* the store does not sell other meals, the store is not a restaurant and the sale of prepared meat, poultry or fish items is not taxable. See *Commissioner of Revenue v. Jones*, 28 Mass. App. Ct. 332 (1989). A vendor exempting the sales of items from tax on the basis of this rule must be able to predict accurately the percentage of these sales to the store's total gross receipts for the year, since the vendor is responsible for the tax due even if no tax was collected.

"Prepared meat, poultry, and fish items," include meat, poultry, or fish parts or pieces, such as fried chicken wings or barbecued spare ribs. This definition does not include whole cooked, sliced, or unsliced meat, poultry, or fish such as a whole turkey or ham. This definition also does not include sliced meat, poultry, or fish sold by weight such as bologna, cold boiled ham, turkey loaf, etc.

Example 1: A fish market has a counter from which it sells heated fried fish, french fries, and cole slaw. The counter is a restaurant part and these sales are taxable.

Example 2: A poultry farm sells barbecued chicken pieces but no other prepared foods. Its sales of chicken pieces constitute less than 15% of its total gross sales from all its activities. The farm's sale of chicken pieces is not taxable.

6. Video store. If a video store sells refreshments for off-premises consumption the rules as to store sales apply.
- a. A video or other store's sales of the following items *are taxable*.
 - Beverages, poured or fountain type; and
 - Snacks unpackaged, for example, fresh popped popcorn.
 - b. A video or other store's sales of the following items for off-premises consumption *are not taxable*.
 - Beverages in unopened, original containers; and
 - Snacks prepackaged including, for example, baked goods, candy, ice cream novelties, or chips in sealed, unopened, original containers intended and manufacturer marked for individual sale.

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(7) Sales Price. The sales tax imposed on a meal is based on the sales price of that meal. The sales price is the total amount paid by a purchaser to a vendor as consideration for the sale of the meal, valued in money or otherwise. The sales price on which the sales tax is based includes any amount paid for services that are a part of the sale and any amount for which credit is given to the purchaser. The sales price includes the cost of the property sold, the cost of materials used, labor or service cost, interest charges, losses, or other expenses.

(a) Service Charges Included in the Sales Price of Meals. Generally, separately stated amounts designated as service charges added to the price of a meal are included in the sales price, when such amounts are in fact part of the consideration for food and beverages. However, separately stated amounts designated as gratuities, service charges or tips are not included in the sales price of the meal if they are distributed by the vendor to the service employees, wait staff employees or service bartenders as provided in M.G.L. c. 149, § 152A. If the service charges are paid only in part to the waiters or other service personnel, the charges are included in the sales price of the meal and subject to the sales tax.

(b) Room Rentals Included in the Sales Price of Meals.

1. Definition: Operator, as defined in M.G.L. c. 64G, § 1(f).

2. Room Rented for Serving a Meal. If a customer rents a room for the purpose of serving a meal and the meal is provided by the operator of the room, the charge for the room, whether or not separately stated, is included in the sales price of the meal.

3. Room Rented for the Purpose Other Than Serving a Meal. When a customer rents a room for purposes other than the serving of meals and there is an incidental serving of light refreshments by the operator of the room for an additional charge, the sales tax applies only to the sales price of the refreshments, if the charge for the refreshments is separately stated on both the records of the vendor and the bill to the customer. If the charges are not separately stated, the entire amount charged is subject to the sales tax.

The provisions of 830 CMR 64H.6.5(7)(b) are illustrated by the following examples:

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Example 1: A business holds a lunch meeting in a function room at a hotel. The charge includes the cost of the lunch served and a separately stated room rental fee. The sales tax on meals is imposed upon the entire charge because the room was rented for the purpose of serving a meal.

Example 2: A corporation holds an all-day conference in a function room at a hotel. The hotel serves coffee and pastries in the morning but not lunch. The hotel charges a room rental fee and an additional charge for the coffee and pastries served. The separate charge is reflected both on the bill to the customer and on the books and records of the hotel. The sales tax is imposed only upon the sales price of the coffee and pastries because the room was rented for purposes other than serving a meal.

(c) Package plan, mandatory charges included in sales price of meals.

1. Definition: Package Plan, for the purposes of 830 CMR 64H.6.5, a package plan is an arrangement for a private function, sold for a single price which includes a meal or meals, other activities such as entertainment, or other items such as place settings, flowers, or prizes, and may or may not include the rental of a function room.
2. Package plans. The charge for a room rented for the purpose of serving a meal is part of the total cost of providing meals and is included in the sales price of the meal subject to tax whether or not the charge is separately stated. If other various charges included in a package plan are mandatory, the sales tax on meals is imposed upon the total amount charged for the package plan, whether or not the charges are separately stated. However, if the various charges (other than room rental) are not mandatory and the vendor of the package plan separately states and reasonably allocates the sales price of the meals and the other items or activities on both the bill to the customer and on the vendor's books and records, the sales tax is imposed only on the sales price of the meals, including the charge for the room rented.

The provisions of 830 CMR 64H.6.5(7)(c) are illustrated by the following example:

Example: Company X is engaged in the business of providing wedding receptions and private parties. The customer pays a fee for a package plan under which Company X provides a function room in which to hold the reception or party, a meal, and an orchestra. The charge for the room and the meal is subject to tax. The charge for the orchestra is not mandatory and is separately stated. The sales tax is imposed only upon the sales price of the meals and the room, and not on the price of the orchestra.

3. Bed and Breakfast. Meals served in owner-occupied one, two, and three room bed and breakfast homes as defined in M.G.L. c 64G, § 1, are exempt from the sales tax. M.G.L. c. 64H, § 6(h). Any tax collected on meals served in breakfast homes before August 10, 1988 must be paid over to the Commonwealth. The value of meals served in bed and breakfast establishments as defined in M.G.L. c. 64G, § 1 generally is included in the rent subject to the room occupancy tax under M.G.L. c. 64G, St. 1988, c. 31. However the operator of a bed and breakfast establishment may apply the room occupancy excise to the room rent only and the sales tax to the sales price of the meals if the operator separately states and reasonably allocates the room rent and the sales price of the meals on both the bill to the guest and on the operator's books and records.

(d) Admission charges for entertainment or recreation. The sales tax is imposed upon admission charges collected by a place of entertainment where food, alcoholic beverages, or both are sold, unless all the following requirements are met:

1. a ticket is sold and collected as evidence of the admission charge;
2. the patron is not required to purchase any food or beverages;
3. the charge is for admission only and does not include any payment for food or beverages; and;
4. the admission charges are segregated from other receipts in the books and records of the place of entertainment.

(e) Discounts, Coupons and Rebates. See 830 CMR 64H.1.4.

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(8) Nonreturnable Containers, Purchases by Vendors.

(a) General Rule. Sales of containers to vendors are not taxable, subject to the proper use of Exempt Container Certificates. Packaging is considered an exempt container when it will be used by the vendor's customers to transport food or drink off the premises. A seller may sell packaging to a vendor tax free if the seller accepts a properly completed Exempt Container Certificate. The sale of packaging to a vendor is taxable when the packaging is used on the premises by the vendor's customers. M.G.L. c. 64H, § 6(q). *Jan Co. Central, Inc. v. Commissioner of Revenue*, 405 Mass. 686 (1989).

(b) Definition. The term container is limited to items used in transporting food or drink off the premises. The meaning of the term is found by determining the use to which a particular item is put. For example, when a paper product is used on the premises as a plate, it is not a container. When a paper product is used to transport food off the premises, it is a container. The term container may include, for example, paper or plastic wrappers, cups, cup lids, or multicup holders used to carry more than one drink, if these items are used to transport food or drink off premises. The same items used on premises are not considered to be containers for purposes of the M.G.L. c. 64H, § 6(q) exemption. Coffee stirrers, utensils, napkins, and straws are examples of items not considered containers whether used on or off premises.

(c) Exempt Container Certificates. If upon the purchase of packaging, the vendor is unable to determine the packaging that will qualify under M.G.L. c. 64H, § 6(q) as exempt containers, the vendor may give the seller of the containers an Exempt Container Certificate. The certificate may be given and accepted only for those items that may be exempt *containers* depending on later use. The certificate must be signed by and bear the name and address of the purchaser, give a description of the property being purchased and be otherwise properly completed as provided on the form. Acceptance of a fully and properly completed certificate will relieve the seller of the containers from further liability for the tax. The vendor (container purchaser) must keep an accurate record of the containers used to transport food or drink off premises. Packaging not so used is subject to tax. The vendor (container purchaser) must report these purchases on its ST-9, Sales and Use Tax Return, or its ST-10, Business Use Tax Return as applicable. See M.G.L. c. 62C, § 16(i).

(9) Sales of Meals Exempt when Sold to Certain Organizations.(a) General Rules.

1. Sales of meals to government organizations are exempt under M.G.L. c. 64H, § 6(d). For purposes of 830 CMR 64H.6.5(9) through (12), government organizations include the United States and its agencies, the Commonwealth of Massachusetts, and any of its political subdivisions and their respective agencies and any organization that Massachusetts is prohibited from taxing under the Constitution or laws of the United States.

2. Sales of meals to nonprofit organizations which are exempt from taxation under § 501(c)(3) of the Internal Revenue Code, or sales to nonprofit organizations that are in the process of obtaining exemption under § 501(c)(3) but have not yet received certification from the Internal Revenue Service (hereinafter “§ 501(c)(3) organizations”) are exempt from tax if the following rules are met.

a. The meals sold to the § 501(c)(3) organization will be used to further its exempt purpose;

b. The § 501(c)(3) organization has obtained a certification from the Commissioner (*i.e.* Form ST-2) stating that it is entitled to the exemption. Organizations subject to the mandatory exceptions of § 508(c) of the Internal Revenue Code are exempt from this requirement. Nonprofit organizations that have applied for, but not yet received, a certification from the Internal Revenue Service establishing their status as a § 501(c)(3) organization may be eligible for exemption on their purchases if they have obtained temporary certification from the Commissioner in accordance with the requirements of Technical Information Release 96-9;

c. The § 501(c)(3) organization gives the vendor a properly completed Exempt Purchaser Certificate (Form ST-5) certifying that the meals purchased are for an exempt use. A copy of the organization's Form ST-2 must accompany the Form ST-5 given to the vendor;

d. The vendor keeps a record of the sales price of each separate sale, the name of the purchaser, the date of the sale, and the number of the Certificate of Exemption; and

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e. The § 501(c)(3) organization in all other respects complies with the provisions of 830 CMR 64H.8.1: *Resale and Exempt Use Certificates*.

3. Sales of meals furnished to organizations of elderly persons or organizations of elderly or handicapped persons residing in a qualifying housing project are exempt from tax under M.G.L. c. 64H, § 6(cc), provided the following requirements are met.

a. For purposes of 830 CMR 64H.6.5(9)(a)5., "organization" means a formally organized group, consisting of ten or more individuals, with bylaws regulating its function and the selection of officers empowered to act for it, which holds meetings on a regular basis at least once per year. The group must have a *bona fide* organizational purpose apart from claiming the exemption under M.G.L. c. 64H, § 6(cc).

b. Sales of meals to organizations under 830 CMR 64H.6.5(9)(a)5. are exempt from tax provided the following requirements are met:

i. membership in the organization is limited by the bylaws to:

(i) persons 60 years of age or older; or

(ii) elderly or handicapped persons living in a housing project.

For purposes of 830 CMR 64H.6.5(9)(a)5., a "housing project" means a separate housing project or a definite portion of a housing project provided by the housing authority of a Massachusetts city or town under M.G.L. c. 121B, §§ 25 through 44 for "elderly persons of low income" and "handicapped persons of low income" as defined by M.G.L. c. 121B, § 1. A housing project includes but is not limited to the following types of housing: cooperative apartments, community residences or such other forms of congregate housing, or housing in separate dwelling units; units or apartments in remodeled or reconstructed existing buildings; condominium units purchased by the housing authority of a city or town; or units or apartments occupied under the rental assistance program pursuant to M.G.L. c. 121B, §§ 42 through 44.

ii. the organization has obtained a tax exemption certificate from the Commissioner in a manner as prescribed by the Commissioner; and

iii. the organization presents a copy of the tax exemption certificate to the vendor and confirms that all diners are members.

4. Sales of meals to persons, groups, or organizations not described in 830 CMR 64H.6.5(9)(a)1., 2., or 3., are generally taxable regardless of whether the property is to be used for fundraising, unless exempt under some other provision of law.

5. Sales of meals to persons, groups, or organizations, including caterers, acting through or on behalf of entities described in 830 CMR 64H.6.5(9)(a)1. or 2., are also exempt from taxation when the purchases are made through or on behalf of the exempt entity, provided that the substantiation requirements of 830 CMR 64H.6.5(12)(b) or (d) as appropriate are met.

(10) Special Rules for Sales of Meals in Fundraising Activities.

(a) Sales of meals for fundraising purposes by a government organization are exempt from the sales tax on meals as casual and isolated sales if the organization does not make sales of meals in the regular course of business. Sales of meals by a nonprofit organization for fundraising purposes are exempt from sales tax as casual and isolated sales if (i) the organization does not make sales of meals in the regular course of business and if (ii) amounts derived from sales of meals are used to further the organization's exempt purpose. If these tests are met, the number of casual and isolated sales in a calendar year is immaterial.

(b) The Commissioner will generally presume that amounts derived from the sale of meals purchased for fundraising activities are used to further the organization's exempt purpose.

(11) Exempt Organizations -- Sales of Meals in the Regular Course of Business. In general, whether a nonprofit or governmental organization sells meals in the regular course of business is a question of fact, to be determined from an examination of the facts and circumstances surrounding the transactions and overall operations of the organization. The Commissioner will consider the following factors in deciding whether meals are sold in the regular course of an organization's business:

(a) whether the organization conducts sales from a retail establishment that it operates. For purposes of 830 CMR 64H.6.5(11)(a) a retail establishment is a restaurant or other premises from which sales of meals are regularly conducted.

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(b) whether the organization is required to hold a vendor's registration certificate pursuant to M.G.L. c. 64H, § 7, and is ordinarily engaged in making sales of meals.

(c) whether the proceeds from sales of meals constitute unrelated business income, within the meaning of applicable Internal Revenue Code provisions and the regulations promulgated thereunder.

(12) Special Substantiation Requirements. For purposes of 830 CMR 64H.6.5(9) through (11), the following substantiation requirements apply:

(a) Sales Directly to Government Organizations. Government organizations are encouraged to obtain a Certificate of Exemption (Form ST-2) and submit to the vendor a properly executed Exempt Purchaser Certificate (Form ST-5) and a copy of its ST-2, if available, when making exempt purchases. Vendors must retain forms in the same manner as other sales tax records. *See* Record Retention regulation, 830 CMR 62C.25.1, for further recordkeeping requirements. If the government organization does not present Form ST-5, the vendor must maintain other adequate documentation verifying that the purchaser is exempt, *e.g.*, a copy of the organization's check or credit card.

(b) Sales to Entities Purchasing Through or on Behalf of Government Organizations. Entities purchasing through or on behalf of government organizations must certify that they are doing so by presenting a properly executed Form ST-5 when making such purchases. Form ST-5 may be made out by the exempt organization or the purchaser, but must contain the name, address, and, if available, the exemption number of the government organization on whose behalf purchases are made, as well as a description of the property purchased. At the time of purchase, the purchaser must attach to the Form ST-5 submitted to the vendor, a copy of the government organization's Form ST-2 if available. Vendors must retain forms in the same manner as other sales tax records. *See* Record Retention regulation, 830 CMR 62C.25.1, for further recordkeeping requirements.

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(c) Sales Directly to Organizations Exempt Under I.R.C. § 501(c)(3). A § 501(c)(3) organization must first obtain a Form ST-2 (or temporary certificate: see TIR 96-9) from the Commissioner certifying that it is entitled to exemption under M.G.L. c. 64H, § 6(e). When making purchases these organizations must submit to the vendor a copy of their Form ST-2 attached to a properly executed Form ST-5. Vendors must retain both forms in the same manner as other sales tax records. See Record Retention regulation, 830 CMR 62C.25.1, for further recordkeeping requirements.

(d) Sales to Entities Purchasing Through or on Behalf of Organizations Exempt Under I.R.C. § 501(c)(3). Entities purchasing property through or on behalf of organizations exempt under I.R.C. § 501(c)(3) must submit to the vendor a copy of the organization's Form ST-2 attached to a properly executed Form ST-5 from the organization on whose behalf it is making purchases. Vendors must retain both forms in the same manner as other sales tax records. See Record Retention regulation, 830 CMR 62C.25.1, for further recordkeeping requirements.

The provisions of 830 CMR 64H.6.5(12)(b) and (d) are illustrated by the following example:

Every year, the parent teacher organizations (PTO) at two different high schools conduct a "Spring Fling" for fundraising purposes to benefit their school. Each PTO hires a band, purchases flowers, and contracts with a local hotel for a banquet hall and the provision of 100 meals. Additionally, the PTO reserves a block of 30 rooms at the hotel for parents.

One high school in this example is a public school in Boston (Public High). The PTO for Public High holds no exemption itself, but would like to avail itself of the exemption which would be available to Public High under M.G.L. c. 64H, § 6(d) had Public High purchased the property directly. In order to substantiate a claim of exemption under M.G.L. c. 64H, § 6(d), Public High PTO must submit to the vendor a properly executed Form ST-5 and must attach a copy of Public High's Form ST-2 if the Form ST-2 is available. If Public High does not present these forms to PTO, the PTO may itself fill out the appropriate sections of Form ST-5 and submit the form to vendors when making purchases through or on behalf of Public High.

