DLS
DIVISION OF LOCAL SERVICES
MA DEPARTMENT OF REVENUE

Christopher C. Harding
Commissioner of Revenue

Sean R. Cronin
Senior Deputy Commissioner

2019 Municipal Law Seminar
WORKSHOP A
Tax Administration

DISCUSSION SUMMARY
(Prepared For Informational and Training Purposes Only)

This summary of the informal discussion presented at Workshop A is provided for educational and training purposes. It does not constitute legal advice or represent Department of Revenue opinion or policy, except to the extent it reflects statements contained in a public written statement of the Department of Revenue (Informational Guideline Release or Local Finance Opinion).

1. A renewable energy company, "Sunshine Power Co.," is building a utility-scale solar facility in Little Hampton, MA on a 100-acre leased site, part of a 150-acre parcel presently classified for agricultural and horticultural use. The landowner is local farmer Wiley Coyote. The plant's generating capacity will be approximately 50 megawatts. Nearly all electricity produced will be sold to the power grid; yet a small portion of the energy will be used on-site and for the adjacent farm, which is continuing horticultural activities on the remaining 50 acres.

   Sunshine Power Co. has drafted a tax payment agreement which it presents to the town manager. The agreement is threadbare but provides for quarterly payments at the constant amount of $500,000 per year for 20 years. The agreement covers the personal property and the real estate. The town manager is satisfied with the payment level and asks the selectboard to approve the tax payment agreement. The selectboard gives its approval. At no point in the process leading up to execution of the tax payment agreement are the assessors consulted. The assessors are informed once the agreement has been approved by the selectboard.

   After the agreement is in place, the assessors are told to start billing Sunshine Power Co. as they would any taxpayer, with quarterly payments of $125,000 to fall due on August 1, November 1, February 1, and May 1. The agreement makes no provision for billing and collection issues. For the first year, Sunshine Power Co. makes its payments under the agreement, but always after the due date for payment of quarterly bills. The assessors add statutory late payment interest to the quarterly installments received after the due date, which the generating company refuses to pay.

   As bills are being prepared for the second fiscal year in which the tax payment agreement applies, Sunshine Power Co. ceases to comply with the tax payment obligations altogether. The generating company says the town of Little Hampton failed to disclose a

Informal Summary

material fact, which is that the Appellate Tax Board (ATB) has recognized a complete property tax exemption for solar generating equipment. *See KTT, Inc. v. Assessors of Swansea*, Mass. ATB Findings of Fact and Report 2016-426. Sunshine Power Co. says the agreement is invalid for reasons of failure of consideration—the company has no property tax liability for which a tax payment agreement would be appropriate.

The town manager feels double-crossed and orders vigorous legal action. The collector pursues collection remedies, which might entail a contract action in the trial court under G.L. c. 60, § 35 for the amounts due under the agreement. Recognizing the risk that no money damages will be recovered in the trial court litigation, the assessors proceed to issue an omitted assessment for the amounts payable under the agreement for year two. Sunshine Power Co. pays the omitted assessment, applies for abatement, then appeals the abatement denial. G.L. c. 59, § 5, Clause Forty-fifth; G.L. c. 59, § 38H; G.L. c. 60, § 35; G.L. c. 218, § 21.

a. How solid is the tax payment agreement? Does it comply with G.L. c. 59, § 38H(b)? What about Informational Guideline Release (IGR) 17-26?

A city/town may not enter into an agreement in lieu of property tax absent authorization by a general law or special act of the legislature. The only legally authorized payment in lieu of tax (PILOT) agreement that could apply here is under G.L. c. 59, § 38H(b). Therefore, the PILOT must comply with that statute and with the official guidance issued by the Dept. of Revenue, IGR 17-26. First, the statute requires that the agreement "shall be the result of good faith negotiations and shall be the equivalent of the property tax obligation based on full and fair cash valuation." See also IGR 17-26. We have no idea from the facts whether this agreement is reflective of taxes assessed at full and fair cash value; we have no idea how the PILOT payment was derived. The lack of involvement of the assessors, who have the relevant legal authority to arrive at fair cash valuations, casts doubt whether fair cash value was considered during negotiations. Note that a formula could also have been used in the agreement for the determination of fair cash value of the solar facility, but a formula must allow for a clear determination of the value before the submission of the annual tax recap and setting of the town's tax rate. This is because the town needs a value for the solar facility prior to the setting of the tax rate for the fiscal year because the value is required by G.L. c. 59, § 38H(b) to be included in determining the tax rate.

Another fundamental flaw in the PILOT agreement is that it was not presented to the town's legislative body for approval. Here, only the selectboard approved the agreement. A municipality acts through its legislative body, which is town meeting or a city or town council. See IGR 17-26, which states that the PILOT agreement must be approved by the legislative body of the town.

Another problem is that the agreement purports to apply to property not owned by the owner of the solar facility, Sunshine Power Co. G.L. c. 59, § 38H(b) provides no authority for including the real estate tax obligation of a third party in the PILOT with Sunshine Power. The agreement may only cover the tax obligations of Sunshine Power. Here, that would include only the tax liability for the personal property

Informal Summary

owned by Sunshine Power Co. This is so even if there is an agreement between the owner of the land and Sunshine that Sunshine will be responsible for the taxes on the real estate – that would be a private agreement between the parties and not affect the tax assessment. The taxes on the real estate must be assessed to the owner thereof. G.L. c. 59, § 11.

See IGR 17-26 for more information regarding PILOT agreements.

b. Can Wiley Coyote be assessed for the land value of the solar farm?

Wiley Coyote is the proper party to be assessed the taxes on the real estate as he is the owner of the land. There is no statutory basis for entering into an agreement with Wiley Coyote regarding his real property tax obligations as he is not an electric generating company as contemplated by G.L. c. 59, § 38H(b).

c. Is the collector entitled to sue in district court to collect on the agreement?

The amount in controversy in a district court small claims action for unpaid taxes is unlimited. Yet the sums involved in this agreement are far beyond the usual stakes in district court litigation, particularly the small claims process. Moreover, it is not clear that payment amounts under the agreement constitute taxes for the purposes of G.L. c. 218, § 21. This litigation would more likely be appropriate for superior court and the town should bring separate counts to cover both possibilities – one count for unpaid taxes and the other for breach of contract.

d. Does Sunshine Power Co. have a persuasive claim that the tax payment agreement is unenforceable?

