

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**JOSUEL SANTOS**

**v.**

**COMMISSIONER OF REVENUE**

Docket No. C339522

Promulgated:  
August 26, 2020

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 personal income taxes assessed against Josuel Santos ("Mr. Santos" or "appellant") for the periods ending December 31, 2009 and December 31, 2010 ("tax years at issue").

Commissioner Good heard the appellee's Motion to Dismiss for Lack of Jurisdiction ("Motion to Dismiss"). Chairman Hammond and Commissioners Rose, Elliott, and Metzger joined her in allowing the appellee's 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 appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.

*Timothy Burke, Esq.*, for the appellant.

*Celine E. de la Foscade-Condon, Esq.*, for the appellee.

## **FINDINGS OF FACT AND REPORT**

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

The appellant timely filed his 2009 Massachusetts Income Tax Return on March 10, 2010, and he timely filed his 2010 Massachusetts Income Tax Return on March 6, 2011. On August 22, 2013, the Commissioner was notified of a change in the federal tax liability of the appellant, which affected the appellant's Massachusetts tax liability for both tax years at issue. On May 18, 2015, the Commissioner assessed additional taxes against the appellant stemming from the federal change. The assessment was made within two years of the appellee receiving notice from the Internal Revenue Service of the federal change in accordance with G.L. c. 62C, § 30.

On October 14, 2015, the appellant's attorney filed with the Commissioner a Form M-2848, Power of Attorney and Declaration of Representative ("power of attorney form"), authorizing him to act on the appellant's behalf in proceedings before the Commissioner with respect to tax years 2000 through 2016. The power of attorney form indicates that originals of all notices and other communications from the Commissioner will be sent to the taxpayer and gives the taxpayer the option of designating another individual to

receive copies of such notices or communications by checking the appropriate box. The appellant failed to designate his attorney or anyone else to receive copies of any notices or communications.

The appellant filed a total of four abatement applications pertaining to the assessments at issue. The appellant filed his first abatement application on November 23, 2015, which the Commissioner denied by Notice of Abatement Determination dated June 22, 2016. The appellant did not file an appeal of this denial.

On March 1, 2017, the appellant filed a second abatement application. The Commissioner conceded that the second abatement application contained new information that was not included in the first application. On the second abatement application, the appellant marked the appropriate oval indicating his refusal to allow the Commissioner more than six months to act on his application. The Commissioner did not act on the second abatement application within six months and, therefore, it was deemed denied by operation of law on September 1, 2017, in accordance with G.L. c. 58A, § 6 and G.L. c. 62C, § 39.

Although the second abatement application was already denied by operation of law, the Commissioner sent the appellant a Request for Additional Information on February 8,

2018. The appellant failed to respond to this request. The Commissioner then sent the appellant a Notice of Abatement Determination dated March 22, 2018, denying the appellant's second abatement application. The appellant failed to file an appeal with the Board within sixty days of either the deemed denial or the Commissioner's Notice of Abatement Determination.

Rather, on October 2, 2018, the appellant filed a third abatement application. The appellant again refused to consent to the Commissioner having additional time to act on the application. Finally, on August 16, 2019, the appellant filed a fourth abatement application, which the Commissioner denied by a Notice of Abatement Determination dated September 4, 2019.

On October 18, 2019, the appellant filed his Petition Under Formal Procedure with the Board, within sixty days of the Commissioner's denial of the appellant's fourth abatement application but long after the statutory deadline for appealing the denials of the previous three applications.

Upon reviewing the evidence, the Board found that the third and fourth applications did not include newly discovered facts or information that was not already provided with the second abatement application. The Board thus found that the third and fourth abatement applications were not

valid for purposes of extending the statutory appeal period. Therefore, for the reasons explained more fully in the Opinion, the Board found that it was the denial of the appellant's second abatement application that set the timeframe for determining the Board's jurisdiction over this appeal.

The appellant contends that the Commissioner erred by not sending notice of the denial of the second abatement application to the appellant's attorney. The originals of all notices from the Commissioner were sent to the appellant at the address of record on file with the Commissioner. The Commissioner submitted an affidavit from Brian Looney, a Tax Auditor with the Massachusetts Department of Revenue ("Department"), who attested that there was no indication in the Department's records that notices were returned to the Department as a result of an incorrect or insufficient address or for any other reason, and the Board found this evidence credible. Further, the appellant does not deny receiving the originals of any notices issued by the Commissioner.

As previously indicated, the power of attorney form executed by the appellant did not authorize anyone to receive copies of notices or other communications from the Commissioner. The Board thus found that the Commissioner did

not err in sending original notices to the appellant without copies to his designated tax representative.

