COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

MICHAEL J. DUCHEINE **v.** **COMMISSIONER OF REVENUE**

Docket No. C255963 Promulgated:
July 18, 2001

This is an appeal filed under the formal procedure pursuant to G.L. c. 62C, § 39, from the refusal of the Commissioner of Revenue to abate income taxes assessed under G.L. c. 62, § 2 for tax years 1993 and 1994.

Commissioner Gorton heard the appeal and was joined in the decision for the appellee by Chairman Burns and Commissioners Scharaffa, Egan and Rose.

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

Michael J. Ducheine, pro se, for the appellants.

Lisa S. Mediano, Esq., for the appellee.

FINDINGS OF FACT AND REPORT

Based on exhibits and testimony offered into evidence at the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact.

During calendar years 1993 and 1994, Appellant Michael J. Ducheine and his wife Gabrielle P. Ducheine ("the Ducheines"), were residents of the Commonwealth of Massachusetts. The Ducheines filed 1993 and 1994 joint personal income tax returns showing refunds due, with a listed address of P.O. Box 1128, Randolph, MA. On or about August 12, 1996, the Internal Revenue Service ("IRS") notified the Ducheines that it had made a deficiency assessment of tax plus interest and penalty for calendar years 1993 and 1994. The deficiency was due in large part to disallowed Schedule C business expense deductions. The IRS notice was mailed to P.O. Box 1128, Randolph, MA and 16 Francis Drive, Apt #3, Randolph, MA.

The Ducheines did not, as required by G.L. c. 62C, § 30, report the federal change to the Commissioner of Revenue ("Commissioner"). On or about February 10, 1998, the Commissioner received a copy of the Revenue Agent Report from the IRS, showing the deficiency assessment resulting from the final determination. Shortly thereafter, on or about February 21, 1998, the Commissioner issued two Notices of Intention to Assess ("NIAs"), notifying the Ducheines of his intent to assess additional income tax, plus penalties and interest, for calendar years 1993 and 1994, based on the federal change. More than

thirty days later, on or about May 6, 1998, the Commissioner issued a Notice of Assessment ("NOA") of the additional income taxes, plus interest and penalties, for both years. Both the NIAs and the NOA were sent to "P.O. Box 1128, Randolph, MA," the Commissioner's last known address for the Ducheines. The Ducheines did not pay the deficiency assessment, and sometime in 1999 after learning that Mr. Ducheine was employed by Lotus Corporation in the Commonwealth, the Commissioner levied Mr. Ducheine's wages.

On February 15, 2000, Michael Ducheine filed two applications for abatement which were denied by the Commissioner on March 28, 2000. Subsequently, on April 19, 2000, the appellant timely filed an appeal with the Board. On this basis, the Board found that it had jurisdiction over the subject appeal.

Mr. Ducheine testified on his own behalf. During the years at issue, he and his wife resided in the Commonwealth and during that time he operated a tax preparation business as a sole proprietorship. Mr. Ducheine testified that sometime in the early part of 1995, he moved to South Carolina. From that point until 1999, he moved approximately six times. At no time did Mr. Ducheine notify the Commissioner of a change of address. Instead,

he relied solely on the U.S. Postal Service's change of address procedure for forwarding of mail.

At the time that Mr. Ducheine moved in 1995, he and his wife divorced and she continued to reside at the same Randolph address. Mr. Ducheine testified that his ex-wife did not know his whereabouts but acknowledged that he kept in touch with his children. In addition, Mr. Ducheine noted that Mrs. Ducheine continued to live at the Randolph address for some time, but was not certain as to when she moved.

Mr. Ducheine testified that he was not appealing the Commissioner's assessment of additional tax, but only the interest and penalties. His only argument for abating the interest and penalties was that he did not receive the NIAs or the NOA, since he had moved out of state, and that the Commissioner's failure to determine his whereabouts resulted in an illegal assessment. He suggested that it was the Commissioner's duty to determine his address in 1998 and that "after pulling information from the federal government about my tax liability, [the Commissioner] failed to pull the most important information which is my whereabouts."

Based on the evidence, the Board found that the deficiency assessment at issue was valid. The NIAs and the

NOA were mailed to the Commissioner's last known address for the appellant, the same address which appeared on the IRS notice of deficiency assessment. There is no special additional burden placed upon the Commissioner to determine the appellant's subsequent whereabouts in the circumstances of this appeal. The Board further found that the appellant failed to offer reasonable cause for his failure to notify the Commissioner of the federal change. Accordingly, the Board issued a decision for the appellee.

