

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**BRAYTON POINT ENERGY, LLC**

**v.**

**BOARD OF ASSESSORS OF THE  
TOWN OF SOMERSET**

Docket No. F336543

Promulgated:  
July 26, 2021

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 Board of Assessors of the Town of Somerset ("assessors" or "appellee") to abate a tax on certain personal property located in the Town of Somerset owned by Brayton Point Energy, LLC ("appellant" or "Brayton") for fiscal year 2018 ("fiscal year at issue").

In lieu of a hearing, this matter went forth on a joint stipulation of facts, accompanying exhibits, and briefs submitted by the parties. Chairman Hammond and Commissioners Rose, Good, Elliott, and Metzger joined in a decision for the appellee.

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

*Daniel J. Finnegan, Esq. and Michael D. Roundy, Esq. for the appellant.*

*David Klebanoff, Esq. for the appellee.*

## **FINDINGS OF FACT AND REPORT**

On the basis of the joint stipulation of facts and accompanying exhibits, and the briefs submitted by the parties, the Appellate Tax Board ("Board") made the following findings of fact.

The appellant was a Virginia limited liability company whose sole member was Dynegy Resource III, LLC ("Dynegy Resource"), a Delaware limited liability company. The appellant and Dynegy Resource were both members of the Dynegy, Inc., consolidated group.

On January 1, 2017, the valuation date for the fiscal year at issue, the appellant was the owner of personal property located in the Town of Somerset ("appellant's personal property"), including coal and fuel inventory used in connection with the generation of electricity at the Brayton Point Power Plant. The coal and fuel inventory are the specific personal property at issue in this appeal ("subject property"). The assessors valued the appellant's personal property at \$89,000,000 for the fiscal year at issue and assessed a tax thereon at the rate of \$28.76 per \$1,000 in the total amount of \$2,559,640. The amount of tax attributable to the subject

property - the amount sought as an abatement by the appellant in this matter - is \$1,601,925.53.<sup>1</sup>

The appellant timely filed an abatement application with the assessors on January 29, 2018, which was denied by the assessors on April 25, 2018. The appellant timely filed an appeal with the Board on July 12, 2018. Pursuant to G.L. c. 59, § 64, the appellant paid at least half the tax prior to filing a petition with the Board. Based on these facts, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

On or about October 13, 2017, Dynegy GasCo Holdings, LLC - a Delaware limited liability company that was treated as a corporation for federal income tax purposes and that was also a member of the Dynegy, Inc. consolidated group - filed a Form 355U: Excise for Taxpayers Subject to Combined Reporting ("Excise Return") for the Massachusetts corporate excise tax year ending December 31, 2016. The appellant was a disregarded entity for federal income tax purposes and a disregarded entity for purposes of the Excise Return. Its income and certain of its assets, including the subject property, were included on the Excise Return through Dynegy Resource, its sole member. Dynegy

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<sup>1</sup> This sum is calculated by taking \$55,699,775 in assessed value at a rate of \$28.76 per \$1,000.

Resource was treated as a corporation for federal income tax purposes.

The appellant contends that the subject property is exempt from taxation pursuant to G.L. c. 59, § 5, Clause Sixteenth(2) ("Clause Sixteenth(2)") because the property was subject to the Massachusetts corporate excise tax by inclusion on the Excise Return through Dynegy Resource. Clause Sixteenth(2) provides a property exemption for business corporations subject to tax under G.L. c. 63, § 39.<sup>2</sup>

Based upon the above facts and an analysis of relevant legal provisions and case law, as discussed below in the Opinion, the Board found and ruled that the appellant was not a business corporation subject to tax under G.L. c. 63, § 39, and so it was not eligible for the exemption under Clause Sixteenth(2) for the subject property for the fiscal year at issue. Consequently, the Board issued a decision in favor of the assessors in this appeal.

