

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

**SOUTHERN MASS STAFFING
SERVICES, INC.**

v. COMMISSIONER OF REVENUE

Docket No. C341659

Promulgated:
January 16, 2026

This is an appeal filed by Southern Mass Staffing Services, Inc.¹ (“Staffing Services” or “appellant”) under the formal procedure pursuant to G.L. c. 62C, § 39(c) from the refusal of the Commissioner of Revenue (“Commissioner” or “appellee”) to abate corporate excise assessed against the appellant for the tax year ending December 31, 2015 (“tax year at issue”).

Chairman DeFrancisco heard the appeal. Commissioners Good, Elliott, Metzger, and Bernier joined him in the decision for the appellee.

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

Forrest W. Kim, Esq., for the appellant.

Martin J. Saulen, Esq. and *Christopher Glionna*, Esq., for the appellee.

¹ According to the Articles of Organization filed by the appellant, the legal name of the corporation is “Southern Mass Staffing Inc.” The appellant filed its Petition with the Appellate Tax Board as “Southern Mass Staffing Services, Inc.”

FINDINGS OF FACT AND REPORT

Based on the testimony of Mesa Som, president, treasurer, secretary, and director of Staffing Services, and documents admitted into evidence during the hearing of the appeal, the Appellate Tax Board (“Board”) made the following findings of fact.

The sole issue before the Board was whether the appellant was entitled to deduct an expense for subcontractors in the amount of \$1,004,507, which was first claimed on its second amended 2015 Massachusetts Form 355 (Business or Manufacturing Corporation Excise Return).

I. Background

Staffing Services was incorporated in Massachusetts on February 17, 2015, under the name Southern Mass Staffing Inc., with its registered office in Worcester, Massachusetts. The Articles of Organization state that the corporation intended to operate an employment agency. Staffing Services took over the business of a temporary staffing agency that had been providing workers principally for Shields Packaging Co. Inc. (“Shields”) and Pilgrim Food (“Pilgrim”). At the time the appellant took over the business, Mr. Som was aware that the prior owner had been paying its workers in cash. The appellant’s workers, some of whom had not provided information about their eligibility to work in the United States, performed various functions, including work on an assembly line and receiving or moving products in a warehouse. The appellant communicated with Shields through a Shields supervisor, who provided Mr. Som with many of the names of workers. For Pilgrim, however, Mr. Som testified that he mostly found people himself. Some workers walked to work; others were picked up at their houses by the appellant and driven to their place of work.

Shields maintained timesheets that it provided weekly to the appellant, which in turn generated a weekly invoice for its services. Pursuant to the arrangement with Shields, Staffing Services was paid an agreed-upon amount per hour for each worker. Payment was in cash. The appellant paid its workers a lesser amount per hour. Mr. Som explained that some of his workers demanded cash, and that although some did not give him the information he asked for, he continued to use them thinking the information would come. The cash payments due to those working for Shields were generally delivered by the Shields supervisor in envelopes marked with the name of the worker, date, amount, and number of hours worked. Mr. Som testified that the amounts paid in cash to workers were reported to neither the Massachusetts Department of Revenue nor the Internal Revenue Service. However, 69 workers were paid in 2015 through a payroll service. A 2015 Form W-3 Transmittal of Wage and Tax Statements and accompanying 2015 Forms W-2 Wage and Tax Statement (“2015 Forms W-2”) entered into evidence indicate payroll wages totaling \$287,836.41.

