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Docket: CIVIL ACTION NO. 2017-1772 BLS1

Date: September 11, 2017

Parties: AMERICAN CATALOG MAILERS ASSOCIATION and NETCHOICE VS. MICHAEL J. HEFFERNAN, in his capacity as Commissioner of the MASSACHUSETTS DEPARTMENT OF REVENUE

Judge: Mitchell H. Kaplan, Justice of the Superior Court

ORDER ON DEFENDANT'S EMERGENCY MOTION TO VACATE MEMORANDUM OF DECISION AND ORDER ENTERING DECLARATORY JUDGMENT ON COUNT I AND REVISED ORDER FOR THE ENTRY OF FINAL JUDGMENT

On June 28, 2017, this Court issued a Memorandum of Decision and Order Entering Declaratory Judgment on Count I of Plaintiff's Verified Complaint (the Decision). The Decision concluded with the following Order:

For the foregoing reasons, Final Judgment shall enter (a) as to Count One of the Complaint, declaring that the Directive is a regulation promulgated without compliance with Sections 2 or 3 of G.L. Chapter 30A and, therefore, invalid; and (b) as to Counts Two through Four dismissing these counts without prejudice.

Apparently also on June 28, 2017, the defendant (DOR) revoked the Directive and filed with the court pleadings entitled: "Defendant's Notice of Immediate Revocation of Department of Revenue Directive 17-1" and "Defendant's Notice of Objection to Entry of Final Declaratory Judgment on Count I." The Decision was, however, completed and signed by the Court well before it received these two pleadings. Thereafter, the DOR filed the pending motion in which it asks the court to vacate the Decision.

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The court denies the motion to the extent that it requests that the Decision be vacated. Count I of the complaint presented a pure issue of law. The parties submitted what appeared to be comprehensive briefs addressing it. There was a lengthy oral argument on the issue on June 27, 2017. The Directive was to go into effect on July 1, 2017. During argument, the DOR rejected the court's suggestion that it voluntarily delay the date by which internet retailers would have to be in compliance with the Directive. During argument, the court made quite clear its intention to enter a final judgment on Count One (and dismiss the other counts), if it concluded that the Directive was a regulation, as it was undisputed that it had not been promulgated following the procedures required by the Administrative Procedures Act. The DOR expressed no objection to this approach until the following day. By then, the Court had completed and signed the Decision while the matters raised by Count One were still actively in dispute between the parties to this litigation.

However, before the separate Final Judgment required by Mass.R.Civ.P. 58 (a) could issue, the court learned that the Directive had been revoked "effective immediately." It is the court's understanding that, thereafter, the DOR began the process of promulgating the Directive as a regulation in accordance with the APA. It therefore appears that the Directive that was the subject of this litigation is no longer in effect, nor is it likely to be resurrected other than as a regulation. In consequence, the issues raised by the complaint are no longer presently in dispute, but rather have become moot.

Therefore, the court **ALLOWS** the DOR's motion to the following extent only. The Order set out in the Decision is revised as follows:

Final Judgment shall enter dismissing the Complaint on the grounds that the claims asserted therein have become moot.

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In all other respects the motion is DENIED.

Mitchell H. Kaplan, Justice of the Superior Court

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