#### **OPINION**

Pursuant to G.L. c. 59, § 2, all property, real and personal, situated within the Commonwealth, unless expressly exempt, shall be subject to taxation. General Laws c. 59, § 5

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<sup>2</sup> The appellant initially set forth an overvaluation claim in its petition, but this claim was later abandoned.

lists exemptions to property tax, including Clause Sixteenth(2), which provides an exemption:

[i]n the case of a business corporation subject to tax under section 39 of chapter 63 that is not a manufacturing corporation, all property owned by the corporation or a telephone corporation subject to chapter 166 other than the following:— real estate, poles, underground conduits, wires and pipes, and machinery used in the conduct of the business, which term, as used in this clause, shall not be considered to include stock in trade or any personal property directly used in connection with dry cleaning or laundering processes or in the refrigeration of goods or in the air-conditioning of premises or in any purchasing, selling, accounting or administrative function.

G.L. c. 59, § 5, Clause Sixteenth(2).

General Laws c. 63, § 39 requires "every business corporation, organized under the laws of the commonwealth, or exercising its charter or other means of legal authority, or qualified to do business in the commonwealth, or owning or using any part or all of its capital, plant or any other property in the commonwealth" to pay the excise as provided in G.L. c. 63, § 39. The term "business corporation" is specifically defined by G.L. c. 63, § 30(1) as having the following meaning:

any corporation, or any 'other entity' as defined in section 1.40 of chapter 156D, whether the corporation or other entity may be formed, organized, or operated in or under the laws of the Commonwealth or any other jurisdiction, and whether organized for business or for non-profit purposes, that is classified for the taxable year as a corporation for federal income tax purposes.

See also 830 CMR 63.30.3 (stating that "St. 2008, c. 173 has changed the way unincorporated businesses are classified and treated . . . resulting in general conformity with federal entity classification and filing rules" and defining "business corporation" the same as statute). General Laws c. 156D, § 1.40 defines "other entity" as follows:

any association or entity other than a domestic or foreign business corporation, a domestic or foreign nonprofit corporation or a government or quasi-governmental organization. The term includes, without limitation, limited partnerships, general partnerships, limited liability partnerships, **limited liability companies**, joint ventures, joint stock companies, business trusts and profit and not-for-profit unincorporated associations.

General Laws c. 156D, § 1.40 (emphasis added).

Consequently, if a limited liability company is classified for the taxable year as a corporation for federal income tax purposes, it is a "business corporation" subject to tax under G.L. c. 63, § 39 and it is eligible for the exemption under Clause Sixteenth(2) (so long as it meets the other requisites of Clause Sixteenth(2)). See G.L. c. 59, § 5, Clause Sixteenth(2); G.L. c. 63, § 30; G.L. c. 156D, § 1.40. In this matter, however, Brayton was a disregarded entity; it was not classified as a corporation for federal income tax purposes and as a result it was not a business corporation subject to tax under G.L. c. 63, § 39 as required by Clause Sixteenth(2). As noted by the

assessors in their brief, an entity disregarded for purposes of the corporate excise cannot conversely be an entity that is subject to the corporate excise.

The appellant suggests that it was subject to the corporate excise tax "through its sole member" Dynegy Resource. But Clause Sixteenth(2) makes no such allowance and the Board cannot read this language into the statute. See **Commonwealth v. Mansur**, 484 Mass. 172, 176 (2020) ("As a basic tenet of statutory interpretation, we ordinarily do not 'add language to a statute where the Legislature itself has not done so.'" (citation omitted); **Commonwealth v. Mandell**, 61 Mass. App. Ct. 526, 528 (2004) ("We are not free to add language to a statute for the purpose of interpreting it according to what we might imagine to be the Legislature's objective.").