Staffing Services’ employment practices received the attention of the Massachusetts Attorney General, who commenced an investigation pertaining to the time period from April 1, 2015, through October 31, 2016. Mr. Som testified that the investigation may have begun around October 2016, stating “[i]t could be because at the time I also had an investigation with OSHA.” An agreement among (i) the Office of the Attorney General, and (ii) Southern Mass Staffing, Inc. and Mesa Som (collectively, the “Employer”) executed in February 2018 (the “Wage-Hour Agreement”) set forth the Employer’s violation of various wage and hour laws, including the failure as to 272 “employees” to pay the required minimum wage, provide earned sick time, maintain

accurate payroll records, and provide “a suitable paystub showing their rate of pay and number of hours worked when distributing cash wages.” The Attorney General further found that the Employer had misclassified employees as independent contractors in violation of Massachusetts law. The Employer agreed, *inter alia*, to pay total earned sick-time restitution of \$36,000 and a penalty of \$44,000. A copy of the Wage-Hour Agreement, as executed by the parties, was entered into evidence.

II. Jurisdiction

The appellant filed a Massachusetts Form 355, Business or Manufacturing Corporation Excise Return (“Form 355”) for the tax year at issue (“original 2015 Form 355”) on March 15, 2016, reporting gross receipts of \$381,203 and total deductions of \$340,727 (including a wage deduction of \$297,836 and no subcontractor expenses), resulting in taxable income of \$40,476 and an associated tax liability of \$3,320. By Notification of Audit dated July 11, 2016, the Audit Division of the Department of Revenue stated that the appellant’s original 2015 Form 355 had been selected for verification and audit, and requested documents noted in an attached Information Document Request. By Revised Notice of Intent to Assess (“Revised NIA”) dated May 12, 2017, the Commissioner stated that the appellant had failed to report the correct corporate excise for the period from February 1, 2015, to December 31, 2015. The Revised NIA indicated the Commissioner’s intent to assess \$75,005.03, consisting of tax of \$75,802 plus interest of \$4,332.33 less a credit of \$5,129.31, based on gross receipts of \$1,328,638 recalculated per information the Audit Division had received from Shields.

The appellant sought a reduction in the proposed assessment through a pre-assessment appeal, as a result of which the Commissioner’s Office of Appeals sent two

Requests for Additional Information dated July 6, 2017, and September 22, 2017. During the course of the pre-assessment appeal proceedings, the appellant filed two amended Forms 355 with the Office of Appeals, one dated September 13, 2017 (“first amended 2015 Form 355”), and the other dated October 20, 2017 and received on October 23, 2017 (“second amended 2015 Form 355”). Both were signed by the same preparer – different from the person who had prepared the appellant’s original 2015 Form 355. The first amended 2015 Form 355 reported (i) gross receipts of \$1,328,638 (the amount from Shields), (ii) other deductions of \$755,454 (including subcontractor expenses of \$706,671, as indicated on a Form 1120X, Amended U.S. Corporation Income Tax Return for the tax year at issue (“2015 Form 1120X”), filed at the same time), (iii) taxable income of \$242,411, and (iv) a tax due thereon of \$19,393. The second amended 2015 Form 355 reported (i) gross receipts of \$1,428,362 (consisting of the gross receipts from Shields plus \$99,723.34 from Pilgrim²), (ii) other deductions of \$1,053,290 (including subcontractor expenses of \$1,004,507, as indicated on a second 2015 Form 1120X filed at the same time), (iii) taxable income of \$44,299, and (iv) a tax due thereon of \$3,544. Mr. Som testified that although the list entered into evidence at the hearing showing gross receipts of \$1,428,362 had probably been prepared in 2016, the receipts were not reported on the appellant’s originally filed 2015 Form 355 because “I just trusted my tax preparer.”

² Over the objection of the Commissioner, there was entered into evidence a list of (i) weekly receipts totaling \$1,328,638.35 from Shields during 2015, commencing March 2, 2015, and (ii) total 2015 receipts of \$99,723.34 from Pilgrim. Mr. Som testified that he had prepared the list at the end of 2015 or the beginning of 2016 based on an invoice record, a “receipt check,” and the bank statement. Copies of receipts from The Broadway in Worcester, a check cashing service (which were also entered into evidence over the objection of the Commissioner) substantiate certain of the indicated weekly receipts.

