

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

GEOFFREY HOROWITZ TS¹

v. BOARD OF ASSESSORS OF
THE CITY OF BOSTON

Docket No. F275666

Promulgated:
February 13, 2006

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 2004.

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

¹ The appellant apparently used the abbreviation "TS" to indicate that, at all relevant times, Geoffrey Horowitz was the trustee of the Geoffrey Horowitz 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 failure of Geoffrey Horowitz TS ("appellant") 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, 2003, the appellant was the assessed owner of a certain parcel of commercial real estate located at 18 Lagrange Street in the City of Boston ("subject property"). The assessors valued the subject property at \$2,108,000 and assessed a tax thereon, at the rate of \$33.08 per \$1,000, in the amount of \$69,732.64.

On or about February 12, 2003, the assessors sent to the appellant, by certified mail, a 38D request for fiscal year 2004 with a letter printed on the reverse side. After explaining the purpose of and reasons for the 38D request, the last paragraph of the single-page letter advised the appellant that:

This request is made pursuant to Massachusetts General Laws Chapter 59, Section 38D. Failure to respond to this request will jeopardize any appeal rights for this property at the state Appellate Tax Board. Additionally, any owner who fails to submit requested information will be levied a fifty dollar (\$50) fine in the next tax year.

The 38D request sought recent lease information and an overview of the performance of the building on the subject property in calendar year 2002. It also informed the property owner in bold

print that "[i]nformation submitted on this form will be held confidential." In both bold print and caps, it further advised the property owner to "RETURN THIS FORM WITHIN (60) DAYS OF RECEIPT." In addition, the 38D request contained a statement at the bottom of the page to the effect that the property owner has "read this return [and] . . . declare[s] that to the best of my knowledge and belief, this form is true, correct and complete."

This 38D request went unclaimed. On April 28, 2003, the assessors sent a second 38D request and letter. The appellant did not dispute its receipt of the second 38D request and letter and conceded that it failed to respond to, answer, or otherwise provide the information sought by the 38D request. The appellant did not contest that the information sought was "reasonably required" for a determination of the actual fair cash value of the subject property for fiscal year 2004 or, to the extent relevant to these proceedings, that the assessors were prejudiced by the appellant's failure to supply the assessors with the requested information. The appellant also conceded 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 claimed and the Board found that they had to set the subject property's fair cash value for fiscal year

2004 without the benefit of the requested lease and performance information.

On April 16, 2004, before the last day for payment of the actual tax bill, the appellant timely filed an application for abatement with the assessors alleging that the subject property's fiscal year 2004 assessment was excessive. Following the assessors' denial of the application on May 13, 2004, the appellant seasonably appealed to this Board on August 12, 2004.

Subsequently, 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, without submitting any legal authority, on the ground that the 38D request did not specifically request the taxpayer to make the written return "under oath," pursuant to the provisions of G.L. c. 59, § 38D.

The Board found that the letter on the reverse side of the 38D request contained appropriate information and expressly informed the recipient that the 38D request was sent pursuant to G.L. c. 59, § 38D. The Board also found that the statement to be signed by the property owner that was printed on the bottom of the 38D request ("I declare that to the best of my knowledge and belief, this return is true, correct and complete.") was an affirmation and was "under oath" as that phrase is used in § 38D. The Board further found that a primary purpose for signing

the 38D request "under oath" is to help ensure that assessors receive accurate and true data on which to rely for determining their assessments. If, as in this appeal, assessors opt for a property owner to sign the 38D request "to the best of [its] knowledge and belief, [that] this return is true, correct and complete," the Board found that this affirmation is "under oath" for purposes of § 38D.

On this basis, the Board allowed the assessors' motion to dismiss this appeal for the appellant's unjustifiable failure to respond to the assessors' valid 38D request. The Board found that the appellant received the 38D request; the appellant failed to respond to the 38D request; 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; to the extent relevant to these proceedings, the assessors were prejudiced by the appellant's failure to provide the assessors with the requested information; 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 appellee.

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 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. (Emphasis added.)

