

**COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD**

BRENDAN O. MACDONALD

v.

COMMISSIONER OF REVENUE

Docket No. C349351

Promulgated:
December 31, 2025

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39(c) from the refusal of the Commissioner of Revenue (“Commissioner” or “appellee”) to grant an abatement of personal income tax assessed to Brendan O. MacDonald (“appellant”) for calendar year 2018 (“tax year at issue”).

Chairman DeFrancisco heard the appellee’s Motion to Dismiss for Lack of Jurisdiction (“Motion to Dismiss”). Commissioners Good, Elliott, Metzger, and Bernier joined him in the decision for the appellee, allowing the Motion to Dismiss.

These findings of fact and report are made at the request of the appellant pursuant to G.L. c. 58A, § 13 and 831 CMR 1.34.

Brendan O. MacDonald, pro se, for the appellant.

Wendi Safran, Esq., for the appellee.

FINDINGS OF FACT AND REPORT

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

On March 10, 2019, the appellant filed a Form 1 Massachusetts Resident Income Tax Return for the tax year at issue (“2018 Form 1”), reporting \$236 in personal income tax. The address for the appellant on the 2018 Form 1 was 5310 English Oak Drive in Killeen, Texas (“Texas address”).

On December 20, 2021, the Commissioner issued a Notice of Assessment to the appellant, assessing an additional \$1,454 in personal income tax for the tax year at issue, plus accrued interest. The Notice of Assessment referenced an exchange agreement between the Internal Revenue Service and the Commonwealth of Massachusetts and explained that corrected wages were determined based upon federal W-2s and federal wages reported.¹ The Notice of Assessment was sent to the appellant at the Texas address.

The appellant filed an online abatement application with the Commissioner on October 27, 2022, contesting the Commissioner’s assessment for the tax year at issue (“first abatement application”) on the basis that he was not a resident of Massachusetts in 2018. The first abatement application included his email address in the contact information section.

By Notice of Abatement Determination dated March 10, 2023 (“first NAD”), the Commissioner denied the appellant’s first abatement application. The first NAD stated as a reason for the denial that the appellant failed to appear for his hearing and that based on the record before the Commissioner the tax was properly due. The first NAD was mailed to the Texas address on March 15, 2023, according to an affidavit signed by the supervisor of the Commissioner’s unit responsible for the mailing of such notices. The

¹ The Motion to Dismiss did not include a Notice of Intent to Assess as an exhibit, but a document in the record references a Notice of Intent to Assess dated November 4, 2021.

first NAD was also emailed by the Commissioner's Office of Appeals on March 10, 2023, to the email address provided by the appellant in the first abatement application. The Commissioner provided both a copy of the email sent on March 10, 2023, at 10:56 a.m. EST and the read receipt establishing that the email was opened on March 10, 2023, at 12:20 p.m. EST. The first NAD directed the appellant to file an appeal with the Board within sixty days of the first NAD if the appellant disagreed with the Commissioner's determination and included the Board's address. Sixty days from the first NAD was May 9, 2023.

The appellant filed another online abatement application with the Commissioner on March 29, 2023, again contesting the Commissioner's assessment for the tax year at issue ("second abatement application") on the basis that he was not a resident of Massachusetts in 2018. The second abatement application also stated in part that "I filed an initial appeal, which was denied due to a failure to appear at the hearing" and "all notices were sent to the address in Texas, despite all contact and mailing information in the DOR website being correct and final notices of the audit and appeal being mailed to the correct address." The second abatement application included the same email address in the contact information section as provided in the first abatement application. The record does not contain any copies of the "contact and mailing information in the DOR website."

By Notice of Abatement Determination dated June 26, 2023 ("second NAD"), the Commissioner denied the appellant's second abatement application on the basis that the appellant's claims were the same as those considered previously. The second NAD also referenced the first NAD, and as had been provided in the first NAD, the appellant should

have appealed to the Board within sixty days of the first NAD. The second NAD was mailed to an address in Pennsylvania. There is no evidence in the record to indicate whether or not the second NAD was also emailed to the appellant.

The appellant filed a petition with the Board on July 7, 2023 (postmarked June 30, 2023), challenging the Commissioner's assessment for the tax year at issue. The petition contains the same address as the first and second abatement applications and the Pennsylvania address to which the second NAD was mailed. The petition was filed within sixty days from the date of the second NAD, but more than 100 days from the date of the first NAD.

In the Motion to Dismiss, the Commissioner argued that the appellant received the first NAD and should have timely appealed to the Board from this denial of the first abatement application. The Commissioner further argued that a second abatement application was only appropriate if 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 that shows an overpayment; there is a second assessment imposed; or there is a subsequent change in decisional law. None of those circumstances, the Commissioner contended, were present here.

During the hearing on the Motion to Dismiss, the appellant was in agreement as to the timeline of the facts presented. He stated that he filed the second abatement application within sixty days of the first NAD, and that he filed with the Board four days after receiving the second NAD.

Based on the evidence before it, the Board found that by March 29, 2023, the appellant received written notification of the Commissioner's determination via the first

NAD. Thus, May 9, 2023, was the due date for filing a petition with the Board. The appellant acknowledged in the second abatement application that he “filed an initial appeal, which was denied due to a failure to appear at the hearing.” Instead of timely filing an appeal with the Board, however, the appellant filed the second abatement application. The second abatement application was not operative, as the appellant challenged the same item of tax that he had challenged in the first abatement application. He provided no evidence of any other circumstances for which the second abatement application would be appropriate. Thus, the second abatement application was invalid, and the appellant failed to timely file an appeal with the Board.

Accordingly, the Board allowed the Motion to Dismiss the appeal for lack of jurisdiction.

OPINION

General Laws c. 62C, § 39 provides that a person aggrieved by the refusal of the Commissioner to abate a tax may appeal to the Board “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 G.L. c. 62C, § 39. See ***Watus Electric, Inc. v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1993-139, 142; ***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 sixty days of the first NAD. While the petition was filed within sixty days of the second NAD, 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. See also 830 CMR 62C.37.1(5)(f) (“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.”).

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 29 n.4). None of these circumstances were present here. The appellant’s second abatement application was a repeat of his first abatement application, challenging the same personal income tax assessment. 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 set the jurisdictional clock for G.L. c. 62C, § 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"); 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 sixty days of the Commissioner's denial of an abatement application).

Because the appellant failed to file a timely appeal under G.L. c. 62C, § 39 from the Commissioner's first NAD, the Board found and ruled that it did not have 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: 
Mark J. DeFrancisco, Chairman

A true copy,

Attest: 
Clerk of the Board