Enforceability of the agreement does not hinge on whether the town disclosed a publicly available, quasi-judicial decision from the ATB. The company can find out about ATB opinions without getting a disclosure on the overall tax environment from the town. Moreover, § 38H requires no such disclosure from the town as a condition of validity of the payment agreement.

The single, most important factor in rendering the § 38H agreement unenforceable is the fact that the town of Little Hampton did not properly approve the agreement. The selectboard's approval of the agreement was ultra vires (without proper authority) and legally insufficient.

e. What happens if the superior court decides that the tax payment agreement is invalid?

If the superior court holds the agreement unenforceable, it could hold the payment amounts are not due.

f. Do the assessors have authority to issue an omitted assessment after the annual commitment to assess the solar power facility under G.L. c. 59, § 75?

Informal Summary

The assessors can hardly say that their failure to assess the tax while the agreement was purportedly in force was "unintentional" as required for an omitted assessment under G.L. c. 59, § 75. The requirement of an unintentional omission to tax does not apply in the circumstances of a personal property audit. Therefore, the assessors could open a personal property audit and take advantage of the longer look-back period allowed in the audit context.

g. Does Sunshine Power Co. have a claim to a property tax exemption?

If Sunshine relies upon ATB decisions, it can argue that the clause forty-fifth exemption applies to exempt any property tax liability for its solar facility. However, the town could appeal an adverse decision of the ATB to the appeals court for review. The relevant ATB decisions - *Forrestall Enterprises, Inc. v. Assessors of Westborough*, Mass. ATB Findings of Fact and Report 2014-1025 and *KTT, LLC v. Assessors of Swansea*, Mass. ATB Findings of Fact and Report at 2016-426 – were not appealed to the courts for their review and determination.

h. What happens if the Appellate Tax Board deems the omitted assessment invalid?

If the assessors fail to open a personal property audit, it is doubtful that they can validly assess an omitted tax before June 20th of the relevant fiscal year. Omissions must be unintentional and when the town did not assess taxes in this case, it was intentional as it was relying upon the payment agreement to satisfy the tax payment obligations.

2. Ms. Jane Gray bought a small condo subject to an affordable housing restriction. The purchase was made from the Bromley Housing Authority, which issued a deed recorded on January 15, 2015 in the Leicestershire Registry of Deeds. Unfortunately, the housing authority failed to record an affordable housing restriction on the deed itself. Nor was the restriction separately recorded. The purchase and sale agreement included a reference to an affordable housing restriction.

The Bromley assessors reviewed records at the registry of deeds and found the deed received by Ms. Gray. They were not on notice of the affordable housing restriction as none was on record. The condo neighborhood is an area of high-value homes with a few affordable properties available to lower income purchasers. The assessors proceed to value the property in their mass appraisal system.

A value of $400,000 was set for Ms. Gray's property for FY 2017-18, though the unrecorded affordable housing covenant prohibited the sale of the house for greater than $275,000. At the town's tax rate for FY 17 the condo assessment entailed a tax of $1000. The house would have been valued at $250,000, and the assessment would have been $375 less had the affordable housing stipulation restriction been considered.

Ms. Gray paid the tax for FY 17 and 18 without question, but when she received her tax bill for FY 19 she balked at the increased assessed value of $425,000. She paid the tax as

Informal Summary

billed in full but contacted the assessors after the deadline for abatement filings to complain that her condo was overvalued because of the affordable housing provision. The assessors filed an 8 of 58 application with the Commissioner requesting authority to abate the paid taxes so as to bring the tax in line with the affordable housing stipulation and its impact on value. G.L. c. 58, § 8; G.L. c. 59, § 38.

a. What are the standards for authorizing an abatement of a paid tax?

In general, G.L. c. 58, § 8, the "8 of 58" statute, allows the Commissioner of Revenue to authorize assessors to abate a tax after the assessors' jurisdictional time period for abating a tax has expired. When section 8 was first enacted, there was no provision for the Commissioner to authorize the assessors to abate a paid tax. That provision was added by St. 1990, § 490, enacted on December 29, 1990.

There are several statutory requirements for the Commissioner of Revenue to grant authority to assessors to abate a paid tax. First, there must be an obvious clerical error committed by the assessors in the assessment of the tax. Second, the abatement of a paid tax can only go back for the three previous fiscal years before the fiscal year in which the abatement is granted. Please also refer to the guidance contained in IGR 92-206.

b. How far can the assessors go in requesting authority to abate a paid tax?

They can go back three fiscal years before the year in which the abatement is granted. Even if there was an obvious clerical error in the assessment more than three years prior to the abatement year, no abatement can be authorized. In such cases, payment of the tax precludes abatement going back more than three years.

c. Was there an "obvious clerical error"?

There was no clerical error on the part of the town or the assessors in this case. The housing authority neglected to include the affordable housing restriction in the recordings, either as part of the deed of conveyance or as a separate filing with the registry of deeds. Assessors are required to rely on information recorded at the registry of deeds or probate. The affordable housing restriction does not impact value when unrecorded.

d. Who's responsible for the error?

The assessors relied on the recorded information as G.L. c. 59, § 11 requires. If the assessors were not responsible for the clerical error, it does not matter who was responsible. Only taxes imposed as the result of an "obvious clerical error" on the part of the assessors warrant authorization for an abatement of a paid tax under G.L. c. 58, § 8. Here, the assessors made no error.

e. Did Ms. Gray pursue the statutory abatement process established under G.L. c. 59, § 59?

Informal Summary

No. Ms. Gray did not file for tax relief using the abatement process of G.L. c. 59, § 59.

f. Should that factor bear on whether the 8 of 58 abatement is approved?

