COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

ZERO WASTE SOLUTIONS, LLC **v.** **COMMISSIONER OF REVENUE**

Docket No. C337570

Promulgated:
September 22, 2021

This is an appeal filed under the formal procedure pursuant to G.L. c. 58, § 2 and G.L. c. 58A, § 7 from the refusal of the Commissioner of Revenue ("Commissioner" or "appellee") to grant manufacturing classification to Zero Waste Solutions, LLC ("Zero Waste" or "appellant") for calendar year 2019.

This matter proceeded on a Motion for Summary Judgment ("Motion") brought by the Commissioner. Commissioner Good heard the Motion and was joined in a decision for the appellee by Chairman Hammond and Commissioners Elliott, Metzer, and DeFrancisco.

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

George J. Leontire, Esq. for the appellant.

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

FINDINGS OF FACT AND REPORT

On the basis of the Motion and accompanying exhibits, and the appellee's Objection to the Motion ("Objection"), the Appellate Tax Board ("Board") made the following findings of fact.

On January 31, 2019, the appellant timely filed with the Commissioner a Form 355Q, Statement Relating to Manufacturing Activities ("Form 355Q"), seeking classification as a manufacturing corporation. On its Form 355Q, the appellant stated that it was not presently engaged in manufacturing in Massachusetts and that manufacturing activities would begin in May 2019.

On March 14, 2019, the Commissioner informed the appellant that "[w]e intend to deny classifying the corporation as a manufacturing corporation for local tax purposes effective January 1, 2019." Pursuant to G.L. c. 58, § 2,[1] Zero Waste timely filed a petition with the Board on April 30, 2019, challenging the Commissioner's action. On the basis of these facts, the Board determined that it had jurisdiction to decide this appeal.

The Commissioner filed the Motion with the Board on December 2, 2019, contending that the appellant was not entitled to manufacturing classification because it was not engaged in

[1] The statute permits "[a]ny person aggrieved by any classification made by the commissioner under any provision of chapters fifty-nine and sixty-three or by any action taken by the commissioner under this section" to "file an application with the [Board] on a form approved by it, stating therein the classification claimed." G.L. c. 58, § 2. The application must be filed with the Board "on or before April thirtieth of said year or the thirtieth day after such list is sent out by the commissioner, whichever is later." G.L. c. 58, § 2.

manufacturing as of January 1, 2019, as required by 830 CMR 58.2.1(6)(a).[2] The Commissioner also contended that the appellant failed to meet the "substantial" test of 830 CMR 58.2.1(6)(a) because any alleged manufacturing activities at the time of filing the Form 355Q were anticipated and not actual.

The appellant acknowledged that its alleged manufacturing activities began after January 1, 2019, stating in the Objection that the Form 355Q "included substantial information detailing the state-of-the-art manufacturing processes and activities ***to be performed***." (emphasis added). Instead, the appellant claimed that the date of determination is July 1, pursuant to G.L. c. 59, § 5, not January 1. The appellant challenged the Commissioner's regulation at 830 CMR 58.2.1 on the basis that the regulation conflicts with G.L. c. 59, § 5 by requiring a corporation to be engaged in manufacturing as of January 1 and argued that the Commissioner's enforcement of the regulation frustrates the statutory purpose for manufacturing classification, which is meant to attract new industries and manufacturing to the Commonwealth.

Based upon the record before it, the Board found and ruled that this appeal presented a question of law with respect to which

[2] The Commissioner initially denied the appellant's request on the basis that Zero Waste was a limited liability company that had not elected to be taxed federally as a corporation and because it was not engaged in manufacturing. Subsequently, the appellant provided the Commissioner with a copy of IRS Form CP277 dated May 6, 2019, in which the IRS informed Zero Waste that its election to be classified as a corporation for federal tax purposes was approved and effective January 1, 2018.

there was no genuine issue of material fact, and thus the appeal was appropriate for summary judgment. The Board further found and ruled that the appellant was not entitled to manufacturing classification for calendar year 2019 because it was not engaged in any manufacturing activities in Massachusetts as of January 1, 2019.[3] Because the appellant was not engaged in any manufacturing activities as of January 1, 2019, it also failed to establish that its manufacturing activities were substantial.[4] Consequently, the Board granted the Motion and issued a decision for the appellee.

OPINION

Pursuant to Rule 22 of the Board's Rules of Practice and Procedure at 831 CMR 1.22, "[i]ssues sufficient in themselves to determine the decision of the Board or to narrow the scope of the hearing may be separately heard and disposed of in the discretion

[3] The Board made no findings as to whether any activities engaged in by the appellant from May 2019 onwards constituted the requisite activities for manufacturing classification in a future calendar year.

