

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

BRIAN RUSSELL HOGAN

v.

COMMISSIONER OF REVENUE

Docket No. C341543

Promulgated:
August 31, 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 refund alleged overpayments of sales taxes for the quarterly tax periods ended March 2002 through June 2005, and withholding taxes for the quarterly tax periods ended December 2001 through June 2005 ("tax periods at issue"), assessed to Brian Russell Hogan ("appellant") as a responsible person with respect to Resource Systems, Inc. ("Resource Systems").

Commissioner Good heard this appeal. Chairman DeFrancisco and Commissioners Elliott and Metzger joined her in allowing the appellee's Motion to Dismiss for Lack of Jurisdiction and dismissing the appeal following a hearing on the merits.

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.

Brian Russell Hogan, pro se, for the appellant.

John J. Connors, Jr., 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.

I. Background

Resource Systems, a Massachusetts corporation, filed quarterly sales and withholding tax returns for the tax periods at issue, but failed to pay in full the tax liabilities reported on those returns. The Commissioner sent Notices of Assessment to Resource Systems for periods from December of 2001 through June of 2005 relating to the amounts at issue, including interest and penalties.

The Commissioner, having determined that the appellant was personally and individually liable for the assessed and unpaid sales and withholding tax liabilities of Resource Systems, also assessed those taxes to the appellant as a responsible person pursuant to Notices of Determination of Personal Liability and Deemed Assessments dated June 8, 2004, March 2, 2006, and April 1, 2008. As of January 18, 2013, the balance due on account of these assessments pursuant to a Current Liability Statement issued to the appellant by the Massachusetts Department of Revenue ("Massachusetts DOR") was \$35,384.89.

On January 30, 2013, the appellant entered into a Payment Agreement with the Massachusetts DOR ("Payment Agreement"),

promising to pay his outstanding liability in accordance with a schedule of installment payments. He agreed to pay the sum of \$100 a month to the Massachusetts DOR until his obligation had been paid in full. He also agreed to waive the normal ten-year statute of limitations on collection of the liability.

From March 22, 2013, through March 21, 2019, the appellant made payments under the Payment Agreement totaling \$7,300 and on August 9, 2017, he made a "good faith payment" of \$4,328.92, together totaling \$11,628.92.¹ The Payment Agreement ended on April 2, 2019, at the request of the appellant, and the Massachusetts DOR no longer sought collection of the tax liabilities of Resource Systems from the corporation or the appellant.

II. Commissioner's Motions to Dismiss

On July 15, 2019, the Commissioner's Office of Appeals received the appellant's Massachusetts Form ABT, Application for Abatement. Having received two separate Notices of Abatement Determination denying his abatement application relating to the tax periods at issue, the appellant timely filed his Petition Under Formal Procedure with the Board.

¹ The installment payments made under the Payment Agreement as well as the appellant's "good faith payment" were credited by the Massachusetts DOR against the underlying tax liabilities of Resource Systems.

The Commissioner thereupon filed two separate Motions to Dismiss for Lack of Jurisdiction. In a Motion to Dismiss dated September 30, 2021, the Commissioner noted that the appellant did not contest the underlying tax assessments or his status as a responsible person, but rather argued that he had overpaid pursuant to a payment plan. Asserting that the relief sought should be brought in the Superior Court, the Commissioner moved to dismiss the appeal for lack of jurisdiction.

Subsequently, in a Motion to Dismiss for Lack of Jurisdiction Under G.L. c. 62C, § 36, dated April 20, 2022, the Commissioner again moved to dismiss the appeal for lack of jurisdiction based on the conclusion that there was no overpayment. The Commissioner, addressing arguments made by the appellant in his abatement application, stated that the records of the Massachusetts DOR did not show any money received by it from the United States Internal Revenue Service ("IRS") for or on behalf of the appellant or Resource Systems for the tax liabilities of Resource Systems, and that the appellant remained liable under a payment agreement after having made a "good faith payment" in August of 2017.

The Board withheld action on the Commissioner's Motions pending a hearing on the merits of the appellant's appeal.