The other high school is a local non-governmental high school (Private High) that has § 501(c)(3) status. The PTO for Private High does not itself have § 501(c)(3) status but would like to avail itself of the exemption which would be available to Private High under M.G.L. c. 64H, § 6(e) had Private High purchased the property directly. In order to substantiate a claim of exemption under M.G.L. c. 64H, § 6(e), Private High PTO must submit to the vendor a properly executed Form ST-5 and must attach a copy of Private High's Form ST-2 or temporary Form ST-2. If the PTO itself has applied for and received § 501(c)(3) status, the substantiation requirements in 830 CMR 64H.6.5(12)(c) apply.

Generally, if a customer rents a room for the purpose of serving a meal and the meal is provided by the operator of the room, the charge for the room is subject to sales tax whether or not the charge for the room is separately stated from the charge for the meal. See 830 CMR 64H.6.5(7)(b)2. Here, however, the rental of the banquet hall is exempt as a sale to an entity purchasing through or on behalf of an organization exempt under I.R.C. § 501(c)(3) or an entity purchasing through or on behalf of a government organization.

The rental of the 30 rooms in this example for sleeping and living purposes is subject to the Room Occupancy Excise under M.G.L. c. 64G, § 1. There is no exemption for room rentals under M.G.L. c. 64G corresponding to the exemption under the sales tax statute for purchases by governmental and § 501(c)(3) organizations and entities purchasing through or on their behalf.

(e) The substantiation requirements of 830 CMR 64H.6.5(12) are in addition to any other recordkeeping requirements imposed by law.

(13) Sales of Meals Exempt When Sold by Certain Other Institutions and Organizations.

(a) Health and Day Care Facilities. All sales of meals by hospitals, sanatoria, convalescent or nursing homes, boarding homes for the aged licensed under M.G.L. c. 111, § 71, and institutions and private houses licensed as residential or day care facilities under M.G.L. c. 19, § 29, are exempt when the meals are both prepared and served by employees of the institution, or by persons doing uncompensated volunteer work for it, and the meals are served there. For the purposes of 830 CMR 64H.6.5(11)(a) "employee," in addition to its usual meaning, includes independent contractors and their staff where the independent contractors constitute no more than 50% of the "employees" engaged to prepare and serve meals.

64H.6.5: continued

The provisions of 830 CMR 64H.6.5(13)(a) are illustrated by the following examples:

Example 1: A state-funded organization located on the grounds of a licensed state hospital provides training to handicapped persons. The training includes preparing and serving meals at the organization's coffee shop. The organization is not a hospital, and the sale of meals prepared and served by the trainees is subject to the sales tax.

Example 2: Employees of a hospital prepare and serve meals in the hospital's cafeteria. The cafeteria provides meals for paid staff, students, patients, and visitors. All these sales are exempt from the sales tax.

(b) Hot Lunch Programs for Elderly Persons. The sale of meals to authorized elderly persons, as defined by M.G.L. c. 15, § 1, through school lunch programs qualifying under M.G.L. c. 15, § 1L is exempt from the sales tax.

The provisions of 830 CMR 64H.6.5(13)(b) are illustrated by the following example:

Example: The school committee of Town X, with the approval of the Commissioner of Education, has extended the school lunch period to serve lunches to persons 60 years of age and over and their spouses. The lunch program meets the conditions and restrictions of M.G.L. c. 15, § 1L. The sale of meals through the program is exempt from the sales tax.

(c) Churches, Synagogues, and other Religious Organizations. The sale of meals by churches, synagogues, and other religious organizations, is exempt from the sales tax if all the following conditions are met:

1. the meals sold are prepared and served by members of the church, synagogue, or other religious organization;
2. the meals sold are served only to members of the church, synagogue, or other religious organization and their invited guests. Whether an individual is an "invited guest" depends on all the facts and circumstances, but the term "invited guest" does not include the general public; and the proceeds from the sales of meals, net of expenses, must be used exclusively to further the religious and charitable purpose for which the church, synagogue or other religious organization was formed;
3. the meals are served on the premises of a church synagogue, or other religious organization; and
4. Sales by a vendor regularly engaged in the business of selling meals are generally not exempt from tax under M.G.L. c. 64H, § 6(cc). In some circumstances, however, a vendor who is a member of the religious organization may prepare meals served to the other members and guests of the organization. Such sales of meals are exempt under § 6(cc) if the vendor receives no profit from the sales (any receipts in excess of necessary expenses being donated to the organization) and all other conditions of 830 CMR 64H.6.5(13)(c) are met.

The provisions of 830 CMR 64H.6.5(13)(c) are illustrated by the following examples:

Example 1: A synagogue contracts with a caterer to prepare and serve a meal on synagogue premises to benefit its building fund. Since the meals are not prepared and served by synagogue members, the sales of the meals by the synagogue are not exempt under M.G.L. c. 64H, § 6(cc); they may, however, be exempt as casual and isolated sales under M.G.L. c. 64H, § 6(c). See 830 CMR 64H.6.1.

Example 2: A church holds a dinner meeting at a retreat camp owned by the church. The meals are prepared and served by church members to church members. Meals served at the retreat camp are served on church premises. The proceeds help to maintain the camp. The sales of the meals are not taxable.

(d) Educational institutions.

1. Sales to Students. The sale of meals to students by educational institutions, or their agents, with a regular faculty and curriculum and a regularly enrolled body of students is exempt from the sales tax on meals. To substantiate the exempt sales, the books and records of the educational institution must separate the gross receipts between sales to students and sales to non-students.

64H.6.5: continued

2. Sales to Non-Students. The sale of meals by educational institutions to people who are not students, for example, to faculty and staff, is subject to the sales tax on meals.

The provisions of 830 CMR 64H.6.5(13)(d) are illustrated by the following examples:

Example 1: A university operates a snack shop in its student union to sell sandwiches, soft drinks, and snack items to students, faculty, and staff. The sales of meals to university students are exempt from the sales tax on meals. The sales of meals to the faculty and staff are subject to the sales tax on meals.

Example 2: A public school system operates a nonprofit culinary arts training program. As part of the program, students operate a restaurant which serves low-cost meals to students and the public. The sale of meals to students is exempt from the sales tax; the sale of meals to the public is subject to the sales tax.

Example 3: A vending machine is located in a high school in an area designated primarily for students. The sale of sandwiches, soft drinks, and snack items such as potato chips from the machine is exempt from the sales tax on meals.

(e) Summer Camps. The sales of meals served by summer camps for children 18 years of age or under or for developmentally disabled individuals as defined in M.G.L. c. 64H, § 6(cc) are exempt from the sales tax, regardless of the status of the consumer of the meals. A summer camp as described above will not lose its exemption from tax on its sale of meals if the summer camp offers its facilities for no more than 30 days during the off-season to individuals 60 years of age or older. The sales of meals served by summer camps to individuals 60 years of age or older during the off-season period as described above are also exempt from tax. The exemption from tax for the sale of meals served by summer camps is effective on June 1, 1988.

(f) Commercial Airlines.

1. Sales to Passengers. The furnishing of meals to commercial airline passengers in commercial aircraft, whether the aircraft is in flight or on the ground, is exempt from the sales tax.

2. Sales to Airline. The sale of meals to a commercial airline for consumption by its passengers in the aircraft is exempt from the sales tax.

(g) Assisted Living Residences. The sales of meals served in assisted living residences certified pursuant to M.G.L. c. 19D are exempt from the sales tax. The exemption extends to meals served to residents, guests, and staff.

(14) Sales of Meals Exempt When Purchased with Food Stamps.

(a) General. M.G.L. c. 64H, § 6(kk) exempts from tax sales of tangible personal property purchased with federal food stamps and not otherwise exempt under M.G.L. c. 64H. Vendors and meal providers as defined in 7 U.S.C. § 2012(g) that participate in the federal food stamp program should not collect sales tax on otherwise taxable sales of any item purchased with food stamps. When a food stamp recipient uses a combination of cash (credit card, check, *etc.*) and food stamps in making a food purchase the vendor or meal provider must allocate the food stamps first to food stamp eligible items that otherwise would be taxed. Thus, items currently taxable but eligible to be purchased with food stamps (such as cold sandwiches) would be exempt to the extent of the dollar value of the food stamps received.

(b) Meals for the Homeless. Homeless food stamp recipients (including newly eligible residents of temporary shelters for the homeless) may use their food stamps to purchase prepared meals served by an authorized public or private nonprofit establishment, approved by an appropriate State or local agency. Providers should not collect sales tax on meals purchased with food stamps. When a homeless food stamp recipient uses cash (credit card, check, *etc.*) or a combination of cash and food stamps when purchasing a meal the amount paid for with cash is subject to tax unless the sale by the provider is otherwise exempt. If the meals are free or "payment" is an optional donation, the sales tax does not apply.

The provisions of 830 CMR 64H.6.5(14)(a) are illustrated by the following example.

64H.6.5: continued

Example 1: A food stamp recipient purchases \$50.00 worth of groceries. Payment is made with \$10.00 in food stamps and \$40.00 in cash. The purchase included \$38.00 worth of tax exempt items and \$12.00 worth of food that may be purchased with food stamps but is subject to Massachusetts sales tax unless purchased with food stamps (eligible taxable items). The dollar value of the food stamps (\$10.00) is first applied against the purchase of the eligible taxable items (\$12.00). The balance (\$2.00) is taxable.

(15) Liquor License Holders; Innkeepers and Common Victuallers.

(a) Liquor License Holders.

1. Definition. Liquor License Holder, a person who has been licensed to sell alcoholic beverages under M.G.L. c. 138.
2. Sale of Alcoholic Beverages. The liquor license holder is a vendor of all alcoholic beverages sold at the licensed premises, and is jointly and severally responsible with any other person selling such beverages on the premises for the collection and payment of the tax imposed by M.G.L. c. 64H.
3. Sale of Meals without Alcoholic Beverages. The liquor license holder is presumed to be a vendor of all meals sold without alcoholic beverages at the licensed premises. As a presumed vendor of such meals, the liquor license holder is responsible for the collection and payment of the tax imposed by M.G.L. c. 64H. The liquor license holder may rebut this presumption by showing 1) that a person other than the liquor license holder sold the meals without alcoholic beverages; 2) that this person was not the agent or otherwise acting on behalf of the liquor license holder; and 3) that the two parties agreed previously in writing that the person other than the liquor license holder was responsible for the collection and payment of the tax imposed on such meals by M.G.L. c. 64H.

(b) Innkeepers and Common Victuallers.

1. Definition. Innkeeper or Common Victualler, a holder of an innkeeper's or common victualler's license to sell meals without alcoholic beverages under M.G.L. c. 140.
2. Meals Sold on Licensed Premises. The innkeeper or common victualler is a vendor of all meals sold without alcoholic beverages at the licensed premises, and is jointly and severally responsible with any other person selling such meals on the premises for the collection and payment of the tax imposed by M.G.L. c. 64H.

(16) Recordkeeping.

- (a) General. Refer to 830 CMR 62C.25.1 "Record Retention" for recordkeeping and record retention rules applicable to vendors. In addition to other applicable provisions of 830 CMR 62C.25.1, section (8)(g) requires a vendor of meals to maintain complete and accurate records of all sales of meals and alcoholic beverages, and all sales of non-taxable food and beverages. The records must include cash register tapes showing each individual transaction, alcoholic beverages bar checks, dining room meals checks, and a daily receipts book or record. Vendors must retain copies of sales tax on meals returns filed.
- (b) Dining Room Meals Checks. Dining room meals checks must be serially numbered and used in sequence for all meals served with no number being repeated for a one year period. Dining room meals checks must contain the name and address of the vendor and the wording: "5% Mass. Meals Tax" with a space opposite for insertion of the amount of the tax. All dining room meals checks must be securely tied and preserved in dated, daily bundles, and the daily tax recordings must be entered in the vendor's records to substantiate the tax return.
- (c) Caterers' Records. Caterers must record all catering business in a reservation ledger or book which should state all dates of jobs, names of purchasers, numbers of persons served, price totals, and the proper amount of tax for all meals served. Caterers not using dining room meals checks must serially number bills or contracts and preserve them with the reservation book or ledger.

64H.6.7: Out-of-State Sales and Deliveries

(1) Statement of Purpose, Outline.

(a) Statement of Purpose. 830 CMR 64H.6.7 explains the sales tax treatment of sales of tangible personal property by a Massachusetts vendor to be delivered outside of Massachusetts.

(b) Outline. 830 CMR 64H.6.7(1)(b) lists the sections contained in 830 CMR 64H.6.7.

1. Statement of Purpose, Outline.
2. Definitions.
3. Sales of Tangible Personal Property for Delivery Out of State.
4. Compliance.

(2) Definitions. For the purposes of 830 CMR 64H.6.7 the following definitions apply:

Commissioner, the Commissioner of Revenue or the Commissioner's duly appointed representative.

Interstate carrier, a carrier in the business of delivering goods across state lines, including the United States Postal Service.

Sale, any transfer of title to or possession of tangible personal property as defined in M.G.L. c. 64H, § 1(12)(a) through (f).

Sales tax, the excise imposed by M.G.L. c. 64H.

Use tax, the excise imposed by M.G.L. c. 64I.

Vendor's own truck, a vehicle owned by the vendor or operated for the vendor by one not in the business of transporting goods for the public at large.

(3) Sales of Tangible Personal Property for Delivery Out of State.

(a) General Rules. In general, whether a sale of tangible personal property to be delivered out of state is subject to sales or use tax depends upon the following principles. It is assumed for purposes of 830 CMR 64H.6.7 that the sale is not exempt under any other provision of Massachusetts law.

1. If the purchaser or the purchaser's agent takes possession of the property within Massachusetts, whether or not for redelivery or use outside Massachusetts, the sale is taxable.
2. Where the property sold is not in Massachusetts at the time a contract for its sale is made and the only contact with Massachusetts is the mere execution of the contract, the sale is exempt under M.G.L. c. 64H, § 1(13)(d).
3. If the vendor is obligated by an agreement to deliver the property to its purchaser outside Massachusetts (whether by interstate carrier or in the vendor's own truck), the sale is exempt under M.G.L. c. 64H, § 6(b).
4. If the vendor is obligated by an agreement to deliver the property to the purchaser's designee outside Massachusetts, the sale will be exempt if the purchaser of the property is outside of Massachusetts at the time the order for the property is placed. M.G.L. c. 64H, § 6(b). Please note that absent any evidence as to the location of the purchaser, the Commissioner will presume that the purchaser is inside Massachusetts at the time the order for the property is placed.
5. If the vendor is obligated by an agreement to deliver the property to the purchaser's designee outside Massachusetts and the purchaser is within Massachusetts when the order for the property is placed, the sale will generally be taxable unless both title to and possession of the property pass outside Massachusetts. Under the Uniform Commercial Code, passage of title depends upon the following circumstances:
 - a. Title specified in contract. If a contract specifies where title will pass, title passes in accordance with the terms of the contract.
 - b. Contract silent on passage of title.
 - i. If the contract is silent on the passage of title, title passes in Massachusetts when the property is delivered to an interstate carrier for redelivery to the purchaser's designee and the sale is taxable.

64H.6.7: continued

ii. If the contract is silent on the passage of title and if the property is to be delivered to the designee by the dealer (for example, in the dealer's own truck), title will not pass until delivery is completed. Under this circumstance, there is no sale in Massachusetts, and no sales tax is imposed.

(b) Use Tax.

1. Reports to other States. If property purchased in Massachusetts is delivered out of state, a use tax may be due in the other jurisdiction. The Department of Revenue and the tax authorities of other states routinely share tax information.

2. Property returned to Massachusetts. If property purchased in Massachusetts is delivered out of state but is later returned to Massachusetts for use, storage, or other consumption in Massachusetts and no sales tax was paid on the property, the use tax will apply if the property was originally purchased with the intent to use, store, or otherwise consume it here. M.G.L. c. 64I, §§ 2, 8(f). The use tax statute presumes that personal property brought into Massachusetts within six months of the date of purchase was purchased for use here. M.G.L. c. 64I, § 8(f).

3. Property stored in Massachusetts. If property purchased outside Massachusetts is brought into Massachusetts the use tax will apply, unless the property was brought here solely to be kept or retained for the purposes of subsequent transportation outside Massachusetts. M.G.L. c. 64I, § 1. The sales tax does not apply to the purchase of property outside Massachusetts and brought into Massachusetts.

4. Payment of use tax. If a use tax is due, the purchaser must file an Individual Use Tax Return, Form ST-11, with the Commissioner and pay the tax imposed. M.G.L. c. 64I, §§ 2, 3. This return and payment are due on or before the 20th day of the month following the month in which the property is first used here. Failure to file a return and pay the use tax when due will subject the taxpayer to interest and penalties calculated from the due date of the return or payment. M.G.L. c. 64I, § 2; M.G.L. c. 62C, § 16(i). *See* 830 CMR 62C.16.2.

These provisions are illustrated by the following. In all of these examples, a use tax may be due if property delivered out of state is returned to Massachusetts for use, storage, or other consumption in Massachusetts. *See* Example 12.

