

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

JAMES CONSTABLE

v. COMMISSIONER OF REVENUE

Docket No. C342736

Promulgated:
January 27, 2023

This is an appeal originally filed under the small claims procedure pursuant to G.L. c. 58A, § 7B and later transferred to the formal procedure pursuant to G.L. c. 58A, § 7. James Constable ("appellant") challenged the refusal of the Commissioner of Revenue ("Commissioner" or "appellee") to refund alleged overpayments for tax year 2011 ("tax year at issue"), as well as the refusal to abate penalties and interest.

Commissioner Metzger heard this appeal. Chairman DeFrancisco and Commissioners Good and Elliott joined her in the 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.

James Constable, pro se, for the appellant.

Martin J. Saulen, Esq., for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of the testimony and exhibits offered into evidence at the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact.

The appellant and his wife filed a joint Massachusetts resident income tax return for the tax year at issue on or about June 5, 2013 ("original 2011 return"), reporting no tax due and withholding of \$3,000, which resulted in an overpayment of \$3,000 that the appellant applied to 2012 estimated tax.

Subsequently, due to a federal change, the Commissioner issued to the appellant a Notice of Intent to Assess for the tax year at issue in the amount of \$9,263 in proposed tax, plus proposed penalties and interest. In response to the Notice of Intent to Assess, the appellant filed an application for abatement/amended return for the tax year at issue ("abatement application/amended 2011 return") on or about December 28, 2018, seeking a reduction of the proposed tax assessment and abatement of proposed penalties and interest.

The abatement application/amended 2011 return reported a tax due of \$7,625 and withholding of \$6,211, consisting of the \$3,000 overpayment that had already been applied to 2012 estimated tax as directed by the appellant on the original 2011 return, and additional withholding of \$3,211 that the appellant had not

reported on the original 2011 return.¹ The abatement application/amended 2011 return also reported a 2010 overpayment of \$3,988 applied to 2011 estimated tax (which the appellant had not reported on the original 2011 return). This amount consisted of a \$2,000 overpayment from tax year 2009 and a \$1,988 overpayment from tax year 2010.

The abatement application/amended 2011 return resulted in a series of actions by the Commissioner. The Commissioner issued a Notice of Abatement Determination to the appellant on January 24, 2019 ("January 2019 Notice of Abatement Determination") in response to the abatement application/amended 2011 return, granting an abatement for the tax year at issue in the amount of \$1,638. This amount consisted of the difference between the proposed tax amount of \$9,263 on the Notice of Intent to Assess and the tax amount of \$7,625 reported on the abatement application/amended 2011 return by the appellant. Consequently, there is no dispute between the parties that the tax liability for the tax year at issue was \$7,625 as a result of the federal change. The January 2019 Notice of Abatement Determination did not grant relief from penalties and interest as requested by the appellant. The appellant did not file a petition with the Board within sixty

¹ This \$3,211 amount consisted of an additional withholding of \$1,802 on the same \$90,600 in wages for the appellant as reported on the original 2011 return and withholding of \$1,409 on \$26,400 in wages for his wife that had not been reported on the original 2011 return.

days of the January 2019 Notice of Abatement Determination to seek further relief.

The Commissioner issued a Notice of Assessment to the appellant on January 30, 2019, with an assessment date of January 14, 2019, assessing tax in the amount of \$7,625, along with associated interest and penalties. The Notice of Assessment indicated that "[t]his assessment is a result of an amended return." Though the appellant had not claimed the additional withholding of \$3,211 on the original 2011 return, the Commissioner credited the appellant for this amount as reported on the abatement application/amended 2011 return. The Commissioner sought payment of the remaining balance of tax, penalties, and interest. The Notice of Assessment directed the appellant to contact the Commissioner and attach copies of cancelled checks or verification of electronic payments if he believed he had not received credit for all payments and/or to request an abatement if he disagreed with the tax amount or would like to appeal any penalties assessed. The appellant did not file an abatement application in response to the Notice of Assessment.²

Subsequent to the Commissioner's issuance of the January 2019 Notice of Abatement Determination and the Notice of Assessment, the appellant engaged in ongoing correspondence with the

² The Commissioner's counsel confirmed this during the course of the hearing, stating that the appellant had not filed a "traditional" abatement application.

Commissioner, including the provision of various documents to the Commissioner in an envelope with a postmark date of April 8, 2021 ("April 8, 2021 package"). The appellant, through this ongoing correspondence, alleged that withholdings and carryovers not only covered the entirety of the \$7,625 tax due for the tax year at issue, but that a balance of overpayments remained for which the Commissioner owed him a refund. He also alleged that a letter of disability furnished to the Commissioner relieved him of any penalties and interest.

