

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

**MARKETPLACE CENTER II
LIMITED PARTNERSHIP**

**v. BOARD OF ASSESSORS OF
THE CITY OF BOSTON**

Docket Nos. F247822, F244845,
X281911, X278929, X274955

Promulgated:
April 12, 2000

These are appeals under the formal procedure pursuant to G.L. c. 59, §§ 64 and 65, from the refusal of the Board of Assessors of the City of Boston ("Assessors") to abate taxes assessed on real estate located in the City of Boston owned by and assessed to Marketplace Center II Limited Partnership ("Marketplace") under G.L. c. 59, § 38.

Former Chairman Gurge heard the Assessors' Motion to Dismiss for Docket Numbers X274955, X278929, X281911 and F244845, relating to fiscal years 1994, 1995, 1996 and 1997 on December 14, 1998 and was joined by Commissioners Scharaffa, Burns, Gorton and Egan in a decision for the appellee. Chairman Burns heard the Assessor's Motion to Dismiss for Docket Number F247822 relating to fiscal year 1998 on December 6, 1999 and was joined by Commissioners Scharaffa, Gorton, and Egan in a decision for the appellee.

These findings of fact and report are promulgated at the request of Marketplace, pursuant to G.L. c. 58A, § 13 and 831 CMR 1.32.

John Plotkin, Esq. and Paul D. Wilson, Esq. for Appellant Marketplace.

James D. Rose, Esq. and E. Renee Mapa, Esq. for the Appellee Assessors.

FINDINGS OF FACT AND REPORT

These appeals raise the issue of whether a taxpayer's failure to timely respond to a Board of Assessors' request for information pursuant to G.L. c. 59 § 38D ("§ 38D request") forecloses the taxpayer's right of appeal to the Appellate Tax Board ("Board").

On January 1, 1994 through January 1, 1998, Marketplace was the assessed owner of a parcel of commercial real estate located at 200 State Street in the City of Boston. The property contains retail shops, Class A office space, parking, and pushcart vendors. The building is located next to Faneuil Hall and is known as Marketplace Center.

For all tax years relevant to these appeals, the Assessors requested in writing, pursuant to G.L. c. 59, § 38D, that owners of forty office towers in the City of Boston, including Marketplace, supply them with information the Assessors determined to be "reasonably required" for determination of the actual fair cash value of the property. Section 38D allows taxpayers sixty days

to respond to the request. For all relevant tax years, thirty-nine of the forty office tower owners responded to the § 38D request. Marketplace was the only office tower owner that did not respond to them.

Marketplace concedes that it did not specifically respond to the § 38D requests for the years at issue. As a result, the Assessors valued and assessed the subject property without the benefit of timely, property-specific, owner-supplied § 38D responses. After the City valued and assessed the property, Marketplace timely applied for an abatement of the assessment for each year at issue. As a part of the abatement process, the Assessors requested, and Marketplace timely provided, income and expense information pursuant to G.L. c. 59, § 61A ("§ 61A request").

Marketplace maintains that it substantially complied with the Assessors' § 38D request by submitting income and expense information, albeit for a prior year, pursuant to the Assessors' § 61A request. However, although the information contained in the § 61A response is similar to that requested by § 38D, there is a fundamental distinction between information requests under § 38D and § 61A, as they are requested at different points, and serve different purposes, in the assessment and appeal process.

The § 38D request seeks income and expense information prior to the property's assessment and prior to the Commissioner of Revenue's certification of the City's tax rate.¹ Accordingly, the information sought by the § 38D request is income and expense information for the calendar year immediately preceding the relevant valuation date for the fiscal year for which the Assessors seek to value the property and assess a tax.

The § 61A request seeks income and expense information as part of the abatement process, which necessarily occurs post-assessment and post-certification of the tax rate. Accordingly, the information sought by the § 61A request is income and expense data for the calendar year immediately preceding the relevant valuation date for the fiscal year for which the taxpayer has filed an application for abatement. While the Assessors use the information provided by the § 61A response to deliberate and act on an application for abatement, the information provided by the § 38D response is used both for valuing the property and setting the tax rate for Boston. The result of the differences in timing and purpose between the § 38D and § 61A requests is that, if the requests are made within a

¹ The Commissioner of Revenue "certifies" or approves the tax rate for each city and town in the Commonwealth. G.L. c. 59, § 21D.

few months of each other, the information sought will be for different years, with the § 61A request seeking information for a calendar year one year earlier than the information sought by the § 38D request.