III. Parties' Positions

A. Alleged Overpayments under Payment Agreement

The appellant did not dispute his status or liability as a responsible person. Nor did he dispute the sales and withholding taxes assessed by the Commissioner to Resource Systems. Rather, the appellant first argued that, after having made his "good faith payment" on August 9, 2017, no further amounts were due under the Payment Agreement because he had been "told by the MDOR" that this amount would pay off the balance of his tax liability. Nevertheless, he stated, a monthly payment of \$100 continued to be withdrawn from his bank account each month from August 21, 2017, until January 21, 2019 - a total of \$1,900, which the appellant asserted was refundable as an overpayment.

To establish that his "good faith payment" fully satisfied his tax liability, the appellant entered several documents into evidence - first, a series of Account Transcripts dated August 24, 2017, issued by the IRS in his name ("2017 Account Transcripts"), for certain quarterly tax periods ended in 1994 and from 2000 through 2005. These relate to what is stated on each to be a "Miscellaneous penalty IRC 6672 Trust Fund Recovery Penalty" - entered as a debit on various dates. The 2017 Account Transcripts also record additional debits for interest charged for late payment, and then (i) the write-off on August 9, 2010, following a fully accepted offer in compromise, of the total balances due

from the appellant for all indicated quarterly tax periods except that ended in 1994, and (ii) for the quarter ended in 1994, the application on March 25, 2005 of the \$41,892.34 "Payment Suit" amount noted in the 2019 Account Transcripts, described below, reducing the balance due to zero.

The appellant also entered into evidence Consolidated Bills dated January 1, 2010, and December 30, 2012, issued to Resource Systems by the Massachusetts DOR's Collections Bureau ("Consolidated Bills"), showing total amounts due of \$37,824.60 and \$33,847.36, respectively, and various Payment Agreement Reminders issued by the Massachusetts DOR's Customer Service Bureau to Resource Systems from February 8, 2013, through April 25, 2015 ("Payment Agreement Reminders").

The appellant maintained that debits reflected on the 2017 Account Transcripts (which the appellant refers to as a "Fund") represented amounts that the IRS turned over to the Massachusetts DOR, which in turn applied them in full satisfaction of his tax liability, as evidenced by declining balances due shown on the Consolidated Bills and the Payment Agreement Reminders issued to Resource Systems, and also by the fact that he had been advised by the Massachusetts DOR that making his "good faith payment" would reduce his tax liability to zero. Before the Board, the appellant claimed that the Fund paid a total of \$39,138.01 on account of his tax liability, in addition to the "good faith payment" he had made

- representing the sum of the differences between (i) the amounts shown on the two Consolidated Bills, (ii) the opening and closing balances due shown on the Payment Agreement Reminders, and (iii) the amount shown on the last Payment Agreement Reminder entered into evidence and the appellant's "good faith payment." ²

However, the debits reflected on the 2017 Account Transcripts do not indicate disbursements made by the IRS - rather they reflect amounts due from the appellant. Further, the 2017 Account Transcripts relating to debits entered in 2001 and 2006 indicate that on August 9, 2010, the IRS simply wrote off the debit amounts indicated thereon to be due from the appellant, while the 2017 Account Transcript relating to the quarter ended in 1994 indicates that the sum of \$41,892.34 was applied in 2005 to offset the appellant's federal tax liability. The appellant provided no documentary evidence to the Board in support of his claim of a transfer of Fund amounts (the debits) from the IRS to the Massachusetts DOR, and the Massachusetts DOR had no record of receipt of any money from the IRS for or on behalf of the appellant and/or Resource Systems for the tax liabilities of Resource Systems.

² In contrast, in a statement accompanying his abatement application, the appellant asserted that a tax liability of \$31,456.22 had been paid from monies seized by the IRS in 2000 and forwarded to the Massachusetts DOR.

Together, the appellant's "good faith payment" on August 9, 2017, and the total payments he made pursuant to his Payment Agreement from March 22, 2013, through March 21, 2019, were less than a third of what was owed. A Payment Agreement Reminder dated December 8, 2017 - several months after the appellant made his "good faith payment" - informed Resource Systems that monthly installments of \$100 were due under the Payment Agreement from December 21, 2017, through November 21, 2020, and reflected a total balance due of \$43,743.67.

The Massachusetts DOR continued to withdraw \$100 monthly payments from the appellant's bank account pursuant to the Payment Agreement from August 21, 2017, through March 21, 2019. It was not until April 2, 2019, that (i) the Payment Agreement ended, and (ii) the Massachusetts DOR wrote off all amounts then due on account of Resource Systems' outstanding sales and withholding tax obligations.