OPINION

G.L. c. 62C, § 30 provides in pertinent part:

> If the federal income of a person subject to taxation under chapter sixty-two is finally determined by the federal government to be different from the taxable income as originally reported, such final determination *shall be reported, accompanied by payment of any additional tax due with interest* as provided in section thirty-two, to the commissioner within one year of receipt of notice of such final determination . . . (emphasis added).

Section 30 further provides that:

> Any person [] failing to comply with the provisions contained in the first paragraph hereof shall be assessed a penalty . . . said penalty to become part of the additional tax due.

Id.

In the present appeal, the appellant admits that he received from the IRS a notice of a change in his federal taxable income and a corresponding federal deficiency assessment for calendar years 1993 and 1994. The appellant did not, as required by law, report the changes and pay the taxes due to the Commissioner within one year of his receipt of notice of the federal change.

The appellant does not contest the underlying tax assessment but asks this Board to abate the interest and penalties. The appellant's only argument is that since he did not receive notice of the tax liability, the assessment is illegal.

Section 30 provides that:

> [a]n assessment under this section shall be made in the manner provided in section twenty-six within one year of the receipts of such report or within two years of the receipts by the commissioner of information from the federal government that it has made a final determination of such person's federal taxable income . . . .

Section 26 requires the Commissioner to first give notice of his intent to assess taxes, and then, more than thirty-days later, to assess any additional taxes due. G.L. c. 62C, § 26(b).

In the present appeal, the Commissioner received notice from the federal government of the federal change on

February 10, 1998. Less than two weeks later, on or about February 21, 1998, the Commissioner mailed the NIA to P.O. Box 1128, Randolph, MA, the Commissioner's last known address for the Ducheines, as reported on the Ducheines' 1993 and 1994 income tax returns and as appeared on the IRS notice of deficiency. Pursuant to G.L. c. 62C, § 26, the Commissioner assessed the deficiency on May 6, 1998, more than thirty days after the issuance of the NIAs, and issued a NOA for the deficiency tax assessment, plus interest and penalty. The NOA was mailed to the same Randolph post office box.

Mr. Ducheine testified that he moved out of the Commonwealth in 1995 and that during the years 1995 to 1999 he moved a total of six times. As a result of his frequent moves he claimed not to have received the Commissioner's NIAs and NOA. He then argued that, as a result of his failure to learn of the tax liability, the tax assessment was illegal and for this reason the interest and penalty should be abated.

"Any notice authorized or required under the provisions of this chapter [62C] may be served personally or may be given by mailing the same, postage prepaid, to the person for who it is intended, addressed to such person at his address as it appears in the records of the

commissioner." G.L. c. 62C, § 71. In his testimony, Mr. Ducheine conceded that he never filed a change of address form with the Commissioner. Consequently, the only address the Commissioner had on file for the appellants was the address that appeared on the 1993 and 1994 personal income tax returns. This was the address to which the NIAs and the NOA were sent. There is nothing in § 71 or elsewhere which requires the Commissioner to go to further lengths to find a taxpayer at an address other than that reflected in the Commissioner's records.

Furthermore, § 26 specifically states that "failure to receive the notice provided for by this paragraph shall not affect the validity of the tax." G.L. c. 62C, § 26. The courts and this Board have ruled that the failure to ***receive*** an NOA has no effect on the validity of the tax, whereas the failure to ***send*** the NOA as soon as may be violates the explicit requirements of the statute. *See* ***Tambrands, Inc. v. Commissioner of Revenue,*** 46 Mass. App. Ct. 522, 527 (1999); ***Interface Group-Nevada, Inc. v. Commissioner of Revenue,*** 1998 ATB Adv. Sh. 1017, 1040 (October 20, 1998).

In ***Tambrands*** it was undisputed that the taxpayer received the notice of assessment. What was at issue was whether the Commissioner notified the taxpayer "as soon as

may be" as required by statute. Upholding the Board's decision that the Commissioner satisfied the statutory requirement, the Appeals Court distinguished between the Commissioner's failure to send a notice of assessment and a taxpayer's failure to receive the notice. The Court ruled that language in §§ 26 and 31 providing that a taxpayer's lack of receipt of the notice did not affect the validity of the tax was meant as "a safeguard against a notice of assessment not reaching its target, as might occur if the taxpayer had moved and not left a change of address with DOR." 46 Mass. App. Ct. at 527. The taxpayer in the present case falls squarely within the example described in ***Tambrands*** as an instance where a taxpayer's failure to receive a notice would not invalidate an assessment.