For example, in the present appeals, the Assessors made their § 38D request for fiscal year 1995 on February 18, 1994. Because January 1, 1994 is the relevant assessment date for fiscal year 1995, the § 38D request sought income and expense information for calendar year 1993. Shortly after the February 18, 1994 § 38D request for fiscal year 1995, the taxpayer provided, on March 1, 1994, responses to the Assessors' § 61A request with respect to fiscal year 1994. The relevant information sought and supplied was for calendar year 1992. Therefore, the data was one year older than the relevant information requested for establishing the fiscal year 1995 value. The relevant calendar year 1993 information was not supplied until March 1, 1995, in response to a § 61A request, more than a year after the information was requested for purposes of valuing the property, and long after the value had been set by the Assessors for fiscal year 1995.

As the following table shows, for each year at issue, the taxpayer failed to respond to the Assessors' § 38D requests. Rather, the only information provided at or

about the time of the § 38D request was information one year older than the information most relevant for setting the value of the property for purposes of assessing the real estate tax.

| TAX YEAR | 38D REQUEST | 38D RESPONSE DUE | ABATEMENT APPLICATION | 61A RESPONSE |
|-------------------|-----------------------------------|------------------|-----------------------|----------------------|
| FY94 ² | 5/21/93 CY92 ³ DATA | 7/20/93 | 1/31/94 | 3/1/94 CY92 DATA |
| FY95 | 2/18/94 CY93 DATA | 4/19/94 | 1/30/95 | 3/1/95 CY93 DATA |
| FY96 | 5/31/95 CY94 DATA | 7/30/95 | 1/29/96 | 2/28/96 CY94 DATA |
| FY97 | 3/18/96 CY95 DATA | 5/17/96 | 1/30/97 | 2/28/97 CY95 DATA |
| FY98 | 5/01/97 CY96 DATA | 6/30/97 | 1/30/98 | 3/02/98 CY96 DATA |

On the basis of the foregoing, the Board found that the taxpayer failed to comply with the Assessors' valid § 38D requests, and that Marketplace's failure was not due to reasons beyond its control. The information requested by the Assessors' § 38D requests, income and expense information for the calendar years immediately preceding the relevant fiscal year, was reasonably required by the Assessors to determine the fair cash value of the property for the fiscal year at issue. The taxpayer's provision of information one year older than that requested

² FY is used to mean fiscal year, ending on June 30 of the indicated year.

³ CY is used to mean calendar year, which runs from January 1 through December 31 of the indicated year.

within a few months of the § 38D request is insufficient to establish that the Assessors' need for current income and expense information was unreasonable. Accordingly, the Board allowed the Assessors' motion to dismiss these appeals.

OPINION

The issue raised in these appeals is whether a taxpayer's failure to timely respond to a Board of Assessors' request for information pursuant to a § 38D request forecloses the taxpayer's right of appeal to this Board.

G.L. c. 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, in order to resolve the issue raised in these appeals, the Board must determine whether: (1) the information requested by the Assessors under § 38D was

"reasonably required" to determine the actual fair cash value of the subject property; (2) Marketplace failed to timely respond to the § 38D requests; (3) Marketplace was unable to respond for reasons beyond its control; and (4) the plain language of G.L. c. 59, § 38D bars Marketplace's appeal.

I: Was Data Reasonably Required By The Assessors?

Marketplace argues, in effect, that the § 38D response was not reasonably required for determination of the actual fair cash value of the subject property because the Assessors could have gathered the information from third party sources and the Assessors could have used the § 61A responses relating to the prior fiscal year's application for abatement. These assertions fail.

