



Chairman Hammond took no part in the deliberations or decisions of these appeals.

These findings of fact and report are made pursuant to requests by both the appellants and appellee under G.L. c. 58A, § 13 and 831 CMR 1.32.

*Maxwell D. Solet*, Esq. for the appellants.

*Marikae Grace Toye*, Esq. and *Andrew O'Meara*, Esq. for the appellee.

#### **FINDINGS OF FACT AND REPORT**

On the basis of all of the evidence, the Appellate Tax Board ("Board") made the following findings of fact.

TTSC is a Massachusetts corporation, which is a wholly owned subsidiary of TechTarget, a Delaware corporation.

TechTarget, as the principal reporting corporation for a combined group, filed a Massachusetts Form 355C Domestic or Foreign Corporation Return for each of tax years 2004, 2005 and the tax years at issue. TTSC was not included in TechTarget's combined filings, because the appellants took the position that TTSC was a securities corporation taxable under G.L. c. 63, § 38B(a) ("§ 38B(a)") and therefore not subject to inclusion in TechTarget's combined group. Accordingly, TTSC timely filed a separate tax return, Massachusetts Form 355SC Domestic or Foreign Securities Corporation Return, for each of tax years 2004, 2005 and the tax years at issue.

Pursuant to a validly executed consent to extend the time for assessment of taxes, the Commissioner, after having first issued to each appellant a Notice of Intent to Assess, assessed tax, interest and penalties against the appellants. On June 15, 2011, the Commissioner assessed tax, interest and penalties against TTSC, based on the determination that it was not a securities corporation subject to tax under § 38B(a) as indicated below:

<b>Tax year ending</b>	<b>Tax</b>	<b>Interest</b>	<b>Penalty</b>	<b>Total</b>
12/31/2006	\$42,922.00	\$12,949.48	\$ 8,548.00	\$ 64,419.48
12/31/2007	\$95,475.00	\$18,936.41	\$19,095.00	\$133,506.41
<b>TOTAL</b>				\$197,925.89

On June 18, 2011, the Commissioner assessed tax, interest and penalties against TechTarget, based on the determination that TTSC should have been included as part of its combined return under G.L. c. 63, § 32B, as indicated below:

<b>Tax year ending</b>	<b>Tax</b>	<b>Interest</b>	<b>Penalty</b>	<b>Total</b>
12/31/2006	\$ 96,201.00	\$ 9,939.28	\$19,266.04	\$125,406.32
12/31/2007	\$159,873.00	\$23,395.94	\$35,891.80	\$219,160.74
<b>TOTAL</b>				\$344,567.06

The penalties were assessed pursuant to G.L. c. 62C, § 35A ("§ 35A"), which provides for a twenty-percent penalty based upon an asserted "substantial understatement" of liability. On August 18, 2011, the appellants each filed an abatement application with respect to these assessments, which the

Commissioner denied by Notice of Abatement Determination dated November 16, 2011. On January 6, 2012, the appellants each filed a Petition to appeal the Commissioner's denial of their abatement applications. Based on the facts of this paragraph, the Board found and ruled that it had jurisdiction over these appeals for the tax years at issue.

The assessments at issue related to the Commissioner's determination that TTSC was not entitled to classification as a securities corporation. At all relevant times, TTSC's Articles of Organization stated that its purpose was "[t]o engage exclusively in buying, selling, dealing in or holding securities on its own behalf and not as a dealer." Although TechTarget and TTSC filed tax returns for tax years 2004, 2005 and the tax years at issue, the appellants did not file a separate application for classification of TTSC as a security corporation. In response to line 4 of its Form 355SC from tax year 2004, the "Date corporation first classified as a securities corporation," TTSC responded with "12/10/2004," the same date that TTSC began business in Massachusetts. The Commissioner did not select the appellants' earlier tax returns from tax years 2004 or 2005 for audit.

On the basis of the evidence of record, and as will be explained in the Opinion, the Board found and ruled that TTSC was not entitled to classification as a securities corporation

for the tax years at issue. The Board further found and ruled that there was a substantial understatement of tax, and therefore, the Commissioner properly assessed penalties under § 35A. However, the Board found, and the parties so stipulated, that the Commissioner miscalculated the § 35A penalty against TechTarget for tax year 2007. Based on the additional tax liability of \$159,873.00 for that tax year, the twenty-percent penalty should have been assessed at \$31,974.60.

Accordingly, and simultaneously with these Findings, the Board issues a corrected decision for the appellants in Docket No. C314726, ordering an abatement of \$3,917.20 in penalties assessed against TechTarget in tax year 2007, and issued a decision for the appellee in all other aspects.

