

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

RICHARD ARONOVITZ

v.

BOARD OF ASSESSORS OF  
THE TOWN OF MILFORD

Docket No. F311257

Promulgated:  
March 26, 2013

This is an appeal under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65 from the refusal of the appellee to abate taxes on certain real estate in the Town of Milford owned by and assessed to the appellant under G.L. c. 59, §§ 11 and 38 for fiscal year 2011.

Chairman Hammond heard the appellee's Motion to Dismiss under G.L. c. 59, 38D. Commissioners Scharaffa, Rose, Mulhern and Chmielinski joined him in the decision for the appellee.

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.

*Richard Aronovitz, pro se, for the appellant.*

*Kenneth W. Gurge, Esq. for the appellee.*

## FINDINGS OF FACT AND REPORT

On January 1, 2010, the appellant, Richard Aronovitz ("appellant") was the owner of a parcel of commercial real estate improved with a multi-tenanted retail building located at 161 East Main Street in the Town of Milford ("subject property").

On January 4, 2010, the Milford Board of Assessors ("assessors" or "appellee") sent to the appellant, by properly addressed first class mail, a request for income and expense information under G.L. c. 59, § 38D (the "first § 38D request"). The first § 38D request included a cover letter explaining the information sought and a reference to G.L. c. 59, § 38D, as well as an information request form approved by the Commissioner of Revenue. This request sought lease and expense information concerning the subject property during calendar year 2009, necessary to establish the fair cash value of the subject property as of January 1, 2010, the valuation date for fiscal year 2011. The assessors received no response to the first § 38D request.

On March 18, 2010, the assessors sent a second § 38D request ("second § 38D request"), which they titled "Final Request," to the appellant at the same address. The second § 38D request contained a cover letter, a second copy of the information request form, and a recitation of relevant language

from § 38D, including, “[f]ailure of an owner or lessee of real property to comply with such request within sixty (60) days after it has been made shall bar him from any statutory appeal.” The assessors received no response to the second § 38D request.

For fiscal year 2011, the assessors valued the subject property at \$1,563,000 and assessed a tax thereon, at the rate of \$26.05 per \$1,000, in the amount of \$40,716.15. The appellant timely paid the tax and filed an Application for Abatement with the assessors on January 31, 2011, which the assessors denied on March 30, 2011. The appellant seasonably filed a petition with the Appellate Tax Board (the “Board”) on April 4, 2011.

The assessors filed a Motion to Dismiss the appellant’s appeal for failure to comply with § 38D. The assessors maintained that the appellant failed to respond to either the first or the second § 38D request, and that, as a result of the appellant’s failure to provide the requested information, the assessors were prejudiced in their ability to determine the actual fair cash value of the subject property for fiscal year 2011. Based on the testimony of the appellant and Priscilla Hogan, Assessor and Administrator for the Town of Milford, and the documentary evidence offered at the hearing of the assessors’ Motion, the Board made the following findings of fact.

The appellant did not dispute that he received the § 38D requests nor did he argue that the income and expense information sought was "reasonably required" for the assessors to determine the actual fair cash value of the subject property for fiscal year 2011. Instead, the appellant maintained that he completed the § 38D forms and mailed them to the assessors as required. As evidence thereof, the appellant submitted copies of completed income and expense forms which he had purportedly mailed to the assessors. However, neither of the forms was dated and the appellant failed to provide any corroborating evidence to support his testimony that he returned the § 38D requests to the appellee. In contrast, Ms. Hogan testified that the assessors did not receive any responses from the appellant to either the first or the second § 38D request for fiscal year 2011.

Based on all the evidence, the Board found that the appellant's claim that he had timely completed and returned the § 38D requests for fiscal year 2011 to the assessors was unsubstantiated and not credible. The Board found that: the appellant received the § 38D requests; the appellant failed to respond to the § 38D requests; the requested information was reasonably required by the assessors to determine the actual fair cash value of the subject property for the fiscal year at issue; and the appellant's failure to respond to the § 38D

requests was not due to reasons beyond his control. On this basis, the Board allowed the assessors' Motion to Dismiss this appeal for the appellant's unjustifiable failure to respond to either of the assessors' § 38D requests. Accordingly, the Board decided this appeal for the appellee.