In addition to the additional withholding of \$3,211 allowed by the Commissioner as reported on the abatement application/amended 2011 return, the following chart summarizes the alleged overpayment amounts that the appellant contended should be credited against the tax liability of \$7,625 for the tax year at issue, with any balance as a refund:

Amount	Description
(\$2,000.00)	Overpayment from tax year 2009.
(\$1,988.00)	Overpayment from tax year 2010.
(\$3,000.00)	2011 withholding for the appellant as reported on the original 2011 return.
(\$511.45)	Alleged 2011 withholding for the appellant's wife. Neither the withholding nor associated income was reported on the original 2011 return.
(\$3,000.00)	Withholding characterized by the appellant as "taken from the year 2012, and not returned."
(\$1,638.00)	Amount abated by the Commissioner (difference between the amount of proposed tax liability on the Notice of Intent to Assess and the tax amount reported on the abatement application/amended 2011 return).

Though the appellant filed no other abatement application aside from the abatement application/amended 2011 return, the Commissioner - ostensibly in response to the April 8, 2021 package

- issued another Notice of Abatement Determination for the tax year at issue on May 12, 2021 ("May 2021 Notice of Abatement Determination"), stating that the appellant's "abatement request" had been denied on the basis that "[a]fter a review of the issues raised in your request for an abatement, we have determined that these issues were considered in a prior claim. Pursuant to M.G.L., Chapter 62C, section 37, you may not challenge an item of tax that has already been challenged in a previous claim."

The appellant timely filed a petition under the small claims procedure with the Board on June 1, 2021, in response to the May 2021 Notice of Abatement Determination. On its own motion, the Board ordered that the proceedings be transferred to the formal procedure because the appellant failed to execute a waiver of right to appeal, a necessary element of the small claims procedure pursuant to G.L. c. 58A, § 7B(c).

Based upon the documents in the record and the testimony presented at the hearing of this appeal, the Board determined that the appellant's claims fell into three categories - a request for refund or credit of alleged overpayments governed by G.L. c. 62C, § 36; a request for abatement of penalties governed by G.L. c. 62C, § 37;³ and a request for abatement of interest governed by

³ "Tax" under G.L. c. 62C includes "any tax, excise, interest, penalty, or addition to tax imposed by this chapter or the statutes referred to in section two." G.L. c. 62C, § 1.

830 CMR 62C.33.1(4).⁴ All claims presented flaws that deprived the Board of jurisdiction.

Request for Refund or Credit of Alleged Overpayments

The Board found that the record established that no overpayments existed. Consequently, there could be no refund or credit of overpayments for the tax year at issue. Unpaid and uncontested tax remained for the tax year at issue, along with associated statutory penalties and interest. While the Board has jurisdiction over appeals from the Commissioner's refusal to refund or credit an overpayment of a tax, the Board has no jurisdiction to compel a refund or credit where no overpayment exists. See G.L. c. 62C, §§ 36 and 39.

The following chart summarizes the disposition of the amounts underlying the appellant's claim for refund or credit of overpayments for the tax year at issue:

⁴ The appellant had also asserted the ability to eliminate any tax due for the tax year at issue through the use of a tax loss from a later year. Massachusetts imposes a tax on so-called Part B taxable income equal in general to Massachusetts gross income other than capital gains, interest, and dividends (G.L. c. 62, § 2(a) and § (b)(2)), minus allowable deductions and exemptions (G.L. c. 62, § 2(d) and G.L. c. 62, § 3.B). Net operating loss deductions allowed by Section 172 of the federal Internal Revenue Code ("Code") are not among the allowable deductions. See G.L. c. 62, § 2(d)(1)(C). See also G.L. c. 62, §1(c) (applying the Code as amended on January 1, 2005). Accordingly, the Board found and ruled that even if the appellant were able to establish, on a timely filed amended tax return, that he or his wife realized a net operating loss in a succeeding tax year from which tax losses could be carried back under the Code, any such reported loss could not be applied to offset the income shown on the application for abatement/amended 2011 return for the tax year at issue.

Amount	Description	Disposition
(\$2,000.00)	Overpayment from tax year 2009.	Refunded to the appellant.
(\$1,988.00)	Overpayment from tax year 2010.	Refunded to the appellant.
(\$3,000.00)	2011 withholding for the appellant as reported on the original 2011 return.	Applied to 2012 estimated tax, as directed by the appellant on the original 2011 return. Fully utilized in tax year 2012.
(\$511.45)	Alleged 2011 withholding for the appellant's wife. Neither the withholding nor associated income was reported on the original 2011 return.	Beyond statutory deadline of G.L. c. 62C, § 36 to seek a refund or credit.
(\$3,000.00)	Withholding characterized by the appellant as "taken from the year 2012, and not returned."	No withholding was taken from tax year 2012 and applied back to the tax year at issue. Any withholding reported on the 2012 return was utilized in tax year 2012.
(\$1,638.00)	Amount abated by the Commissioner (difference between the amount of proposed tax liability on the Notice of Intent to Assess and the tax amount reported on the abatement application/amended 2011 return).	This amount was filed in response to the Notice of Intent to Assess. Even if it were a reduction of an actual assessment, the appellant had to have an overpayment in his account for the tax year at issue to result in a refund or credit of this amount. The evidence has established otherwise.