#### **OPINION**

The issue raised by these appeals is whether TTSC was entitled to classification as a securities corporation under § 38B(a) when the appellants did not file with the Commissioner an application seeking classification on behalf of TTSC for the tax years at issue or for any previous tax years. The Commissioner's denial of securities-corporation classification for TTSC had two negative effects for the appellants. First, TTSC had a higher tax liability, because a corporation "engaged exclusively in buying, selling, dealing in, or holding

securities in its own behalf and not as a broker" receives favorable excise treatment under § 38B(a). Second, TechTarget, as the parent corporation, also had a higher tax liability because the Massachusetts taxable income of the combined group included TTSC's income under G.L. c. 63, § 32B (as in effect prior to St. 2008, c. 173, § 48).

The requirements for qualification as a securities corporation pursuant to § 38B(a) are as follows:

Every financial institution, or business corporation which is engaged exclusively in buying, selling, dealing in, or holding securities on its own behalf and not as a broker, except securities of a DISC, and is not a bank holding company under the Internal Revenue Code, as amended and in effect for the taxable year, **and, which either applies to the commissioner to be classified as a security corporation before the end of the taxable year and is so classified, or has been so classified by the commissioner for a prior taxable year and such classification has not been revoked before the end of the taxable year,** shall pay, on account of each taxable year, an excise equal to one and thirty-two one hundredths percent of the gross income, as defined in section thirty, received by such corporation during the taxable year or four hundred and fifty-six dollars, whichever is greater.

(emphasis added)

The Board first found that the plain language of § 38B(a) indicates that application to the Commissioner for classification is not an alternative but a requirement, which can be satisfied "either" by submitting the application before the end of the taxable year "or" by having a classification from the Commissioner from a previous taxable year, if that previous

classification has not been revoked. The parties stipulated that the appellants never made an actual application for TTSC's classification as a securities corporation before the end of any of the tax years at issue, nor did the appellants ever receive a prior classification by the Commissioner from an earlier tax year.

The appellants contend, however, that the application requirement should be waived for TTSC. First, they claimed that there were no clear procedures in the statute or regulations pertaining to the application process. While acknowledging that the Commissioner had issued **Department of Revenue Directive 86-33** ("**DD 86-33**") to describe the application process required by § 38B(a) and to detail the information required to be submitted to the Commissioner in an application for classification, the appellants claimed that this promulgation is not authoritative. The appellants emphasized that **DD 86-33** was not promulgated pursuant to the Administrative Procedure Act, G.L. c. 30A, § 1(5), which requires the agency to hold a public hearing and solicit comments. The appellants thus claimed that in the absence of procedures clearly outlined in the statute itself or in duly promulgated regulations, they were merely required to take reasonable steps to notify the Commissioner of their claim that TTSC should be classified as a securities corporation. According to their contention, TTSC's filing of a Form 355SC for

tax year 2005 was a reasonable step to notify the Commissioner of the appellants' claim that TTSC was a security corporation, and the Commissioner's acceptance of that return indicated that the Commissioner, notified of that claim, acquiesced.

The appellants' argument unnecessarily complicates § 38B(a). The plain language of § 38B(a) expressly requires an application to be submitted to the Commissioner requesting classification as a securities corporation to be submitted **before** the end of the tax year, unless the Commissioner has already approved an application for a prior tax year. The appellants made no such application at all; TTSC simply filed its Forms 355SC, **after** the close of tax years 2004 through 2007. Moreover, on those returns, TTSC did not request to be classified as a securities corporation. TTSC's response on line 4 of its Form 355SC for tax year 2004 indicates that the appellants assumed that TTSC was already classified since its inception. The Board found and ruled that TTSC's Forms 355SC did not qualify as applications for TTSC's classification as a securities corporation.

Further, contrary to the appellants' contention, a regulation regarding the application process for a securities corporation was in place during the tax years at issue: 830 CMR 63.38B.1, Massachusetts Taxation of Security Corporations was promulgated on July 14, 2006 and took effect for tax years

beginning on or after January 1, 2006. 830 CMR 63.38B.1(11). This regulation reiterates the statute's requirement that the application be submitted before the end of the tax year, and it essentially mirrors **DD 86-33's** listing of information required to be included on the application, so the appellants cannot complain that they lacked information about the procedures required to comply with § 38B(a). Form 355SC, which the appellants claim can be used as an application for classification as a securities corporation, omits some of the key information required by the regulation and by the earlier-promulgated **DD 86-33**, including the requirements for a balance sheet and income statement from the beginning of the tax year to the date of the application. See 830 CMR 63.38B.1(6)(b)(4) and (5).

Finally, the Commissioner's acceptance of the appellants' prior returns, without selecting them for audit, is not tantamount to the Commissioner's acquiescence in TTSC's classification as a securities corporation. The Commissioner's failure to enforce a statutory provision has no effect on its authority. "Statutory authority (like an easement in land) is not subject to atrophy or abandonment merely from nonuse." **Hillside Country Club Partnership, Inc. v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 2011-191, 195 (citing **Polaroid Corp. v. Commissioner of Revenue**, 393 Mass.

