

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

HERMAN BANQUER TRUST<sup>1</sup>

v. BOARD OF ASSESSORS OF  
THE CITY OF BOSTON

Docket No. F268325

Promulgated:  
December 9, 2005

This is an appeal under the formal procedure pursuant to G.L. c. 59, §§ 64 and 65 from the refusal of the appellee to abate taxes on certain real estate in the City of Boston assessed under G.L. c. 59, §§ 11 and 38 for fiscal year 2003.

Commissioner Scharaffa heard the appellee's motion to dismiss this appeal under G.L. c. 59, § 38D. Commissioners Gorton, Egan, and Rose joined him in allowing the motion and deciding this appeal 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.

*Mark J. Witkin, Esq.* for the appellant.

*Laura A. Caltenco, Esq.* for the appellee.

**FINDINGS OF FACT AND REPORT**

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<sup>1</sup>This appellant is sometimes referred to in the pleadings as "Banquer Herman Trust" and "Banquer, Herman Trust."

The Appellate Tax Board ("Board") heard this motion to dismiss brought by the Board of Assessors of the City of Boston ("assessors") for the appellant's failure to timely respond to the assessors' request for information pursuant to G.L. c. 59, § 38D ("38D request"). The salient facts are essentially undisputed.

On January 1, 2002, the appellant was the assessed owner of a certain parcel of commercial real estate located at 75 Boston Street in the City of Boston ("subject property"). The assessors valued the subject property at \$953,000 and assessed a tax, at the rate of \$31.49 per \$1,000, in the amount of \$30,009.97.

On or about June 17, 2002, the assessors sent to the appellant, by certified mail, a letter enclosed with a 38D request for fiscal year 2003. In the cover letter, the assessors requested that the information sought in the 38D request be provided to them within sixty days pursuant to G.L. c. 59, § 38D. The cover letter also stated that "[t]he requested information should reflect the income and expenses of the property for the year ending December 31, 2001," which the assessors considered to be "reasonably required" for the determination of the actual fair cash value of the subject property for fiscal year 2003. The first page of the 38D request contained an affidavit to be signed by the "owner"

and/or "preparer" to the effect that "[t]he enclosed information and addenda are presented as being true, correct and complete to the best of my knowledge and belief and are submitted under the penalties of perjury."

The appellant conceded that it failed to respond to, answer, or provide the information sought by the 38D request for fiscal year 2003. The appellant did not contest that the information sought was "reasonably necessary" for a determination of the actual fair cash value of the subject property for fiscal year 2003 or, to the extent relevant to these proceedings, the assessors were prejudiced by the appellant's failure to supply the assessors with the requested information. The appellant also did not dispute that its failure to comply with the 38D request was not occasioned by reasons beyond its control. As a result of the appellant's failure to provide the information sought by the 38D request, the assessors had to set the subject property's fair cash value for fiscal year 2003 without the benefit of the requested income and expense information.

In January, 2003, the appellant timely filed an application for abatement with the assessors alleging that the assessment was excessive. Following the assessors' denial of the application, the appellant seasonably appealed to this Board.

On May 17, 2004, the Board heard the assessors' motion to dismiss the appellant's appeal for the appellant's unjustifiable failure to respond to the assessors' valid 38D request. The appellant opposed the motion on the ground that the 38D request and cover letter were ambiguous because they did not specifically request the taxpayer to make the written return under oath, as required by G.L. c. 59, § 38D, and because they specifically "ask[ed]" for only expense and income information while in fact seeking more.

The Board found that the 38D request and cover letter were not ambiguous and that the appellant's arguments in support of any alleged ambiguities were essentially without merit. The Board found that the affidavit contained on the first page of the 38D request specifically and quite clearly require the "owner" or "preparer" to sign the 38D request "under the penalties of perjury," which, under the circumstances, the Board equated with being signed under oath. The Board also found that, while the 38D request may have been entitled "Real Estate Income and Expense Requisitions," it only sought "such information as may reasonably be required by [the assessors] to determine the actual fair cash valuation of such property," as the relevant statute, G.L. c. 59, § 38D, authorizes. The Board further noted that the first sentence of the introductory paragraph on the first page of the 38D request is clear in

explaining what information was being sought by stating that: "[t]he following information is required pursuant to Massachusetts General Laws Chapter 59, Section 38D, in order to develop a fair and equitable valuation of the subject property." The Board found that, to the extent any ambiguities might have existed, they were at most inconsequential and did not invalidate the 38D request, which the Board found complied with the provisions of G.L. c. 59, § 38D.

The appellant advanced an additional ground in opposition to the assessors' motion to dismiss for failure to comply with the assessors' 38D request. The appellant asserted that even if the owner were barred from appealing its assessment because of its failure to comply with the assessors' 38D request, the tenant who paid more than one-half the tax, and, accordingly, could have brought an appeal of the assessment under G.L. c. 59, §§ 59, 64, and 65 was not so barred. The appellant argued that because the assessors never sent the tenant a 38D request, the tenant could not be barred from taking the appeal because any failure to answer was "for reasons beyond his control," viz., that the tenant never received a 38D request and could not control the owner's failure to respond to the 38D request.