As indicated in the chart above, but for the \$511.45 in alleged withholding and the \$1,638 abatement, the amounts relied upon by the appellant had either previously been refunded to the appellant by the Commissioner or applied to and utilized in a subsequent tax year as directed by the appellant.

The appellant's request for a refund or credit of the \$511.45 in alleged withholding for his wife is jurisdictionally barred under G.L. c. 62C, § 36 based upon the timing requisites of the statute. While the appellant and his wife filed the original 2011 return within the required statutory period set forth in G.L. c. 62C, § 36, they failed to claim a refund or credit of the \$511.45

on that return, reporting only the state income tax of \$3,000 withheld from the appellant's W-2 compensation.⁵

Request for Abatement of Penalties

While premature abatement filings generally are not fatal to jurisdiction, as discussed further in the Opinion, the Board does not construe a filing, even if premature, as an opportunity to reset the jurisdictional timeline on the same items for which the taxpayer sought an abatement in the first instance.

In this case, the appellant responded to the Notice of Intent to Assess by filing the abatement application/amended 2011 return to seek abatement of - amongst other items - proposed penalties. The January 2019 Notice of Abatement Determination - issued in response to the abatement application/amended 2011 return - did not grant relief from penalties.

Once he set the abatement process of G.L. c. 62C, § 37 into motion, the appellant's next step upon receiving the January 2019 Notice of Abatement Determination was to file an appeal with the Board within sixty days pursuant to G.L. c. 62C, § 39. He did not take this action. The later-dated Notice of Assessment did not reset the abatement process, but the lack of any abatement

⁵ The original 2011 return failed to even report any W-2 compensation paid to the appellant's wife during the tax year at issue.

application filed within two years of the January 14, 2019 assessment date nevertheless rendered this a moot point.⁶

Request for Abatement of Interest

The Board has no jurisdiction to abate interest on a tax validly due. See 830 CMR 62C.33.1(4)(c). There is no legal authority - and the appellant cites to none - to abate interest on account of a medical disability.

Based upon the above and the testimony and evidence offered by the parties, the Board lacked jurisdiction over this appeal and issued a decision for the appellee.

OPINION

"[T]he Board has only that jurisdiction conferred on it by statute." *Commissioner of Revenue v. Pat's Super Market, Inc.*, 387 Mass. 309, 311 (1982); *Scheffer v. Assessors of Shrewsbury*, Mass.

⁶ The Board notes that the April 8, 2021 package - which itself was filed more than two years beyond the assessment date of January 14, 2019 - is not a "form approved by the Commissioner" as required by G.L. c. 62C, § 37, and the Commissioner's questionable treatment of it as such a form is not grounds for the Board to follow suit. See *Assessors of Boston v. Suffolk Law School*, 295 Mass. 489, 494 (1936) ("The lack of an application in the statutory form is not excused by the good faith of the taxpayer, or acceptance by the assessors of an application in some other form nor by the fact that the assessors are not inconvenienced or misled."); *Jones v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 2018-560, 567 ("Moreover, the Board found that the appellant's settlement request form did not qualify as an abatement application, because a settlement request form is not a form approved by the Commissioner for purposes of requesting abatement."). See also Administrative Procedure 627 ("Taxpayers seeking to obtain an abatement of a tax or penalty that has been assessed by DOR should use MassTaxConnect (MTC) and follow the instructions provided for disputing a tax or penalty. Alternatively, taxpayers may file a paper Form ABT, Application for Abatement. However, abatement applications filed electronically through MTC will be processed faster than paper applications. Note that taxpayers that are required to file their taxes electronically must also file abatement requests electronically.").

ATB Findings of Fact and Reports 2022-140, 147. The appellant's three claims - a request for refund or credit of alleged overpayments governed by G.L. c. 62C, § 36; a request for abatement of penalties governed by G.L. c. 62C, § 37; and a request for abatement of interest - all presented flaws that deprived the Board of jurisdiction.

Request for Refund or Credit of Alleged Overpayments

General Laws c. 62C, § 39 provides the Board with jurisdiction over an appeal involving "[a]ny person aggrieved by the refusal of the commissioner . . . to refund any tax . . . whether such refusal results from the denial of an abatement application made under section 36 or section 37." Critically, under G.L. c. 62C, § 36, however, there must be an underlying overpayment, and the Board found that the record established that no overpayments existed in this matter. Consequently, the Board had no jurisdiction to compel any refund or credit of alleged overpayments. See G.L. c. 62C, §§ 36 and 39.