The Assessors are required by statute and the Massachusetts Constitution to assess real estate at its actual fair cash value. G.L. c. 59 § 38. See **Coomey v. Board of Assessors of Sandwich**, 367 Mass 836, 837 (1975). Use of the capitalization of income method of valuation is generally recognized as appropriate for income-producing properties. See e.g. **Assessors of Lynnfield v. New England Oyster House, Inc.** 362 Mass 696 (1972) **General Electric v.**

Board of Assessors of Lynn, 393 Mass. 591, 609 (1984). The actual income and expenses are strong evidence of the property's value, provided that they represent the earning capacity of the property. See **Carye v. Assessors of Chelmsford**, 394 Mass. 1001 (1985).

The Assessors are required to determine the fair cash value of real estate as of January 1 of each year. G.L. c. 59, § 2A(a). In order to determine the earning capacity of the property as of January 1 of each year, the Assessors requested income and expense data for the subject property, and for the City's other office towers which they determined comprised the relevant market, for the calendar year immediately preceding the relevant January 1 valuation date. By reviewing actual data from the subject property, together with contemporaneous data from comparable properties, the Assessors are able to determine whether the actual income and expenses which the taxpayer received represented market income and expenses -- the property's earning capacity -- as of the relevant assessment date.⁴

⁴ By comparing the actual income with the market data it compiled from other comparable properties, the Assessors could determine that actual receipts did not represent market income where, for example, actual receipts were impacted by a long-term lease unfavorable to the owner. See e.g. **Pepsi-Cola Bottling Co. v. Assessors of Boston**, 397 Mass. 447 (1986) ; **Donovan v. Haverhill**, 247 Mass. 69 (1923).

The best indicator of the earning capacity of the subject property as of the relevant assessment dates at issue in these appeals is income and expense information for the calendar year immediately preceding the relevant assessment dates. Such data discloses the building's most recent performance in terms of rents received, particularly for leases beginning during that one-year period, rents for retail space, expenses and vacancy. Under G.L. c. 59, § 38D, the Assessors are permitted to request information "reasonably required" from the taxpayer to determine actual fair cash value. The type of data requested by the § 38D request -- income, expense and other related economic information -- is reasonably required to determine fair cash value under the capitalization of income approach.

Olympia & York State Street Co. v. Board of Assessors of Boston, 428 Mass. 236, 244 (1998). "It is the duty of the assessors within reasonable limits to seek light from every available source bearing on the "fair cash value" of all property to be assessed by them for the purposes of taxation." ***Assessors of Brookline v. Prudential Insurance Company***, 310 Mass. 300, 310 (1941).

Relying on year-old data, made available to the Assessors for consideration of a prior year's abatement application, will fail to capture trends in the property's

earning capacity by missing recently negotiated leases, as well as current expenses and vacancies. Moreover, if other owners of comparable properties took a similar position, the Assessors' ability to determine market income and expenses would be significantly hindered. Accordingly, the Board ruled that income and expense information for the calendar year immediately preceding the relevant assessment date is reasonably required by the Assessors to determine the actual fair cash value of the subject property.

II: Did Marketplace Respond to the G.L. c. 59, § 38D Request Within 60 Days?

G.L. c. 59, § 38D states that: "[f]ailure . . . to comply with such request within 60 days . . . shall bar . . . him from statutory appeal under this chapter." Marketplace concedes that it did not respond specifically to the § 38D requests within 60 days. "Since the remedy by abatement is created by statute the board . . . has no jurisdiction to entertain proceedings for relief by abatement begun at a later time or prosecuted in a different manner than is prescribed by the statute." ***Assessors of Boston v. Suffolk Law School***, 295 Mass. 489, 492 (1936). Moreover, "the board has only that

jurisdiction conferred on it by statute." **Stilson v. Assessors of Gloucester**, 385 Mass. 724, 732 (1981).

