

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

BRADLEY K. BASS

v.

COMMISSIONER OF REVENUE

Docket No. C347455

Promulgated:
August 15, 2023

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65 from the refusal of the Commissioner of Revenue ("Commissioner" or "appellee") to abate personal income taxes for calendar years 2016 and 2017 ("tax years at issue").

Chairman DeFrancisco heard the appellee's Motion to Dismiss for Lack of Jurisdiction ("Motion to Dismiss"). He was joined by Commissioners Good, Elliott, and Metzger in allowing the Motion to Dismiss.

These findings of fact and report are made pursuant to a request by the appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.

Bradley K. Bass, pro se, for the appellant.

Wendi Safran, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

Based on testimony and documentary evidence submitted by the parties during the hearing of the Motion to Dismiss, the Appellate Tax Board ("Board") made the following findings of fact.

The appellant, a Massachusetts resident, filed resident income tax returns, Forms 1, for the tax years at issue. He filed the calendar year 2016 Form 1 on April 14, 2017, and he filed the calendar year 2017 Form 1 on May 24, 2018. By Notice of Assessment dated July 15, 2019 ("NOA"), the Commissioner informed the appellant that he had failed to report the correct amount of personal income taxes for the tax years at issue. The Commissioner assessed the appellant as follows:

Tax year	Assessment date	Tax liability	Penalty	Interest	Amount due
2016	07/15/2019	\$3,138.00	\$ 628.00	\$457.88	\$4,223.88
2017	07/15/2019	\$3,465.00	\$ 693.00	\$310.99	\$4,468.99
		\$6,603.00	\$1,321.00	\$768.87	\$8,692.87

The NOA stated that the assessment was based on disallowance of claimed business expenses and medical/dental expenses "because no response was received to the Notice of Selection for Audit requesting substantiation of the claimed expenses," as well as application of the substantial-understatement penalty under G.L. c. 62C, § 35A.

On April 22, 2020, the appellant filed an abatement application online with the Commissioner ("First Abatement Application") requesting abatement of the assessed taxes,

interest, and penalties for the tax years at issue. The appellant asserted, "I would like a chance to submit proof of expenses." On May 15, 2020, the Commissioner sent a Request for Additional Information to the appellant. Having received no response, on July 20, 2020, the Commissioner sent a second Request for Additional Information to the appellant. The Commissioner received no response to the second request as well.

On March 10, 2022, the Commissioner sent a Notice of Abatement Determination to the appellant denying the appellant's request for abatement ("First Denial Notice"). The First Denial Notice gave as a reason for the determination the following: "DOR requested additional documentation, which you failed to provide. Since we do not have sufficient evidence to support your claim, your abatement application is denied." The First Denial Notice further explained that if the appellant disagreed with the denial, he could file a petition with the Board but emphasized, **"[y]our Petition at the Board must be postmarked or received at the Board within 60 days after the date of this notice."** (Bolded in original). Sixty days from the First Denial Notice was May 9, 2022.

The appellant claimed that he never received the First Denial Notice. However, his statement on a subsequent filing with the Commissioner belies that claim. On June 22, 2022, the appellant filed another abatement application online with the Commissioner ("Second Abatement Application"). The Second Abatement Application

stated: "I previously submitted more than a hundred receipts and documentation via the Massachusetts connect website. I was told I would be able to be heard at a hearing on an appeal. Then COVID hit and I no longer had access to the previous email address that alerted me with updates. Suddenly two years later I get a rejection letter based on claims 'I didn't provide information' but I did provide it and nobody ever informed me additional information is required." Given the appellant's explicit reference to the First Denial Notice, the Board found that the appellant's claim that he never received the First Denial Notice lacked credibility.

On July 1, 2022, the Commissioner sent the appellant a denial of the Second Abatement Application ("Second Denial Notice"), explaining that the issues raised in the Second Abatement Application were already considered in a prior abatement application, and that the appellant was prohibited from challenging an item of tax that has already been considered in a prior claim.

The appellant filed his Petition with the Board on August 29, 2022,¹ beyond 60 days of the First Denial Notice but within 60 days of the Second Denial Notice.

Based on the evidence before it, the Board found that the Second Abatement Application challenged the same items of tax that

¹ While the Petition was stamped as received by the Board on August 31, 2022, it was mailed in an envelope postmarked on August 29, 2022. Pursuant to G.L. c. 58A, § 7, the Board considered the date of postmark to be the date of filing.

the appellant had challenged in the First Abatement Application - the assessment of additional personal income tax based on the denial of business and medical/dental expenses - and for the same reason - failure to substantiate those expenses. Therefore, for the reasons explained in the Opinion, the Board found that the Second Abatement Application was not valid for purposes of extending the statutory appeal period beyond 60 days from the First Denial Notice. The Board thus found and ruled that the appellant's Petition to the Board was filed unseasonably. Accordingly, the Board allowed the Commissioner's Motion to Dismiss the appeal for lack of jurisdiction.