The Board found that this ground was also without merit. The primary flaw in the appellant's logic was that the tenant

failed to actually bring an appeal.<sup>2</sup> The only appeal of the assessment on the subject property for fiscal year 2003 was brought by, and in the name of, the owner, the Herman Banquer Trust, not the tenant. The owner was also the one who failed to timely answer the 38D request. The tenant, while perhaps having had a right to appeal under G.L. c. 59, §§ 59, 64 and 65, never perfected its right by filing a timely application for abatement and then bringing a timely appeal after the denial, deemed denial, or partial abatement of its application. The appeal for this property was brought in the name of the owner, and not in the name of the tenant. The tenant, therefore, is in no position now, months after the relevant filing deadlines, to complain about some alleged injustice to its appeal rights. The Board did not find here that the tenant was at any time ineligible to bring a timely appeal because of the subject property owner's unjustifiable failure to respond to a valid 38D request. The Board only found that the property owner was ineligible to prosecute its appeal, and the tenant failed to bring an appeal in its own right.

On this basis, the Board allowed the assessors' motion to dismiss this appeal for the appellant's unjustifiable failure to

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<sup>2</sup> The appellant argued that the tenant was the real party in interest here because the tenant had requested its attorney to investigate filing an application for abatement on the subject property for fiscal year 2003. The indisputable fact remains, however, that all such filings relating to the subject property for fiscal year 2003 were made in the name of the owner, not the tenant.

respond to the assessors' valid 38D request. The Board found that the requested information was reasonably required by the assessors to determine the actual fair cash values of the subject property for the fiscal year at issue and the appellant's failure to respond to the 38D request was not due to reasons beyond its control. Accordingly, the Board decided this appeal for the assessors.

#### OPINION

General Laws chapter 59, § 38D states 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 be reasonably 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.

Accordingly, when an owner or tenant, as the case may be, fails to respond under oath within sixty days to a written request from the assessors for information reasonably required by the assessors to determine the fair cash value of the property at issue, the owner's or tenant's right to appeal an assessment to this Board is foreclosed unless the owner or tenant was unable to comply for reasons beyond the owner's or tenant's control. See *Marketplace Center II Limited v. Board of Assessors of the*

*City of Boston*, ATB Findings and Reports 2000-258, 276-77 (*"Marketplace Center II"*), *aff'd*, 54 Mass. App. Ct. 1101, 1107 (2002) (decision pursuant to Rule 1:28).

There is no dispute that in these appeals: (1) the appellant failed to respond to the assessors' 38D request within sixty days; (2) the information sought by the assessors was reasonably required by them to determine the actual fair cash value of the subject property for the fiscal year at issue; (3) to the extent it may be relevant to these proceedings, the assessors were prejudiced by the appellant's failure to provide the assessors with the requested information; and (4) the appellant's failure to comply with the request was not occasioned by reasons beyond its control. See *Marketplace Center II*, ATB Findings and Reports 2000 at 276-77.

The appellant instead argued that the assessors' 38D request and cover letter were ambiguous and the 38D request was not required to be signed under oath as the relevant statute directed. After thoroughly examining the relevant documents, the Board found that these allegations were without merit. The Board found that the documents were essentially not ambiguous and the 38D request was required to be signed "under the penalties of perjury," which the Board found, in accordance with G.L. c. 4, § 6, cl. Sixth and G.L. c. 268, § 1A, equated with being signed under oath.

Wherever any writing is required to be sworn to . . . such oath . . . shall be taken before a justice of the peace or notary public, or such oath may be dispensed with if the writing required to be sworn to contains or is verified by a written declaration under the provisions of section one A of chapter two hundred and sixty-eight.

G.L. c. 4, § 6, cl. Sixth. "No written statement required by law shall be required to be verified by oath or affirmation before a magistrate if it contains or is verified by a written declaration that it is made ***under the penalties of perjury.***"

G.L. c. 268, § 1A (emphasis added).

The appellant further argued that even if the owner of the subject property were barred from appealing the assessment because of the owner's failure to timely comply with the assessors' 38D request, the tenant who paid more than one-half the tax, and, accordingly, could have brought an appeal of the assessment under G.L. c. 59, §§ 59, 64 and 65, was not so barred. The appellant argued that because the assessors never sent the tenant a 38D request, the tenant could not be barred from taking the appeal because any failure to answer was "for reasons beyond his control," which were that no 38D request was sent to or received by the tenant and the tenant could not control the owner's failure to answer the 38D request directed to the owner. The Board's short answer to these arguments was that the tenant never brought a timely appeal in its own name

and could not subsequently complain that the owner's appeal was being dismissed for the owner's failure to timely respond to the assessors' valid 38D request.<sup>3</sup> Simply, the tenant elected not to pursue *its* appeal rights, and the appellant's failure to answer the 38D request was not for reasons beyond its control.

On this basis, the Board granted the assessors' motion to dismiss under G.L. c. 59, § 38D and decided this appeal for the appellee.

**APPELLATE TAX BOARD**

**By:** \_\_\_\_\_  
**Anne T. Foley, Chair**

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**Frank J. Scharaffa, Commissioner**

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**Donald E. Gorton, III, Commissioner**

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**Nancy T. Egan, Commissioner**

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**James D. Rose, Commissioner**

**A true copy,**

<sup>3</sup> At the hearing of the motion to dismiss, the appellant also suggested that there was some undefined procedural or notice infirmity associated with the Board's dismissal of this appeal without some prior notification to the tenant of the owner's failure to respond to the 38D request and the possible consequences for that failure. The Board ruled that where the tenant never brought an appeal in its name, there was no procedural foundation to advance this argument.

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