Example 1: Adams buys a boat at a boatyard in Massachusetts and takes delivery of the boat there. The boat is then sailed to Delaware and docked. When Adams takes possession of the boat in Massachusetts, the sale in Massachusetts is complete; the sales tax applies even though Adams sails the boat to Delaware for use there. *See* 830 CMR 64H.6.7(3)(a)1.

64H.6.7: continued

Example 2: Bean goes to a computer store in Massachusetts and buys a personal computer that she then takes to her home in Maine. When Bean takes possession of the computer in Massachusetts, the sale in Massachusetts is complete; the sales tax applies even though Bean transports the computer to Maine for use there. *See* 830 CMR 64H.6.7(3)(a)1.

Example 3: Carter while in Massachusetts orders a chair sent to his daughter in Maine. The chair will be sent there from the Massachusetts vendor's out-of-state warehouse. This sale is exempt from tax because the chair was not in Massachusetts at the time the contract for its sale was made and the chair is to be delivered out of state for use there. *See* 830 CMR 64H.6.7(3)(a)2.

Example 4: Donaldson goes to a furniture dealer in Massachusetts and orders a couch to be delivered from the store to her summer home in Maine. Since the vendor is obligated to have the couch delivered to its purchaser outside Massachusetts, the sale of the couch is exempt regardless of the delivery method used. *See* 830 CMR 64H.6.7(3)(a)3.

Example 5: Evans buys a car from a dealer in Massachusetts who agrees to deliver the car to Evans's residence in Connecticut. Since the dealer is obligated to deliver the car to its purchaser outside Massachusetts, the sale of the car is exempt from sales tax. *See* 830 CMR 64H.6.7(3)(a)3. The dealer should retain proof that delivery of the car was made in Connecticut.

Example 6: Foster writes to a Massachusetts antique dealer from his home in Vermont and orders a china platter sent to his daughter in Michigan. Where the purchaser of the property is located outside of Massachusetts at the time of the sale and the property will be delivered out of state to the purchaser's designee, the sale is exempt, regardless of the delivery method used. *see* 830 CMR 64H.6.7(3)(a)4.

Example 7: Graham goes to a shop in Massachusetts and orders a vase sent to her daughter in New Hampshire. The contract for the sale of the vase specifies that title to the vase will not pass until it is delivered in New Hampshire. This sale is exempt because by the terms of the contract title will pass outside Massachusetts. *See* 830 CMR 64H.6.7(3)(a)5.a. Note that the rationale of Example 6 does not apply here, since the purchaser of the property was within Massachusetts at the time of sale.

Example 8: Harrison goes to a shop in Massachusetts and orders a vase sent to his daughter in New Mexico. The contract is silent on the passage of title. The vase will be delivered by interstate carrier. This sale is taxable because title to the property passes in Massachusetts. Where the contract is silent on the passage of title, title passes when the property is delivered to the interstate carrier. *See* 830 CMR 64H.6.7(3)(a)5.b.i. Once again, the rationale of Example 6 does not apply.

Example 9: Irons while in Massachusetts orders an antique from a Massachusetts vendor sent to her son in Rhode Island. The antique will be delivered to Rhode Island in the dealer's truck. Here, too, the rationale of Example 6 is inapplicable because Irons was in Massachusetts when he ordered the antique. The antique is to be delivered to Rhode Island in the dealer's own truck, and title to it will not pass until delivery is completed there. *See* 830 CMR 64H.6.7(3)(a)5.b.ii. This sale is, therefore, exempt from sales tax.

Example 10: Joiner Corp., a Massachusetts corporation with laundromats in several states, orders washers and dryers from another Massachusetts corporation to be delivered to its new units in New Jersey. The sale of the washers and dryers is exempt from Massachusetts tax because the washers and dryers are to be delivered to their purchaser outside Massachusetts. *See* 830 CMR 64H.6.7(3)(a)3. The parties must consider the New Jersey sales and use tax treatment of this transaction.

64H.6.7: continued

Example 11: Kanga Corp., a corporation located in Massachusetts, orders key chains as gifts for its customers from Lockco Co., also located in Massachusetts. Kanga supplies Lockco with lists of the customers, all of whom are located outside Massachusetts. Lockco sends the key chains to these customers by interstate carrier. Here, Lockco is obligated to deliver the property to the purchaser's designees outside of Massachusetts and the sale will be taxable unless title and possession pass outside of Massachusetts. Because title passes in Massachusetts when Lockco delivers the chains to the interstate carrier, the sale is taxable. *See* 830 CMR 64H.6.7(3)(a)5.b(i).

Example 12: Mills buys a pearl necklace and a diamond ring at stores in Massachusetts and has them shipped to her at her winter home in Florida. One month later, Mills returns to her home in Massachusetts, bringing the jewelry with her. Since the items were delivered to Mills out of state, they were exempt from the sales tax. Here, however, Mills bought both items intending to return them to Massachusetts for use, storage, or other consumption here. In these circumstances, the Massachusetts use tax applies. This tax is imposed at the same rate as the sales tax (5%) and must be paid to the Department of Revenue by the 20th day of the month following the month the items were first used here, using Form ST-11 (Individual Use Tax Return). *See* 830 CMR 64H.6.7(3)(b)1., 2. and 4.

Example 13: Nelson Department Stores, Inc., buys store counters in North Carolina and transports them in Nelson's own trucks to Massachusetts where Nelson has a warehouse. The counters remain in the warehouse for several months. Nelson subsequently ships some of the counters to two Massachusetts stores and ships some of the counters to a Delaware store. The use tax applies to the use of the counters at the two Massachusetts stores, but no use tax and no sales tax applies to the retention of the counters eventually sent to the Delaware store. *See* 830 CMR 64H.6.7(3)(b)3.

(4) Compliance.

(a) Record-Keeping. The vendor must maintain books and records under M.G.L. c. 62C, § 25, sufficient to substantiate taxable and tax-exempt sales. *See* 830 CMR 62C.25.1.

1. Transactions in which the property is not in Massachusetts at the time of sale (sales exempt under M.G.L. c. 64H, § 1(13)(d)). Records for transactions exempt under M.G.L. c. 64H, § 1(13)(d) and 830 CMR 64H.6.7(3)(a)2. must substantiate that the property was in fact transferred to the recipient from a location outside Massachusetts. The following are examples of acceptable records of such transactions: the contract for the sale of the property and warehouse records indicating that the property was not in Massachusetts at the time the contract was executed. Similar records substantiating the terms of the contract and the location of the property at the time of sale are also acceptable.

2. Property sold for delivery out of state (sales exempt under M.G.L. c. 64H, § 6(b)). Records for transactions exempt under M.G.L. c. 64H, § 6(b), and 830 CMR 64H.6.7(3)(a)3. through 5. must substantiate that the vendor was obligated to deliver the item out of state, the name and address of the purchaser, and the place and manner of delivery, e.g., "own truck" or "FOB destination." In the case of property driven, towed, or sailed out of state, the records should specify the name of the person driving, towing, or sailing the property and the means by which that person returned to Massachusetts. Where applicable, records should also indicate the name and address of any designee to receive the property. The following records, properly completed, are acceptable records of delivery:

- a. Invoices;
- b. Bills of lading or freight manifests;
- c. Delivery records or receipts signed by the customer;
- d. Delivery logs, mail logs, trip or travel logs (including receipts for travel expenses), as applicable; or
- e. Other similar records.

64H.6.7: continued

(b) Record Retention

1. The vendor must retain copies of the records required by 830 CMR 64H.6.7(4)(a) as records of exempt transactions. Since the burden of proof that a transaction is exempt from tax lies upon the vendor, M.G.L. c. 64H, § 8(a), failure to maintain adequate records will generally mean that the vendor will not sustain this burden of proof. This may result in the assessment of additional tax, plus interest and penalties.
2. The records required by 830 CMR 64H.6.7(4)(a) must be kept, at a minimum, until the statute of limitations for making additional assessments for the tax period for which the return was due has expired. Generally this is three years from the due date of the return or from the actual date the return was filed, whichever is later. *See* 830 CMR 62C.25.1(3); 830 CMR 62C.26.1. The statute of limitations is six years if the vendor omits from the sales tax return an amount greater than 25% of the amount properly includible on it. M.G.L. c. 62C, § 26(h).

64H.6.11: Qualifying Small Business Energy Exemption

(1) Statement of Purpose; Effective Date; Outline of Topics.

(a) Statement of Purpose. The purpose of 830 CMR 64H.6.11 is to explain the process for claiming an exemption from the sales tax for purchases of gas, steam, electricity, or heating fuel taxable under M.G.L. c. 64H and M.G.L. c. 64I by and for the use of qualifying small businesses under M.G.L. c. 64H, § 6(qq). 830 CMR 64H.6.11 introduces an online Small Business Exemption (SBE) registration and certificate process, accessible through MassTaxConnect, designed to improve processing time and efficiency. 830 CMR 64H.6.11 promulgated on June 2, 2006, is repealed and replaced as set forth in 830 CMR 64H.6.11(1)(b).

(b) Effective Date. 830 CMR 64H.6.11 applies to purchases of gas, steam, electricity, or heating fuel on or after January 1, 2019. The prior version will continue to apply to purchases made on or before December 31, 2018.

(c) Outline of Topics. 830 CMR 64H.6.11 is organized as follows:

1. Statement of Purpose; Effective Date; Outline of Topics.
2. Definitions.
3. General Rule.
4. Gross Income Requirement.
5. Qualifying Employees.
6. Registration Process for and Use of SBE Certificates by Small Businesses.
7. Vendor Obligations and Credits.
8. Misuse of Certificates.

(2) Definitions. For the purpose of 830 CMR 64H.6.11 the following terms have the following meanings:

Affiliated Businesses. Two or more businesses are affiliated when the same owner or the same group of common owners holds in the aggregate, directly or indirectly, 50% or more of the total value of the ownership interest or 50% or more of the combined voting power in each business. The Commissioner will apply the constructive ownership provisions of Code § 318 for purposes of determining ownership under 830 CMR 64H.6.11, regardless of whether the ownership is represented by stock shares, partnership interests, or other *indicia* of ownership, provided that the constructive ownership provisions shall apply to siblings in addition to the relationships enumerated in Code § 318. Affiliated businesses include all members of an affiliated group as defined by Code § 1504.

Business. Any activity engaged in by any person or caused to be engaged in by him or her with the object of gain, benefit, or advantage, whether direct or indirect, that would constitute a trade or business for federal income tax purposes.

Code. The Internal Revenue Code in effect for the applicable period.

Commissioner. The Commissioner of Revenue or the Commissioner's duly authorized representative.

64H.6.11: continued

Department. The Massachusetts Department of Revenue.

Gross Income. The amount properly reportable as the total amount of income of a business, less any amount attributable to cost of goods sold.

Qualifying Employee. Any person performing services for a business for consideration, if the relationship between the person performing services and the person for whom the person performs such services is the relationship of employer and employee, as described in I.R.C. § 3401(c), (d), and Treas. Regs. §§ 31.3401(c)-1, 31.3401(d)-1, whether or not the individual is treated as such by the business, and who meets both of the following criteria:

- (a) the person normally works for the business for 30 hours per week or more; and
- (b) the person is hired for a period of five months or more, or for an indefinite period of time.

Qualifying Employee also includes any partner, owner, or officer of a business who normally works for the business for 30 hours per week or more.

Qualifying Small Business. A small business that meets all of the prerequisites of M.G.L. c. 64H, § 6(qq) and 830 CMR 64H.6.11 for the applicable period, including compliance with the registration and certificate presentation requirements of 830 CMR 64H.6.11(6).

Seasonal Business. A seasonal business is a business that operates for periods of less than 12 consecutive months during the calendar year in the regular course of its business.

Small Business. A business that has five or fewer qualifying employees and that had gross income of less than \$1,000,000 for the preceding calendar year, and that reasonably expects gross income of less than \$1,000,000 for the current calendar year. All members of an affiliated business are deemed to be a single business for purposes of the small business exemption.

Small Business Exemption (SBE). The exemption from tax available under M.G.L. c. 64H, § 6(qq) for a qualifying small business.

SBE Certificate. The certificate the Department issues after a small business registers for the SBE.

Tax. The excise imposed under M.G.L. c. 64H or M.G.L. c. 64I.

Taxable Energy. Gas, steam, electricity, or heating fuel which is subject to tax imposed under M.G.L. c. 64H or M.G.L. c. 64I.

Vendor. For purposes of 830 CMR 64H.6.11, a retailer or other person selling taxable energy.

(3) General Rule.

(a) Exemption Requirements. Gas, steam, electricity and heating fuel are generally taxable when sold to businesses. However, such taxable energy may be exempt under M.G.L. c. 64H, § 6(qq) when sold to a small business, provided that all of the following requirements are met.

1. the business claiming the exemption must be the purchaser of the taxable energy and the taxable energy purchased must be solely for the business's own use;
2. the business must have had gross income of less than \$1,000,000 for the preceding calendar year, and must reasonably expect to have gross income of less than \$1,000,000 for the current calendar year, as further described in 830 CMR 64H.6.11(4);
3. the business must have five or fewer qualifying employees for the current calendar year, as further described in 830 CMR 64H.6.11(5); and
4. the business must register as a qualifying small business with the Department using MassTaxConnect, obtain an SBE Certificate from the Department, and notify a vendor before the purchase of taxable energy to which exemption may apply, as further described in 830 CMR 64H.6.11(6). The registration will generally be valid from the date of registration in a current year through the end of the next calendar year.

64H.6.11: continued

(b) Effect of Certificates. The effect of a business registering with the Department for the small business energy exemption and of the Department's associated issuance of an SBE certificate and number is as follows:

1. Vendors. A vendor will be relieved of the burden of proving that purchases made by a qualifying small business are exempt and will be presumed to have acted in good faith if it takes a copy of the small business's current SBE Certificate or by verifying the small business's current SBE registration with the Department, in accordance with procedures established by the Commissioner.

2. Small Business Purchasers. A small business that registers with the Department and receives an SBE Certificate is certifying to the Department that it meets the requirements in 830 CMR 64H.6.11(3)(a)1. through 3. to use an SBE Certificate when making purchases of energy. Receipt of an SBE Certificate is not a determination by the Department that the business is in fact eligible for the exemption. A small business must maintain adequate employee time and wage records as well as income records to substantiate its eligibility for the small business exemption. A small business purchaser that receives an SBE Certificate that does not in fact satisfy the qualifications for the small business exemption, as described in 830 CMR 64H.6.11(3)(a)1. through 3., is liable for use tax on its purchases of energy, notwithstanding its registration or its receipt of an SBE Certificate.

(4) Gross Income Requirement.

(a) Determining Gross Income. In determining whether the business had gross income of less than \$1,000,000 for the preceding calendar year or whether it expects to have gross income of less than \$1,000,000 for the current calendar year (*i.e.*, the year that it is registering for), the business must examine the particular facts and circumstances at the time that the business registers with the Department. A business that has already registered and received an SBE certificate and that later determines that its actual income for the preceding calendar year was \$1,000,000 or more, or that its actual income for the current calendar year will likely be \$1,000,000 or more, must revoke its registration as detailed in 830 CMR 64H.6.11(6)(d). The business must also file use tax returns and pay any tax due for any transactions where no sales tax was collected and the business did not qualify as a small business.

(b) No Retroactivity Where Gross Income for Current Year is Less Than Expected. A small business that does not reasonably expect to have gross income of less than \$1,000,000, but actually has gross income of less than \$1,000,000 for the current year, cannot retroactively register for the SBE certificate and seek a credit or refund of sales tax previously paid. Once it reasonably expects to have gross income of less than \$1,000,000, and otherwise qualifies for the SBE certificate, a small business may register for the SBE certificate, as provided in 830 CMR 64H.6.11(6).

(c) Examples. The provisions of 830 CMR 64H.6.11(4) are illustrated by the following examples.

Example 1: ABC Jewelry Boutique is a business that purchases electricity for its own use. It has five or fewer qualifying employees during calendar year 2019. During calendar year 2018, it had gross income of \$980,000. It expects to have gross income of \$990,000 during 2019. ABC would be a small business for purposes of the SBE for calendar year 2019.

Example 2: Same facts as Example 1, except that ABC reasonably expects to have \$1,500,000 in income for calendar year 2019. ABC is ineligible to register for an exemption certificate for calendar year 2019 because it reasonably expects to have gross income in excess of \$1,000,000. If, in August of 2019, it reasonably expects its gross income for 2019 to be less than \$1,000,000, ABC would be a small business for purposes of the SBE as of August 2019, but may not claim the exemption retroactively.

Example 3: Same facts as Example 1, except that in August of 2019 ABC knows that its gross income will exceed \$1,000,000 for calendar year 2019. ABC no longer qualifies as a small business for calendar year 2019. If ABC registered and received an SBE Certificate for 2019, it must revoke its registration in August of 2019 and notify its vendors.

64H.6.11: continued

Example 4: Same facts as Example 1, except that after registering and qualifying for the SBE Certificate in calendar year 2019, in December of 2019 ABC reasonably expects to have \$2,000,000 in gross income for the next calendar year 2020. Although it was a qualifying small business when it registered in 2019, ABC no longer qualifies as a small business for calendar year 2020. If ABC registered and received an SBE Certificate for 2020, it must revoke its registration for 2020 and notify its vendors.

(5) Qualifying Employees.

(a) Presumption of Employee Status for Partners, Owners, and Officers. A partner, owner, or officer of any business who regularly works for the business is presumed to be a qualifying employee of the business. This presumption may be rebutted by the business upon evidence establishing that such partner, owner, or officer does not normally work for the business for 30 hours per week or more.