B. Funds Allegedly Received from the IRS

The appellant's second argument, presented at the hearing before the Board, related to his claim for a refund of \$194,652.84,³ plus interest. In the appellant's view, these sums arose from bankruptcy proceedings that he voluntarily commenced on or about

³ In his abatement application, the appellant requested a release to him of \$246,675.65, which he described as "the remainder of the monies seized by the IRS after all monies owe[d] to the IRS and Massachusetts Department of Revenue have been paid."

January 12, 2001, pursuant to Chapter 13 of Title 11 of the United States Code (the "Bankruptcy Code"), that were later converted to a case under Chapter 7 of the Bankruptcy Code.

The appellant claimed that, in 2000, the IRS seized monies due him (\$325,000) which, on July 30, 2004, he agreed the IRS could retain, subject to the condition that it satisfy his outstanding federal tax liability and transfer the remainder to the Massachusetts DOR. It was the appellant's understanding that the Massachusetts DOR would then pay off his Massachusetts tax liability and return the balance to him. The appellant offered no documentation in support of his contentions.

However, the record reflects the following facts. Pursuant to a stock purchase agreement entered in November of 2000, the appellant sold his interest in the stock of W.P Properties, Inc., an entity that he controlled. Pending satisfaction of certain conditions of the stock purchase agreement, the acquiring entity deposited the sum of \$325,000 in escrow with legal counsel (the "Escrow"). In conjunction with the sale, the parties also entered into a consulting agreement pursuant to which the appellant was to render consulting services to the acquiring entity for five years in exchange for \$25,000 a year.

At the commencement of the appellant's bankruptcy proceedings, the balance in the Escrow totaled \$203,000. By Bankruptcy Court order dated April 14, 2004, the then remaining

funds in the Escrow, after payment of fees and expenses - a total of \$187,258.99 (the "Escrowed Funds") - were turned over to the Bankruptcy Court by legal counsel. Later, by Bankruptcy Court order entered on or about July 15, 2004, the sum of \$62,470.31 (the "Consulting Funds") - representing the present value of the remaining consulting payments, net of an amount claimed not to be payable to the appellant - was paid over to the Bankruptcy Trustee.

Early in the bankruptcy proceedings, the IRS filed a proof of claim seeking to collect \$208,236.86, including a secured claim of \$178,409.02, and the Massachusetts DOR filed a proof of claim seeking to collect \$67,028.81, including a secured claim of \$41,171.16. The Stipulation of Settlement Among the Chapter 7 Trustee, United States of America, and the Debtor ("Stipulation") entered on February 7, 2005 in the bankruptcy proceedings provided that: (i) the IRS was to receive the Escrowed Funds held by the Bankruptcy Court, to be applied against its secured claim plus post-petition interest, and (ii) the Consulting Funds were to be divided among the Bankruptcy Trustee and his counsel (\$24,830), the appellant's former counsel (\$17,862.02), and the Massachusetts DOR (the remaining balance - approximately \$19,600).

The Stipulation was approved by the Bankruptcy Court on February 18, 2005. Thereupon (i) Consulting Funds in the amount of \$19,495.40 were transferred to and applied by the Massachusetts DOR against the liabilities of two other corporations unrelated to

the instant appeal, with respect to which the appellant testified he was a responsible person, and (ii) the sum of \$187,258.99 was paid to the IRS. Five Account Transcripts dated March 8, 2019, issued by the IRS in the name of the appellant ("2019 Account Transcripts"), show that credits totaling \$187,258.99 were applied on March 25, 2005, to offset amounts owed by the appellant to the IRS on account of civil penalties relating to tax periods ended in 1991, 1994, 1995, and 1998, and late payment interest. In particular, the following "Payment Suit" amounts are indicated:

<u>Amount</u>	<u>Tax Period Ended</u>
\$63,723.84	September 30, 1991
\$41,892.34	December 31, 1991
\$18,474.99	December 31, 1994
\$53,246.82	December 31, 1995
<u>\$9,921.00</u>	December 31, 1998
\$187,258.99	

Notwithstanding the foregoing, the appellant took the position before the Board that the \$325,000 placed in the Escrow was seized by the IRS, which was left with the sum of \$270,992.05 ("Transferred Amount") once it had satisfied its secured tax claim. The appellant further argued that, from this amount, \$24,830 was paid to the Bankruptcy Trustee and \$17,862.02 was paid to the appellant's former counsel,⁴ leaving a balance to be paid over to the Massachusetts DOR by the IRS. According to the appellant, the

⁴ These are the amounts which, according to the Stipulation, were to be paid with Consulting Funds.