The appellant's request for a refund or credit of the \$511.45 in alleged withholding is jurisdictionally barred under G.L. c. 62C, § 36 on the basis that such a request - where a required return has not been timely filed - "shall be made by filing the overdue return within 3 years from the due date of the return, taking into account any extension of time for filing the return, or within 2 years of the date that the tax was paid, whichever is

later.” While the appellant and his wife filed the original 2011 return in June 2013 within the required statutory period set forth in G.L. c. 62C, § 36, they failed to claim a refund of, or credit for, the \$511.45 on that return, reporting only the state income tax of \$3,000 withheld from the appellant’s W-2 compensation. The appellant’s request for refund or credit of the \$511.45, initiated beyond the statutory deadlines, was jurisdictionally barred.

Request for Abatement of Penalties

The appellant filed his abatement application/amended 2011 return in response to a Notice of Intent to Assess issued by the Commissioner, which proposed the assessment of penalties, amongst other items. While G.L. c. 62C, § 37, in relevant part, requires that a “person aggrieved by the assessment of a tax” take action “within 2 years from the date the tax was assessed,” case law has held that “where a statute require[s] action within a certain time ‘after’ an event, [] the action may be taken before that event,” because deadline “statutes have been construed as fixing the latest, but not the earliest, time for the taking of the action.” ***Becton, Dickinson and Company v. State Tax Comm’n***, 374 Mass. 230, 234 (1978); ***Nasuti v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2015-544, 554-55, *aff’d*, 90 Mass. App. Ct. 1120 (2016) (Rule 1:28 decision), *further app. rev. denied*, 476 Mass. 1110 (2017).

Relevant here is the singularity of the phrase "the taking of the action." **Becton, Dickinson and Company**, 374 Mass. at 234; **Nasuti**, Mass. ATB Findings of Fact and Reports at 2015-554-55. Once the appellant took the action of filing for an abatement - whether premature or not - he set the process of G.L. c. 62C, § 37 in motion. The appellant's next step upon receiving the January 2019 Notice of Abatement Determination dated January 24, 2019 was to file an appeal with the Board within sixty days pursuant to G.L. c. 62C, § 39 (providing that "[a]ny person aggrieved by the refusal of the commissioner to abate . . . any tax . . . may appeal therefrom, within 60 days after the date of notice of the decision of the commissioner . . . by filing a petition with the clerk of the appellate tax board"). He did not do so.

The Notice of Assessment dated January 30, 2019 - six days later - did not serve to reset the abatement timeline articulated in G.L. c. 62C, § 37 on the same contested item. See **Santos v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 2020-485, 492 (stating that "[t]he Board has previously ruled that a taxpayer cannot extend the jurisdictional timeline of § 39 by filing subsequent abatement applications"). But the absence in the record of an abatement application filed within two years of the January 14, 2019 assessment date indicated in the Notice of Assessment obviated any analysis on this point regardless.

Request for Abatement of Interest

Pursuant to G.L. c. 62C, § 32(a), “[t]axes shall be due and payable at the time when the tax return is required to be filed, determined without regard to any extension of time for filing the return.” The statute further provides that “[i]f any amount of tax is not paid to the commissioner on or before its statutory due date, there shall be added to the tax interest at the rate of the Federal short-term rate determined under section 6621(b) of the Internal Revenue Code, as amended and in effect for the taxable year, plus four percentage points, compounded daily.” G.L. c. 62C, § 32(a).

Statutorily, the appellant is responsible for any interest accrued on the unpaid tax amount,⁷ and the Board has no jurisdiction to rule otherwise. See G.L. c. 62C, § 32. As stated in 830 CMR 62C.33.1(4)(c), “[t]he Commissioner may not abate assessed or accrued interest unless the underlying tax on which the interest is computed is also abated.” See **PPC Constructors, Inc. v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 2001-310, 339 (“[T]he Board has previously held that ‘interest can be abated only if it is shown to have been incorrectly calculated or if the underlying tax is abated as

⁷ See also footnote 3.

excessive or illegal.'") (citation omitted), *aff'd*, 57 Mass. App. Ct. 1111 (2003) (Rule 1:28 decision).

A medical disability, as claimed by the appellant, is not an exception to the accrual of interest on a tax validly due. See **PPC Constructors, Inc.**, Mass. ATB Findings of Fact and Reports at 2001-339 ("There is no provision for abating interest accrued on a tax validly due.") (citation omitted); **Shulam v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 2008-419, 422 ("The Board could abate interest in this appeal only if the interest was improperly imposed or calculated or if the underlying tax was abated as excessive or illegal.").

Based upon the above, the Board found and ruled that the appellant's claims were jurisdictionally barred. Accordingly, the Board issued a decision for the appellee in this appeal.

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