[4] To determine substantiality, the Commissioner's regulation at 830 CMR 58.2.1(6)(d)-(e) generally looks to four tests involving the previous tax year's gross receipts, employee, and tangible property fractions. For corporations that were in existence but had not previously performed any manufacturing activities in Massachusetts, the regulation at 830 CMR 58.2.1(6)(e)5.b permits the corporation to still apply for classification "by submitting current information and reasonable projections of its business activity for the taxable year in which it begins manufacturing." Here, the appellant's "current information" at the time of filing its Form 355Q in January 2019 did not allege that manufacturing activities were then occurring. For instance, the appellant stated in its Form 355Q that "[t]he building & property ***will be leased*** at a total annual cost of $500,000.00," that "[a]ll of the 85,000 square feet leased by ZWS at this facility ***will be used*** for the purposes of manufacturing," and that "[o]ur annual budget for payroll is, Year 1 (***May 2019 start***) 43 employees at $1,685,868." (emphasis added). The Board does not construe this provision of the regulation to permit classification entirely based upon anticipation of future activities.

of the Board." Although the Board does not specifically adopt Rule 56 of the Massachusetts Rules of Civil Procedure, it does look to Rule 56 for guidance when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. *See generally* ***Rossi v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2003-473, 475-76; ***Omer v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1999-586, 591. In this matter, the Board found that no genuine issue of material fact existed and that disposition by summary judgment was appropriate pursuant to 831 CMR 1.22. The only fact relevant to disposition of this matter was undisputed – that the appellant was not engaged in any manufacturing activities in Massachusetts as of January 1, 2019. The only legal issue before the Board was whether the appellant's request for classification as a manufacturing corporation was properly denied by the Commissioner for calendar year 2019.

General Laws c. 58, § 2 requires the Commissioner to "annually, on or before April first of each year, forward to each board of assessors a list of all corporations known to him to be liable on January first of said year to taxation under chapters fifty-nine, sixty A and sixty-three." On the list, the Commissioner "shall indicate which of said corporations have been classified by the commissioner as manufacturing corporations or research and development corporations." G.L. c. 58, § 2. *See also* 830 CMR

58.2.1(a) ("The purpose of 830 CMR 58.2.1 is to explain classification of manufacturing corporations and revocation of manufacturing classification."); **DOR Directive** 12-5 ("[T]he classification by the Commissioner of Revenue or, after appeal, by the Appellate Tax Board as to whether or not an entity qualifies as a *manufacturing corporation* must be followed in the assessment of property tax of machinery used in the conduct of business.").

To be classified by the Commissioner as a manufacturing corporation, the regulation at 830 CMR 58.2.1(7) explains the procedure for submitting an application to the Commissioner and states at 830 CMR 58.2.1(6)(a) that "[a] corporation may be classified as a manufacturing corporation for any calendar year if it is in existence and is engaged in manufacturing in Massachusetts as of January 1 of that year." The appellant attested on its Form 355Q filed on January 31, 2019, that it was not then engaged in manufacturing in Massachusetts and that any alleged manufacturing activities would not begin until May 2019. Consequently, as a matter of law, the appellant could not be classified as a manufacturing corporation for calendar year 2019 because it was not engaged in any manufacturing activities in Massachusetts as of January 1, 2019. *Contrast* ***Noreast Fresh, Inc. v. Commissioner of Revenue***, 50 Mass. App. Ct. 352, 354 (2000) (in a case involving manufacturing classification for calendar year 1995, the court noted that the taxpayer had already started leasing expensive

industrial machinery and equipment in 1993, added an additional $1.5 million in machinery and equipment in 1994, and had 102 persons employed in 1994, "87 of whom took part in production activities"). The appellant likewise could not meet the requirement that "the manufacturing activities performed by the corporation are substantial" because as of January 1, 2019, there were no alleged manufacturing activities to even quantify. *See* 830 CMR 58.2.1(6)(a) and footnote 4, *supra*.

The appellant alleged conflict between the regulation and G.L. c. 59, § 5, contending that G.L. c. 59, § 5 controls the date of determination for purposes of manufacturing classification and that July 1 is the correct date under the statute rather than January 1. But the appellant construed conflict where there is none. Its argument relied upon the general introduction to G.L. c. 59, § 5, which states that "[t]he following property shall be exempt from taxation and the date of determination as to age, ownership or other qualifying factors required by any clause shall be July 1 of each year unless another meaning is clearly apparent from the context." However, the appellant critically ignored G.L. c. 59, § 5(16)(5), which states that "[t]he classification by the commissioner or the appellate tax board of a corporation as a business corporation, manufacturing corporation or research and development corporation, as respectively defined as aforesaid, shall be followed in the assessment under this chapter of machinery