Pursuant to G.L. c. 59, § 64, the Board may grant an abatement only where a taxpayer has "complied with all applicable provisions of law." Each year the Assessors made a request for information pursuant to G.L. c. 59, § 38D to 40 office towers in Boston. Each year, Marketplace was the only one of the 40 that failed to respond to this specific information request. "Following well-established principles of interpretation, we give effect to the 'usual and ordinary' meaning of words in a statute." **Sisk v. Assessors of Essex**, 426 Mass. 651, 654 (1998). Under § 38D, failure of a taxpayer to timely comply with an assessors' request for information reasonably required to set the fair cash value of property "shall bar him from any statutory appeal under" Chapter 59. Pursuant to the "usual and ordinary" meaning of the language used in § 38D, such failure to respond within 60 days, in the absence of reasons beyond the control of the taxpayer, bars appeal under chapter 59. That same failure also deprives the Board of jurisdiction to grant an abatement because Marketplace has not "complied with all applicable provisions of law" as required in § 64.

Further, in finding that Marketplace did not timely respond to the § 38D request, the Board follows well established precedent. In ***William Cantor v. Board of Assessors of the City of Newton***, (Docket No. 83059, March 23, 1977), the Board found that it had no jurisdiction to hear an abatement appeal when the taxpayer's response to the § 38B request⁵ did not contain all of the information requested and was not submitted within 60 days after the request was made. *Id.* See also ***Gerald Goldsmith v. Assessors of Newton***, (1981 A.T.B. Adv. Sh. 78, March 16, 1981) (Board found it had no jurisdiction to hear abatement appeal because taxpayer did not submit § 38B response). In both cases, the Board strictly construed the 60-day submission requirement of the statute.

Accordingly, the Board found and ruled that Marketplace did not provide the information requested within sixty days of the City's § 38D requests.

III. Was Non-Compliance Due To Reasons Beyond Marketplace's Control?

G.L. c. 59, § 38D provides that an appeal is barred unless the taxpayer's failure to respond to the § 38D

⁵ Section § 38B was the predecessor to section § 38D and contains virtually identical language.

request within 60 days was due to "reasons beyond his control." The Board has previously limited the meaning of "reasons beyond his control" to such events as serious illness of the taxpayer, fire, flood, or calamity that prevented the taxpayer from disclosing the information. See *Cantor, supra*. Mistake or inadvertence is not "beyond the control" of the taxpayer. *Id.* See also *Goldsmith, supra*.

The only reason given for Marketplace's non-compliance is administrative oversight and error. Oversight and error do not constitute "reasons beyond the control" of the taxpayer. Thus, Marketplace cannot circumvent the statute by citing administrative error or mistake as reasons for not complying with the submission requirement of § 38D.

IV: Assessors Are Harmed By Marketplace's Non-Compliance

To the extent that prejudice to the Assessors is a necessary factor for determining whether Marketplace's failure to respond to the Assessors § 38D requests warrants dismissal of its appeals, the Assessors have shown prejudice in these appeals.

Marketplace relies on **Board of Assessors of Provincetown v. Vara-Sorrentino Realty Trust**, 369 Mass. 692 (1976), for the proposition that the Assessors must show that they were prejudiced by a taxpayer's refusal to provide § 38D responses in order for the Board to dismiss its appeals. In **Vara-Sorrentino**, the Assessors sought reversal of the Board's decision on the ground that they were "unfairly handicapped in meeting the capitalization of income theory because of the owner's failure (as they claim) to supply them with facts and figures as to receipts, expenses, and other matters." **Id.** at 693. On the basis of a "sketchy" record, the Court concluded that the Board did not err in denying the Assessors' motion to dismiss for failure to respond to § 61A requests because "the owner did supply some information to the assessors although what that information consisted of is not clear." **Id.** at 694.

As the Board had in its decision, the Court went on to point out that the Assessors had a number of means to gather data to "meet the 'capitalization of earnings' theory," but had not availed themselves of these means. **Id.** The Court therefore concluded that the Assessors were not "handicapped" in their ability to counter at trial the taxpayer's valuation methodology.