Moreover, because the appellant had refused to consent to additional time for the Commissioner to act on his second abatement application, the second abatement application was deemed denied on September 1, 2017. The appellant did not file his Petition with the Board within six months of the deemed denial, as required under the relevant statutory authority, or even within sixty days of the Commissioner's second Notice of Abatement Determination. Therefore, because the appellant failed to timely appeal from the deemed denial of his second abatement application, the Board found and ruled that it lacked jurisdiction over the instant appeal.

Accordingly, the Board granted the appellee's Motion to Dismiss and entered a decision for the appellee.

#### **OPINION**

This is an appeal from a decision of the Commissioner refusing to grant an abatement of income taxes. The Commissioner filed a Motion to Dismiss the appeal for not being filed seasonably. The statute governing appeals to the Board is G.L. c. 62C, § 39 ("§ 39"), which requires that appeals be taken "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 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 § 39. **Watjus Electric, Inc. v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 1993-139, 142; see also **Cannavo v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 2012-551, 561-62. Neither the courts nor this Board have the authority to create an exception to the time limit specified by the statute. **Sears Roebuck & Co. v. State Tax Commission**, 370 Mass. 127, 130 (1976).

The appellant filed a total of four abatement applications. The Commissioner maintained that the second abatement application was valid but not the third and fourth applications, and that therefore, the denial of the second application set the timeframe for the Board's jurisdiction. The appellant did not grant his consent to an extension of time for the Commissioner to act on the second abatement application, and therefore, it was deemed denied on September

1, 2017 pursuant to G.L. c. 58A, § 6 and G.L. c. 62C, § 39. The appellant filed his Petition on October 18, 2019, beyond the statutory timeframe under § 39.

The Board has previously ruled that a taxpayer cannot extend the jurisdictional time limit of § 39 by filing subsequent abatement applications: "It is beyond dispute that a 'second application [for an abatement] on the same ground [does] not give the applicant a second chance to appeal to the board.'" **Focaccia, Inc. v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 2013-665, 668 (citing **Liberty Life Assurance Company of Boston v. State Tax Commission**, 374 Mass. 25, 29, n.4 (1977)); see also **Fredkin, et al., v. State Tax Commission**, 369 Mass. 973, 974 (1976) (ruling that "further applications after the time [to appeal to the Board] had run did not avoid the time limit.").

After already filing one abatement application, a subsequent application would be appropriate only where: a taxpayer seeks to challenge a part of the excise that was not involved in the prior abatement application; there are newly discovered facts that were not able to be included on the first application; 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. **Focaccia,**



Mass. ATB Findings of Fact and Reports at 2013-668, 669 (citing **Liberty Life**, 374 Mass. at 28, 29, n.4).

The Commissioner acknowledged, and the Board so found, that the second abatement application contained information that was not already included in the first abatement application, and therefore, the second application was valid. However, upon reviewing the third and fourth abatement applications, the Board found that these subsequent applications did not contain newly discovered facts not already included on the second abatement application, nor did they meet any of the other requirements outlined in **Liberty Life** for a subsequent abatement application to be valid. The Board thus found and ruled that the third and fourth abatement applications were not valid and, accordingly, the second abatement application was controlling for purposes of determining jurisdiction.

The appellant contended that by sending the denial of his second abatement application to him instead of to his designated tax representative, the Commissioner violated the appellant's rights under the Taxpayer Bill of Rights, specifically his right to representation before the Commissioner. The appellant cites to 830 CMR 62C.37.1(8), which provides: "The Commissioner shall mail or deliver written notice of the decision to grant or deny the abatement

application to the taxpayer or the taxpayer's representative." The appellant argues that to the extent that this provision may be ambiguous, tax provisions are to be strictly construed and "all doubts are to be resolved in favor of the taxpayer." ***Bolster v. Commissioner of Corporations & Taxation***, 319 Mass. 81, 85 (1946).

However, the appellant ignores the fact that, as indicated on the power of attorney form, originals of notices and other communications were to be sent to the taxpayer, and the appellant failed to designate his attorney or anyone else to receive copies of such notices or communications. Therefore, under the facts of this appeal, the Board rules that "[t]here is simply nothing to support a finding that the Commissioner was under an obligation to send notice of the denial to [a designated tax representative] or that the appellant's time for appealing the denial was somehow expanded because his lawyer received no timely notice of the denial." ***DiCato v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2007-47, 56.

Since the appellant refused to consent to the Commissioner having additional time to act on the second abatement application, the second abatement application was deemed denied on September 1, 2017. The appellant did not file his Petition with the Board within six months of the

deemed denial, as required under the relevant statutory authority, or even within sixty days of the Commissioner's second Notice of Abatement Determination.

Accordingly, the Board granted the appellee's Motion to Dismiss and entered a decision for the appellee.

**THE APPELLATE TAX BOARD**

By: /s/ Thomas W. Hammond, Jr.  
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: /s/ William J. Doherty  
Clerk of the Board