used in the conduct of the business." Classification by the Commissioner or the Board follows the procedures and timeline of G.L. c. 58, § 2, not G.L. c. 59, § 5. In other words, the appellant could not qualify for the exemptions provided for in G.L. c. 59, § 5(16) without first receiving the necessary manufacturing classification by the Commissioner or the Board pursuant to G.L. c. 58, § 2.[5] *See* ***Assessors of Holyoke v. State Tax Commission***, 355 Mass. 223, 225, 233 (1969) (holding that "[t]he question for decision is whether the Commissioner of Corporations and Taxation, for the purposes of G.L. c. 59, § 5, Sixteenth (3)(a), properly classified (as of January 1, 1964) Holyoke Water Power Company [HWPC] as a 'domestic manufacturing corporation' as defined in G.L. c. 63, § 38C" and that "[t]he issue of the proper classification of HWPC, presented under G.L. c. 58, § 2, does not

[5] The appellant also engaged in an erroneous interpretation of G.L. c. 59, § 5(16)(3). The provision reads as follows: "In the case of (i) a manufacturing corporation or a research and development corporation, as defined in section 42B of chapter 63, or (ii) a limited liability company that; (a) has its usual place of business in the commonwealth; (b) is engaged in manufacturing in the commonwealth and whose sole member is a manufacturing corporation as defined in section 42B of chapter 63 or is engaged in research and development in the commonwealth and whose sole member is a research and development corporation as defined in said section 42B; and (c) is a disregarded entity, as defined in paragraph 2 of section 30 of chapter 63, all property owned by the corporation or the limited liability company other than real estate, poles and underground conduits, wires and pipes." The appellant reads clauses (a), (b), and (c) as applicable to both subsections (i) and (ii), rather than just subsection (ii), but the context of the statute clearly cannot support this interpretation. A "manufacturing corporation" cannot be a "disregarded entity." Only a limited liability company that has elected to be treated as a corporation – as the appellant itself did – can classify as a manufacturing corporation. *See* **DOR Directive** 00-4 ("An LLC that elects to be taxed as a corporation is eligible to be considered for manufacturing corporation classification, provided that it otherwise meets the requirements found at 830 CMR 58.2.1."). *See also* footnote 2, *supra*.

directly involve any 'exemption' from taxation, although its determination will decide whether in 1964 HWPC was within the provisions of G.L. c. 59, § 5, Sixteenth(3)").

The January 1 requisite in the regulation is not an arbitrary date selected by the Commissioner, as the appellant asserted, but a date that directly stems from G.L. c. 58, § 2. By statute, the Commissioner must compile a list of all corporations known to him to be liable to taxation on January 1 of each year and to indicate on the list which corporations the Commissioner has classified as manufacturing corporations or research and development corporations. *See* G.L. c. 58, § 2. Identification of a corporation's tax liability on the list[6] is coterminous with its classification, *i.e.*, the liability to taxation and the classification are both effective January 1. *See* ***Veolia Energy Boston, Inc. v. Assessors of Boston***, 438 Mass. 108, 109 n.2 (2019) (recognizing that manufacturing classification was "effective January 1, 2016"); ***The Sherwin-Williams Company v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2003-200, 205 ("The issue in the present appeal is whether the appellant's production of colored paint, performed at its retail stores located throughout the Commonwealth, qualifies Sherwin-Williams for manufacturing

[6] The list must be released to the boards of assessors by April 1 of that same year. *See* G.L. c. 58, § 2. There is neither a reference to July 1 nor a feasible timeline where July 1 could be the controlling date of determination for manufacturing classification.

corporation classification pursuant to G.L. c. 58, § 2, for the tax year commencing January 1, 2001."); ***UNIFI Communications Corp. v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Report 1999-190, 191 n.1 ("The Appellant received a letter from the Commissioner, dated April 21, 1993, granting the Appellant's request to be classified as a manufacturing corporation effective January 1, 1994. The Appellant did not receive any communication regarding its request for classification as of January 1, 1993 and, accordingly, the Appellant appealed from being left off the list of corporations classified as manufacturing corporations for calendar year 1993.").

Onex Communications Corp. v. Commissioner of Revenue, 457 Mass. 419 (2010), does not provide the support relied upon by the appellant. In ***Onex***, the parties disagreed on whether the taxpayer was engaged in manufacturing during the tax period August 1, 1999 to September 21, 2001, for purposes of a use tax exemption under G.L. c. 64I, § 7(b), specifically whether being engaged in manufacturing requires production of at least one completed product or whether it requires only being engaged in some essential and integral step in the manufacturing process. ***Id.*** at 425. The Supreme Judicial Court held the latter to be correct. ***Id.*** at 426. This issue bears no relevance to the present appeal, which turns entirely on the question of whether the appellant was engaged in manufacturing as of January 1, 2019. The appellant itself

represented that it was not. Consequently, the appellant cannot be classified as a manufacturing corporation effective January 1, 2019, rendering moot any substantive analysis of whether the appellant was actually engaged in manufacturing later in 2019.[7]