#### OPINION

At all times relevant to this appeal, § 38D provided in pertinent part:

A board of assessors may request the owner or lessee of any real property to make a written return under oath within sixty days containing such information as may reasonably be required by it to determine the actual fair cash valuation of such property. Failure of the owner or lessee to comply with such request within sixty days after it has been made shall bar him from statutory appeal under this chapter, unless such owner or lessee was unable to comply with such request for reasons beyond his control.<sup>1</sup>

Accordingly, when a taxpayer fails to respond within sixty days to a written request from the assessors for information

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<sup>1</sup> Effective July 27, 2010, after both § 38D requests in this appeal were mailed, the Legislature amended § 38D. It now provides in pertinent part:

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 and the county commissioners 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.

St. 2010, c. 188, § 47.

reasonably required by the assessors to determine the fair cash value of the property at issue, the taxpayer's right to appeal an assessment to this Board is foreclosed unless the taxpayer was unable to comply for reasons beyond the owner's control. See, e.g., **Marketplace Center II Limited Partnership v. Assessors of Boston**, Mass. ATB Findings of Fact and Reports 2000-258, 276-77, *aff'd*, 54 Mass. App. Ct. 1101, 1107 (2002); **Forty-Four - 46 Winter Street, LLC v. Assessors of Boston**, Mass. ATB Findings of Fact and Reports 2005-656, 661; and **Herman Banquer Trust v. Assessors of Boston**, Mass. ATB Findings of Fact and Reports 2005-664, 671.

The subject property is a multi-tenanted retail building. The appellant did not dispute that he received the § 38D requests nor did he argue that the income and expense information sought was not "reasonably required" for the assessors to determine the actual fair cash value of the subject property for fiscal year 2011. Instead, the appellant maintained that he completed the § 38D forms and mailed them to the assessors' office. The appellant, however, failed to offer any credible corroborating evidence. In contrast, the assessors presented credible evidence that the assessors had not received any reply from the appellant for the fiscal year at issue.

Although the appellant testified that he completed and mailed the § 38D requests for fiscal year 2011, the Board

ultimately found the appellant's unsubstantiated testimony was not credible. Matters of witness credibility are properly left to the Board. See, e.g., *Cumington School of the Arts, Inc. v. Assessors of Cumington*, 373 Mass. 597, 605 (1977) ("The credibility of witnesses, the weight of the evidence, and inferences to be drawn from the evidence are matters for the board."); *Bayer Corp. v. Commissioner of Revenue*, 436 Mass. 302, 308 (2002) ("[W]e have consistently ruled that the assessment of the credibility of witnesses is a matter of the board.") (citing *Kennametal, Inc. v. Commissioner of Revenue*, 426 Mass. 39, 43 n. 6 (1997)). Given the lack of credible evidence substantiating the appellant's claims coupled with the credible evidence submitted by the assessors, the Board was not persuaded by the appellant's testimony.

The Board found in this appeal that the appellant received but did not respond to the § 38D requests, and that the information requested by the assessors on the § 38D requests was reasonably required by them to determine the actual fair cash value of the subject property for the fiscal year at issue. See, e.g., *Marketplace Center II*, Mass. ATB Findings of Fact and Reports at 2000-276-77; *Forty-Four-46 Winter Street*, Mass. ATB Findings of Fact and Reports at 2005-661-62; and *Herman Banquer Trust*, Mass. ATB Findings of Fact and Reports at 2005-671-72.

Accordingly, the Board granted the assessors' Motion to Dismiss under § 38D and decided this appeal for the appellee.

**APPELLATE TAX BOARD**

By: \_\_\_\_\_  
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: \_\_\_\_\_  
Clerk of the Board