OPINION

This is an appeal from a decision of the Commissioner refusing to grant an abatement of personal income taxes. The Commissioner filed the Motion to Dismiss arguing that the appellant's Petition was not timely. The statute governing appeals to the Board is G.L. c. 62C, § 39 ("§ 39"), which requires that appeals be taken "within 60 days after the date of notice of the decision of the commissioner." See, e.g., ***Daimler Chrysler Corporation v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2007-270, 274. The abatement remedy is created by statute and, therefore, the Board has only that jurisdiction conferred on it by statute. ***Commissioner of Revenue v. Pat's Super Market Inc.***, 387

Mass. 309, 311 (1982). The Board has no jurisdiction to consider an appeal filed later than authorized by § 39. **Watjus Electric, Inc. v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 1993-139, 142; see also **Cannavo v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 2012-551, 561-62. Neither the courts nor the Board have the authority to create an exception to the time limit specified by statute. **Sears, Roebuck & Co. v. State Tax Commission**, 370 Mass. 127, 130 (1976).

The appellant failed to file his Petition with the Board within 60 days of the First Denial Notice. While the Petition was filed within 60 days of the Second Denial Notice, Massachusetts courts and the Board have consistently ruled that a "second application on the same ground would not give the applicant a second chance to appeal to the board." **Liberty Life Assurance Company of Boston v. State Tax Commission**, 374 Mass. 25, 29, n.4 (1977); **Fredkin, et al., v. State Tax Commission**, 369 Mass. 973, 974 (1976) (ruling that "[f]urther applications after the time [to appeal to the Board] had run did not avoid the time limit"); **Cannavo**, Mass. ATB Findings of Fact and Reports at 2012-561-62 (same). See also 830 CMR 62C.37.1(5)(f).

A second abatement application is appropriate only where: a taxpayer seeks to challenge a "portion of an excise not involved" in the prior application; there are newly discovered facts; the first application is a return which shows an overpayment; there is

a second assessment imposed; or there is a subsequent change in decisional law. **Focaccia, Inc. v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 2013-665, 668 (citing **Liberty Life**, 374 Mass. at 28, 29, n.4). None of those circumstances is present here. The appellant's Second Abatement Application is a repeat of his first, challenging the same personal income tax assessment based on the denial of expenses for failure to substantiate, and it did not contain any substantiating evidence or new relevant information. Therefore, the Second Abatement Application is invalid for purposes of setting the Board's jurisdiction, and the denial of the First Abatement Application thus sets the jurisdictional clock for § 39. See **Santos v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 2020-485, 493 (ruling that when a subsequent abatement application "did not contain newly discovered facts not already included" in the earlier abatement application, the previous abatement application "was controlling for purposes of determining jurisdiction").²

"It has long been the law of this Commonwealth that, when a remedy is created by statute, and the time within which it may be

² In **Santos**, the taxpayer had filed four abatement applications. While the second application included information not contained in the first, the third and fourth abatement applications did not contain new information. "The Board thus found and ruled that the third and fourth abatement applications were not valid and, accordingly, the second abatement application was controlling for purposes of determining jurisdiction." Mass. ATB Findings of Fact and Reports at 2020-493.

availed of is one of the prescribed conditions for relief, failure to meet that time limit deprives a judicial body, court, or administrative appeals board of jurisdiction to hear the case."

Nissan Motor Corp. v. Commissioner of Revenue, 407 Mass. 153, 157 (1990); see also ***Good v. Commissioner of Revenue***, 395 Mass. 686, 688 (1985) (affirming Board's dismissal of appeal where taxpayer failed to timely file an appeal with the Board within 60 days of the Commissioner's denial of an abatement application).

Because the appellant failed to file a timely appeal under § 39 from the Commissioner's First Denial Notice, the Board found and ruled that it has no jurisdiction over this appeal.

Accordingly, the Board allowed the Commissioner's Motion to Dismiss this appeal for lack of jurisdiction.

THE APPELLATE TAX BOARD

By: /s/ Mark J. DeFrancisco
Mark J. DeFrancisco, Chairman

A true copy,

Attest: /s/ William J. Doherty
Clerk of the Board