(b) Determining Employee Status for Other Workers. In determining whether a person is a qualifying employee for purposes of the SBE, the Commissioner will examine the particular facts and circumstances surrounding the relationship between a business and an individual who works for the business, including, but not limited to, the following:

1. whether the business pays the individual a wage or salary;
2. whether the business is required to withhold income tax from the individual's compensation;
3. whether the business is required to pay under the Federal Insurance Contribution Act on behalf of the individual;
4. whether the business pays worker's compensation insurance premiums on behalf of the individual;
5. whether the business is required to pay under the Federal Unemployment Tax Act on behalf of the individual;
6. whether the business considers the individual to be an employee;
7. whether the business exercises or has a right to exercise control over the means of accomplishing the end result, or over the end result only;
8. the general practices of the business with respect to the employment status of other individuals who work for the business.

A business that has already registered and received an SBE certificate and that later determines that it does not have five or fewer qualifying employees, must revoke its registration as detailed in 830 CMR 64H.6.11(6)(d). The business must also file use tax returns and pay any tax due for any transactions where no sales tax was collected and the business did not qualify as a small business.

(c) Normally Working 30 Hours per Week or More. A person normally works 30 hours per week or more if, in the calendar year, the number of hours the person works divided by the number of weeks the person works is equal to or greater than 30.

(d) Employment for Five Months or More. A person is hired by a business for five months or more if the person works for the business for at least 20 weeks in the calendar year or for 20 weeks during the 12 month period immediately preceding the claim of the SBE. A person is hired by a business for fewer than five months only if the person and the business specifically agree, prior to the employment, that the person will work for the business for fewer than five months and the person in fact works for the business for fewer than 20 weeks in the calendar year or fewer than 20 weeks during the 12 months period immediately preceding the claim of the SBE.

(e) Special Rules for Seasonal Businesses. A seasonal business that does not have five or fewer qualifying employees at some point during the calendar year may still be a small business for the purpose of the SBE provided it reasonably expects that it will have a monthly average of five or fewer qualifying employees for the current calendar year. A seasonal business may reasonably expect that it will have a monthly average of five or fewer qualifying employees if, after applying the following fraction, its total number of anticipated qualifying employees in the current calendar year is five or fewer: The numerator of the fraction is comprised of the following: (number of qualifying employees during operational months times number of operational months) plus (number of qualifying employees during non-operational months times number of non-operational months). The denominator of the fraction is 12.

64H.6.11: continued

A seasonal business that has already registered and received an SBE certificate and that later determines that it does not have five or fewer qualifying employees, must revoke its registration as detailed in 830 CMR 64H.6.11(6)(d). The seasonal business must also file use tax returns and pay any tax due for any transactions where no sales tax was collected and the business did not qualify as a small business.

(f) Examples. The provisions of 830 CMR 64H.6.11(5) are illustrated by the following examples.

Example 1: XYZ Corporation is a small business that employs a number of people to perform weekend security guard services for various companies. It consists of one full time owner operator who works 30 or more hours per week. The corporation also employs 15 security guards who normally work eight hours each day on Saturdays and Sundays. Under these facts, for the calendar years in question, XYZ Corporation has only one qualifying employee, since only one individual normally works 30 hours per week or more. The 15 part-time security guards who work only 16 hours per week are not qualifying employees. Thus, the business has five or fewer qualifying employees.

Example 2: Betty's Office Cleaning Service, Inc. ("Betty's") is a business owned and operated by Betty, who works 30 hours per week for the business. Betty employs a number of people who provide day and evening office cleaning services to a large office building. All individuals work according to a fixed regular schedule as follows: Five individuals work on Mondays, Tuesdays, and Wednesdays from 4:00 P.M. until 11:00 P.M. (21 hrs/wk). On Thursdays and Fridays, Betty's uses five different individuals who work the same shift from 4:00 P.M. to 11:00 P.M. (14 hrs/wk). Under these facts, Betty is the only qualifying employee working for Betty's, because each of the other employees works less than 30 hours per week.

Example 3: "The Four G's Bakery" is a local business that operates a neighborhood bakery. It is owned by four sisters who are equal partners in the business: Greta, Gertrude, Gilda, and Grace. Greta and Gertrude each work 40 hours per week at the bakery. Gilda does the bookkeeping for the business at home. Grace, who provided most of the initial capital for the business, occasionally works at the bakery if one of the other workers is unable to go to work. In addition to Greta and Gertrude, the bakery also hired Fanny and Frieda to work 40 hours per week for an indefinite (rather than temporary) period of time, and Paula and Phyllis, who each work 20 hours per week.

For purposes of determining if The Four G's Bakery has five or fewer qualifying employees, Greta, Gertrude, Fanny and Frieda must be counted as qualifying employees of the business, since a qualifying employee includes any person, including a partner, owner, or officer of the business who normally works for the business for 30 hours per week or more. Paula and Phyllis are not qualifying employees, since neither normally works for the business for 30 hours per week or more. Gilda and Grace normally work for the business, although their hours vary. Since any partner, owner, or officer of the business who normally works for the business is presumed to be a qualifying employee, the business must demonstrate that Gilda and Grace do not work for 30 hours per week or more. If the business cannot demonstrate that Gilda and Grace normally work for the business for less than 30 hours per week, the business is presumed to have six qualifying employees and therefore does not have five or fewer qualifying employees.

Example 4: Sally's Ski Emporium ("Sally's") is a seasonal ski shop operating on the premises of a ski resort in Massachusetts. Most calendar years it operates from January through April and from November through December and is closed from May through October. From January through April of a given year, Sally's has ten full-time employees and will have the same employees from November through December. It will have no employees from May through October. After applying the formula set forth in 830 CMR 64H.6.11(5)(e), $\frac{(10 \times 6) + (0 \times 6)}{12} = \frac{60}{12} = 5$, Sally's has a monthly

average of five qualifying employees.

64H.6.11: continued

(6) Registration Process for and Use of SBE Certificates by Small Businesses.

(a) Registration Process. To qualify for the SBE, a small business as defined in 830 CMR 64H.6.11(2) must register with the Department using MassTaxConnect and obtain an SBE Certificate with an SBE Certificate number. The SBE Certificate will be valid for up to two years as of the registration date through the end of the next calendar year, provided that the business continues to be a small business. SBE certificates are valid only as of the date of registration. A small business may not retroactively register or use an SBE certificate. The same SBE Certificate and SBE Certificate number may be used for multiple vendors. As of January 1, 2019, a small business that has not registered and obtained an SBE Certificate will not qualify for the SBE and will be liable for sales or use tax on purchases of taxable energy, except as provided in 830 CMR 64H.6.11(6)(g)1. A small business may register with the Department and obtain an SBE Certificate at any time after January 1, 2019; however, it will qualify for the SBE only on purchases made on or after the date of registration with the Department.

(b) Use of SBE Certificates. A qualifying small business must give each vendor a copy of its SBE Certificate or its SBE Certificate number on or before its first exempt purchase of taxable energy. The Department may also share the small business's registration information with any vendors participating in this program. The SBE Certificate is valid only for purchases made on or after the registration date shown on the SBE Certificate. If a small business has not registered with the Department and obtained an SBE Certificate, a vendor must collect sales tax from such small business on its taxable energy purchases, except as provided in 830 CMR 64H.6.11(6)(g)1. Once a qualifying small business presents an SBE Certificate or its SBE Certificate number to a vendor in a calendar year, it will continue to qualify for the SBE on subsequent purchases from that vendor until the expiration of the SBE Certificate, unless the SBE is revoked as detailed in 830 CMR 64H.6.11(6)(d) and (e).

(c) Registration Renewals. A small business must renew its registration with the Department and update its SBE Certificate on or before the expiration date to continue to qualify for the SBE. Once a small business renews its registration, it will obtain an SBE Certificate with a new expiration date that will be valid for up to another two year period. If the business does not timely renew its registration and SBE Certificate, it will no longer qualify for the SBE. Any purchases made after the expiration of the prior year SBE Certificate will be subject to tax. A small business may re-register with the Department and obtain a new SBE Certificate at any time; however, such small business will qualify for the SBE only for purchases made on or after the date of its re-registration. Upon renewal of its registration with the Department, a small business must give each vendor a copy of its SBE Certificate or its SBE Certificate number on or before its first exempt purchase of taxable energy after the renewal date, in accordance with the rules in 830 CMR 64H.6.11(6)(b).

(d) Revocation of Registration by Small Business. A business that is registered with the Department as a qualifying small business but that ceases to qualify as a small business as defined in 830 CMR 64H.6.11(2) during either calendar year must revoke its registration with the Department and notify all of its vendors. Upon notification, a vendor of taxable energy must begin to collect tax from any business that has revoked its registration with the Department. The business is liable for use taxes on any purchases of taxable energy for which no sales tax was paid during the period in which it did not qualify. The business must file use tax returns and pay any tax due for any such taxable transactions in a manner as required by the Commissioner.

(e) Revocation by the Commissioner. Notwithstanding the foregoing, the Commissioner may deny or revoke the SBE registration and SBE Certificate if the Commissioner determines that a business does not qualify for the SBE or the small business is using the SBE Certificate to evade any tax due and assess the business any amount of use tax due to the Commonwealth, or any portion thereof, which the Commissioner believes has not been assessed, in accordance with M.G.L c. 62C. The business is liable for use taxes on any purchases of taxable energy for which no sales tax was paid during the period in which it did not qualify for the SBE or an SBE certificate was used to evade remittance of the proper tax due. The Commissioner may also notify any known vendors to begin collecting sales tax from such business.

(f) Notice to Vendors. Any business that has revoked its SBE registration or that has had its SBE registration revoked by the Commissioner, or whose registration has otherwise expired, shall notify all of its taxable energy vendors that its SBE Certificate is no longer valid.

64H.6.11: continued

(g) Transition Rules for 2018 and 2019. All small businesses may register with the Department and obtain an SBE Certificate at any time as of January 1, 2019.

1. Existing Exemption Certificates. A small business may use a valid, previously-issued Form ST-13 that has been provided to a vendor to claim the small business exemption for purchases of taxable fuel made through March 31, 2019, or such later date as the Commissioner may subsequently specify. A small business may no longer use Form ST-13 to claim the SBE for purchases of taxable fuel made after March 31, 2019. A small business must register with the Department and obtain a new SBE Certificate on or before March 31, 2019, to continue to qualify for the SBE on purchases of taxable energy made after that date. After March 31, 2019, all previously issued exemption certificates on Form ST-13 will no longer be valid for purposes of claiming the SBE.

2. New SBE Certificates. As of January 1, 2019, a small business that did not use an exemption certificate on Form ST-13 for transactions in 2018 must register with the Department and obtain an SBE Certificate, as detailed in 830 CMR 64H.6.11(6), to qualify for the SBE on purchases of taxable energy. A business may register with the Department and obtain an SBE Certificate at any time after January 1, 2019, as long as it otherwise qualifies as a small business as defined in 830 CMR 64H.6.11(2); however, it will only qualify for the SBE on purchases made on or after the date of the registration with the Department.

3. Deadline for Registration. A small business must register with the Department and obtain a new SBE Certificate on or before March 31, 2019, to continue to qualify for the SBE on purchases of taxable energy made after that date. After March 31, 2019, a small business that has not registered with the Department and has not obtained an SBE Certificate, will not qualify for the SBE until such time as the small business registers with the Department. A small business may register with the Department and obtain an SBE Certificate at any time after March 31, 2019; however, it will qualify for the SBE only for purchases made on or after the date of registration with the Department. A vendor of taxable energy must collect sales tax on any purchases made without a current SBE Certificate.

(7) Vendor Obligations and Credits.

(a) Verification Requirements. Before allowing an SBE, a vendor must verify that a small business purchaser is registered as a qualifying small business with the Department. Also, upon expiration or revocation of an SBE certificate and SBE registration, a vendor must verify that the small business purchaser has renewed its registration with the Department. A vendor may verify this information either by obtaining a copy of the small business's current SBE Certificate or by verifying the small business's current SBE registration with the Department, in accordance with procedures established by the Commissioner. Verification by either of these methods shall create a presumption of good faith on the part of the vendor under M.G.L. c. 64H, § 6(qq) and the vendor will be relieved of the burden of proving that purchases made by the small business are exempt.

(b) Recordkeeping Requirements. A vendor shall retain records relating to the verification process in 830 CMR 64H.6.11(7)(a) and make available such records to the Commissioner no later than 60 days from the date of a notice from the Commissioner to produce such records. A vendor's records must include the name of the qualifying small business purchaser and its SBE Certificate number, along with any other records required by 830 CMR 62C.25.1: *Record Retention*.

(c) Annual Report. A vendor will provide the Department with an annual report of its exempt sales to qualifying small businesses and any credits claimed under 830 CMR 64H.6.11(7)(d) in a manner prescribed by the Commissioner. In general, the report shall identify the total dollar amount of exempt purchases made by each purchaser claiming the SBE during the calendar year, including detailed information on any credits claimed for prior transactions.

(d) Credits. A vendor that collected sales tax from a small business that purchased taxable energy, which should have been exempt because the small business had a valid SBE registration and SBE Certificate, may claim an offset on the vendor's next monthly sales tax return in accordance with procedures established by the Commissioner. A vendor must refund the previously collected sales tax to the qualifying small business to claim the credit. Any credit claimed under this provision must be within the statute of limitations provided in M.G.L. c. 62C, §§ 36, 37, and any credit claimed after such time limits will not be allowed. A vendor that uses the offset process in 830 CMR 64H.6.11(7)(d), waives its right to receive any interest on the offset amounts under M.G.L. c. 62C, § 40.

64H.6.11: continued

(e) Amended Returns. In *lieu* of the credit process in 830 CMR 64H.6.11(7)(d), a vendor may submit an amended return as provided by 830 CMR 62C.26.2: *Amended Returns*, after refunding any previously collected sales tax to the qualifying small business. Any amended return filed under 830 CMR 64H.6.11(7)(e) must be filed within the statute of limitations provided in M.G.L. c. 62C, §§ 26, 36 and 37. A vendor may not offset an amount under 830 CMR 64H.6.11(7)(d) and submit an amended return under 830 CMR 64H.6.11(7)(e) for sales tax related to the same transaction.

(f) Transition Rules for 2018 and 2019 For Existing Exemption Certificates. As noted in 830 CMR 64H.6.11(6)(g)(1), a small business may use a valid, previously-issued Form ST-13 to claim a small business exemption for purchases of taxable fuel made prior to March 31, 2019. A vendor may accept a valid Form ST-13, and will not be subject to the verification requirements in 830 CMR 64H.6.11(7)(a) for such purchases. A vendor may claim an offset on its next monthly sales tax return in accordance with the provisions in 830 CMR 64H.6.11(7)(d) for purchases made using Form ST-13 within three years from March 31, 2019. Purchases made using Form ST-13 must be included in the vendor's annual report required by 830 CMR 64H.6.11(7)(c).

64H.6.11: continued

(g) Invalid Registration. A vendor must collect sales tax from a business that does not have a current registration and SBE certificate. A vendor that is notified, either by a taxpayer or by the Department, that a business's SBE has been revoked must begin collecting sales tax. A vendor may not receive a vendor credit or refund from the Commissioner for any amount that the vendor has refunded to a purchaser on purchases made without a current registration or made after the vendor received notice that the registration was revoked.

(8) Misuse of Certificates. Any person who willfully presents any certificate under M.G.L. c. 64H or M.G.L. 64I known by that person to be fraudulent or false as to any material matter and given for the purpose of evading payment of sales or use tax may be subject to fines, imprisonment, or both. Any person who willfully aids or assists in the preparation of presentation of such a fraudulent or false document may be subject to fines, imprisonment, or both. If any purchaser of taxable energy improperly presents a certificate, the purchaser remains fully liable for payment of use tax on its purchase.

64H.8.1: Resale and Exempt Use Certificates

(1) Statement of Purpose, Effective Date, Outline of Topics.

(a) Statement of purpose. The purpose of 830 CMR 64H.8.1 is to explain the requirements for the presentation and acceptance of resale certificates for sales of tangible personal property and taxable services, the requirements for the presentation and acceptance of exempt use certificates for sales of tangible personal property, and the rules for determining when sales of property or taxable services are sales for resale.

(b) Effective date. 830 CMR 64H.8.1 applies to the sale or use of tangible personal property and taxable services, except gas, steam, electricity, heating fuel or taxable services sold or used before September 1, 1990. However, 830 CMR 64H.8.1(4)(d) and 830 CMR 64H.8.1(5)(d) are effective as of March 6, 1991.

(c) Outline of topics. 830 CMR 64H.8.1 is organized as follows:

1. Statement of Purpose, Effective Date, Outline of Topics.
2. Definitions.
3. General Rule.
4. Sales for Resale.
5. Sales for Exempt Use.

(2) Definitions. For the purpose of 830 CMR 64H.8.1, the following terms have the following meanings, unless the context requires otherwise:

Commissioner. The Commissioner of Revenue or the Commissioner's duly authorized representative.

Exempt Use Certificate, Form ST-12. A certificate, prescribed by the Commissioner, certifying that tangible personal property is purchased for a use exempt under M.G.L. c. 64H, § 6(r) or (s).

Resale Certificate, Form ST-4. A certificate prescribed by the Commissioner, certifying that taxable services or tangible personal property are purchased for resale in the regular course of business.