Yes. Filing for an abatement is cited in IGR 92-206 as a factor relevant to the Commissioner's exercise of discretion in allowing relief under G.L. c. 58, § 8. The basis for this rule is that the administrative abatement process of G.L. c. 59, § 59 should be the exclusive means for correcting an error in the assessment of a property tax. However, if an error inflates the tax due 100% (doubling it), the error is arguably so egregious as to warrant correction even if there was no timely-filed abatement application. But, again, here – there was no error on the part of the assessors – the affordability restriction was unrecorded and the condominium's value was not affected by it. The Commissioner will not grant authority to the assessors to abate the paid tax in this case.

3. The local nonprofit Youth-Grow in Painswick, MA applied to the assessors for exempt status under G.L. c. 59, § 5, Clause Third. Its purpose was to fund programs for children and families. Their programs and activities included access to a large gym facility. Membership fees were modest, and the salaries of staff were generally in line with non-profit organizations' pay scales in the region. However, Youth-Grow splurged on the salary of its new fitness director, a YouTube fitness celebrity with a large following of subscribers. The salary was so large that the assessors considered the argument that the fitness director's salary operated to distribute profits illegally to employees. The assessors nevertheless granted the exemption on a vote of 3-2.

The Painswick Youth-Grow operated a few blocks away from a for-profit gym, Swole Fitness, which charged higher fees. Upon bringing in its celebrity fitness director, Youth-Grow launched a marketing campaign which Swole Fitness believed was responsible for a loss of customers for Swole Fitness. As a result of the competition from Youth-Grow, Swole Fitness's revenues declined by 20% on a going-forward basis. *Healthtrax International Inc. v. Assessors of Hanover & So. Shore YMCA,* Mass. ATB Findings of Fact and Report 2001-366 (5/14/01); G.L. c. 59, § 5B

a. What recourse does Swole Fitness have to appeal the eligibility of Youth-Grow for the charitable exemption?

Under G.L. c. 59 § 5B, any person of a city or town aggrieved by a determination of the board of assessors on the eligibility or non-eligibility of a corporation or trust for a charitable exemption within three months of the decision may appeal to the ATB. For purposes of this section, "person" includes the corporation or trust applying for the exemption and it also includes an individual, corporation or trust who is involved in a business activity in direct competition with the activity conducted by the charitable corporation or trust. Here, Swole is a "person" because Swole's business is in competition with that of Youth-Grow. As a result, Swole can appeal Youth-Grow's exemption to the ATB.

Informal Summary

Note – The facts in this case study are based on the *Healthtrax* decision (citation above). In that case, the South Shore YMCA was granted a charitable exemption for its property and Healthtrax appealed the exemption. Healthtrax operated a for-profit fitness facility. The ATB upheld the charitable exemption because Healthtrax failed to show that the YMCA did not qualify for the exemption.

b. What if Swole Fitness filed its appeal in the Appellate Tax Board 120 days after the assessors' determination of exempt status?

They would be past the three-month deadline and their appeal would be denied.

c. How are salaries restricted in a tax-exempt non-profit entity?

Under G.L. c. 59, § 5, Clause Third (a), if any of the income or profits of the business of the charitable organization is divided among the members, or is used or appropriated for other than charitable purpose, its property shall not be exempt. If Youth-Grow is using all its revenue to pay for a celebrity trainer and for advertising, then that revenue would not be available to fund the charitable purpose. As a result, Swole fitness may have a strong claim that Youth-Grow should not qualify as a tax-exempt charitable entity.

4. Mr. Juan Juarez owns an old home in Margate, MA that he's neglected to maintain for the three years he has been unemployed after losing his job at the Pilgrim Nuclear Plant. The residence is structurally sound but battered after an intense series of nor'easters: windows need replacing, the exterior needs a new paint job, and the master bathroom toilet overflows from time to time. Yet the valuation of Mr. Juarez's property actually increased for FY 20. Mr. Juarez paid his taxes on time.

   Mr. Juarez complained about his property valuation in a conversation with the town collector, insisting he was overassessed. He followed up the conversation with a letter to the collector in which he asked for tax relief. However, he filed no abatement application by the FY 20 deadline for filing. He assumed his correspondence with the collector would serve to contest his assessment.

   Mr. Juarez did some research on his property and found that he was being assessed for a fireplace that had been closed and cemented up years before. He figured he had been assessed for the fireplace for the past 10 years. When the collector informed him that abatement applications are accepted only by the assessors, he contacted the assessors. In a belligerent phone call with an assistant assessor, he demanded that his letter to the collector be considered as an abatement application.

   After Mr. Juarez approached his neighbor on the selectboard, the assessors were asked by the town administrator to file an 8 of 58 request seeking refunds on the extra amount added to his taxes by the mistakes on the property record card; and an allowance for impairment of value due to the deferred maintenance. The assessors grumbled but filed the request with DOR as instructed. G.L. c. 58, § 8; G.L. c. 59, § 59

Informal Summary

a. Did Mr. Juarez have a satisfactory reason for not invoking the abatement process of G.L. c. 59, § 59?

There was not a satisfactory reason for Mr. Juarez to by-pass the statutory abatement process. The legal requirement is clear and well-settled that abatement applications must appear on a form approved by the Commissioner and be submitted to the assessors before the close of business on the deadline date. This information is basic to the system of property tax administration in Massachusetts and can readily be obtained from the assessors or the ATB. Indeed, the necessity of an abatement filing with the assessors to challenge errors in the assessment is printed on the property tax bill. Recently, the appeals court in *Veolia Energy Boston, Inc. v. Assessors of Boston,* 95 Mass. App. Ct. 26 (2019), upheld the denial of an abatement and held that there is no good faith exception to the abatement procedures established by statute and a taxpayer must timely file an abatement application with the assessors on a form approved by the Commissioner.

b. Is overvaluation a persuasive ground on which to seek 8 of 58 abatement authority?

Overvaluation claims usually depend on the facts and circumstances of a particular case: comparable sales, market rents, vacancy rates, for example. When the assessors seek authority under the 8 of 58 process to grant an abatement after their jurisdictional authority has expired, the Commissioner of Revenue generally looks to see why the taxpayer did not timely file for an abatement. If there is a good reason, such as illness, and the overvaluation is great, then the Commissioner is likely to grant an 8 of 58 application.

c. Is deferred maintenance a valid ground for a reduction in assessed value in the 8 of 58 context?

