



**Steve Leimberg's Income Tax Planning Email Newsletter -  
Archive Message #275**

**Date: 05-Aug-25**

**From: Steve Leimberg's Income Tax Planning Newsletter**

**Subject: Marc Soss on Welch v. Commissioner of Revenue - How  
Can a Non-Massachusetts Resident's Stock Gain be Subject to  
Massachusetts Income Tax?**

“It is important for attorneys and advisors to make their clients aware that establishing an entity or doing business in Massachusetts comes with potential perils. G. L. c. 62, § 5A permits a tax on a nonresident who did business in the Commonwealth regardless of whether the business was conducted in that particular year. ‘All items of income that derive from the conduct of a trade or business or employment in Massachusetts, as those terms are defined in 830 CMR 62.5A.1(3)(a)1., are Massachusetts source income, even if the taxpayer has not been present in Massachusetts during the year of receipt.’ This ruling has wide-reaching implications for entrepreneurs, employees, and business owners, particularly those who have moved out of Massachusetts (or other states with similar tax regimes) but retain equity interests in companies they helped build within the state. Of greater concern is that this ruling, if not overturned, could inspire other states to adopt similar tax positions to generate revenue.”

Marc Soss, J.D., LL.M., provides members with commentary on the case of Welch v. Commissioner of Revenue, No. 24-P-109 (Mass. App. Ct. April 3, 2025) and its application to employees that receive stock and non-resident entrepreneurs who establish and operate a business in the Commonwealth of Massachusetts. If not overturned by the Massachusetts Supreme Court, the commonwealth could see itself as the worst place in the United States to start a business and lead to other states following along.

Marc Soss’ practice focuses on estate planning, probate and trust administration, and corporate legal matters in Sarasota and Manatee County, Florida. Marc is a frequent contributor to LISI and has published articles in the Florida Bar, Rhode Island Bar, North Carolina Bar and National Contract Management Association magazine. Marc is also a retired United States Navy Supply Corps Officer.

Here is his commentary:

**EXECUTIVE SUMMARY:**

On April 03, 2025, the Appeals Court of the Commonwealth of Massachusetts entered its ruling in Welch v. Commissioner of Revenue, No. 24-P-109. The case derives from the Welch’s appeal of a decision of the Appellate Tax Board (“Tax Board”) concluding that they were not entitled to an abatement of Massachusetts income tax on their gain from the sale of AcadiaSoft stock (“Stock”). In affirming the Tax Board, the Appellate Court concluded that under G. L. c. 62, § 5A (a), the gain from the sale was “derived from or effectively connected with his trade or business or employment at AcadiaSoft,” and the tax applied “even though at the time of the sale he was no longer actively engaged in a trade or business or employment in the commonwealth.”

## **COMMENT:**

### Company Background:

In 2003, Craig H. Welch (“Welch”) formed AcadiaSoft as a corporation in the Commonwealth of Massachusetts. He subsequently voluntarily dissolved the entity in 2005, and formed a new entity, under the same name, with Danny J. Moyse. In 2006 and 2007, AcadiaSoft raised funding from “angel investors” in return for 28.2% of its common stock. This diluted Welch's share of the stock down to 35.9%. In 2009, AcadiaSoft merged into a Delaware corporation of the same name, and received additional funding from financial services firms. This diluted Welches stock ownership to 13%.

In 2013, AcadiaSoft entered into another round of financing which further diluted Welch's share of AcadiaSoft stock to 11.86%. In June 2015, AcadiaSoft offered to purchase Welch's shares, contingent on all the holders of common stock agreeing to sell their shares. Welch accepted the offer and AcadiaSoft entered into another round of financing and then purchased the entirety of Welch's shares.

### Craig H. Welch:

Between 2003 - 2014, the Welch’s filed Massachusetts resident income tax returns. During those years he reported \$0 in wage income for 2003 – 2005; \$5,533.77 in 2006; \$7,235.42 in 2007; \$80,415 in 2008; \$185,274 in 2009; \$192,708 in 2010; \$185,000 in 2011; \$279,692 in 2012; \$245,600 in 2013; \$339,664 in 2014; and \$556,916 in 2015.

On April 30, 2015, the Welch’s moved to New Hampshire. In June 2015, upon the sale of their stock, the Welch’s received a 2015 1099-B tax form which reported cash proceeds of \$4,744,759.96, with no cost or other basis. For 2015, they filed a Massachusetts nonresident/part-year resident tax return, on which they reported that amount as having been included as a capital gain on their federal income tax return, but none on their Massachusetts tax return.

### Audit, Assessment & Tax Board:

On January 18, 2019, the Commissioner issued a Notice of Intent to Assess, followed by a Revised Notice of Intent to Assess on February 26, 2019. The Commissioner issued a Notice of Assessment on March 5, 2019, which assessed \$244,182 in tax, \$48,836 in interest, and \$42,950.62 in penalties, for a total of \$335,968.62. All based on the gain realized by the sale of their AcadiaSoft stock. The Welch’s then applied for an abatement, which was denied on October 25, 2019. The Welch’s then appealed the decision to the Tax Board on November 7, 2019.

On appeal, the Welch’s argued: (i) separateness of entity and shareholder trade or business; (ii) adequate compensation for employment; and (iii) strict construction of tax laws. The Welch’s cited Massachusetts caselaw which recognizes that the trade or business of a C or S corporation is separate and distinct from the trade or business of its shareholders for purposes of G.L. c. 62, § 5A (Commissioner of Revenue v. Dupee, 423 Mass. 617 (1996)). The Welch’s argued that Mr. Welch

received adequate compensation during his time employed at the company, and the Tax Commissioner's position that the entire stock gain is also wage income taxable under § 5A disregards that fact. Further, the Welch's invoked the principal that "tax laws are to be strictly construed, and any doubts resolved in favor of the taxpayer." (*Cabot v. Commissioner of Corps. & Taxation*, 267 Mass. 338, 340 (1929)).