By alleging that the January 1 date of determination gives the phrase "engaged in manufacturing" too restrictive a meaning, the appellant erroneously conflated the timing requisite of G.L. c. 58, § 2 with the substantive inquiry of whether a taxpayer's activities constitute manufacturing. The appellant relied upon the Court's statement in ***Onex*** that "the taxpayer must demonstrate that it is engaged in manufacturing, i.e., an essential step in the manufacturing process, ***during the tax year at issue***." 457 Mass. at 429 (emphasis added).[8] The appellant construed the phrase "during

[7] The Commissioner indicated that he would likely find that the appellant's activities could qualify it for classification in a later calendar year if it met the tests of 830 CMR 58.2.1, but the Board made no findings as to future years. *See* footnote 3, *supra*.

[8] ***Onex*** involved the Commissioner's denial of a use tax exemption, not the denial of a manufacturing classification. Mass. ATB Findings of Fact and Reports 2007-976, *aff'd*, 457 Mass. 419 (2010). The distinction is important to note. A use tax exemption is not contingent upon manufacturing classification. As stated in 830 CMR 58.2.1(5): "A corporation that does not apply for manufacturing corporation classification but that is engaged in manufacturing . . . may be treated as having manufacturing corporation 'status.' A corporation with manufacturing corporation status may use the benefits outlined in 830 CMR 58.2.1(4)(b) [investment tax credit] and (c) [an exemption from sales and use tax]; however, only those corporations with manufacturing corporation ***classification*** are entitled to use the tax benefit outlined in 830 CMR 58.2.1(4)(a) [property tax exemption]." (emphasis added). *See, e.g.*, ***BNZ Materials, Inc. v. Assessors of Billerica***, 1996 Mass. Tax LEXIS 65 (Appellate Tax Board, March 6, 1996) (Even though a corporation was "indisputably engaged in manufacturing and meets the qualifications necessary to be classified" the Board held that it had no jurisdiction to grant manufacturing classification where the corporation did not follow the timeline of G.L. c. 58, § 2 for application.).

the tax year at issue" to mean that a taxpayer may commence manufacturing activities at any time during a calendar year to be classified as a manufacturing corporation. ***Onex*** did not endorse taking such liberties with timing. The Court stressed that "[s]uch a demonstration will necessarily require a showing of the company's current activities." 457 Mass. at 429.

The term "current" in the context of the decision of the Court in ***Onex*** encompassed activities conducted during the entirety of the time period for which the taxpayer sought a use tax exemption. *See* ***Onex*** at 429 and 432 (stating that "the assertion that Onex was engaged in manufacturing only after the audit period is inaccurate" and agreeing with the board that "throughout the audit period, Onex was engaged in creation of the 'blueprint,' an essential and integral step in the manufacturing process"). At the time the appellant in the present appeal sought manufacturing classification in January 2019, its "current activities" did not involve manufacturing and no alleged manufacturing activities were planned until almost halfway through the calendar year. Given these facts, as a matter of law the appellant was not entitled to manufacturing classification for calendar year 2019. *See* G.L. c. 58, § 2; 830 CMR 58.2.1(3).

Further, the Board's adherence to and endorsement of the timing requirement of G.L. c. 58, § 2 does not frustrate the statutory purpose of attracting new industries and manufacturing

to the Commonwealth. The Board has no authority to enlarge a time period mandated by statute. *See*, *e.g.*, ***Commissioner of Revenue v. Pat's Super Market, Inc.***, 387 Mass. 309, 311 (1982) ("[T]he board has only that jurisdiction conferred on it by statute."); ***Levitt v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1997-38, 45 ("[R]egardless of the equities of the situation and the underlying substantive merit of the taxpayers' position, the Board has no jurisdiction to order an abatement unless it finds that the proceedings for relief were begun within the time, and prosecuted in the manner specifically prescribed by the governing statute."), *aff'd*, 43 Mass. App. Ct. 1118 (1997) (Decision under Rule 1:28); ***Springfield Sugar and Products Co. Inc. v. State Tax Commission***, 1979 Mass. Tax LEXIS 16 (Appellate Tax Board, Nov. 6, 1979) ("Another forum may have, but we do not, the power to do what the appellant claims as its equitable need or recompense."), *aff'd*, 381 Mass. 587 (1980).

[This space intentionally left blank.]

CONCLUSION

Based upon the foregoing, the Board ruled that the appellant was not entitled to manufacturing classification for calendar year 2019. Accordingly, the Board issued a decision for the appellee in this appeal.

THE APPELLATE TAX BOARD

By: */S/ Thomas W. Hammond*
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: */S/ William J. Doherty*
Clerk of the Board