If the taxpayer has shown good reason why s/he did not follow the ordinary abatement process and shows the value of the property is substantially reduced and the assessor seeks authority to abate under the 8 of 58 process, then the Commissioner could so grant it.

d. What is the balance of equities?

It is a balancing of the hardship to the taxpayer posed by a higher assessment vs. why the taxpayer failed to follow the regular abatement process.

e. Imagine that mistakes on the property record card inflated the assessed valuation by 75%. Does the case for 8 of 58 authority get stronger in that circumstance?

The balance of equities changes in favor of the taxpayer when a significant assessment error in the range of 100% overvaluation is presented. If the assessors agree that the assessment was in error, the case for granting relief becomes

Informal Summary

stronger. The case for granting 8 of 58 authority reduces, however, when the assessment error is less.

5. Lollipops and Sunshine, Inc. is a small, local non-profit organization in Bingley, MA that provides fun experiences for children under 12 with chronic illnesses. Only a small number of the town's children present chronic illnesses at any given time, but the group has served over 35 children during its ten years of existence. It has been continuously recognized as a charitable organization by the Bingley assessors.

   There was a rift among board members in the winter of 2018-19 that led to the departure of the group's treasurer and clerk. It took several months for Lollipops and Sunshine to replace these officers on a permanent basis. In the interim, three different board members rotated as acting treasurer, with responsibility for tax returns and other governmental filing requirements. In February of 2019, two board members held the position of acting treasurer.

   Unfamiliar with property tax compliance, the acting treasurer as of 3/1/19 failed to file the Form 3ABC reflecting the group's real and personal property assets as of 1/1/19. No extension was requested to allow filing after the due date. In the fall, without a Form 3ABC on file for Lollipops and Sunshine, the assessor treated the real and personal property as subject to tax. The group was assessed for approximately $3000 in property tax for FY 20. The tax debt remained unpaid.

   The new permanent treasurer received the first of two semi-annual tax bills by October 1. She soon contacted the tax assessor to inquire about the group's charitable status for tax exemption purposes. She learned that the Form 3ABC had not been timely filed. Because no extension was requested in advance of the prescribed filing date, the assessor indicated that it was too late to reclaim tax exempt status for FY 20. The treasurer was advised to be sure that the FY 21 Form 3ABC was ready and filed by 3/1/20.

   After the assessors made clear that the group's property was taxable for FY 20, sentiment grew among townspeople that the group should be allowed to late-file for continuation of charitable status. Selectboard members received calls from citizens objecting to the taxation of a group that benefited sick children, and the assessors reconsidered their position. G.L. c. 58, § 8; G.L. c. 59, § 29; G.L. c. 59, § 5, Clause Third

   Let's look at the assessors' options:

   a. What if the assessor relented and allowed the filing of the Form 3ABC before November 1st?

   The assessors have the power to extend the deadline for the 3ABC filing until the last day for filing abatement applications on a timely basis. So they have discretion to allow charitable organizations to file up until November 1st. There are arguments both for and against granting an extension of time to file. But it is important that the assessors' discretion be understood.

   b. What if November 1 passes and the group still had not filed its Form 3ABC?

Informal Summary

The assessors cannot extend the filing deadline beyond the due date for filing abatement applications. So the taxpayer has failed to file within the time parameters allowed by statute. Under G.L. 59, § 61, a failure to file the Form 3ABC bars the remedy of abatement. The statute speaks of compliance with the provisions of G.L. c. 59, § 29 as a prerequisite for any abatement relief. But a late filing vs. a non-filing opens up a limited right to seek abatement. Any amount exceeding 150% of the fair cash value can be abated provided the taxpayer has a "reasonable excuse" for the delay in filing. Yet the statute goes on to say that an abatement may be had despite a failure to file the form of list or Form 3ABC, provided the applicant includes a "sufficient description in writing of the particular real estate as to which an abatement is requested." That introduces an element of ambiguity in the consequences of a failure to file under G.L. c. 59, § 29. But there is no ambiguity as to the consequences of a failure to comply with an audit summons.

c. Assuming the tax was unpaid, would the assessors have a viable application for authority to abate under G.L. c. 58, § 8?

Where a charity files late or not at all, consideration should be given to the circumstances of the non-profit entity. Here – we have a charity that had long been receiving an exemption from property tax. The turnover in their volunteer staff resulted in a non-filing of records required by chapter 59. An 8 of 58 application may be allowable in these specific circumstances, should the assessors decide to seek 8 of 58 authority.

d. What if the tax due had been paid?

As there was no "obvious clerical error" by the assessors in assessing the tax, the statutory language precludes a grant of authority to abate a paid tax.

6. Dan Eagan owns two adjoining parcels of real estate in Saltonstall, MA at 19 and 21 Pacific Road. The taxes on the properties for FY 2018 were $8,454 and $8,675 respectively. Dan balked at the values for which the properties were assessed. The taxes were based on a city-wide revaluation of property done in 2018 by a firm of appraisers hired for that purpose. Coincidentally the appraisers selected by the town were denied qualification as valuation experts in two contemporaneous, but unrelated ATB cases.

Dan did not file for abatement by the February 2018 deadline. On June 6, 2018, Dan sent a letter to the assessors asserting that the assessments were determined by disqualified appraisers and insisting that a qualified appraiser determine his property valuations instead. The assessors did not take any action. Infuriated, Dan filed a complaint in superior court seeking to invalidate the assessments because the appraisers were held unqualified in an unrelated ATB case. *Nearis v. Gloucester*, 357 Mass 203 (1970)

a. What is the remedy for overassessment?

Informal Summary

The abatement procedure provided in G.L. c. 59 section 59 is the exclusive remedy for excessive assessment.

b. Are there any exceptions to this rule? Would those exceptions apply here?

This case is based on *Nearis v. Gloucester*. In *Nearis*, the court explained in exceptional cases, extraordinary relief, apart from the abatement remedy may be granted. The courts have held that the criteria for extraordinary relief includes the requirement that "relief by ordinary procedures will be seriously inadequate." Here, the exception would not apply. The ordinary abatement procedures, which are not shown to be seriously inadequate, were open to him to seek a revaluation if his assessments are too high.

c. What would be considered seriously inadequate abatement procedures?

