

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

J & P INC.

v. COMMISSIONER OF REVENUE

Docket No. C344797

Promulgated:
February 2, 2023

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39 from the refusal of the Commissioner of Revenue ("Commissioner" or "appellee") to abate sales tax on meals ("meals tax") and associated penalties and interest assessed to J&P, Inc. ("appellant") for the monthly tax periods ended December 31, 2014, through July 31, 2017 ("tax periods at issue").

Chairman DeFrancisco heard the appellee's Motion to Dismiss for Lack of Jurisdiction ("Motion to Dismiss"). Commissioners Good, Metzger, and Elliott joined the Chairman in allowing the Motion to Dismiss and dismissing the appeal for lack of jurisdiction.

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

James Everett, Esq., for the appellant.

Kevin Daly, Esq., for the appellee.

FINDINGS OF FACT AND REPORT

Based on evidence presented at the hearing of the Motion to Dismiss, the Appellate Tax Board ("Board") made the following findings of fact.

The appellant operates a pizza restaurant known as "Papa George Pizza" located in Easthampton, Massachusetts, and timely filed meals tax returns for the tax periods at issue. Following an audit, the Commissioner issued a Notice of Assessment on December 10, 2018, which included an additional assessment of meals tax and associated penalties and interest.

The appellant timely filed an application for abatement on December 26, 2018 ("First Application"), which was within two years of the date the tax was assessed, pursuant to G.L. c. 62C § 37 ("§ 37").¹

The parties participated in a telephonic hearing held by the Commissioner's Office of Appeals ("Office of Appeals") on March 25, 2020. The Office of Appeals issued a letter of determination ("Letter") dated July 15, 2020. Contemporaneously, the Commissioner issued a Notice of Abatement Determination ("First

¹ General Laws c. 62C, § 37 provides, in relevant part, that "[a]ny person aggrieved by the assessment of a tax ... may apply in writing to the commissioner, on a form approved by the commissioner, for an abatement thereof at any time: (1) within 3 years from the date of filing of the return ...; (2) within 2 years from the date the tax was assessed or deemed to be assessed; or (3) within 1 year from the date that the tax was paid, whichever is later."

Notice") dated July 15, 2020, which was mailed to the appellant on July 17, 2020. The Letter advised the appellant of the determination by the Office of Appeals that "the Taxpayer failed to maintain records adequate to verify the sales as reported on its Forms ST-MAB-4 and that the alternative method the Audit Division used to calculate the Taxpayer's sales was reasonable."

The alternative method employed by the Audit Division involved calculation of an error factor applicable to all the appellant's reported taxable sales, which was based on a comparison of the appellant's purchase of grinder rolls (with allowances for waste or other use of the rolls) against reported sales of grinder rolls for a sample period. The appellant contested the validity of the alternative method in the First Application and during the hearing process prior to issuance of the First Notice.

The First Notice advised the appellant that pursuant to G.L. c. 62C, § 39 ("§ 39"), the appellant had 60 days from the date of the First Notice to submit an appeal to the Board. The appellant did not file an appeal within that timeframe.

Almost a year after issuance of the First Notice, on June 28, 2021, the appellant made a payment toward the taxes owed. Shortly thereafter, on July 7, 2021, the appellant filed a second application for abatement regarding the tax periods at issue ("Second Application").

The Second Application again challenged the Commissioner's alternative method of estimating taxable sales, this time focusing on pizza supplies and sales as a proxy for the flaws in the alternative method. The Commissioner issued a Notice of Abatement Determination ("Second Notice") on January 31, 2022, denying the Second Application on the basis that the issue raised in the Second Application was the same issue that had been decided in the First Application. On March 8, 2022, the appellant timely filed a Petition Under Formal Procedure with the Board regarding the Second Notice.

While the Second Application was submitted more than two years after the date the tax was assessed and more than three years after the appellant filed returns for the tax periods at issue, it was timely submitted within a year of a tax payment, allowing it to be considered by the appellee. See § 37 and 830 CMR 62C.37.1.

Regardless, the Board ruled that the Second Application failed because the appellant challenged the same portion of tax that had been addressed in the First Application. More specifically, the First Application challenged the alternative method that had been applied to the total sales subject to the meals tax. The Second Application challenged the same net sum, the total sales subject to the meals tax (and the consequent meals tax), but it focused on pizza supplies and sales to demonstrate alleged flaws in the Commissioner's alternative method.