The entity seeking the exemption must be both the owner of the property and a business corporation subject to tax under G.L. c. 63, § 39. See G.L. c. 59, § 5, Clause Sixteenth(2). Dynegy Resource was not the owner of the subject property during relevant time periods and so its classification as a corporation for federal income tax purposes is not relevant to the issue of whether the appellant - a disregarded entity - was entitled to the exemption under Clause Sixteenth(2) for the fiscal year at issue as the owner of the subject property. See **In re MCI Worldcom Network Services**, 454 Mass. 635, 649 (2009) ("Even

though MCImetro was disregarded for corporation income tax purposes, it was always treated separately for personal property ad valorem taxation. For personal property taxation, exemption status turns on ownership."). There is no legal basis for the appellant to assume Dynegy Resource's classification in order to receive the exemption under Clause Sixteenth(2). See **Commissioner v. National Alfalfa Dehydrating & Milling Co.**, 417 U.S. 134, 149 (1974) ("[W]hile a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice, whether contemplated or not . . . and may not enjoy the benefit of some other route he might have chosen to follow but did not.").

As a disregarded entity, Brayton's income, assets, and activities were considered to be those of its owner, Dynegy Resource, for purposes of G.L. c. 63. See G.L. c. 63, § 30(2) (A disregarded entity "shall similarly be disregarded for purposes of this chapter, and without limitation, all income, assets, and activities of the entity shall be considered to be those of the owner."). Dynegy Resource was included in the Excise Return, and the value of the subject property was included as part of Dynegy Resource's schedule.<sup>3</sup> But this statutory flow through of income,

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<sup>3</sup> The subject property was included on the Excise Return on Schedule U-ST: Member's Separate Computation of Tax, for Dynegy Resource, as part of the total amount of the "Member's taxable tangible property" as reported on line 32. General Laws c. 63, § 30 states that "[t]he value of a corporation's tangible property taxable under clause (1) of



assets, and activities does not transform disregarded entities into business corporations.

A "disregarded entity" and a "business corporation" are two distinct, defined terms under G.L. c. 63, § 30. Of critical note, Clause Sixteenth(2) makes no reference to a "disregarded entity"; it references "a business corporation subject to tax under section 39 of chapter 63." However, a disregarded entity can qualify for an exemption under G.L. c. 59, § 5, Clause Sixteenth(3) ("Clause Sixteenth(3)"), further indicating that Clause Sixteenth(2) does not apply to a disregarded entity. Clause Sixteenth(3) states in pertinent part as follows:

(i) a manufacturing corporation or a research and development corporation, as defined in section 42B of chapter 62, or (ii) a limited liability company that; (a) has its usual place of business in the commonwealth; (b) is engaged in manufacturing in the commonwealth and whose sole member is a manufacturing corporation as defined in section 42B of chapter 63 or is engaged in research and development in the commonwealth and whose sole member is a research and development corporation as defined in said section 42B; and (c) is a disregarded entity, as defined in paragraph 2 of section 30 of chapter 63, all property owned by the corporation or the limited liability company other than real estate, poles and underground conduits, wires and pipes.

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subsection(a) of section thirty-nine shall be the book value of such of its tangible property situated in the commonwealth on the last day of the taxable year **as is not subject to local taxation** nor taxable under section sixty-seven." (emphasis added). This provision casts doubt on the appellant's suggestion that the subject property was impermissibly taxed twice. Any responsibility for multiple taxation rests with the appellant. It is unclear from the record whether an abatement on the Excise Return was ever sought from the Department of Revenue.

G.L. c. 59, § 5, Clause Sixteenth(3). But the appellant did not allege, and the record does not support, that Brayton qualified for an exemption under Clause Sixteenth(3).

#### **CONCLUSION**

Based upon the foregoing, the Board ruled that the appellant was not a business corporation subject to tax under G.L. c. 63, § 39 and so it was not entitled to an exemption under Clause Sixteenth(2) for the subject property for the fiscal year at issue. Accordingly, the Board issued a decision for the appellee in this appeal.

#### **THE APPELLATE TAX BOARD**

By: /s/ Thomas W. Hammond  
Thomas W. Hammond, Jr., Chairman

A true copy,

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