The cases where the court has said that other relief is available raised constitutional issues. "An assessment may be excessive in a constitutional sense, not because land is assessed at a figure in excess of its fair cash value, but because it is assessed at [fair cash value or] less than fair cash value while the land of other taxpayers is intentionally assessed at . . . lower percentages of the full, fair cash value of such land." *Stone v Springfield*, 341 Mass. (1960).

Standing alone, the fact that the time period for obtaining administrative relief has expired is not sufficient reason for seriously inadequate procedures. Exhaustion of administrative remedies is generally required unless the administrative remedy is seriously inadequate and exceptions to the rule occur most often when important, novel or recurrent issues are at stake, when the decision has public significance or when the case reduces to a question of law.

d. How is the superior court likely to rule on Dan's complaint?

It will likely be dismissed. Nothing alleged here presents a situation for substituting declaratory or injunctive equitable relief for the usual statutory abatement remedy.

7 Meyer Chevrolet is a dealership for new and used cars in the town of Washington, MA. Meyer first began using town water service in 2010. Its water usage was consistent until 2015 when they received a bill for approximately 4.8 million gallons of water over a six-month period. Meyer's water meter was inspected, found to be deficient, and replaced. The water commissioners granted a substantial abatement. Meyer's water usage returned to normal levels.

In June 2018, Meyer received a water bill presently at issue in the amount of $15,083.45 showing over four million gallons of water used for a four-month period. On July 15, 2018 Meyer applied for an abatement. The town re-inspected the property and tested the meter. The testing company reported back that the meter was underreporting water use.

Informal Summary

By letter to Meyer dated August 22, 2018 the town water superintendent gave notice to Meyer that on "August 2018, at a regularly scheduled meeting, the board of water commissioners discussed the situation and unanimously voted to deny your application for an abatement due to the test results." There was nothing in the letter stating that "appeal from such decision may be taken as provided in sections 64 to 65B inclusive" as required by G.L. c 59, § 63.

Meyer requested and was given a hearing by the water commissioners. By letter to Meyer dated September 24, 2018, the town water superintendent explained that the abatement request was denied due to the testing of the meter. This second letter again failed to include any information on appellate rights.

On December 17, 2018, more than three months after the August 22, 2018 letter of denial, Meyer commenced proceedings before the ATB. *Stagg Chevrolet, Inc. v. Board of Water Commissioners of Harwich*, 68 Mass. App. Ct. 120 (2007). G.L. c. 59, § 63

a. Should the ATB hear this case?

Yes. This case is based on *Stagg Chevrolet Inc. v. Bd. of Water Commissioners of Harwich*. The court in that case concluded that the legislature mandated that important information about how to appeal be included in the notice and therefore the water commissioner's decision was ineffective for the purpose of determining when to commence running the three-month appeal period. This notice did not include appeal rights, and therefore the three-month period did not start running on August 22nd. Tax statutes must be strictly construed and all doubts are to be resolved in favor of the taxpayer.

b. How should the ATB rule?

The ATB here should take up the case and decide whether the meter was faulty. If the meter is found to have been faulty, it can rule for Meyer, and reduce the water charge to a number that is consistent with the average of Meyer's customary usage and order an abatement.

c. What was wrong with the water commissioners' August 22, 2018 notice? What should the notice have included?

The ATB should deny the motion of the water commissioners to dismiss and determine that the water commissioners' notices of August 22 and September 24 were ineffective based on noncompliance with G.L. c. 59, § 63, which requires that assessors give written notice that an appeal from the assessors' decision or inaction may be made to the ATB within three months.

Here, the August 22 notice did not inform the abatement applicant that the decision was appealable, that the ATB was the agency that would be responsible for deciding the appeal of the disputed water bill, and that the appeal needed to be filed within three months of the water commissioner's decision. The court ruled in *Stagg* the

Informal Summary

inadequate notice; the failure to notify the applicant of its appeal rights may be cured by allowing a reasonable time for appeal based on the most relevant statutory standards. Here, where notice has been given, but lacks critical information for the applicant as to its appellate rights, the deemed to be denied time frame provides a reasonable time period with dates easily ascertained by both parties.

d. Why is notice of the right to appeal to the ATB necessary to include?

It is required by G.L. c. 59, § 63. The reason behind the law is that the notice provides a roadmap to guide an appeal, directing the applicant to the ATB, a not-so-obvious place to challenge water bills. It also alerts the applicant to the potentially fatal hazard presented by the three-month window to file. The requirement that notices conform to the legislative directive would be rendered meaningless if the courts did not provide a redress for the failure to inform the applicant of their appellate rights.

8. A hotel in Kenilworth, MA underwent a corporate restructuring, and emerged as an LLC after having previously been classified as a business corporation. The hotel has no corporate parent filing federally as a corporation. It filed its form of list slightly late in April, 2019 declaring its taxable personal property, but failed to add property taxable to an LLC but not taxable to a business corporation, *e.g.* furniture and fixtures.

The assessors in Kenilworth are aware of the change in entity status and noted that the form of list was basically the same as last year, suggesting significant underreporting. The assessors invoked G.L. c. 59, § 36, which authorized assessors to estimate the value of taxable personal property based on "best information and belief."

The taxpayer filed for abatement on grounds of overvaluation. The application was denied. As the hotel filed an appeal the assessors relied on G.L. c. 59, § 61 to argue that the taxpayer was required to prove a reasonable excuse and could only seek abatement of as much of the tax that corresponds to an overassessment of 150%. The Appellate Tax Board denied the assessors' motion to dismiss, arguing that a delay of less than two months was inconsequential. G.L. c. 59, § 5, Clause Sixteenth; G.L. c. 59, § 36; G.L. c. 59, § 61

a. If the Appellate Tax Board makes a decision authorizing an abatement of tax, then what issues do the assessors have to take on appeal?

The granting of an abatement is inconsistent with G.L. c. 59, § 61.

b. Since the hotel did not fully disclose its taxable personal property on its form of list, what options do the assessors have to get a reliable picture of the whole of its personal property.