Retail Sale. A sale for any purpose other than resale in the regular course of business.

Tangible Personal Property. Personal property of any nature consisting of any produce, goods, wares, merchandise, and commodities, including gas, steam, electricity, and heating fuel, but excluding rights and credits, insurance policies, bills of exchange, stocks, bonds, and similar evidences of indebtedness or ownership.

Tax. The excise tax imposed under M.G.L. c. 64H or M.G.L. c. 64I.

Taxable Service or Taxable Services. Any activities engaged in by a person for consideration that are subject to the tax imposed by M.G.L. c. 64H or M.G.L. c. 64I, whether or not such activities are the primary activity of the person providing the service. Taxable services are limited to telecommunications services.

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Telecommunications services, any transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiber-optics, laser, microwave, radio, satellite, or similar facilities, but not including cable television. See 830 CMR 64H.1.6, Telecommunications Services.

Vendor, a retailer or other person selling taxable services or tangible personal property the gross receipts from the retail sale of which are required to be included in the measure of the tax imposed by M.G.L. c. 64H or c. 64I.

(3) General Rule. All gross receipts of a vendor from the sale of tangible personal property or taxable services are presumed to be from retail sales subject to tax until the contrary is established. The burden of proving that a sale is not a retail sale is on the vendor unless the vendor takes a resale certificate from the purchaser, under the conditions of M.G.L. c. 64H, § 8; M.G.L. c. 64I, § 8 and 830 CMR 64H.8.1(4). The burden of proving that a sale is exempt under M.G.L. c. 64H or c. 64I is on the vendor unless the vendor takes an exempt use certificate from the purchaser, under the conditions of M.G.L. c. 64H, § 8; M.G.L. c. 64I, § 8, and 830 CMR 64H.8.1(5).

(4) Sales of Tangible Personal Property and Taxable Services for Resale.

(a) Presumptions and burdens of proof.

1. Sales tax. The burden of proving that a sale of tangible personal property or taxable services is not a retail sale is on the vendor unless the vendor accepts a resale certificate from the purchaser, under the conditions of M.G.L. c. 64H, §§ 8(a) through (d), and 830 CMR 64H.8.1.

2. Use tax. Tangible personal property that the purchaser accepts within Massachusetts or that the vendor or a licensed carrier on behalf of the vendor delivers to the purchaser within Massachusetts is presumed to be sold for use, storage, or other consumption in Massachusetts until the contrary is established. The burden of proving the contrary is on the vendor unless the vendor accepts a resale certificate from the purchaser, under the conditions of M.G.L. c. 64I, §§ 8(a)-(e), and 830 CMR 64H.8.1.

(b) Good faith requirement for resale certificates. A resale certificate relieves a vendor from the burden of proving that a sale of tangible personal property or taxable service is not a retail sale only if the vendor accepts the resale certificate in good faith from a purchaser who is engaged in the business of selling tangible personal property or taxable services, and who, at the time of the purchase, intends to sell the tangible personal property or taxable service in a retail sale in the regular course of business or is unable to ascertain at the time of purchase whether the tangible personal property or taxable service will be sold or will be used for some other purpose.

(c) Requirements for proper resale certificates. Each resale certificate must be in the form prescribed by the Commissioner and must contain the following information:

1. Name of purchaser;
2. Address of purchaser;
3. Purchaser's registration number;
4. Any other information the Commissioner may require.

(d) 60-day rule for production and correction of resale certificates. The rules below apply to resale certificates for sales of tangible personal property and resale certificates for sales of taxable services.

1. Commissioner's notice to produce resale certificates.

a. Upon written notice to a vendor, the Commissioner may require the vendor to produce particular resale certificates accepted during any period for which a tax return has been filed or for which a return is due. The vendor must make the requested resale certificates available for inspection by the Commissioner within 60 days of the date of the Commissioner's notice.

b. If the vendor does not produce the requested resale certificates within the 60-day period, the vendor must carry the burden of proving, by other evidence, that the sale was not a retail sale subject to tax.

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- c. If the vendor, within the 60 days of the original notice, produces any requested resale certificates that the Commissioner then determines are deficient in some material manner, the vendor must correct such resale certificates within the same 60-day period, calculated from the date of the original notice.
 - 2. Commissioner's notice to correct resale certificates.
 - a. If the Commissioner notifies any vendor in writing that a resale certificate not previously subject to the 60-day rule for production is deficient in some material manner, the vendor must correct the resale certificate within 60 days from the date of the Commissioner's notice.
 - b. If the vendor does not correct the particular resale certificate within the 60-day period, the vendor must carry the burden of proving, by other evidence, that the sale was not a retail sale subject to tax.
 - (e) Use of tangible personal property or taxable services by purchasers. If a purchaser presents a resale certificate with respect to the purchase of tangible personal property or a taxable service and subsequently makes any use of the property or service, other than retention, demonstration, or display while holding it for sale in the regular course of business, the use is deemed to be a retail sale by the purchaser as of the time the property or service is first used by the purchaser, and the cost of the property or service to the purchaser must be included in the purchaser's gross receipts.
 - (f) Special Requirements for Presentation of Resale Certificates for Purchases of Telecommunications Services. For rules regarding the use of resale certificates in connection with purchases of telecommunications services, see 830 CMR 64H.1.6 (Telecommunications Services).
- (5) Sales for Exempt Use.
- (a) Acceptance of exempt use certificates. If a purchaser purchases tangible personal property for a purpose that qualifies for exemption from the tax under M.G.L. c. 64H, or M.G.L. c. 64I, the purchaser may present an exempt use certificate to the vendor to certify that the tangible personal property will be used in an exempt manner. The burden of proving that a sale of tangible personal property is exempt under M.G.L. c. 64H or M.G.L. c. 64I is on the vendor unless the vendor accepts an exempt use certificate from the purchaser, under the conditions of M.G.L. c. 64H, §§ 8(e) through (h); M.G.L. c. 64I, §§ 8(g) through (j), and 830 CMR 64H.8.1. A purchaser may not present, and a vendor may not accept, an exempt use certificate for a purchase of taxable services.
 - (b) Good faith requirement for exempt use certificates. An exempt use certificate relieves the vendor from the burden of proof that a sale of tangible personal property is for exempt use only if the vendor accepts the certificate in good faith from a purchaser who, at the time of purchasing the tangible personal property, intends to use the property in a manner that qualifies for an exemption under M.G.L. c. 64H, or M.G.L. c. 64I, or who is unable to ascertain at the time of purchase whether the tangible personal property will be used in an exempt manner or will be used for some other purpose.
 - (c) Requirements for proper exempt use certificates. Each exempt use certificate must be in the form prescribed by the Commissioner and must contain the following information:
 - 1. Name of purchaser;
 - 2. Address of purchaser;

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3. Purchaser's registration number, if any;
 4. The general character of the tangible personal property purchased;
 5. Certification of the exempt use to which the tangible personal property will be applied; and
 6. Any other information the Commissioner may require.
- (d) 60-day rule for production and correction of certificates. The rules below apply to exempt use certificates for sales of tangible personal property.
1. Commissioner's notice to produce certificates.
 - a. Upon written notice to a vendor, the Commissioner may require the vendor to produce particular exempt use certificates accepted during any period for which a tax return has been filed or for which a return is due. The vendor must make the requested exempt use certificates available for inspection by the Commissioner within 60 days of the date of the Commissioner's notice.
 - b. If the vendor does not produce the requested certificates within the 60-day period, the vendor must carry the burden of proving, by other evidence, that the sale was not a retail sale subject to tax.
 - c. If the Commissioner determines that any of the produced certificates are deficient in some material manner, the vendor must correct the certificates within the same 60-day period, calculated from the date of the original notice.
 2. Commissioner's notice to correct certificates.
 - a. If the Commissioner notifies any vendor in writing that a certificate not previously subject to the 60-day rule for production is deficient in some material manner, the vendor must correct the certificate within 60 days from the date of the Commissioner's notice.
 - b. If the vendor does not correct the particular certificates within the 60-day period, the vendor must carry the burden of proving, by other evidence, that the sale was not a retail sale subject to tax.
- (e) Nonexempt use of tangible personal property by purchaser. If a purchaser who presents an exempt use certificate for the purchase of tangible personal property makes any use of property other than a use that is exempt under M.G.L. c. 64H or M.G.L. c. 64I, the use is deemed to be a retail sale by the purchaser as of the time the service is first used by the purchaser, and the cost of the tangible personal property to the purchaser must be included in the purchaser's gross receipts.
- (f) Sales of taxable services. None of the exempt use provisions of M.G.L. c. 64H or M.G.L. c. 64I apply to sales of taxable services. Therefore, a purchaser may not present, and a vendor may not accept, an exempt use certificate with respect to a sale of a taxable service.

64H.25.1: Motor Vehicles

(1) Purpose. The sale or use of motor vehicles, trailers, and other types of vehicles in Massachusetts is generally subject to the sales or use tax. 830 CMR 64H.25.1 applies the provisions of M.G.L. c. 64H and M.G.L. c. 64I, the Massachusetts sales and use tax statutes, to the sale or use of such vehicles.

(2) Definitions. When used in 830 CMR 64H.25.1, the following words have the following meanings, unless the context requires otherwise:

Average trade-in price or value, the wholesale or trade-in value which corresponds to a particular make, model, type, and year of a motor vehicle, trailer, or other vehicle, as listed in the most recent edition of the applicable National Automobile Dealers Association (NADA) used vehicle pricing guide or, if specifically agreed upon by the Commissioner and Registrar, any other values or used vehicle pricing guides designated under such agreement.

Business entity, a person or entity regularly engaged in any activity, the object of which is profit or gain, direct or indirect.

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Casual and isolated sale or transfer, a sale or transfer at retail of a motor vehicle, trailer, or other vehicle other than a retail sale by a Massachusetts dealer or Massachusetts lessor in the regular course of business.

Commissioner, the Commissioner of Revenue or any person authorized or designated to act on the Commissioner's behalf.

Dealer, a person who is regularly engaged in the business of buying, selling, or exchanging motor vehicles, trailers, or other vehicles at retail.

Finance leasing arrangement, a lease of a motor vehicle, trailer, or other vehicle which qualifies for treatment under and is taxed under the provisions of I.R.C. § 168(f)(8).

Insurer, a person engaged in the business of providing personal casualty, property damage, fire and theft insurance for motor vehicles, trailers, and other vehicles.

Lessor, a person who is regularly engaged in the business of leasing or renting motor vehicles, trailers, or other vehicles.

Massachusetts dealer, a dealer who holds a valid Massachusetts Vendor's Registration Certificate.

Massachusetts lessor, a lessor who holds a valid Massachusetts Vendor's Registration Certificate.

Massachusetts Vendor's Registration Certificate, Department of Revenue Form ST-1, lawfully obtained from and issued by the Commissioner to a dealer or lessor.

Motor Vehicle, a motorized, self-propelled vehicle which is constructed and designed for transportation or travel over a land surface; but not including mopeds, motorized bicycles, or vehicles incapable of speeds in excess of 12 miles per hour which are used other than for transporting persons or property, and are either used exclusively for highway building, repair, or maintenance, or are especially designed for use other than on public highways.

Off-road Vehicle, a motorized, self-propelled vehicle which is not designed for use nor used primarily for transportation or travel on public highways.

Purchaser, a buyer, vendee, lessee, renter, or other person who receives title to or possession of a motor vehicle, trailer, or other vehicle as the result of a sale.

Registrar, the Registrar of Motor Vehicles or any person authorized or designated to act on the Registrar's behalf.

Resale in the regular course of business, a sale, other than a lease or rental, of a motor vehicle, trailer, or other vehicle by a Massachusetts dealer, or a lease or rental of a motor vehicle, trailer, or other vehicle by a Massachusetts lessor, which is the type of sale or lease, whichever is applicable, upon which the dealer or lessor primarily relies in the conduct of its business. Resale includes the use of a vehicle for demonstration or display.

Sale, any transfer of title or possession, or both, by exchange, barter, lease, rental, conditional or otherwise, of a motor vehicle, trailer, or other vehicle for a consideration in any manner or by any means whatsoever.

Sale at retail or retail sale, a sale, lease, or rental of a motor vehicle, trailer, or other vehicle for any purpose other than resale in the regular course of business.

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Sales price, the total amount or value paid or exchanged by a purchaser as consideration for the transfer of title to or possession of a motor vehicle, trailer, or other vehicle, whether valued in money or otherwise, less any vehicle manufacturer's excise tax imposed by the United States.

Sales tax, the tax imposed by M.G.L. c. 64H on the retail sale of a motor vehicle, trailer, or other vehicle by a Massachusetts dealer or Massachusetts lessor in the regular course of business.

Seller, a vendor, dealer, lessor, or other person who transfers title to or possession of a motor vehicle, trailer, or other vehicle in exchange for consideration.

Storage, the keeping or retaining of a motor vehicle, trailer, or other vehicle for any purpose other than the sale of the vehicle in the regular course of business or the use of the vehicle exclusively outside of Massachusetts.

Trade-in, the transfer of complete ownership of a motor vehicle, trailer, or other vehicle from a purchaser to a seller, but only if the transfer occurs at the time of and as consideration for a sale of a similar type of vehicle by the seller to the purchaser.

Trailer, a vehicle which is not self-propelled, which must be towed by a motor vehicle, and which is constructed and designed for use upon the public highways.

Transferee, a purchaser or other person who becomes the legal, equitable, or beneficial owner of a motor vehicle, trailer, or other vehicle as a result of the sale, lease, gift or other transfer of title to or possession of a vehicle.

Transferor, a person who sells, gives, or otherwise transfers legal, equitable, or beneficial ownership or possession of a motor vehicle, trailer, or other vehicle to a transferee.

Unrealistic sales price, a sales price which is less than the average-trade-in price.

Use, the exercise of any right or power over a motor vehicle, trailer, or other vehicle incident to the ownership of title to or possession of the vehicle; but not including a sale of the vehicle in the regular course of business.

User, a person who stores, uses, consumes, or otherwise exercises a right or power over a motor vehicle, trailer, or other vehicle in Massachusetts.

Use tax, the tax imposed by M.G.L. c. 64I upon the storage, use, or other consumption of a motor vehicle, trailer, or other vehicle in Massachusetts.

Vehicle, a motor vehicle, trailer, or any self-propelled machine constructed and designed primarily for transportation or travel over a land surface; but not including railroad, railway, or trolley cars, or any other machines running upon rails or tracks.

(3) Imposition of the Sales Tax; Imposition of the Use Tax.

(a) General rule. Upon the retail sale or other transfer of a motor vehicle, trailer, or other vehicle in Massachusetts, or upon the storage, use, or other consumption of a motor vehicle, trailer, or other vehicle in Massachusetts, a sales or use tax is imposed on the purchaser, transferee, or other user by either M.G.L. c. 64H or c. 64I. The sales tax, which is imposed by M.G.L. c. 64H, applies only to transfers of title or possession through retail sales by Massachusetts dealers and Massachusetts lessors in the regular course of business. The use tax, which is imposed by M.G.L. c. 64I, applies to all other types of transfers of title or possession where the vehicle transferred is thereafter stored, used, or otherwise consumed in Massachusetts. The tax is imposed at the rate of five percent, and is calculated and paid pursuant to the provisions of the applicable statute and 830 CMR 64H.25.1. No exception, adjustment, exemption, deduction, or variance of the tax is permitted, unless specifically authorized by M.G.L. c. 64H or c. 64I and 830 CMR 64H.25.1.

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(b) Sales tax.

1. The sale at retail of a motor vehicle, trailer, or other vehicle by a Massachusetts dealer or Massachusetts lessor in the regular course of business is subject to the sales tax imposed by M.G.L. c. 64H, § 2, unless specifically exempt under that statute and 830 CMR 64H.25.1(5), (7), or (8).

2. Every sale of a motor vehicle, trailer, or other vehicle in Massachusetts is presumed to be a sale at retail. This presumption is rebuttable, and may be overcome by sufficient evidence to the contrary.

(c) Use tax.

1. The storage, use, or other consumption in Massachusetts of a motor vehicle, trailer, or other vehicle purchased or transferred for storage, use, or other consumption in Massachusetts, is subject to the use tax imposed by M.G.L. c. 64I, § 2, unless specifically exempt under that statute and 830 CMR 64H.25.1(5), (7), or (8).

2. Every motor vehicle, trailer, or other vehicle sold or transferred for delivery in Massachusetts or brought into Massachusetts is presumed to have been sold or transferred for storage, use, or other consumption in Massachusetts, unless the vehicle is used exclusively outside of Massachusetts for a period of six months before the date it is first delivered, brought into, or used in Massachusetts. This presumption is rebuttable, and may be overcome by sufficient evidence to the contrary. A vehicle which is used exclusively outside of Massachusetts for a period of at least six months before it is delivered, brought into, or used in Massachusetts is subject to the use tax imposed by M.G.L. c. 64I, § 2 only if, at the time of the purchase or transfer, the purchaser or transferee intended to store, use, or otherwise consume the vehicle in Massachusetts.

(d) Examples. The following examples illustrate the application of 830 CMR 64H.25.1(3).

Example 1: Mr. Blue lives in Florida. While visiting in Massachusetts he decides to purchase a Volvo from a Massachusetts dealer for use in Florida. He pays for the vehicle and receives the certificate of origin to and possession of the vehicle in Massachusetts. Thereafter he drives the vehicle to his home in Florida. Mr. Blue must pay Massachusetts sales tax on the Volvo because title to and possession of the vehicle were transferred to him in Massachusetts.