The appellant's pre-assessment appeal was denied. By a Notice of Assessment dated October 26, 2017, the Commissioner assessed \$77,077.66 for the period from January 1, 2015, to December 31, 2015, consisting of tax of \$75,802 plus interest of \$6,404.97 less a credit of \$5,129.31. As did the Revised NIA, the Notice of Assessment dated October 26, 2017, indicated recalculated gross receipts of \$1,328,638 based on information from Shields.

By Massachusetts Form ABT, Application for Abatement, dated April 18, 2018, the appellant sought an abatement in the amount of \$77,077.66, pointing out that it had already filed "an amended return after audit" and stating that it would substantiate business expenses at the hearing.

By Notice of Abatement Determination dated August 12, 2020, the Commissioner denied the appellant's abatement request, stating that the appellant had failed to demonstrate that it was entitled to deduct its claimed contract labor expenses. On September 29, 2020, the appellant timely filed its Petition Under Formal Procedure with the Board, claiming entitlement to a deduction of \$1,004,507 on account of labor costs that it paid to its workers in cash. The appellant did not appeal the Commissioner's disallowance of various other expenses included in the other deductions of \$1,053,290 claimed on the appellant's second amended 2015 Form 355.

Based on the foregoing facts, the Board found and ruled that it had jurisdiction to hear and decide the appellant's appeal.

III. The Deduction

Staffing Services argued that it was entitled to reduce its gross receipts for services rendered to Shields and Pilgrim in 2015 not only by the Form W-2 wages that it paid to

its workers that year, but also by the wages that it paid to its workers that year in cash. In its response dated May 19, 2022, to the Commissioner's First Set of Interrogatories requesting, *inter alia*, identification of every employee, person, or subcontractor who provided labor services to the appellant during the tax year at issue and the amounts paid, the appellant stated that it "[did] not have a list of employees' names or their addresses as they were paid in cash but [would] provide other documents in response to this question."

At the hearing before the Board, the appellant cited the Wage-Hour Agreement with the Massachusetts Attorney General and introduced into evidence two purported Attachments A to that Agreement, indicating restitution amounts due 275 employees and 181 employees, respectively. Some names appear on both attachments. The difference between these totals (275 and 181), and the number of employees (272) indicated in the body of the Wage-Hour Agreement, was not addressed.

Regarding the cash payments totaling \$1,004,507 at issue, the appellant introduced into evidence an undated and untitled list by name of 222 employees with their hours and gross pay, both with respect to an unidentified year to date.³ Mr. Som initially testified that he had prepared the list in January 2016, based on timesheets from Shields and his invoices, but that he had not provided it to his original preparer because he "listened to the tax preparer, and he didn't tell me that he needed it." Suggesting later that information on the list may have come from the Massachusetts Attorney General, Mr. Som testified that his secretary probably put the list together, and he probably edited it and did the final. However, at the conclusion of the hearing, Mr. Som inconsistently

³ The list, in chart form, assigned a number to each employee (from 1 to 222) and indicated total "Gross Pay YTD" of \$1,004,506.50.

suggested that the list may have been prepared “for the sake of filing an amended tax return.”

Subcontractor expenses totaling \$1,004,507 were first reported on the appellant’s second amended 2015 Form 355 received by the Commissioner’s Office of Appeals on October 23, 2017. None were reported on the original 2015 Form 355, and subcontractor expenses of only \$706,671 were reported on the appellant’s first amended 2015 Massachusetts Form 355. When asked about the difference in the subcontractor expenses shown on the two amended returns, Mr. Som testified that “at the beginning when [he] met [his new accountant, they] didn't go through the full expenses [and] we might've made a mistake with the numbers.”

Further, certain of the employees whose names appear on the list of cash wages also received a 2015 Form W-2 from the appellant. Thus, the extent to which the amounts shown on the list were paid only in cash is unclear, notwithstanding Mr. Som’s testimony that some employees were both on the payroll and paid in cash, and that he did not take double deductions.