This case presents circumstances for initiating a personal property audit under G.L. c. 59, § 31A. Because the taxpayer has not fully disclosed its assets, the assessors are entitled to examine books and records to determine the personal property holdings

Informal Summary

of the hotel. The advantage of the audit process is that it reopens the statute of limitations for omitted or revised assessments. Instead of a deadline of June 20th for the given fiscal year, the assessors can look back 3 ½ years to when the form of list was due or filed, whichever was later. That allows the assessors sufficient time to conduct a thorough audit, identify undisclosed assets, and assess the taxpayer for a deficiency.

c. To what extent is personal property newly taxable for an LLC that used to be a business corporation?

An LLC is entitled to none of the personal property tax exemptions afforded to business and manufacturing corporations. The most important exemption is for personal property, excluding property used in the conduct of business. In a hotel, furnishings and fixtures are subject to tax if owned by an LLC, but not taxable to a business corporation. Machinery used in the conduct of business is generally subject to tax, with a few exceptions, to a business corporation. So the change of entity status expands the scope of personal property subject to tax, to the point that the owner of the personal property is not entitled to any of the G.L. c. 59, § 5, Clause 16th exemptions.

d. What tools do the assessors have to explore the full extent of the personal property holdings of the LLC?

The personal property audit is probably the handiest tool the assessors have to discover taxable personal property not disclosed on a form of list. But there are other ways to explore the relevant assets of an LLC. The discovery process afforded by G.L. c. 59, §§ 38F and 38G is another useful mechanism to get additional information on taxable property. You can request information and documents, and you can require answers to questions under oath. The abatement process is another opportunity assessors have to test whether personal property is subject to tax. If the taxpayer cannot substantiate its entity status which would entitle it to personal property exemptions, abatement can be denied. The taxpayer could appeal to the ATB, but it would have to establish its entitlement to the exemptions in an evidentiary hearing.

9. For fiscal year 2020, the Gillingham, MA assessors assessed a new laundry business in town, organized as an LLC. Although they used the list of personal property assets provided by the business, the assessors assigned values for these assets considerably in excess of the LLC's estimates. The taxpayer decided to seek abatement of the assessment it deemed excessive. But employees took more time than planned identifying asset prices, and the deadline of February 1 in this quarterly community fast approached. On February 1, the taxpayer used Federal Express to file its abatement application, with the package reaching the assessor's office on February 2.

   The assessors concluded that they lacked jurisdiction over the claim and denied it on those grounds. The business filed an appeal with the Appellate Tax Board, within three months of the abatement denial. The assessors quickly moved to dismiss, citing the late-

Informal Summary

filing of the abatement application for a lack of ATB jurisdiction. The ATB denied the motion then scheduled the appeal for a hearing in 2024. G.L. c. 59, § 59; G.L. c. 59, § 64

a. What might be the basis for the ATB's assertion of jurisdiction after the late-filed abatement application?

There does not appear to be a statutory basis for the ATB to assume jurisdiction of the application filed with assessors after the deadline.

b. Does the ATB have regulatory authority over the filing process for applications for abatement?

The process for filing applications for abatements with assessors is statutory and contained in G.L. c. 59, § 59.

c. Is the February 2nd filing of the application for abatement consistent with the requirements of G.L. c. 59, § 59?

No.

d. What recourse do the assessors have to establish a lack of jurisdiction over this appeal?

The assessors may appeal.

10. Solar power developers targeted Pudsey, MA for a large-scale solar array able to generate over 800 MW. They have negotiated for a PILOT agreement which would reflect a significant offset for the value of the plant given the company's claim for a Clause 45th exemption. The value of the plant, at the rate of payments in lieu of taxes, was substantially underestimated, in the opinion of the assessors. The energy produced will be sold to the electricity grid.

A group of residents filed an action for a declaratory judgment in superior court alleging that the underassessment of the solar plant constituted an illegal expenditure. The litigants asked that the PILOT agreement be invalidated.

The superior court judge assigned to the case examined the evidence of value on a summary judgment motion. She concluded that the scale of this solar plant and its commercial character could not be reconciled with the requirements of the Clause Forty-fifth exemption, which she viewed as an exemption for small solar devices and systems used for a single property.

The judge held that the PILOT agreement substantially undervalued the solar plant so as to constitute a gratuity to the solar plant owners. The PILOT agreement did not conform to the requirement in G.L. c. 59, § 38H that payments be based on fair cash value. The agreement was ruled invalid. G.L. c. 59, § 5, Clause Forty-fifth; G.L. c. 59, § 38H

Informal Summary

a. Is the superior court bound by the Appellate Tax Board's interpretation of the Clause Forty-fifth exemption as applicable to solar plants regardless of size, commercial purpose, or revenues generated (unless they supply exempt property)?

No. The superior court is not bound by ATB decisions although ATB decisions theoretically could be relied upon for persuasive value.

b. If the superior court issues an opinion narrowing the construction of the Clause Forty-fifth exemption to small systems designed to power a single property, is the Appellate Tax Board bound by the superior court's view?

No. The ATB is not bound by a superior court's interpretation of law.

c. If the ATB follows its precedents and continues to hold large commercial power plants exempt from property tax, how should assessors respond?

If assessors disagree, assessors may pursue legislation to amend the Clause 45th exemption or appeal an adverse decision on the issue.

d. Is a superior court decision relevant in an appeal to the appellate courts?

The appellate courts are not bound by a superior court's interpretation of law.

e. Will an SJC or appeals court decision on the scope of the Clause Forty-fifth exemption be binding upon the Appellate Tax Board and the trial court in future cases involving the taxation of solar power?

Decisions of the appeals court and the SJC are binding upon the superior court and the ATB.

f. If the SJC or appeals court adopts a narrow construction of the G.L. c. 59, § 5, Clause 45th exemption, what will be the fate of PILOT agreements based on a value less than fair cash value?

Presumably, unless an agreement is challenged, it will continue.