Example 2: Ms. Green lives in New Hampshire. She comes to Massachusetts to purchase an automobile for use in New Hampshire, and orders an Oldsmobile from a Massachusetts dealer at an agreed upon price. When the vehicle becomes available, the dealer delivers it to Ms. Green in New Hampshire. Ms. Green then pays the dealer and receives the certificate of origin to and possession of the vehicle in New Hampshire. Thereafter she uses it in New Hampshire. The sale to Ms. Green is not subject to the Massachusetts sales or use tax because neither title to nor possession of the vehicle was transferred in Massachusetts and because it was not purchased for use in Massachusetts.

Example 3: Mr. Fox lives in Massachusetts. While vacationing in Europe he purchases a Volkswagen, which he then uses to travel through various European countries. Four months later he returns to Massachusetts with the vehicle. Mr. Fox must pay a use tax to Massachusetts for the Volkswagen. It is presumed that he purchased the vehicle for storage, use, or other consumption in Massachusetts because it was not used exclusively outside of Massachusetts for a six month period following the date of purchase.

(4) Procedure for payment of the tax.

(a) General rule. Every purchaser, transferee, or other user having title to or possession of a motor vehicle, trailer, or other vehicle in Massachusetts who is required by M.G.L. c. 90 to register the vehicle in Massachusetts, or who is required by M.G.L. c. 90D to title the vehicle in Massachusetts, must, within ten days of the date of purchase, transfer, or use, file with the Registrar a completed Application for Title and Registration (Registry of Motor Vehicles Form RMV-1) and pay a sales or use tax. If a purchaser, transferee,

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or other user is not required by M.G.L. c. 90 to register the vehicle in Massachusetts, and is not required by M.G.L. c. 90D to title the vehicle in Massachusetts, the purchaser, transferee, or other user must, on or before the 20th day of the month following the month of purchase, transfer, or use, file with the Commissioner a completed Sales Tax Payment form (Department of Revenue Form ST-7R) and pay the sales or use tax.

(b) Form of payment. Payment of the sales or use tax must be as follows:

1. General rule. Payment of the sales or use tax to the Commissioner or Registrar may be in the form of cash or money order; bank, cashier's, or certified check; personal or business check of the party in whose name the vehicle is to be registered; or business check of a Massachusetts dealer, lessor, insurer or other business entity on its own behalf or on behalf of others.

2. Special rules for payment by personal or business checks. A separate personal or business check must be submitted for each Application for Title and Registration (Form RMV-1) and each personal or business check must contain the following identifying information:

- a. the name and address of the party applying for the title or registration of the vehicle, as stated on the Application for Title and Registration (Form RMV-1); and
- b. the name and address of the payor, if other than the applicant (*i.e.*, payment by a Massachusetts dealer, lessor, insurer, or other business entity on behalf of the applicant).

The Registrar may not accept any personal or business check unless it conforms to the requirements of 830 CMR 64H.25.1(4)(b)2.

3. Personal or business checks not honored by bank. Where the sales or use tax is paid by personal or business check by an applicant (or by a business entity on the applicant's behalf) and the check is not honored by the bank on which the check is drawn, the following consequences shall occur:

- a. the Registrar shall immediately withhold issuing the Certificate of Title of the vehicle for which the check was submitted; and
- b. the Registrar shall prohibit the transfer of any Certificate of Registration for such vehicle, and if such Registration is issued, shall suspend or revoke such Registration; and
- c. the Registrar shall not issue or renew any learner's permit, license to operate a motor vehicle, Certificate of Registration or Title, number plates, stickers, decals or any other items issued under the provisions of M.G.L. c. 90 or 90D, to any applicant who submits such check to the Registrar or on whose behalf such check is submitted; and
- d. these restrictions shall remain in effect until said check (or a subsequent check) is honored or until payment in full is otherwise made and collected.

4. Electronic Funds Transfers. The Registrar may, with the approval of the Commissioner, enter into agreements with Massachusetts business entities (for example, motor vehicle dealers, lessors, and insurers) to facilitate payment to the Registrar via electronic funds transfer of the tax due on sales of motor vehicles. All such taxes are to be transmitted to the Registrar by electronic funds transfer on a daily basis.

(c) Issuance of Certificates of Title and Registration. The Registrar may not issue a Certificate of Title and Registration for any motor vehicle or trailer unless:

1. the purchaser, transferee, or user pays a sales or use tax on the vehicle in the full required amount; or
2. the purchaser, transferee or user establishes that the tax or full amount of the tax is not applicable solely by reason of an exemption in M.G.L. c. 64H or c. 64I, and in 830 CMR 64H.25.1(5), (7), or (8). The rules stated in 830 CMR 64H.25.1(4)(c), do not apply when the Registrar issues a duplicate or a renewal of the Certificate of Title and Registration.

(d) Application for Title and Registration. The Application for Title and Registration (Form RMV-1) must be completed as follows:

1. Dealer sales. In the case of a sale at retail by a Massachusetts dealer in the regular course of business, the dealer must complete the Application for Title and Registration (Form RMV-1) and provide five copies thereof to the purchaser.

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2. Casual sales. In the case of a casual and isolated sale or transfer, the purchaser, transferee, or user must complete the Application for Title and Registration (Form RMV-1) and four copies thereof.
 - (e) Payment of tax upon use of exempt vehicles by dealers or lessors. In the case of a motor vehicle, trailer, or other vehicle purchased by a Massachusetts dealer or Massachusetts lessor for resale in the regular course of business, a use tax becomes due if the vehicle is used by the dealer or lessor in a manner other than for resale in the regular course of business. The tax is computed on the cost of the vehicle to the dealer or lessor, including all accessories installed by the dealer or lessor, and is paid pursuant to M.G.L. c. 64I, and the applicable provisions of 830 CMR 64H.25.1(4), (5), and (10).
- (5) Computation of the tax.
- (a) General rule. The sales and use tax is 5% of the sales price, subject to the following rules.
 - (b) Unrealistic sales prices on motor vehicles and trailers. If a motor vehicle or trailer is sold at an unrealistic sales price, the tax is computed as follows:
 1. Dealer sales. If the sale is by a Massachusetts dealer in the regular course of business, the sales tax may be computed on the sales price. Upon payment of the tax, the Registrar may issue a Certificate of Title and Registration, but the exemption is subject to the Commissioner's review and verification. In such cases, the Registrar must forward to the Commissioner a copy of the Application for Title and Registration (Form RMV-1) pursuant to the provisions of 830 CMR 64H.25.1(6)(d).
 2. Casual and isolated sales. If a motor vehicle, trailer or other vehicle is sold or transferred in a casual and isolated sales transaction, the sales price for purposes of computing use tax is determined as follows:
 - a. Sales price. The sales price of a motor vehicle, trailer or other vehicle transferred in a casual and isolated sale is the greater of either 1) the actual amount paid by the purchaser for the vehicle, or 2) the average trade-in value of the vehicle.
 - b. High and low mileage vehicles. In the case of a motor vehicle or other vehicle with high or low mileage that is transferred in a casual and isolated sale, the average trade-in value of such a vehicle must be adjusted upwards or downwards in accordance with any High and Low Mileage Tables in the applicable used vehicle pricing guide.

A high or low mileage vehicle is identified by the type of vehicle, the year of manufacture, and the amount of mileage at the time of transfer.
 - c. Salvage titled vehicles. In the case of a motor vehicle, trailer, or other vehicle titled by the Registrar as a "salvage vehicle," the sales price upon which the use tax shall be computed is the actual amount paid by the purchaser for the vehicle, valued in money or money's worth, without reference to the average trade-in value of such vehicle. For purposes of this subsection, a salvage vehicle is any vehicle that is determined by a motor vehicle insurer to be a total loss due to fire, vandalism, collision, theft, flood or similar event and that has a "SALVAGE TITLE" stamp on its Form RMV-1.

A salvage vehicle is identified as one of two types: parts only or repairable. A salvage vehicle determined to be for parts only can never be retitled or reregistered. A salvage vehicle determined to be repairable may be retitled and reregistered as a reconstructed or recovered theft vehicle.
- The Registrar may not issue a Certificate of Title and Registration unless the tax is computed in accordance with the provisions in 830 CMR 64H.25.1(5). Upon payment of the tax and the submission of any documents required under this regulation, the Registrar may issue the Certificate of Title and Registration. The Registrar must forward to the Commissioner a copy of the Application for Title and Registration form (Form RMV-1) and any other documents submitted at the time of registration, pursuant to the provisions of 830 CMR 64H.25.1(6)(d).

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3. Examples. The following examples illustrate the application of 830 CMR 64H.25.1(5)(b).

Example 1: S, an individual who is not a Massachusetts dealer, sells to V, also not a Massachusetts dealer, his Volvo for \$6,000. The average trade-in value of the Volvo is \$8,000. The sale is a casual and isolated sale by an individual, and so the average trade-in value of \$8,000 is the sales price for purposes of calculating the use tax because it is greater than the actual amount paid of \$6,000. Therefore, V must pay a use tax of \$400 ($\$8,000 \times 5\%$).

Example 2: K, an individual who is not a Massachusetts dealer, sells to F, also not a Massachusetts dealer, a Ford with high mileage for \$6,000. The average trade-in value listed under NADA for the Ford is \$5,000, but there is a \$500 reduction that applies under the NADA High Mileage Tables. Thus, for use tax purposes, the average trade-in value is \$4,500. The actual sales price of \$6,000 is the sales price for purposes of calculating the use tax because it is greater than the adjusted average trade-in value of \$4,500 ($\$5,000$ minus \$500 for high mileage). Therefore, F must pay a use tax of \$300 ($\$6,000 \times 5\%$).

(c) Trade-ins on motor vehicles and trailers. If a motor vehicle or trailer is traded-in or exchanged on the purchase or transfer of another motor vehicle or trailer, the tax is computed as follows:

1. Sales by Massachusetts dealers. If the sale is by a Massachusetts dealer in the regular course of business and the purchaser either previously paid a tax on the vehicle traded-in, or is exempt from tax on the vehicle traded-in under M.G.L. c. 64H or c. 64I and 830 CMR 64H.25.1(5), (7) or (8), the sales tax is computed on the sales price, reduced by any amount credited towards the sales price by reason of a trade-in.

2. Casual and isolated sales and transfers. If the sale or transfer is a casual and isolated sale or transfer, the use tax is computed on the sales price, which may not be reduced by any amount credited towards the sales price by reason of a trade-in.

3. Special definition of "motor vehicle" for purposes of trade-ins. For the purposes of 830 CMR 64H.25.1(5)(c), the term "motor vehicle" means a vehicle designed for use and used primarily for transportation or travel on public highways. Off-road vehicles such as crawler tractors, front end loaders, cranes, and similar or other off-road vehicles are not motor vehicles or trailers under 830 CMR 64H.25.1(5)(c). Accordingly, a reduction from the sales price for amounts credited toward the sales price by reason of trade-ins for such vehicles is never allowed in computing the amount of tax due on a sale or transfer of an off-road vehicle.

(d) Examples. The following examples illustrate the application of 830 CMR 64H.25.1(5)(c). For purposes of 830 CMR 64H.25.1(5)(d), the actual purchase price is presumed to be greater than the average trade-in value of vehicles described in examples 4 and 5.

Example 1: D, who is a Massachusetts dealer, sells a Chevrolet in the regular course of business to P for \$6,000. Upon registration of the car, P must pay a sales tax of \$300 ($\$6,000 \times 5\%$).

Example 2: S, who is a Massachusetts dealer, sells a Chrysler in the regular course of business to B for \$6,000. S credits B with \$2,000 toward the sales price for a Ford which B trades in. B must pay a sales tax of \$200 ($\$6,000$ minus \$2,000 for the trade-in, $\times 5\%$).

Example 3: N, a New Hampshire dealer who does not hold a Massachusetts Vendor's Registration Certificate, sells a Honda for use in Massachusetts to M, a Massachusetts resident, for \$6,000. N credits M with \$2,000 toward the sales price for a 1972 Plymouth which M trades in. M must pay a use tax of \$300 ($\$6,000 \times 5\%$). Since N is not a Massachusetts dealer selling the vehicle in the regular course of business, the sales price is not reduced by the \$2,000 credited for the trade-in of M's 1972 Plymouth.

Example 4: Y, who is not a Massachusetts dealer, sells Z, who is not a Massachusetts dealer, his \$6,000 Cadillac in exchange for Z's \$2,000 Buick and \$4,000 in cash. Since neither Y nor Z is purchasing a motor vehicle from a Massachusetts dealer in the regular course of business, each must pay a use tax. Y must pay a use tax of \$100 on the Buick ($\$2,000 \times 5\%$). Z must pay a use tax of \$300 on the Cadillac ($\$6,000 \times 5\%$).

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Example 5: H, who is not a Massachusetts dealer, sells his \$6,000 Mazda to J, who is not a Massachusetts dealer, for J's \$2,000 Volkswagen and \$4,000 worth of J's services working on H's house. H must pay a use tax for the Volkswagen of \$100 (\$2,000 x 5%). J must pay a use tax on the Mazda of \$300 (\$6,000 x 5%).

(6) Procedures for establishing exemptions from tax.

(a) General rule. No sale or transfer of a motor vehicle, trailer, or other vehicle is exempt from the full amount, or any part, of the sales or use tax for any reason other than the exemptions stated in M.G.L. c. 64H or c. 64I, or 830 CMR 64H.25.1(5), (7), or (8).

(b) Exemptions by Commissioner. The Commissioner may allow any exemption authorized by M.G.L. c. 64H, c. 64I, or 830 CMR 64H.25.1(5), (7), or (8). In considering a claim of exemption under any Division of 830 CMR 64H.25.1(5), (7), or (8), the Commissioner may accept evidence in the form and of the type described in the Division, or in any other form and of any other type the Commissioner determines is acceptable.

(c) Exemptions by Registrar. The Registrar may not allow any exemption unless the right to grant the exemption is expressly authorized to the Registrar in 830 CMR 64H.25.1(5), (7), or (8). In considering a claim of exemption under any Division of 830 CMR 64H.25.1(5), (7), or (8), the Registrar may not accept any evidence unless it is in the form and of the type described in the Division.

(d) Review of unrealistic sales prices and other exemptions. In every case in which the tax is computed on an unrealistic sales price, and in every case in which an exemption is allowed with respect to the payment of the full amount, or any part, of the sales or use tax, the Application for Title and Registration (Form RMV-1) or Sales Tax Payment form (Form ST-7R), whichever is applicable, is subject to review and verification by the Commissioner. The Registrar or other person accepting the Application for Title and Registration (Form RMV-1) or Sales Tax Payment form (Form ST-7R), or otherwise granting the exemption must, within 30 days from the date the exemption is granted, or within such other period as the Commissioner may determine:

1. inform the Commissioner that the applicable forms and other documents are for the Commissioner's review and verification;
2. inform the Commissioner of the identity, position, title, and office of the person granting the exemption;

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3. inform the Commissioner of the specific statutory and regulatory provisions authorizing the granting of the exemption;
4. attach all applicable forms and documents, and any other evidence submitted in connection with the granting of the exemption; and
5. forward to the Commissioner for review and verification a copy of the applicable forms, along with all the required attachments.

(7) Specific statutory exemptions.

(a) General rule. The sale or transfer of a motor vehicle, trailer, or other vehicle is exempt from the sales and use tax under M.G.L. c. 64H and c. 64I and 830 CMR 64H.25.1(7), as follows.

(b) Sales and purchases for resale. Sales and purchases for resale by Massachusetts dealers and Massachusetts lessors are exempt from tax, subject to the following rules:

1. Requirements for exemption:

a. The sale of a motor vehicle, trailer, or other vehicle to a Massachusetts dealer who purchases the vehicle exclusively for resale in the regular course of business is exempt from the sales and use tax only if the vehicle is in fact used exclusively for resale. The sale of a motor vehicle, trailer, or other vehicle to a Massachusetts lessor who purchases the vehicle exclusively for lease or rental in the regular course of business is exempt from the sales and use tax under the preceding sentence only if the vehicle is in fact used exclusively for lease or rental. The sale of a motor vehicle, trailer, or other vehicle to a Massachusetts dealer or Massachusetts lessor who purchases the vehicle for demonstration or display is considered a purchase for resale in the regular course of business and is exempt from the sales and use tax under 830 CMR 64H.25.1(7)(b).

b. The sale of a motor vehicle, trailer, or other vehicle to a person who is an agent, employee, or other representative of a Massachusetts dealer or Massachusetts lessor is a sale to the dealer or lessor if the Certificate of Origin, Title, or other document of ownership is issued, transferred, or assigned in the name of the dealer or lessor. The sale of a motor vehicle, trailer, or other vehicle to a person claiming to be an agent, employee, or other representative of the dealer or lessor is presumed not to be a sale to the dealer or lessor if the Certificate of Origin, Title, or other document of ownership is not issued, transferred, or assigned in the name of the dealer or lessor. The presumption in the preceding sentence of 830 CMR 64H.25.1(7)(b)1.b., is rebuttable, and may be overcome only by sufficient evidence to the contrary submitted to the Commissioner in connection with an application for abatement or other administrative appeal authorized under the laws of Massachusetts.

c. If the sale of a motor vehicle, trailer, or other vehicle is exempt from tax under 830 CMR 64H.25.1(7)(b), at the time of purchase, and if the vehicle is subsequently used by a dealer or lessor in a manner other than for resale in the regular course of business, such subsequent use will subject the dealer or lessor to a use tax. The dealer or lessor must pay the tax pursuant to the applicable provisions of 830 CMR 64H.25.1(4), (5), and (10).