Recently, in ***EMC Corporation v. Commissioner of Revenue,*** 433 Mass. 568, 569 (2001), the Supreme Judicial Court focused on the issue of whether a taxpayer's appeal period began to run on the date of assessment or the date of the notice of assessment. The Court concluded that "a deficiency assessment does not become due until the notice of assessment is ***sent.***" In its decision, the Court made no reference to the taxpayer's receipt of the assessment. Accordingly, the Board found that Mr. Ducheine's failure to

receive the NOA had no bearing on the validity of the tax assessment.

Section 30 requires the Appellant to pay any additional tax due "with interest as provided in section thirty-two" at the same time they notify the Commissioner of the federal final determination. G.L. c. 62C, § 30. Interest on taxes not paid on or before the due date is added to the tax. G.L. c. 62C, § 32. "Interest accrues by operation of law in accordance with G.L. c. 62C, § 32." ***Fields Corner Plate Glass Co. v. Commissioner of Revenue,*** 16 Mass. App. Tax Bd. Rep. 157, 162 (1994). The Board found and ruled that because the tax at issue was validly assessed, the interest shown on the NOA was validly due. It is well-settled that "[t]here is no provision for abating interest accrued on a tax validly due." ***Blue Jay Corporation v. Commissioner of Revenue,*** 16 App. Tax Bd. Rep. 134, 135 (1994).

Like the interest, the penalty was attributable to the appellant's failure to comply with G.L. c. 62C, § 30 and notify the Commissioner of the federal change within one year. The Commissioner may, in his discretion, abate the penalty "for reasonable cause." G.L. c. 62C, § 30. The Board found that the Appellant offered no "reasonable

cause" for their failure to comply with the statute and notify the Commissioner of the federal change.

What constitutes reasonable cause is a question of law. ***Commissioner of Revenue v. Wells Yachts South, Inc.,*** 406 Mass. 661, 664 (1990). "At a minimum, the taxpayer must show that he exercised the degree of care that an ordinary taxpayer in his position would have exercised." ***Id.*** at 665. The taxpayer cannot simply state that he did not know that he had a statutory obligation to notify the Department of Revenue. *See* ***PPC Constructors, Inc. v. Commissioner of Revenue,*** 2001 ATB Adv. Sh. 310, 337 (May 7, 2001).

In ***PPC Constructors,*** the Board found that "the appellant cannot reasonably allege ignorance of the law as a defense." 2001 ATB Adv. Sh. at 337. The Board further found that "as a business taxpayer, PPC Constructors was expected to know the law or, at a minimum, to consult competent tax counsel." ***Id.*** Notably, in the present appeal much of the federal change was attributable to the IRS's disallowance of business expenses for Mr. Ducheine's tax preparation business.

Although ***Wells Yachts*** addressed an abatement of penalty assessed under § 33, and not, as here, a penalty under § 30, the standard of review under each provision is

"reasonable cause." There is no indication that the legislature intended that a different standard or analysis is applicable for abatement of penalties under § 30 and § 33. Accordingly, the Board analyzed the request for abatement of the subject § 30 penalties in the same manner as a claim for abatement of a § 33 penalty.

The appellant's sole argument for abating penalties is based on the claim that he did not receive the NIAs or the NOA and, therefore did not know of the tax liability owed the Commonwealth. The appellant does not deny that he received the IRS notice of change in federal taxable income and the corresponding tax deficiency assessment. To the contrary, Mr. Ducheine testified that he "just paid the additional taxes." Despite knowing of the increase in federal taxable income, the appellant did not inform the Commissioner of these changes as required under § 30. At no time did the appellant proffer an excuse for his failure to file a report with the Commissioner. This unjustified inaction precluded a finding that the appellant exercised the degree of care that an ordinary taxpayer in his circumstances would have shown. Accordingly, there is no basis for a finding of reasonable cause.

Based on the evidence, the Board found that the appellant failed to offer a basis for abatement of the § 30 penalties.

Accordingly, the Board issued a decision for appellee.

APPELLATE TAX BOARD

By:_____
Abigail A. Burns, Chairman

A true copy,

Attest:_____
Clerk of the Board