490, 496 (1984)). See also **Bell Atlantic Mobile Corporation, LTD d/b/a Verizon Wireless v. Commissioner of Revenue and Assessors of 220 Cities and Towns and Assessors of Newton v. Commissioner of Revenue and Bell Atlantic Mobile, LLC**, Mass. ATB Findings of Fact and Reports 2007-121, 180-81 (ruling that corporate cell phone providers were not entitled to the corporate utility exemption, regardless of the Department's long-standing practice, when that practice was not consistent with the underlying statute), *aff'd*, **Bell Atlantic Mobile of Mass. Corp. v. Commissioner of Revenue**, 451 Mass. 280 (2008). The Board here ruled that the Commissioner's failure to audit the appellants' prior returns did not bar the Commissioner's future assessments of the appellants based on § 38B(a).

On the basis of the facts of these appeals, the Board found and ruled that TTSC was required to, but did not, apply to the Commissioner to be classified as a securities corporation. Therefore, the Commissioner's assessments of additional corporate excise, based on the determination that TTSC did not qualify as a securities corporation and that it should have been included in TechTarget's combined reporting group, were proper.

The appellants next contended that the imposition of twenty-percent penalties was not proper. Pursuant to § 35A, twenty-percent penalties are authorized when an underpayment of

taxes is attributable to one or both of the following circumstances:

(1) negligence or disregard of the tax laws of the commonwealth or of public written statements issued by the commissioner; (2) any substantial understatement of liability for a tax referred to in [G.L. c. 62C] section 2.

Section 35A defines "negligence" to include "any failure to make a reasonable attempt to comply with the laws or public written statements" and the term "disregard" includes "any careless, reckless, or intentional disregard." Further, a "substantial understatement" occurs when "the amount of the understatement for the period exceeds the greater of 10 per cent of the tax required to be shown on the return for the period or \$1,000."

In the instant appeals, the appellants offered no evidence that TTSC's failure to comply with the clear statutory requirement and regulatory procedure to apply for security corporation classification was not negligent or in disregard of § 38B(a), 830 CMR 63.38B.1 and **DD 86-33**. See **Chan Market, Inc. v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 2013-1258, 1268-69 (where "the appellant offered nothing but self-serving testimony to dispel the inference that its filing activities were neither negligent nor in disregard of the Commonwealth's tax laws . . . the Board could discern no reason to abate the § 35A penalties.").

Furthermore, the underpayment was substantial because the tax required to be shown on TTSC's return greatly exceeded ten percent of the amount actually shown on its returns. TTSC's Form 355SC reported its excise tax due to be \$13,367 in tax year 2006 and \$27,473 in tax year 2007. TTSC's failure to meet the parameters for classification as a securities corporation resulted in the Commissioner's assessment against the appellants of \$139,123 for tax year 2006, resulting in an understatement of \$125,756, and of \$255,348 for tax year 2007, resulting in an understatement of \$227,875.

The appellants failed to prove that their failure to comply with the statutory requirements was not negligent or in disregard of § 38B(a), 830 CMR 63.38B.1 and **DD 86-33**, and the understatement of tax for both tax years at issue was greater than ten percent of the amount required to be shown on the return. The Board accordingly ruled that the Commissioner's assessment of § 35A penalties against the appellants for the tax years at issue was proper.

However, in accordance with the Stipulation of Facts, the Board found and ruled that the Commissioner miscalculated the § 35A penalty assessed against TechTarget for tax year 2007. Based on the additional tax liability of \$159,873.00 for that tax year, the twenty-percent penalty should have been \$31,974.60, for a difference of \$3,917.20 in penalties. The

Board accordingly ordered an abatement of \$3,917.20 in penalties.

### **Conclusion**

The appellants bear the burden of proving their right as a matter of law to abatement of tax. ***Staples v. Commissioner of Corps. and Taxation***, 305 Mass. 20, 26 (1940). See also ***Stone v. State Tax Commission***, 363 Mass. 64, 65-66 (1973); ***Commissioner of Corp. & Tax. v. Filoon***, 310 Mass. 374, 376 (1941). In the instant appeals, the appellants' contentions justifying their failure to file an application for classification pursuant to § 38B(a) were unpersuasive. The Board thus found and ruled that the Commissioner's assessment of § 35A penalties was proper. However, in accordance with the Stipulation of Facts, the Board ruled that the Commissioner miscalculated the § 35A penalty against TechTarget for tax year 2007.

Accordingly, and simultaneously with these Findings, the Board issues a corrected decision for the appellants, abating \$3,917.20 in penalties assessed against TechTarget for Docket No. C314726 and issued a decision for the appellee for all other aspects.

**APPELLATE TAX BOARD**

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

A true copy,

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