2. This exemption may be allowed only by the Commissioner. The registrar may not issue a Certificate of Title and Registration for a vehicle as to which a claim of exemption under 830 CMR 64H.25.1(7)(b), has been made unless the Commissioner has first approved the exemption on the Application for Title and Registration (Form RMV-1).

3. To establish a claim of exemption under 830 CMR 64H.25.1(7)(b), a dealer or lessor must hold a Massachusetts Vendor's Registration Certificate and, if required by M.G.L. c. 140, must hold a license issued by the city, town, or municipality in which it is located. If a dealer applies for title only to a vehicle, the dealer must submit to the Commissioner a completed Application for Title and Registration (Form RMV-1), a completed Massachusetts Resale Certificate (Department of Revenue Form ST-4),

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and a copy of a current Dealer's License issued pursuant to M.G.L. c. 140 by the city, town, or other municipality in which it is located. If a lessor applies for title only to a vehicle, the lessor must submit to the Commissioner a completed Application for Title and Registration (Form RMV-1), a completed Massachusetts Resale Certificate (Form ST-4), and a completed Application for Deferred Payment form (Department of Revenue Form ST-7L). If a lessor applies for registration of a vehicle, the lessor must submit to the Commissioner a completed Application for Title and Registration (Form RMV-1) and a completed Application for Deferred Payment form (Form ST-7L).

4. Every Massachusetts dealer and Massachusetts lessor must apply to the Commissioner every three years for renewal of its Massachusetts Vendor's Registration Certificate by submitting to the Commissioner on or before January 30 of the applicable calendar year an Application for Re-certification form (Department of Revenue Form MVU-5A). If a dealer or lessor is required by M.G.L. c. 140 to be licensed by the city, town, or municipality in which it is located, the dealer or lessor must also submit a copy of its current license. A Massachusetts dealer or Massachusetts lessor who fails to obtain renewal of its Massachusetts Vendor's Registration Certificate as required herein shall not be entitled to an exemption under 830 CMR 64H.25.1(7)(b).

5. The Commissioner shall maintain a current listing of all Massachusetts dealers and Massachusetts lessors registered in Massachusetts to purchase motor vehicles for resale in the regular course of business who are required to comply and have complied with the requirements of 830 CMR 64H.25.1(7)(b). The Commissioner will not grant an exemption nor approve an exemption on an Application for Title and Registration (Form RMV-1) under 830 CMR 64H.25.1(7)(b), unless the name of the dealer or lessor seeking the exemption appears on the listing.

(c) Sales to exempt organizations. The sale or transfer of a motor vehicle, trailer, or other vehicle to an organization qualifying for treatment under I.R.C. § 501(c)(3) is exempt from the sales and use tax only if the vehicle is purchased by or transferred to the organization, registered in its name, and used directly and exclusively in pursuit of the purposes of the organization.

1. This exemption may be allowed only by the Commissioner. The Registrar may not issue a Certificate of Title and Registration for any vehicle as to which a claim of exemption under 830 CMR 64H.25.1(7)(c), has been made unless the Commissioner has first approved the exemption on the Application for Title and Registration (Form RMV-1).

2. To establish a claim of exemption under 830 CMR 64H.25.1(7)(c), the purchaser or transferee must hold a Certificate of Exemption (Department of Revenue Form ST-2) issued by the Commissioner. The Commissioner may issue the certificate to an organization qualifying for this exemption upon receipt of a completed Application for Registration form (Form TA-1).

(d) Sales to government agencies. The sale or transfer of a motor vehicle, trailer, or other vehicle to the United States or Massachusetts, or to their respective subdivisions or agencies, is exempt from the sales and use tax. This exemption may be allowed by the Registrar, but only if the vehicle is registered in the name of the agency claiming the exemption.

(e) Intra-family casual and isolated sales or transfers. The casual and isolated sale or transfer of a motor vehicle, trailer, or other vehicle is exempt from the sales and use tax as follows:

1. Requirements for exemption:

a. Motor vehicles and trailers. The casual and isolated sale or transfer of a motor vehicle or trailer is exempt from the sales and use tax only if the purchaser or transferee is the parent, spouse, child, brother, or sister of the seller or transferor. For the purposes of 830 CMR 64H.25.1(7)(e), a vehicle owned jointly by a husband and wife may be treated as owned by either.

b. Other vehicles. The casual and isolated sale or transfer of a vehicle other than a motor vehicle or trailer is exempt from the sales and use tax.

64H.25.1: continued

2. This exemption may be allowed by the Registrar, but only if the seller or transferor previously registered the vehicle in Massachusetts, and if the Registrar receives an affidavit signed by the seller or transferor and the purchaser or transferee identifying the specific relationship between the parties to the sale or transfer, and stating that they are so related. If the surnames of the parties to the sale or transfer are the same, or if the parties reside at the same address, only the purchaser or transferee is required to sign the affidavit. The affidavit must be on a form prescribed by the Commissioner.
- (f) Sales to the disabled. The sale or transfer of a motor vehicle to and for the use of any person who has suffered the loss or permanent loss of use of both legs, or both arms, or one leg and one arm is exempt from the sales and use tax. For the purposes of 830 CMR 64H.25.1(7)(f), a vehicle owned jointly by a husband and wife may be treated as owned by either.
1. This exemption applies only to a single motor vehicle which must be purchased by and registered for the personal, non-commercial use of the purchaser or transferee qualifying for this exemption.
 2. Loss of use under 830 CMR 64H.25.1(7)(f), means a loss of function of at least 80%.
 3. This exemption may be allowed by the Registrar, but only if the Registrar receives an affidavit from the person qualifying for this exemption and the person's physician stating that the person suffers a loss of use described in 830 CMR 64H.25.1(7)(f). If the claim of exemption is based upon the loss of two arms or two legs, or one arm and one leg, the affidavit may be signed by either the person qualifying for the exemption or the person's physician. The affidavit must be on a form prescribed by the Commissioner.
- (g) Out-of-state transfers. The sale or transfer of a motor vehicle, trailer, or other vehicle in any state or territory within the United States that is subsequently brought to or used in Massachusetts is exempt from Massachusetts use tax as follows:
1. Requirements for exemption:
 - a. the purchaser or the transferee must have paid a sales or use tax on the vehicle to the state or territory in which the sale or transfer occurred;
 - b. the sales or use tax must have been paid by the purchaser or the transferee and legally due the state or territory;
 - c. the purchaser or the transferee must not have received and must not have a right to receive a refund or credit of the sales or use tax from the state or territory in which the sale or transfer occurred; and,
 - d. the state or territory to which the sales or use tax was paid must allow a corresponding exemption with respect to motor vehicle sales and use taxes paid to Massachusetts.
 2. This exemption may be allowed only by the Commissioner. The Registrar may not issue a Certificate of Title and Registration for any vehicle as to which a claim of exemption under 830 CMR 64H.25.1(7)(g) has been made unless the Commissioner has first approved the exemption on the Application for Title and Registration (Form RMV-1).
 3. To establish a claim of exemption under 830 CMR 64H.25.1(7)(g), the purchaser or transferee must submit to the Commissioner a receipt from the state or territory in which the sale or transfer occurred, showing the amount of sales or use tax paid, the date and place of payment, and the name of the payor. If the purchaser or transferee does not submit a receipt, the Commissioner may accept a Certificate of Title and Registration issued to the purchaser or transferee from the state or territory in which the sale or transfer occurred as proof that the tax was previously paid by the purchaser or transferee. The purchaser or transferee must also submit to the Commissioner an affidavit stating that the purchaser or transferee did not receive and is not entitled to receive credit or refund of the tax. The affidavit must be on a form prescribed by the Commissioner.
 4. If this exemption applies and if the rate of tax imposed by the state or territory in which the vehicle was sold or transferred is less than the rate imposed by Massachusetts, the purchaser or transferee must pay a use tax computed by multiplying the sales price of the vehicle by the difference between the Massachusetts rate and the rate imposed by the state or territory in which the vehicle was sold or transferred. The tax must be paid pursuant to 830 CMR 64H.25.1(4) and (5).

64H.25.1: continued

5. Examples. The following examples illustrate the application of 830 CMR 64H.25.1(7)(g).

Example 1: Mr. Jones is a resident of State X, which has no sales or use taxes. Mr. Jones purchases a motor vehicle in State X, where he registers it and uses it for three months. He then moves to Massachusetts and registers the vehicle in Massachusetts. Mr. Jones must pay a use tax in Massachusetts because he did not pay a sales or use tax on the vehicle in State X.

Example 2: Mr. Right lives in Massachusetts. While vacationing in State Z, Mr. Right purchases a motor vehicle for \$10,000 and thereafter brings it to Massachusetts. Under the sales and use tax laws of State Z, Mr. Right is required to pay and does pay a sales tax to State Z computed at the rate of 4% of the sales price (or \$400). State Z honors the sales and use tax laws of Massachusetts and does not impose its sales and use tax on vehicles which are purchased and taxed in Massachusetts. Mr. Right must pay a use tax to Massachusetts, but the tax is computed on the sales price multiplied by the difference between the Massachusetts rate (5%) and the rate of tax in State Z (4%). The use tax is therefore \$10,000 x 1% or \$100.

For additional examples, see 830 CMR 64H.25.1(3)(d).

(h) Vehicles used in interstate commerce. The sale or transfer of a motor vehicle, trailer, or other vehicle in any state or territory within the United States that is subsequently brought to or used in Massachusetts for purposes of interstate commerce, is exempt from Massachusetts use tax if the sale or transfer of the vehicle is exempt under the provisions of 830 CMR 64H.25.1(7)(g), or if the use of the vehicle in Massachusetts as part of interstate commerce is exempt from use tax under the Constitution or laws of the United States. For the purposes of this subsection, the use of such a vehicle in Massachusetts as part of interstate commerce is exempt from Massachusetts use tax under the Constitution or laws of the United States only if application of the use tax violates the test applied by the United States Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), or any other test subsequently developed by the courts or enacted under the laws of the United States. Under the *Complete Auto Transit* test, the imposition of a use tax is permissible if

1. the tax is applied to an activity that has a substantial nexus with Massachusetts;
2. the tax is fairly apportioned;
3. the tax does not discriminate against interstate commerce; and,
4. the tax is fairly related to the services provided by the taxing authority.

Complete Auto Transit, Inc. v. Brady, 430 U.S. at 279.

(i) Sales of fire engines or ambulances. The sale or transfer of a fire engine or ambulance to and the use thereof by a volunteer non-profit organization providing public fire protection is exempt from the sales and use tax.

1. This exemption may be allowed only by the Commissioner. The Registrar may not issue a Certificate of Title and Registration for a vehicle as to which a claim of exemption under 830 CMR 64H.25.1(7)(i), has been made unless the Commissioner has first approved the exemption on the Application for Title and Registration (Form RMV-1).

64H.25.1: continued

2. To establish a claim of exemption under 830 CMR 64H.25.1(7)(i), the purchaser or transferee must submit to the Commissioner an affidavit from an authorized representative of the organization stating that:

- a. the organization is registered as a volunteer non-profit organization providing public fire protection; and
- b. the vehicle was purchased or transferred exclusively for use as a fire engine or ambulance by the organization.

The affidavit must be on a form prescribed by the Commissioner.

(j) Sales to common carriers. The sale of a motor bus to a common carrier to provide scheduled intracity local service is exempt from the sales and use tax.

1. This exemption may be allowed only by the Commissioner. The Registrar may not issue a Certificate of Title and Registration for a vehicle as to which a claim of exemption under 830 CMR 64H.25.1(7)(j), has been made unless the Commissioner has first approved the exemption on the Application for Title and Registration (Form RMV-1).

2. To establish a claim of exemption under 830 CMR 64H.25.1(7)(j), the carrier must hold a Certificate of Exemption form (Department of Revenue Form MVU-20) issued by the Commissioner. The Commissioner may issue the certificate to a carrier qualifying for this exemption upon receipt of a certificate from the Department of Public Utilities (or from a city, town, or municipality pursuant to its authority under M.G.L. c. 161A, § 11A) stating that the motor bus will be used for scheduled intracity local service.

(k) Sales to foreign diplomats. The sale or transfer of a motor vehicle, trailer, or other vehicle to an ambassador, minister, foreign mission or other diplomatic representative of a foreign government is exempt from the sales and use tax.

1. This exemption may be allowed only by the Commissioner. The Registrar may not issue a Certificate of Title and Registration for a vehicle as to which a claim of exemption under 830 CMR 64H.25.1(7)(k), has been made unless the Commissioner has first approved the exemption on the Application for Title and Registration (Form RMV-1).

2. To establish a claim of exemption under 830 CMR 64H.25.1(7)(k), the purchaser or transferee must submit to the Commissioner a copy of a Tax Exemption Card or Mission Tax Exemption Card from the United States Department of State issued to or in the name of the purchaser or transferee.

(8) Transfers without consideration.

(a) General rule. The transfer of a motor vehicle, trailer, or other vehicle without consideration is exempt from the sales and use tax. Transfers which qualify as transfers without consideration are listed in 830 CMR 64H.25.1(8), and are exempt from tax subject to the following rules.

(b) Transfers by gift. The transfer of complete ownership of a motor vehicle, trailer, or other vehicle by a donor to a donee, without consideration and with an intent on the part of the donor that the transfer is a gift, is exempt from the sales and use tax.

1. This exemption may be allowed only by the Commissioner. The Registrar may not issue a Certificate of Title and Registration for a vehicle as to which a claim of exemption under 830 CMR 64H.25.1(8)(b), has been made unless the Commissioner has first approved the exemption on the Application for Title and Registration (Form RMV-1).

2. To establish a claim of exemption under 830 CMR 64H.25.1(8)(b), both donor and donee must submit to the Commissioner an affidavit on a form prescribed by the Commissioner stating that:

- a. neither party made or received payment in any form in connection with the transfer;
- b. neither party made a promise of payment for the vehicle, and neither party expects payment in the future;

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- c. neither party assumed any debt in connection with the transfer; and
- d. at the time of the transfer, the donor intended to make a gift of the vehicle to the donee.

(c) Transfers for contests, drawings, and raffles. The transfer of a motor vehicle, trailer, or other vehicle to the winner of a contest, drawing, or raffle is deemed to be a gift from the sponsor to the winner, and the winner is exempt from the sales and use tax. However, the donation of a vehicle by a dealer or lessor for a contest, drawing, or raffle is a use of the vehicle by the dealer or lessor other than for resale in the regular course of business, and, accordingly, is subject to the use tax. The use tax must be paid by the dealer or lessor pursuant to 830 CMR 64H.25.1(4) and (5). The tax is computed on the cost of the vehicle to the dealer or lessor, including the cost of all accessories installed by the dealer or lessor.

1. This exemption may be allowed only by the Commissioner. The Registrar may not issue a Certificate of Title and Registration for a vehicle as to which a claim of exemption under this Division, 830 CMR 64H.25.1(8)(c), has been made unless the Commissioner has first approved the exemption on the Application for Title and Registration (Form RMV-1).

2. To establish a claim of exemption under 830 CMR 64H.25.1(8)(c), the winner must submit to the Commissioner an affidavit on a form prescribed by the Commissioner and signed by both the winner and an authorized representative of the sponsor which:

- a. states the name and address of the person, if any, donating the vehicle to the sponsor;
- b. states the name and address of the sponsor; and
- c. states that the person seeking the exemption is the contest winner.

(d) Transfers by inheritance. The transfer of a motor vehicle, trailer, or other vehicle at death, by intestacy, will, or otherwise, to an heir, legatee, or other beneficiary is exempt from the sales and use tax.

1. This exemption may be allowed by the Registrar, but only upon receipt of the following:

- a. a copy of a Notice of Appointment from a Probate Court identifying the executor, administrator, or other personal representative of the decedent's estate, if applicable; and
- b. an affidavit, signed by both the executor, administrator, or other personal representative of the decedent's estate and the transferee, stating that the transferee is entitled to the title to or possession of the vehicle under the laws of intestacy, under the will, or otherwise. The affidavit must be on the letterhead of the executor, administrator, or other personal representative, or on a form prescribed by the Commissioner.

2. If the transferee is the surviving spouse of the decedent, the Registrar may accept, in lieu of any other documents, a copy of the decedent's death certificate and an affidavit signed by the surviving spouse, stating that he or she is entitled to the vehicle under the laws of intestacy, under the will, or otherwise.

(e) Transfers by repossession. The transfer by repossession of a financed or secured motor vehicle, trailer, or other vehicle to the lienholder or security holder is exempt from the sales and use tax, but only if a sales or use tax on the vehicle was previously paid by the debtor. If the lienholder or security holder thereafter registers the vehicle with the Registrar, this exemption does not apply.

1. This exemption may be allowed only by the Commissioner. The Registrar may not issue a Certificate of Title and Registration for a vehicle as to which a claim of exemption under 830 CMR 64H.25.1(8)(e), has been made unless the Commissioner has first approved the exemption on the Application for Title and Registration (Form RMV-1).