In response, the Tax Board noted that § 5A (a) "incorporates an exceedingly broad definition of the phrase derived from or effectively connected with any trade or business." That definition includes the list of phrases "results from, is earned by, is credited to, accumulated for or otherwise attributable to," and specifically enumerates sources of taxable income as including what occurred here: "gain from the sale of an interest in a business." Further, the new § 5A permits a tax on a nonresident who did business in the Commonwealth regardless of whether the business was conducted in that particular year. *VAS Holdings & Investments LLC v. Commissioner of Revenue*, 489 Mass. 669, 685-86 (2022) (citing *Gillette Co. v. Commissioner of Revenue*, 425 Mass. 670, 675 (1997)). The regulation makes clear that the gain from the sale of stock in a C corporation may constitute Massachusetts source income if "the stock is related to the taxpayer's compensation for services." 830 Code Mass. Regs. § 62.5A.1(3)(c)(8).

The Tax Board rejected the Welch's arguments based upon the fact that Welch "expected that in the future AcadiaSoft would be worth a lot more than it was when he started it, and was looking forward to the payout from his hard work." As a result, the Tax Board found that Welch was not a passive investor, but a co-founder whose continued employment with the company contributed to its value, he "exclusively devoted his life for more than a decade to AcadiaSoft," "made crucial contributions that added to, and were critical to, the company's value," "expected a payout for his sweat equity" and 2009 refinancing, he became bound by an agreement that tied his status as a key holder of AcadiaSoft stock to his continued employment with the company. The Tax Board applied G. L. c. 62, § 5A, to "the unique circumstances" of the case and concluded that the gain was "compensatory" and "a remuneration that derived from and was effectively connected with his AcadiaSoft employment." For those reasons, the Tax Board had substantial evidence to determine that the gain from the sale of the AcadiaSoft stock was derived from his employment and "was Massachusetts source income because it was effectively connected with his trade, business, or employment in Massachusetts within the meaning of G. L. c. 62, § 5A (a)."

The Tax Boards interpretation of § 5A (a) was further supported by the regulation that went into effect on June 29, 2015. The regulation provided:

"Income from a trade or business may include income that results from the sale of an interest in a business. This rule generally does not apply to the sale of shares of stock in a C or S corporation, to the extent that the income from such gain is characterized for federal income tax purposes as capital gains. Such gain may give rise to Massachusetts source income if, for example, the gain is otherwise connected with the taxpayer's conduct of a trade or business, including employment." 830 Code Mass. Regs. § 62.5A.1(3)(c)(8).

Court of Appeals:

The central issue on appeal was whether the gain from the stock sale was Massachusetts source income (“derived from or effectively connected with his trade or business or employment”) subject to tax under G. L. c. 62, § 5A, and 830 Code Mass. Regs. § 62.5A.1(3)(c)(8) (2006) (regulation). In upholding the Tax Board ruling, the Court of Appeals cited to *Commissioner of Internal Revenue v. Groetzinger*, 480 U.S. 23, 35, 107 S.Ct. 980, 94 L.Ed.2d 25 (1987) (which held that a full-time gambler was engaged in “trade or business” within meaning of 26 U.S.C. §§ 162[a] and 62[1]; “to be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity and the taxpayer's primary purpose for engaging in the activity must be for income or profit”). The Welch’s are seeking further appellate review from the Supreme Judicial Court of the Commonwealth of Massachusetts.

### **Conclusion:**

It is important for attorneys and advisors to make their clients aware that establishing an entity or doing business in Massachusetts comes with potential perils. G. L. c. 62, § 5A permits a tax on a nonresident who did business in the Commonwealth regardless of whether the business was conducted in that particular year. “All items of income that derive from the conduct of a trade or business or employment in Massachusetts, as those terms are defined in 830 CMR 62.5A.1(3)(a)1., are Massachusetts source income, even if the taxpayer has not been present in Massachusetts during the year of receipt.” This ruling has wide-reaching implications for entrepreneurs, employees, and business owners, particularly those who have moved out of Massachusetts (or other states with similar tax regimes) but retain equity interests in companies they helped build within the state. Of greater concern is that this ruling, if not overturned, could inspire other states to adopt similar tax positions to generate revenue.

**HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!**

*Marc Sass*

### **CITE AS:**

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### **CITATIONS:**

Welch v. Commissioner of Revenue, No. 24-P-109 (Mass. App. Ct. April 3, 2025); G.L. c. 62, § 5A(a); 830 CMR, § 62.5A.1(3)(c)(8); *Commissioner of Revenue v. Dupee*, 423 Mass. 617 (1996);

Cabot v. Commissioner of Corps. & Taxation, 267 Mass. 338, 340 (1929); Commissioner of Internal Revenue v. Groetzinger, 480 U.S. 23; VAS Holdings & Investments LLC v. Commissioner of Revenue, 489 Mass. 669 (2022); Gillette Co. v. Commissioner of Revenue, 425 Mass. 670, 675 (1997)

**UPDATE:**

Supreme Judicial Court for the Commonwealth of Massachusetts  
RE: Docket No. FAR-30297

CRAIG H. WELCH & another  
vs.  
COMMISSIONER OF REVENUE

Appellate Tax Board No. C339531  
A.C. No. 2024-P-0109

**NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW**

Please take note that on June 26, 2025, the application for further appellate review was denied.

Very truly yours,  
The Clerk's Office