There is no explicit requirement in § 38D or in **Vara-Sorrentino** which requires a showing of prejudice to the Assessors. The point of **Vara-Sorrentino** is that the Assessors could not show error because they had received information, which was not shown on the record to be insufficient, and they had other means to prepare for trial. In the present appeals, however, the Assessors have demonstrated how the information provided was deficient. In addition, the information requested was not for pre-trial preparation purposes for which other means existed. Rather, the information was necessary for establishing the valuation of the subject property long before trial and prior to any valuation, assessment or appeal to the Assessors and this Board. Accordingly, no other means were available to the Assessors in the present appeal to gather the necessary information prior to assessment and no issue of "handicap" at trial is raised or relevant in the subject appeals.

Moreover, to the extent prejudice is relevant in these appeals, the Assessors have shown prejudice. The Assessors established that they use the § 38D requests to value property by examining financial information both for the specific property in question and for other properties which form the relevant market, in this case, the downtown

office tower market. Without a timely response to the § 38D request prior to establishment of the assessed value, the Assessors were exposed to the risk of significant abatement and interest liability with regard to the subject property as well as other comparable properties. The timing of the receipt of the § 38D response, pre-assessment and pre-certification of tax rate, is crucial for accurate assessment of both Marketplace's property and other property in the relevant market, as well as for setting an appropriate tax rate for the City as a whole for the coming year. Expected tax revenue and possible abatement exposure relating to commercial properties have a direct effect on the Assessors' determination of the year's tax rate and the City's fiscal plan.

Although, by coincidence, the § 61A response may be submitted within the sixty-day window allowed for receipt of the § 38D response, the information does not cover the most relevant time period. Thus, the Assessors are handicapped in setting appropriate assessments and tax rates if they must use stale data. If it is determined that the taxpayer is due an abatement, the City will be liable for the amount of the abatement plus statutory interest from the date the third and fourth quarter tax bill was paid. See G.L. c. 59, § 69. There is a risk that

an abatement with statutory interest for a commercial office tower such as the subject property or other comparable properties will deplete or exceed the overlay account from which abatements are paid, and cause significant fiscal hardship to the City. Conversely, a taxpayer's failure to respond to a § 38D request could also result in an underassessment of the taxpayer's property, causing an undue burden on municipal finances and requiring other taxpayers in the City to pay more than their fair share of taxes.

Further, a precedent allowing other submissions, regardless of their actual timing, purpose, or content, to substitute for the § 38D essentially would render compliance optional for all commercial properties, as they can argue that any sort of submission to the City is appropriately considered a § 38D response. Such optional compliance would jeopardize the Assessors ability to gather accurate information and set timely and appropriate assessments and tax rates. In addition, allowing one taxpayer to ignore a § 38D request because the assessors had market information from § 38D responses supplied by other property owners would seriously undermine the clear statutory mandate that taxpayer's must provide information necessary for the Assessors' to properly levy property tax.

The statutory scheme embodied in § 38D requires taxpayer compliance in order for the assessors to discharge their constitutional and statutory duty to assess all property at fair cash value. The severity of the statutory remedy for non-compliance, loss of appellate rights, is commensurate with the importance of taxpayer-supplied information in the valuation and taxation process. Taxpayer non-compliance 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. Such risks would multiply if the Board were to adopt Marketplace's arguments.

V. Conclusion

On the basis of the substantial evidence of record detailed above, (see *Koch v. Commissioner of Revenue*, 416 Mass. 540, 555 (1993)), the Board found and ruled that: (1) the information requested by the Assessors under § 38D was "reasonably required" to determine the fair cash value of the subject property; (2) Marketplace failed to timely respond to the § 38D requests; (3) Marketplace's failure to

respond to the § 38D requests was not due to reasons beyond its control; (4) to the extent relevant, the Assessors have shown prejudice resulting from Marketplace's failure to respond; and (5) the plain language of § 38D and § 64 bar the subject appeals. Marketplace's failure to comply with §38D barred its right to appeal under Chapter 59 for all years at issue. Accordingly, the Board granted the Assessors' motions to dismiss Marketplace's appeals for fiscal years 1994, 1995, 1996, 1997, and 1998 and issued decisions for the appellee in these appeals.

APPELLATE TAX BOARD

By: _____
Abigail A. Burns, Chairman

A true copy,

Attest: _____
Clerk of the Board