2. To establish a claim of exemption under 830 CMR 64H.25.1(8)(e), the lienholder or security holder must submit to the Commissioner the following:

- a. the Certificate of Title stating the name of the lienholder or security holder;

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b. an affidavit on a form prescribed by the Commissioner signed by an authorized representative of the lienholder or security holder stating that the vehicle was repossessed under authority of a lien or security interest; and

c. proof that a sales or use tax on the vehicle was previously paid by the debtor. A Certificate of Title and Registration in the name of the debtor is sufficient to satisfy this requirement.

(f) Transfers to insurers. The transfer of a motor vehicle, trailer, or other vehicle to an insurer is exempt from the sales and use tax, but only if the transfer is made by an insured in connection with a claim for the loss or loss of use of the vehicle under an insurance policy, and if a sales or use tax on the vehicle was previously paid by the insured. If the insurer thereafter registers the vehicle with the Registrar, this exemption does not apply.

1. This exemption may be allowed only by the Commissioner. The Registrar may not issue a Certificate of Title and Registration for a vehicle as to which a claim of exemption under 830 CMR 64H.25.1(8)(f), has been made unless the Commissioner has first approved the exemption on the Application for Title and Registration (Form RMV-1).

2. To establish a claim of exemption under 830 CMR 64H.25.1(8)(f), the insurer must submit to the Commissioner an affidavit signed by an authorized representative of the insurer stating that the vehicle was transferred by an insured in connection with a claim under an insurance contract for the loss or loss of use of the vehicle. The affidavit must be on a form prescribed by the Commissioner. A Certificate of Title and Registration in the name of the insured is sufficient to satisfy the requirement that the insured previously paid a tax on the vehicle.

(g) Sales and transfers to or from business entities. The sale or transfer of a motor vehicle, trailer, or other vehicle to or from a business entity is generally subject to the sales or use tax. However, the sale or transfer of a motor vehicle, trailer, or other vehicle to or from a business entity is exempt from tax as follows:

1. Requirements for exemption. In all cases the transferor must have previously paid a sales or use tax on the vehicle; and

a. the sale or transfer must be pursuant to a transaction which qualifies as a "reorganization" within the meaning of I.R.C. § 368(a)(1); or

b. the sale or transfer must be pursuant to the formation of a partnership or corporate trust, or pursuant to the organization of a corporation, solely in exchange for an ownership interest in the enterprise; or

c. the sale or transfer must be to an owner of a business entity solely in exchange for the owner's interest on the complete dissolution of a partnership or corporate trust, or the complete liquidation of a corporation.

2. The sale or transfer of a vehicle by a business entity in exchange for cash or other consideration which is thereafter distributed to an owner on the dissolution of a partnership or corporate trust, or on the liquidation of a corporation, is not exempt from tax under 830 CMR 64H.25.1(8)(g).

3. This exemption may be allowed only by the Commissioner. The Registrar may not issue a Certificate of Title and Registration for a vehicle as to which a claim of exemption under 830 CMR 64H.25.1(8)(g), has been made unless the Commissioner has first approved the exemption on the Application for Title and Registration (Form RMV-1).

4. To establish a claim of exemption under 830 CMR 64H.25.1(8)(g), the Commissioner must receive an affidavit on a form prescribed by the Commissioner and signed by an authorized representative of the transferor and by an authorized representative of the transferee stating that the sale or transfer is exempt from tax, and stating the specific provisions within 830 CMR 64H.25.1(8)(g), under which the exemption is claimed. If a Final Determination Letter from the Internal Revenue Service has been issued with respect to the transaction, the letter must accompany the affidavit. A Certificate of Title and Registration in the name of the transferor is sufficient to satisfy the requirement that the transferor previously paid a tax on the vehicle.

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5. If the sale or transfer occurs within 90 days from the date of the transaction under which the exemption is claimed, it is presumed that the sale or transfer qualifies for this exemption. If the sale or transfer occurs after the 90th day following the date of the transaction under which the exemption is claimed, it is presumed that the transfer does not qualify for this exemption. Both of the presumptions under 830 CMR 64H.25.1(8)(g)5. are rebuttable, and may be overcome by sufficient evidence to the contrary.

6. If the Commissioner reasonably believes that the transaction under which the exemption is claimed was undertaken not for a bona fide business purpose but to avoid imposition of any tax, the exemption will not be approved.

(9) Rules for computation of tax by lessors.

(a) General rule. The lease or rental of a motor vehicle, trailer, or other vehicle by a lessor in the regular course of business is a sale at retail and is subject to the sales tax. Each period for which a lease or rental payment is charged is considered a completed retail sale for the purpose of the imposition, collection, and payment of the tax. The sales price on which the tax is computed for each period is the total lease or rental charges for that period, subject to the following rules:

1. If a motor vehicle, trailer, or other vehicle is leased or rented for a period of one year or more, and if the amount charged includes charges for fuel, insurance, motor vehicle excise, or registration fee, and if the charges for those items are separately stated in the lease, rental agreement, or billing, the charges for those items are not included in the sales price on which the tax is computed.

2. If a motor vehicle is leased or rented for one year or more, and if the amount charged includes charges for insurance, motor vehicle excise, and registration fee which are not separately stated, the sales price on which the tax is computed for each period is reduced by 20%. The preceding sentence does not apply to finance leasing arrangements.

3. If a motor vehicle is leased or rented for one year or more, and if the amount charged includes charges for fuel, insurance, motor vehicle excise, and registration fee which are not separately stated, the sales price on which the tax is computed for each period is reduced by 30%. The preceding sentence does not apply to finance leasing arrangements.

4. All other lease or rental arrangements are governed by the general rule in 830 CMR 64H.25.1(9)(a).

(b) If a vehicle which has been leased or rented is sold or transferred by a lessor, the sale or transfer is subject to the use tax under M.G.L. c. 64I, § 2 and 830 CMR 64H.25.1.

(c) Examples. The following examples illustrate the application of 830 CMR 64H.25.1(9):

Example 1: R&R Motors, a leasing company, purchases a Cadillac for leasing in the regular course of business. R&R Motors leases the Cadillac to P under a two year contract under which P is obligated to pay \$500 per month. Included in the monthly charge are the following: insurance (personal liability, property, fire, theft, and collision), \$70; motor vehicle excise tax, \$34; and registration, \$1. R&R Motors separately states its charges for insurance, excise tax and registration. In this example, it will collect \$19.75 in sales tax per month (\$500 minus \$105 x 5%) from P, in addition to the \$500 leasing charge.

Example 2: The facts are the same as in Example 1, above, except that R&R Motors does not separately state the charges for insurance, excise tax and registration. In this example, it will collect \$20 in sales tax per month (\$500 x 80% x 5%) from P, in addition to the \$500 leasing charge.

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(10) Use of exempt vehicles by dealers and lessors.

(a) General rule. The sale of a motor vehicle, trailer, or other vehicle to a Massachusetts dealer or Massachusetts lessor who purchases the vehicle for resale in the regular course of business is exempt from the sales and use tax. During the period in which the vehicle is held for resale, the dealer or lessor may use it for demonstration or display, without incurring liability for sales or use tax. However, if the dealer or lessor uses the vehicle for any purpose other than resale in the regular course of business, a use tax must be paid to the Commissioner. The tax is computed on the cost of the vehicle to the dealer or lessor which includes the cost of any and all accessories installed by the dealer or lessor, subject to the following rules:

(b) Rules for dealers.

1. If the vehicle is registered with the Registrar, the use tax is computed and paid in a single payment pursuant to the applicable rules 830 CMR 64H.25.1(4) and (5).

2. If the vehicle is not registered with the Registrar, the dealer may elect one of two methods of payment, as follows:

a. the dealer may pay the use tax in a single payment pursuant to the applicable rules of 830 CMR 64H.25.1(4) and (5); or

b. the dealer may pay a monthly use tax of 5% for each vehicle used computed on 3% of the cost of the vehicle. If the dealer elects this method of payment, the dealer must file each month with the Commissioner a Sales and Use Tax Return (Department of Revenue Form ST-9M), along with payment of the monthly tax.

(c) Rules for lessors. If a lessor is required to pay a use tax under the general rule of 830 CMR 64H.25.1(10)(a), the lessor must pay the tax in a single payment pursuant to the applicable rules of 830 CMR 64H.25.1(4) and (5).

(d) Use of "Dealer" or "Repair" license plates. A motor vehicle, trailer, or other vehicle bearing a "Dealer" license plate issued by the Registrar pursuant to M.G.L. c. 90, may be used only for demonstration or display. A motor vehicle, trailer, or other vehicle bearing "Repair" license plates issued by the Registrar pursuant to M.G.L. c. 90, may be used only if the vehicle is being repaired, altered, equipped, or being transferred for repairs, alteration, or equipment. The use by a dealer or lessor of a vehicle bearing "Dealer" or "Repair" license plates in any manner other than the purposes stated in 830 CMR 64H.25.1(10)(d), is a use other than for resale in the regular course of business, and is subject to the use tax pursuant to the rules of 830 CMR 64H.25.1(10).

(e) Trade-ins by dealers and lessors. If a dealer or lessor is required to pay a use tax on the cost of a vehicle pursuant to the rules of 830 CMR 64H.25.1(10), the cost of the vehicle to the dealer or lessor may not be reduced by any amount credited toward the cost by reason of a trade-in.

(f) Examples. The following examples illustrate the provisions of 830 CMR 64H.25.1(10):

Example 1: The cost to Able Motors, Inc. for every vehicle which it purchases for resale is \$6,000, which amount includes the accessories it installs in each vehicle. Each year the president of Able Motors, Inc. takes one of the vehicles which was purchased for resale and uses it for personal purposes. The vehicle is registered in the name of Able Motors, Inc. Able Motors, Inc. must pay a use tax each year for the vehicle which it registers for the president's personal use. The tax is computed and paid pursuant to 830 CMR 64H.25.1(4) and (5).

Example 2: The facts are the same as in the previous example, but in addition to the president, the salespeople who are employed by Able Motors, Inc. are permitted to use ten demonstration vehicles for various company errands unrelated to customer demonstration. Each of these vehicles bears a "Dealer" plate. Able Motors, Inc. must pay a use tax on each of these vehicles. It may compute the use tax at the rate of 5% of its cost for each vehicle (5% x \$6,000) and pay a use tax of \$300 for each of the ten vehicles, or it may elect to pay a monthly tax for each vehicle so used computed at the rate of 5% multiplied by 3% of its cost of the vehicle. If it elects this method of payment it must file a Sales Tax Return (Form ST-9M) and pay a use tax each month of \$90 (5% x 3% x \$6,000 x 10).

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(11) Off-road and other vehicles.

(a) General rule. For the purpose of computing and paying the tax under M.G.L. c. 64H, §§ 3(c) and 26, and M.G.L. c. 64I, §§ 4 and 27, and 830 CMR 64H.25.1(4) and (5), the term "motor vehicle" means a vehicle designed for use and used primarily for transportation or travel on public highways. Off-road vehicles such as crawler tractors, front end loaders, cranes, and similar or other off-road vehicles are not motor vehicles or trailers under 830 CMR 64H.25.1(11)(a).

(b) Sales by dealers and lessors. Upon the retail sale of an off-road or other vehicle which is not a motor vehicle or trailer as defined in 830 CMR 64H.25.1(11)(a), by a Massachusetts dealer or Massachusetts lessor in the regular course of business, the tax is paid to the dealer or lessor. No reduction from the sales price for an amount credited toward the sales price as a trade-in is allowed.

(c) Casual and isolated sales or transfers. The casual and isolated sale or transfer of an off-road or other vehicle which is a motor vehicle or trailer under 830 CMR 64H.25.1(2), is subject to the use tax. The casual and isolated sale or transfer of an off-road or other vehicle which is not a motor vehicle or trailer as defined in 830 CMR 64H.25.1(2), is exempt from the sales and use tax.

(12) Refunds of tax for rescinded and void sales.

(a) General rule. The Commissioner shall refund the sales or use tax paid on a motor vehicle, trailer, or other vehicle if the sale of the vehicle is rescinded, or if the sale of the vehicle is void at law, subject to the following rules.

(b) Rescinded Sales. The purchaser must return the motor vehicle to the seller within 180 days from the date of sale and must receive the full consideration paid for the motor vehicle in cash or credit, less the seller's established handling fees, if any, before claiming a refund; or

(c) Sales void at law. The sale must be void at law because the seller did not have lawful title to or ownership of the vehicle at the time of the sale; and

(d) The purchaser must timely file with the Commissioner an Application for Abatement (Department of Revenue Form CA-6) pursuant to M.G.L. c. 62C, § 37, and the regulations thereunder (830 CMR 62C.37.1: Abatements.)

(13) Record-keeping requirements.

(a) General rule. Every person who sells, transfers, purchases, stores, uses, or otherwise consumes a motor vehicle, trailer, or other vehicle subject to the provisions of M.G.L. c. 64H or c. 64I and 830 CMR 64H.25.1, must retain copies of all returns, forms, records, and other documents pursuant to State Tax Administration Regulation 830 CMR 62C.25.1: (Record Retention).

(b) The provisions of 830 CMR 64H.25.1(13), are in addition to any other record-keeping requirements imposed by M.G.L. c. 62C or any other law, or established by the Commissioner.

(14) Interest and other penalties.

(a) General rule. The provisions of M.G.L. c. 62C relating to interest and penalties are applicable to any failure to pay the tax imposed by M.G.L. c. 64H or c. 64I and 830 CMR 64H.25.1.

(b) Suspension and revocation of Vendor's Registration Certificates. Any Massachusetts dealer or Massachusetts lessor who fails to pay any tax required from such dealer or lessor under the provision of M.G.L. c. 64H or c. 64I and 830 CMR 64H.25.1, may be subject to suspension and revocation of its Massachusetts Vendor's Registration Certificate (Form ST-1).

(c) Criminal penalties. The criminal penalties for evasion of tax provided in M.G.L. c. 62C are applicable to the tax imposed by M.G.L. c. 64H and c. 64I and 830 CMR 64H.25.1.

(d) Other penalties. The provisions of 830 CMR 64H.25.1(14), are in addition to any other penalties imposed by law or established by the Commissioner.

64H.25.1: continued

(15) Department of Revenue guidelines, etc.

(a) General rule. Pursuant to the Commissioner's statutory authority, the Commissioner may establish, and from time to time revise, written guidelines, procedures, and other documents described in State Tax Administration Regulation 830 CMR 62C.3.1: Department of Revenue Public Written Statements, as may be necessary for the proper and efficient administration and enforcement of M.G.L. c. 64H and c. 64I and 830 CMR 64H.25.1. Such guidelines, procedures, and other documents shall be supplemental to and not inconsistent with the provision of those statutes and 830 CMR 64H.25.1.

(b) Distribution to dealers and lessors. The Commissioner may distribute to Massachusetts dealers and Massachusetts lessors written guidelines, procedures, and other documents which describe and explain M.G.L. c. 64H and c. 64I and 830 CMR 64H.25.1. The Commissioner may require Massachusetts dealers and Massachusetts lessors to provide such written guidelines, procedures, and other documents to purchasers of motor vehicles and trailers at the time of sale.

(16) Use of Motor Vehicles by Limousine Businesses.

(a) General rule. A limousine business will be required to pay sales tax on its purchases of limousines. The furnishing of limousines driven by employees of the limousine business is a transportation service exempt from sales tax. This rule applies to transactions on or after June 30, 1988, the operational date of this section, 830 CMR 64H.25.1(16).

(b) Definitions. For the purposes of this section, 830 CMR 64H.25.1(16), the following terms have the following meanings:

Customer, a person or entity who engages a limousine business to provide transportation.

Employee, any person who is at least temporarily under the direct control and supervision of another person.

Limousine business, a business that generally provides transportation in motor vehicles driven by chauffeurs who are employees of the business.

(c) Purchases of motor vehicles by limousine businesses.

1. Purchases of motor vehicles for resale and lease.

a. The purchase of a limousine or other motor vehicle is exempt under 830 CMR 64H.25.1(7)(b), the exemption for sales and purchases for resale, only if the limousine is used exclusively for resale, lease, or rental. See 830 CMR 64H.25.1(7)(b)1.

b. Limousine businesses generally do not resell, lease, or rent their limousines to their customers.

2. Limousine businesses to pay sales tax upon registration. Limousine businesses will pay sales tax on their purchases of limousines upon registration, calculated at 5% of the purchase price of the limousines.

(d) Limousine businesses and the furnishing of transportation services.

1. Under M.G.L. c. 64H, § 1(13)(b), transportation services are not subject to Massachusetts sales and use tax.

2. If the customer of a limousine business hires a limousine to be driven by an employee of the limousine business, the transaction is a nontaxable transportation service.

3. If the customer of a limousine business hires a limousine to be driven by the customer, the transaction is a taxable rental of tangible personal property.

4. The occasional or incidental taxable rental of a limousine by a limousine business to a customer does not alter the requirement that the limousine business pay sales tax on its purchases of limousines upon registration.

(e) Limousine businesses to be removed from current listing of Massachusetts lessors.

The Commissioner will require all limousine businesses to identify themselves as limousine businesses under procedures to be announced by the Department, in accord with 830 CMR 64H.25.1(15). The Commissioner will remove limousine businesses from the current list of Massachusetts lessors described in 830 CMR 64H.25.1(7)(b)5.

830 CMR: DEPARTMENT OF REVENUE

REGULATORY AUTHORITY

830 CMR 64H.00: M.G.L. c. 64H; c. 14, § 6(1); c. 62C, § 3.