11. The city of Northallerton, MA entered into a Tax Incentive Finance (TIF) agreement with a business to develop a parcel of real estate with an old factory building. The taxpayer undertook to tear down the factory building and replace it with a state-of-the-art research and development facility. Negotiations began in FY 17, but the agreement was not finalized and approved by the Economic Affairs Coordinating Council until the end of December, 2017 in FY 18. The business was offered an exemption equal to 50% of the fair cash value of the incentivized improvements to real estate, and a 100% exemption on personal property.

Informal Summary

The agreement took effect at the beginning of the next fiscal year after its execution, FY 19, on July 1, 2018. However, the assessors never received a copy of the final TIF agreement. The assessors committed the property tax for FY 19 in December but did not include the TIF exemption on the higher fair cash value of the property subject to the TIF agreement.

The company made no protest when they received their FY 19 tax bill which made no allowance for the exemption. The bill was paid in full. The assessors remained unaware of the TIF agreement entering FY 20 and committed FY 20 property taxes again without allowing the TIF exemption. The FY 20 bill was paid in full.

In late February of 2020, the company inquired of the assessors as to whether the FY 19 and FY 20 billings included the exemption authorized by the TIF agreement. They supplied a copy of the TIF agreement to the assessors, which was the first time they had read the final agreement.

The assessors initiated a request for authority under G.L. c. 58, § 8 to abate the tax attributable to the agreed TIF exemption. G.L. c. 40, § 59; G.L. c. 58, § 8.

a. Does the Commissioner have authority to allow the requested abatement?

Paid taxes may only be abated under G.L. c. 58, § 8 within a three-year time frame. (See question two above.) Moreover, the assessment must also be the result of an "obvious clerical error" on the part of the assessors and there must otherwise be a valid basis for the exercise of the Commissioner's discretion.

b. What factors militate against a grant of abatement authority for the TIF exemptions?

The taxpayer received bills for two successive fiscal years which did not incorporate the negotiated exemptions and paid them. They also waited until after the abatement deadline for the second fiscal year at issue to raise the issue of failure to provide the exemptions. A company, presumably represented by counsel, lacks excuses for not taking initiative to correct the errors in the assessment.

c. What factors support the grant of abatement authority for the TIF exemptions?

A TIF agreement supports important public policy goals. At the core of the tax incentive program is the creation of new jobs. There are few public policy interests as weighty as stimulating economic growth. A failure to apply legally authorized exemptions works at cross-purposes with the TIF statutes.

The IGR states that public interest is a criteria relevant to the exercise of the Commissioner's discretion to grant authority under G.L. c. 58, § 8.

d. Was the failure of the company to apply for abatement of the tax amounts attributable to the TIF exemptions fatal to the request for authority under IGR 92-206?

Informal Summary

Not necessarily. The equities will be balanced by the Commissioner, including the amount of the exemption that should have been granted and the public policy arguments in favor of implementation of these agreements.

e. Does it matter that the assessors were not responsible for the failure of the Mayor to provide a copy of the TIF agreement?

The assessors were not involved in the TIF formulation process and not given a copy of the agreement, as required by statute. However, TIF agreements in cities must be approved by the city council and the mayor. The Commissioner could find that the assessors were likely aware that the TIF agreement was making its way through the approval process and they should have obtained a copy of the TIF agreement on their own and that a failure to do so was a clerical error which resulted in the overassessment of the property. An exemption was mandated by G.L. c. 40, § 59 and the taxpayer did not receive the benefit.

f. Is the amount of the overassessment a relevant factor in analyzing a request for authority to abate under G.L. c. 58, § 8?

Yes - The larger the exemption amount, the more grievous or egregious the hardship imposed.

12. The incorporated recycling plant in Framlingham, MA owned extensive items of personal property used in its local processing operation. The company took the position that its personal property was exempt from taxation because it was a business corporation. However, machinery used in the conduct of business is taxable to a business corporation.

Arguing that it owned personal property which was exempted under G.L. c. 59, § 5, Clause Sixteenth, the company failed to file timely forms of list for FY 18 and FY 19. Although the assessors repeatedly requested the forms of list, they were never filed.

The assessors opened a personal property audit and subpoenaed inventory records to ascertain the extent of the company's personal property. The company balked at producing these records but was ordered by the superior court to turn over all requested records. Based on these inventory records, the assessors assessed a personal property tax bill of $250,000.

The company filed for abatement, but the assessors denied the application. On the company's appeal to the Appellate Tax Board, the assessors argued that the petition was subject to dismissal because the company failed to file a form of list and it did not voluntarily comply with the personal property audit. The Appellate Tax Board denied the Motion to Dismiss, relying on the case of *Boston & A.R.R. Co. v. Boston,* 275 Mass. 133 (1931) to hold that it had jurisdiction over the appeal.

The *Boston & A.R.R. Co.* case involved a challenge to the Board's jurisdiction where a taxpayer had failed to file a form of list declaring its real estate holdings. (Real estate is not required to be disclosed under G.L. c. 59, § 29, since the assessors did not request a

Informal Summary

form of list filing for items of real estate.) The petition, by contrast, addressed a personal property tax assessment, unlike the *Boston & A.R.R. Co.* case. G.L. c. 59, § 31A; G.L. c. 59, § 61; Boston & A.R.R. Co. v. Boston, 275 Mass. 133 (1931)

a. What are the time limits for filing a petition in the Appellate Tax Board to challenge an audit assessment?

Abatement applications must be filed within three months after issuance of the omitted or revised assessment. Upon denial of abatement there is a three-month period to file a petition in the ATB.

b. What opportunities do the assessors have to raise their argument about jurisdiction?

The assessors can bring a motion to dismiss for lack of jurisdiction. If denied, the motion should be renewed at trial. But even if the assessors fail to raise the issue, questions of jurisdiction are open to the appeals court or SJC for de novo review.

c. Do the assessors have a mechanism to avoid a trial on the merits where the threshold question of jurisdiction was contested?

There is no procedure for an interlocutory appeal during the pendency of an action in the ATB.

d. The company made no showing at trial under G.L. c 59, § 61 that there had been a reasonable excuse for the failure to file the form of list or that the value of the personal property as assessed was more than 150% of fair cash value. Will the company have an opportunity to introduce the evidence required by G.L. c. 59, § 61 at the appellate stage?