IV. The Board’s Findings

Although Staffing Services paid certain of its workers in cash during 2015, it failed to provide any source documentation substantiating the amount of the cash payments. The undated and untitled list of 222 employees with hours and gross pay entered into evidence, purporting to indicate the wages paid by the appellant in cash during 2015, was corroborated only by Mr. Som’s varying and inconsistent testimony. The Board found that Mr. Som’s testimony lacked credibility.

Further, although Mr. Som initially testified to having prepared the list of cash wages, probably in January 2016, none of the wage payments listed thereon were deducted on the appellant's original 2015 Form 355 filed in March 2016. Wage payments totaling \$1,004,507 were first deducted on the appellant's second amended 2015 Form 355 received by the Commissioner on October 23, 2017 – just over a month after the appellant filed its first amended 2015 Massachusetts Form 355 reporting subcontractor expenses of only \$706,671. The circumstances regarding the compilation of the list and its use, variously and inconsistently described by Mr. Som during the hearing, cast serious doubt on its reliability.

Moreover, apart from Mr. Som's testimony that no double deductions were taken, no evidence was introduced to establish that none of the amounts reported on the 2015 Forms W-2 issued by the appellant were also included on the list of cash wages entered into evidence, further derogating from the list's reliability.

Based on the foregoing, the Board found and ruled that the appellant failed to meet its burden of proving its entitlement to the deduction at issue. Accordingly, the Board issued a decision for the appellee in this appeal.

OPINION

At issue in this appeal was whether the appellant was entitled to deduct an expense for subcontractors purportedly paid in cash in the amount of \$1,004,507 claimed on its second amended 2015 Form 355.

Massachusetts "net income" is defined in relevant part to mean gross income less the deductions allowable under the provisions of the Federal Internal Revenue Code, as amended and in effect for the taxable year. G.L. c. 63, §§ 1, 30(4). Under Internal

Revenue Code § 162(a) (“Code § 162(a)”), taxpayers may deduct certain business-related expenses. See **Commissioner v. Lincoln Sav. & Loan Ass’n**, 403 U.S. 345, 352 (1971).

Deductible expenses include a reasonable allowance for salaries and other compensation for personal services actually rendered. Code § 162(a)(1). However, “[d]eductions are to a large extent a matter of legislative grace.” **Drapkin v. Commissioner of Revenue**, 420 Mass. 333, 343 (1995). “[A]n income tax deduction [being] a matter of legislative grace[,] the burden of clearly showing the right to the claimed deduction is on the taxpayer.” **Indopco, Inc. v. Commissioner**, 503 U.S. 79, 84 (1992), citing, *inter alia*, **New Colonial Ice Co. v. Helvering**, 292 U.S. 435 (1934).

The appellant argued that its situation was analogous to that considered by the United States Court of Appeals for the Second Circuit in a decision involving George M. Cohan, a theatrical manager and producer, who deducted estimated travel, entertainment, and advertising expenses incurred in connection with his production of several theatrical shows and a business trip to Chicago. The United States Board of Tax Appeals disallowed the deductions, stating that “the amounts claimed [were] bare estimates unsupported by any vouchers or bookkeeping entries of any kind.” **Cohan v. Commissioner**, 11 B.T.A. 743, 761 (1928). On appeal, the Second Circuit disagreed and remanded the matter to the lower court, stating:

In the production of his plays Cohan was obliged to be free-handed in entertaining actors, employees, and, as he naively adds, dramatic critics. He had also to travel These expenses amounted to substantial sums, but he kept no account and probably could not have done so. At the trial before the Board he estimated [what] he had spent The Board refused to allow him any part of this, on the ground that it was impossible to tell how much he had in fact spent, in the absence of any items or details. . . . Absolute certainty in such matters is usually impossible and is not

necessary; the Board should make as close an approximation as it can, bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making.