Massachusetts DOR "was certainly in possession" of that balance on April 4, 2008, which would have satisfied in full the total tax liability of \$33,647.19 indicated on the Final Notice dated April 4, 2008, issued to Resource Systems and the appellant.⁵ The appellant maintained that, on or about April 4, 2008, that left a balance due him of \$194,652.84 plus interest for 12 years, which he computed to be \$169,114.39.

The appellant arrived at the Transferred Amount by totaling the credits (shown as negative amounts) indicated on the 2019 Account Transcripts. While the appellant concluded that the credits recorded disbursements transferred by the IRS to the Massachusetts DOR, in fact the negative amounts reflect payments that reduced the appellant's federal tax liability and certain other account adjustments - in most instances, the reduction or removal of a miscellaneous penalty. Notably, they include the entries totaling \$187,258.99, discussed above, that the IRS applied to offset the sums owed by the appellant on account of civil penalties and late payment interest.

As noted above, the Massachusetts DOR had no record of receiving any money from the IRS for or on behalf of the appellant and/or Resource Systems for the tax liabilities of Resource

⁵ However, the Consolidated Bills issued by the Massachusetts DOR to Resource Systems in 2010 and 2012 referenced above continued to show balances due in excess of \$33,600.

Systems, and the appellant produced no documents evidencing any transfer of funds from the IRS to the Massachusetts in 2008 or at any time. The following year, confirming his continuing tax liability, the Massachusetts DOR advised the appellant in a notice dated September 4, 2009, that he could apply for temporary relief if he could not satisfy his tax liability either in full or through installments without creating significant hardship.

IV. The Board's Findings

The Board found that the record, in its entirety, established that no overpayments of tax existed. In particular, the Board found no support for the appellant's argument that his "good faith payment" made in August of 2017 fully satisfied his tax liability. Further, the Board found that throughout the period from August 21, 2017, until January 21, 2019, the appellant's tax liability remained in excess of the \$1,900 withdrawn from his bank account pursuant to the terms of the Payment Agreement, which remained in effect until April 2, 2019.

The Board also found no support for the appellant's claimed entitlement to funds belonging to him, which he alleged the Massachusetts DOR had received from the IRS incident to his bankruptcy proceedings. Indeed, the Board found the facts to be contrary to those asserted by the appellant. The sum of \$325,000 was never transferred to the IRS - only the sum of \$187,258.99 was transferred to, and applied by, the IRS against the appellant's

federal liabilities on account of certain civil penalties and late payment interest. Further, the Transferred Amount calculated by the appellant was, in fact, the sum of credit entries (debits) on the 2019 Account Transcripts which recorded payments and other offsets against amounts indicated thereon to be due from the appellant - and at no time was there a transfer of funds from the IRS to the Massachusetts DOR.

In sum, there were no overpayments for the tax periods at issue. Consequently, the Board granted the Commissioner's Motion to Dismiss for Lack of Jurisdiction Under G.L. c. 62C, § 36, 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); see also *Scheffer v. Assessors of Shrewsbury*, Mass. ATB Findings of Fact and Reports 2022-140, 147.

General Laws c. 62C, § 36 authorizes taxpayer requests for refunds of any overpayment of tax, and G.L. 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" Critically, under G.L. c. 62C, § 36, however, there must be an underlying overpayment. The Board found that the documents in the record and the testimony of the Commissioner

established that no overpayments of tax existed in this matter. Consequently, the Board has no jurisdiction to compel any refund. See **Constable v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 2023-27, 37; see also, regarding a taxpayer's burden of proving the facts necessary to justify his claims, **Judson Freight Forwarding Co. v. Commonwealth**, 242 Mass. 47, 55 (1922); **Staples v. Commissioner of Corporations and Taxation**, 305 Mass. 20, 26 (1940); **Commissioner of Corporations and Taxation v. Adams**, 316 Mass. 484, 487 (1944); and **William Rodman & Sons, Inc. v. State Tax Commission**, 373 Mass. 606, 610 (1977).

Accordingly, the Board granted the Commissioner's Motion to Dismiss for Lack of Jurisdiction Under G.L. c. 62C, § 36, and issued a decision for the appellee.

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