A failure to make the showing required by G.L. c. 59, § 61 cannot be rectified on appeal. The only opportunity to introduce evidence is at an evidentiary hearing before the ATB.

e. What if the recycling company were classified as a manufacturing corporation?

The taxpayer would enjoy a much wider scope of exemption for its personal property if it were a manufacturing corporation, so the amount of the deficiency assessment would be much smaller.

13. Ms. Nellie McGillicuddy had a bad fall down the stairs in her home in Carlton, MA shortly after Christmas. She was hospitalized for over a month, then had several months of physical therapy before she regained mobility. Though her property tax bill was paid by an escrow agent for her mortgagee on February 1, the Carlton assessors did not credit her with the Clause Forty-first C exemption she had received the previous fiscal year. Still suffering from lack of mobility on April 1, she failed to file her claim to a 41C exemption. When she brought the exemption issue to the assessors' attention, they

Informal Summary

prepared an application for authority to abate under G.L. c. 58, § 8 to submit to the Commissioner of Revenue. G.L. c. 58, § 8; G.L. c. 59, § 5, Clause Forty-first C

a. What are the legal issues that must be addressed in deciding whether Ms. McGillicuddy is entitled to relief under the 8 of 58 process?

G.L. c. 58, § 8 requires two objective circumstances to authorize abatement of a paid tax. First, the back taxes proposed for abatement cannot go back further than three years before the current fiscal year. Second, there must be an obvious clerical error in the assessment. The factors informing the Commissioner's exercise of discretion to grant extraordinary abatement are grievous hardship, lack of access to the standard abatement remedy, and the public interest.

b. What showing must be made to warrant abatement of a paid tax?

The most significant burden of proof the taxpayer faces is showing an "obvious clerical error" in the assessment.

c. Is there an obvious clerical error?

It does not appear that any errors tainted the assessment process. The taxpayer did not apply for the requested exemption within the time allowed, so the assessors were not mistaken in failing to factor in the exemption amount in calculating the tax due. On the other hand, this taxpayer has a strong case for lack of access to the abatement procedure of G.L. c. 59, § 59, given her injury and lack of mobility. But without an obvious clerical error in the assessment, a paid tax cannot be abated, no matter how sympathetic the taxpayer's circumstances.

d. Would the result be different if the tax due on February 1 had not been paid?

If the tax were unpaid, the answer might be different. The taxpayer would not have to show obvious clerical error and, otherwise, the taxpayer has persuasive grounds to warrant abatement relief.

14. A taxpayer owns a house in a quarterly billing community. The taxpayer was late in paying his first quarter installment for FY 2018 since he was on vacation. Payment of the first two installments was made in October. When he received his actual FY 2018 tax bill in December 2017, he was surprised to see his assessed value skyrocket with a resulting $4,500 total tax bill for the year compared to $2,400 for FY 2017. He filed a timely abatement application which the assessors denied. G.L c. 59, § 57C; G.L. c. 59, § 59; G.L. c. 59, § 64

a. Can the taxpayer appeal his FY 2018 valuation to the ATB?

Under G.L. c. 59, § 64, to process an abatement to the ATB when a tax on real estate for the year is more than $5000, the full amount of the tax must have been paid

Informal Summary

without the incurring of any interest charges. Here, the tax due is $4500, so this rule does not apply.

b. Assume the taxpayer's total tax bill is $5,500. Would your answer be different?

Yes – taxpayer could not process the appeal because the payment rule would apply and taxpayer did not timely pay the 1st quarter bill.

c. Under the three-year average tax rule would the ATB have jurisdiction?

We don't know the tax amount for all three years concluding with FY 18, but if the tax in the first two fiscal years is $2400 or less, it's very likely that the three-year average is under $5000, so the payment rule would not apply.

15. Acme Farm Machinery was assessed a tax on its real estate in the town of Maryport, MA, consisting of an acre of land improved with a single structure including a large farm machinery showroom and business offices. By February 1, 2019, Acme filed for an abatement for the Maryport assessors, contending that the real estate was overvalued.

On March 27, 2019, the assessors denied the application for abatement by notice sent to the taxpayer. Settlement negotiations were conducted in the aftermath of the denial, as both parties worked to achieve an amicable resolution of the dispute. The negotiations continued over several months, then finally broke down.

On July 25, 2019, Acme filed a petition under formal procedure with the Appellate Tax Board. The assessors moved to dismiss the appeal because the filing was made more than three months after the denial of abatement. The taxpayer countered that the assessors were estopped given the fact that the assessors had engaged in negotiations for much of the time period in question. They contended that the time limitation should be tolled during the pendency of negotiations.

The Appellate Tax Board allowed the motion to dismiss, and Acme took the case to the appeals court. *Corea v. Assessors of Bedford*, 384 Mass. 809 (1981); G. L. c. 59, § 64.

a. Does the doctrine of estoppel apply in the context of ATB jurisdiction, such that the town cannot raise the defense of lack of jurisdiction?

No

b. Estoppel requires proof that Acme was induced by the conduct of the assessors to do something differently from what it otherwise would have done, and the assessors knew that their conduct would produce this consequence. What evidence would Acme need to support its argument?

For this argument to have legal validity, it would likely require a stronger evidentiary basis than presented here. The taxpayer would have to show that the assessors somehow tricked it into delaying its abatement filing until the time allowed

Informal Summary

had expired. A misrepresentation is necessary for the assessors to be held accountable. But *Corea* suggests that the doctrine of estoppel is not relevant in the application of the abatement statutes. The taxpayer is responsible for knowing the law.

The court in the *Corea* case explicitly rejected the argument that the assessors expanded the appeal period simply because they briefly engaged in negotiations with a taxpayer. The conduct of negotiations does not expand the scope of ATB jurisdiction.

c. What would be the impact if the Supreme Judicial Court adopted Acme's argument?

A decision in favor of the taxpayer would likely end the prospect of settlement negotiations during the interim period before the required filing of an appeal with the ATB. If negotiations gave the taxpayer a longer time period to file an appeal, assessors would be justified in deferring them until after the appeal is actually filed.

Informal Summary