Accordingly, when an owner 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 right to appeal an assessment to this Board is foreclosed unless the owner was unable to comply for reasons beyond the owner's control. See ***Marketplace Center II Limited v. Board of Assessors of the City of Boston***, ATB Findings of Fact and Reports 2000-258, 276-77 ("***Marketplace Center II***"), *aff'd*, 54 Mass. App. Ct. 1101, 1107 (2002); ***Forty-Four - 46 Winter Street, LLC v. Assessors of Boston***, ATB Findings of Fact and Reports 2005-656, 661 ("***Forty-Four-46 Winter Street***"); and ***Herman Banquer Trust v. Assessors of Boston***, ATB Findings of Fact and Reports 2005-664, 671 ("***Herman Banquer Trust***").

There is no dispute in this appeal that: (1) the appellant received the 38D request; (2) the appellant failed to respond to the 38D request within sixty days; (3) the information sought by

the assessors on the 38D request was reasonably required by them to determine the actual fair cash value of the subject property for the fiscal year at issue; (4) to the extent it may be relevant, the assessors were prejudiced by the appellant's failure to provide the assessors with the requested information; and (5) the appellant's failure to comply with the 38D request was not occasioned by reasons beyond its control. See **Marketplace Center II**, ATB Findings of Fact and Reports 2000 at 276-77; **Forty-Four-46 Winter Street**, ATB Findings of Fact and Reports 2005 at 661-62; and **Herman Banquer Trust**, ATB Findings of Fact and Reports 2005 at 671-72.

The appellant argued, however, that because the 38D request was not required by the assessors to be signed using the explicit language "under oath," the 38D request was invalid and inconsistent with § 38D. After thoroughly examining the 38D request and accompanying letter, the Board found that this assertion was without merit. The Board found that the letter on the reverse side of the 38D request clearly explained the purposes of the 38D request, contained other pertinent information, and advised the appellant that the 38D request was sent pursuant to G.L. c. 59, § 38D. The Board also found that the 38D request was required to be signed by the appellant "to the best of [its] knowledge and belief, this return is true, correct and complete." The Board found that this language

constituted an "affirmation," which, according to BALLENTINE'S LAW DICTIONARY (3rd ed. 1969), is a positive statement or declaration. *Id.* at 46. Similarly, THE AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2002) defines an "affirmation" as a positive statement or judgment or "something declared to be true." *Id.* at 23. According to numerous legal and lay sources, an "oath" may be any form of affirmation by which one signifies that he is bound in conscience to perform an act truthfully or by which one affirms the truth of a

statement. See, e.g., BALLENTINE'S LAW DICTIONARY, *supra* at 875; BLACK'S LAW DICTIONARY 1071 (6th ed. 1990); THE AMERICAN HERITAGE COLLEGE DICTIONARY, *supra* at 957.

General Laws c. 4, § 7, cl. Twenty-first also provides that when the term "oath" appears in a Massachusetts statute, it "shall include affirmation," where legally permissible. The Board, therefore, found and ruled in this appeal, in accordance with cl. Twenty-first and various dictionary definitions that, under the circumstances, once the affirmation contained on the bottom of the 38D request was signed, it constituted signing "under oath" for § 38D purposes. In addition, the Board found that a primary purpose for including the phrase "under oath" in § 38D is to ensure to the extent practicable that information provided to the assessors by owners (or tenants) of real property is true and accurate. If the information were unreliable, it could have far-reaching consequences. See **Marketplace Center II**, ATB Findings of Fact and Reports 2000 at 276 ("Taxpayer non-compliance [with § 38D] affects the ability of the assessors to value the individual property in question and other comparable properties, jeopardizes a municipality's fiscal stability if

unanticipated abatement and interest liabilities exhaust overlay accounts, and results in inequality in taxation if the non-compliant taxpayer is unintentionally underassessed."). The Board ruled that the printed affirmation contained on the bottom of the 38D request furthers this important objective.

Finally, "[w]ords and phrases shall be construed according to common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning." G.L. c. 4, § 6, cl. Third. Whether relying on definitions according to common and approved usage or those with a more distinct legal meaning, the Board ruled, under the circumstances present in this appeal, that the affirmation contained on the bottom of the 38D request fulfills § 38D's directive that the 38D request be signed "under oath."

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

Frank J. Scharaffa, Commissioner

Donald E. Gorton, III, Commissioner

Nancy T. Egan, Commissioner

James D. Rose, Commissioner

A true copy,

Attest: _____
Assistant Clerk of the Board