



THE COMMONWEALTH OF MASSACHUSETTS

Appellate Tax Board

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Boston, Massachusetts 02114*

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Docket No. F332103

McDONALD'S CORPORATION
Appellant.

v.

**BOARD OF ASSESSORS OF
THE TOWN OF GREAT BARRINGTON**
Appellee.

DECISION WITH FINDINGS

After consideration of the parties' submissions filed in connection with the appellee's Motion to Dismiss ("Motion") and the arguments advanced at the September 28, 2017 hearing of the Motion, the Board orders that the Motion is allowed and the appeal is dismissed in accordance with G.L. c. 59, § 38D. On the basis of the pleadings and affidavits filed in connection with the Motion, the Board makes the following findings of fact.

On or about March 4, 2016, the assessors mailed to the appellant, in accordance with §38D, a request for income and expense information concerning the subject property for purposes of determining its fair cash value for fiscal year 2017. The requested information was reasonably required by the assessors to determine the fair cash value of the subject property for fiscal year 2017.

The assessors received no response to the § 38D request. On or about October 26, 2016, the appellant filed an abatement application with the assessors, which they denied on November 30, 2016. The appellant timely filed this appeal on February 23, 2017.

The assessors argued that the appeal must be dismissed, relying on the plain language of §38D, which provides in pertinent part that:

Failure of an owner or lessee of real property to comply with such request within 60 days after it has been made by the board of assessors shall be automatic grounds for dismissal of a filing at the appellate tax board. The appellate tax board . . . shall not grant extensions for the purposes of extending the filing requirements unless the applicant was unable to comply with such request for reasons beyond his control or unless he attempted to comply in good faith.

In response to the Motion, the appellant argues that: (1) although McDonald's, the owner of the property, may have received the 38D request, the lessee did not and, therefore, the lessee is not barred from an appeal under § 38D; and (2) the failure of the §38D notice to request a response under oath makes it a defective notice. The Board rejects these arguments for the following reasons.

1. *The lessee never filed an application or appeal.*

The first and only reference to a lessee in this appeal is the appellant's Opposition to the Motion and the attached unsigned, undated, non-notarized "affidavit" allegedly of the lessee. However, McDonald's is: (1) the assessed owner to whom the tax bill was mailed; (2) the party in whose name the abatement application was brought; and (3) the party in whose name this appeal was brought, as the party aggrieved by the assessors refusal to abate a tax assessed to it.

In language that is equally apt to the present appeal, the Board has previously rejected the same argument advanced here:

The appellant argued that because the assessors never sent the tenant a 38D request, the tenant could not be barred from taking the appeal because any failure to answer was "for reasons beyond his control," which were that no 38D request was sent to or received by the tenant and the tenant could not control the owner's failure to answer the 38D request directed to the owner. The Board's short answer to these arguments is that the tenant never brought a timely appeal in its own name and could not subsequently complain that the owner's appeal was being dismissed for the owner's failure to timely respond to the assessors' valid 38D request. Simply, the tenant elected not to pursue *its* appeal rights, and the appellant's failure to answer the 38D request was not for reasons beyond its control.

Herman Banquer Trust v. Assessors of Boston, Mass. ATB Findings of Fact and Reports, 2005-664, 673-73 (emphasis in original). Because the supposed lessee is a stranger to this appeal, he cannot claim that the appeal should survive because he did not receive a §38D request; McDonald's brought this appeal and its failure to respond to the § 38D request without a statutorily recognized cause is grounds for dismissal.

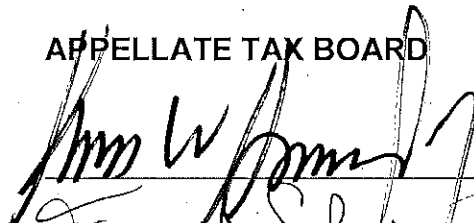
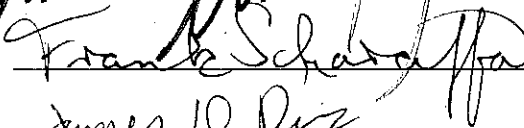
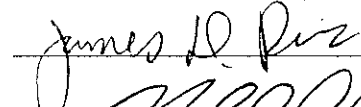
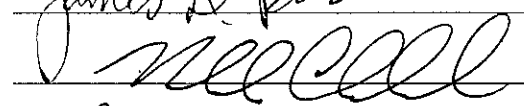
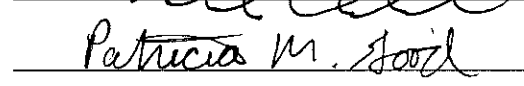
2. *The failure to request a response under oath does not render the §38D request invalid*

The appellant argues that the failure of the § 38D request to require a response under oath excuses its failure to make any response at all. Although such an argument might be a valid defense to a motion to dismiss if the appellant had filed a response which was not under oath, there is no support for the notion that an appellant can avoid the sanctions of § 38D if the assessors fail to request the information under oath. Rather, case law suggests that a § 38D request which does not track the "under oath"

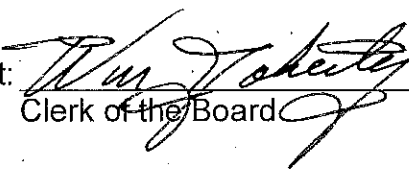
language of the statute is not invalid for that reason. See *Id.* at 671-72 (Board dismissed an appeal under § 38D, ruling that failure of the notice to use the words "under oath" did not invalidate the notice); **Forty-Four – 46 Winter Street LLC v. Assessors of Boston**, Mass. ATB Findings of Fact and Report, 2005-656, 662-63 (same).

The assessors unambiguously requested information reasonably required by them to determine the actual fair cash value of the subject property. The appellant failed to establish that its failure to respond to the request was due to reasons beyond its control or that it attempted to comply with request in good faith. Therefore, the Motion is allowed and the appeal is dismissed in accordance with § 38D.

APPELLATE TAX BOARD

	Chairman
	Commissioner
	Commissioner
	Commissioner
	Commissioner

Attest:


Clerk of the Board

Date: OCT - 4 2017

(Seal)

NOTICE: Either party to these proceedings may appeal this decision to the Massachusetts Appeals Court by filing a Notice of Appeal with this Board in accordance with the Massachusetts Rules of Appellate Procedure. Pursuant to G.L. c. 58A, § 13, no further findings of fact or report will be issued by the Board.