Cohan v. Commissioner, 39 F.2d 540, 543-44 (2nd Cir. 1930).

Based on the so-called “Cohan Rule,” the appellant asked the Board to allow the deduction at issue, noting that it did not involve personal expenses like those addressed in the ***Cohan*** decision. It is indeed true that since the Second Circuit decision in ***Cohan***, the United States Tax Court (successor to the Board of Tax Appeals) has recognized its ability to determine the amount of an allowable deduction when provided with evidence that a deductible expense was incurred. In each case, however, the court has required some basis upon which an estimate could be made. See ***Vanicek v. Commissioner***, 85 T.C. 731, 742-43 (1985).

In a more recent decision involving a taxpayer unable to provide records, receipts, or other substantiating documentation, in which the Tax Court acknowledged the Cohen Rule, the Court stated:

In order for the Court to estimate the amount of a deductible expense, we must have some basis upon which an estimate may be made. . . . Here, there is no such basis, and were we to nonetheless permit any allowance, such would amount to unguided largess. . . . Although we are sympathetic with petitioner's plight, the fact remains that petitioner failed to present even a modicum of evidence to substantiate the disallowed deductions.

Pratt v. Commissioner, T.C. Memo 2002-279.

The same can be said relative to the matter before the Board. The appellant failed to substantiate the cash wages it claimed to have paid to its workers in 2015, offering only Mr. Som's inconsistent testimony and an undated and untitled list of amounts paid per worker. The appellant failed to make available records sufficient to establish the amount of the subcontractor wage deductions shown on its second amended 2015 Form 355,

and to present pertinent records in such form as to enable a determination of the amount of its tax liability. See 830 C.M.R. 62C.25.1(1), (3), (9); Administrative Procedure 609.3: Verification of Returns Through Audit, The Audit Process: Tax Records. See *also* Treas. Reg. § 1.6001-1(a), promulgated under Internal Revenue Code § 6001 (“any person required to file a return ... shall keep such permanent books of account or records ... as are sufficient to establish the amount of ... deductions ... required to be shown by such person in any return of tax ...”).

The appellant had the burden of proof and the obligation to substantiate the deduction for cash wages of \$1,004,507 claimed on its second amended 2015 Form 355. See ***Staples v. Commissioner of Corporations & Taxation***, 305 Mass. 20, 26 (1940); ***Stone v. State Tax Commission***, 363 Mass. 64, 65-66 (1973). Other than an undated and untitled list of cash wages paid per worker and the less than credible testimony of Mr. Som, no contemporaneous documentation supporting the appellant’s entitlement to the deduction at issue – such as copies of the timesheets the appellant received from, and the invoices that it rendered to, Shields – was presented to the Board. See ***Sharcar, Inc. v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1998-198, 228-29 (citing ***Staples***, *supra*) (except for statements of the taxpayer’s president and accountant, no supporting documentation or other reliable evidence indicated the taxpayer’s entitlement to the deduction at issue); ***Hradesky v. Commissioner***, 65 T.C. 87, 89 (1975) (unverified oral testimony without supporting documentary evidence was insufficient to substantiate the taxpayer’s expenses), *aff’d per curiam*, 540 F. 2d 821 (5th Cir. 1976).

Further, the circumstances regarding the compilation of the undated and untitled list of cash wages entered into evidence and its use, which were inconsistently described by Mr. Som during the hearing, and the fact that some employees whose names appear on the list also received a 2015 Form W-2 from the appellant, derogate from the list's reliability and Mr. Som's credibility.

In sum, the appellant presented only self-serving and inconsistent testimony and "records" that were unsubstantiated and conflicting in support of its claim. Consequently, the Board found and ruled that the appellant was not entitled to the deduction at issue and issued a decision for the appellee in this appeal.

THE APPELLATE TAX BOARD

By: 

Mark J. DeFrancisco, Chairman

A true copy,

Attest: 

Clerk of the Board