

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

FOCACCIA, INC.

v.

COMMISSIONER OF REVENUE

Docket No. C319030

Promulgated:
June 14, 2013

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39(c) from the refusal of the appellee, Commissioner of Revenue ("Commissioner"), to grant an abatement of corporate excise assessed to the appellant, Focaccia, Inc. ("appellant") for the tax years ending December 31, 2008 and December 31, 2009 ("tax years at issue").

Chairman Hammond heard the Motion to Dismiss ("Motion") brought by the Commissioner. He was joined by Commissioners Scharaffa, Rose, Mulhern and Chmielinski in the decision allowing the Motion and dismissing the appeal for lack of jurisdiction.

These finding of facts and report are promulgated at the request of the appellant, pursuant to G.L. c. 58A, § 13 and 831 CMR 1.32.

Robert Depesa, pro se, for the appellant.

Jamie E. Szal, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

On August 13, 2011, the Commissioner issued to the appellant a Notice of Assessment of additional corporate excise for the tax years at issue. The appellant filed an abatement application with the Commissioner on October 11, 2011. The appellant claimed in the abatement application that the Commissioner "arbitrarily increased Taxpayer's reported sales with no corresponding increase to the costs/expenses of said sales." The Commissioner issued a Notice of Determination on February 16, 2012 notifying the appellant that she determined that the tax in dispute had been properly assessed and that the appellant's application was denied.

The appellant took no further action until September 7, 2012, when it filed a second application for abatement. In the second application, the appellant again took issue with the Commissioner's conduct of the audit and claimed that the auditor had improperly inflated its sales. By Notice of Abatement Determination dated March 16, 2013, the Commissioner notified the appellant that the second application was denied because the issues raised had already been considered and the appellant could not challenge an item of tax that had already been challenged in a previous claim. The appellant then filed its appeal with this Board on April 25, 2013, within 60 days of the March 16, 2013 denial of its second abatement application.

The Commissioner moved to dismiss this appeal on the ground that, in contravention of G.L. c. 62C, § 39, the appellant failed to file its appeal within 60 days of the February 16, 2012 denial of its initial abatement application and that the appellant could not extend the appeal period by filing a second abatement application that challenged the same item of tax as the first. In support of her Motion, the Commissioner provided the Notice of Assessment, date-stamped copies of both abatement applications, and both Notices of Determination. The appellant offered no written opposition or supporting documents and failed to attend the hearing of the Motion.

On the basis of the documents submitted, the Board found that the appellant filed its appeal 434 days after the first Notice of Determination and 374 days after the expiration of the 60-day appeal period under § 39. The Board further found that the second abatement application challenged the same item of tax - a corporate excise assessment based on an audit that increased the appellant's income from sales - as it challenged in the first application. For the reasons explained in the following Opinion, the Board ruled that the filing of the second abatement application did not extend the appeal period under § 39. Accordingly, the Board allowed the Commissioner's Motion and dismissed the appeal for lack of jurisdiction.

OPINION

G.L. c. 62C, § 39 provides that a person aggrieved by the refusal of the Commissioner to abate a tax may appeal to the Board "within 60 days after the date of notice of the decision of the commissioner." It is clear on the present record that the appellant failed to file its appeal within 60 days of the Commissioner's first Notice of Determination. The appellant can avoid dismissal of this appeal only if the appellant's appeal within 60 days of the denial of its second application satisfied the requirements of § 39.

It is beyond dispute that a "second application on the same ground would not give the applicant a second chance to appeal to the board." *Liberty Life Assurance Company of Boston v. State Tax Commission*, 374 Mass. 25, 30, 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."); *Cannavo v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 2012-551, 561-62; 830 CMR 62C.37.1(g)(2).

A second application would be appropriate where: a taxpayer seeks to challenge a "portion of an excise not involved" in the prior application; there are newly discovered facts; the first application is a return which shows an overpayment; there is a second assessment imposed; or there is a subsequent change in

decisional law. *Liberty Life*, 374 Mass. at 28, 30, n. 4. None of those circumstances is present here. The appellant's second application is a repeat of its first, challenging the same corporate excise assessment on the same basic ground that the auditor improperly increased its income from sales. Accordingly, the appellant's second application did not afford it a second opportunity to file a timely appeal.

"It has long been the law of this Commonwealth that, when a remedy is created by statute, and the time within which it may be availed of is one of the prescribed conditions for relief, failure to meet that time limit deprives a judicial body, court, or administrative appeals board of jurisdiction to hear the case." *Nissan Motor Corp. v. Commissioner of Revenue*, 407 Mass. 153, 157 (1990); see also *Good v. Commissioner of Revenue*, 395 Mass. 686, 688 (1985) (affirming Board's dismissal of appeal where taxpayer failed to timely file an appeal with the Board within 60 days of the Commissioner's denial of an abatement application).

Because the appellant failed to file a timely appeal under § 39 from the Commissioner's denial of its first application for abatement and the appellant's filing of a second application did not afford it a second opportunity to file a timely appeal, the Board has no jurisdiction over this appeal. Accordingly, the Board allowed the Commissioner's Motion and dismissed this appeal for lack of jurisdiction.

THE APPELLATE TAX BOARD

By: _____
Thomas W. Hammond., Jr., Chairman

A true copy,

Attest: _____
Clerk of the Board