Having concluded that the Second Application was duplicative, the Board also ruled that the Second Application was not valid for the purpose of restarting the statutory timeline for appeal to the Board, which lapsed 60 days following the Commissioner's issuance of the First Notice, well before the appellant filed a petition with the Board in March of 2022. Therefore, the Board dismissed the appeal for lack of jurisdiction and issued a decision for the appellee.

OPINION

This is an appeal from a decision of the appellee refusing to grant an abatement of meals tax.² The appellee filed the Motion to Dismiss due to the appellant's untimely filing of its appeal with the Board. As referenced above, § 39 requires that an appeal be brought "within 60 days after the date of notice of the decision of the commissioner or within 6 months after the time when the application for abatement is deemed to be denied." 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. Therefore, the Board has only that jurisdiction conferred on it by statute.

²General Laws c. 64H, § 2 provides that "[a]n excise is hereby imposed upon sales at retail in the commonwealth, by any vendor, or tangible personal property or of services performed in the commonwealth at the rate of 6.25 per cent of the gross receipts of the vendor from all such sales of such property or services, except as otherwise provided in this chapter." Sales of meals and alcoholic beverages are explicitly excluded from the definition of "food products" exempt under G.L. c. 64H, § 6(h) and are therefore subject to sales tax.

Commissioner of Revenue v. Pat's Super Market, Inc., 387 Mass. 309, 311 (1982). The Board has no jurisdiction to hear 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. Neither the courts nor the Board has the authority to make an exception to the time limits that are specified by the statute. **Sears Roebuck & Co. v. State Tax Commission**, 370 Mass. 127, 130 (1976).

The Board has previously ruled that a taxpayer cannot extend the jurisdictional time limit imposed by § 39 by filing a subsequent abatement application. "It is well established that a taxpayer may not file a second application for abatement which puts an identical item of tax at issue that has been the subject of a previous application, unless there are newly discovered facts, the first application is a return which shows an overpayment, there is a second assessment, or there is a subsequent change in decisional law." **National Grid USA Service Company, Inc. v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 2014-630, 642-643 (citing **Liberty Life Assurance Company of Boston v. State Tax Commission**, 374 Mass. 25, 30 (1977) and **Focaccia, Inc. v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 2013-665, 668).

Here, the appellant had 60 days after issuance of the First Notice relating to the First Application to appeal to the Board.

The appellant did not appeal during that statutorily prescribed time-period. The appellant then submitted the Second Application, hoping to be afforded another 60-day opportunity to submit an appeal to the Board after the Second Application was denied. The appellant argued that the Second Application addressed a different portion of the tax and was therefore allowable pursuant to 830 CMR 62C.37.1(5)(f)2 ("Regulation"), which provides:

[a] taxpayer may file a subsequent application for abatement concerning the same tax and taxable period as a previous application so long as the taxpayer intends to challenge a portion of the tax different from that challenged in the previous application. A taxpayer may not file a second application for abatement which puts in issue the identical item of tax for a given period as challenged in a previous application.

The Board, however, found that the Second Application raised a challenge to the same portion of the tax for the same tax period that had already been challenged in the First Application. The appellant acknowledged that both applications pertained to the calculation of the meals tax assessments for the tax periods at issue. However, the appellant sought to distinguish the Second Application as applying to a different portion of the tax relating to pizza sales, which was therefore distinct from sales of grinders.

The Board disagreed. As previously noted, the alternative method employed by the Commissioner to estimate the appellant's taxable sales for the tax periods at issue was based on the number

of grinder rolls purchased, which was used to calculate an error factor that was applied to all reported taxable sales, including pizza sales. The Second Application sought to undermine the same methodology and the same estimate of taxable sales that was challenged in the First Application. The Second Application simply offered a different focus on perceived flaws in the methodology. To be clear, the Board makes no judgment as to the validity of the Commissioner's alternative method, which may be flawed as the appellant claims. The Board cannot, however, find jurisdiction to consider this substantive question where jurisdiction does not exist. Having concluded that the Second Application was duplicative of the first, the Board ruled that the Second Application did not renew the 60-day time-period during which an appeal to the Board could be made.

The appellant's appeal to the Board was filed approximately one year and eight months after denial of the First Application and was therefore untimely under § 39. Accordingly, the Board granted the appellee's Motion to Dismiss 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