COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

WILLIAM H. PHILLIPS, JR. **v.** **COMMISSIONER OF REVENUE**
MICHELE D. PHILLIPS

Docket No. C321613

Promulgated:
March 20, 2015

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39(c) from the refusal of the appellee, the Commissioner of Revenue ("Commissioner" or "appellee"), to grant an abatement of personal income tax assessed to the appellants, William and Michele Phillips ("appellants") for the tax year ended December 31, 2007 ("tax year at issue").

Chairman Hammond heard the Motion to Dismiss ("Motion") filed by the appellee. He was joined by Commissioners Scharaffa, Rose, and Chmielinski in the decision allowing the Motion and dismissing the appeal for lack of jurisdiction.

These finding of facts and report are promulgated at the request of the appellants, pursuant to G.L. c. 58A, § 13 and 831 CMR 1.32.

David Klemm, Esq., *Anthony Kosinski*, Esq., and *James Everett,* Esq. for the appellants.

Diane M. McCarron, Esq. and *Michael Clifford*, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

The appellants are married residents of the Commonwealth. On September 2, 2009, the Commissioner issued a Notice of Failure to File a personal income tax return to the appellants for the tax year at issue. The appellants did not respond to the notice and on December 28, 2009, the Commissioner issued to them a Notice of Assessment of personal income tax in the amount of $299,081.08. The appellants ultimately filed a 2007 Form 1, Massachusetts Resident Income Tax Return ("Form 1"), with the Commissioner on July 6, 2010, reflecting a loss for the tax year at issue and requesting the resulting overpayment of $3,325 of tax to be refunded. The loss was largely driven by $92,494 of combined expenses, which the appellants' claimed were related to two business related activities, that they deducted on Schedule C of the Form 1.

Treating the Form 1 as an abatement application, the Commissioner sent the appellants a letter on October 27, 2010, acknowledging receipt of their submission, but requesting further information, including proof of any final determination made by the Internal Revenue Service ("IRS") and substantiation of the business expenses claimed as deductions on Schedule C. In response, on December 22, 2010, the appellants submitted a Form CA-6, Application for Abatement/Amended Return ("First CA-6"), which contained a statement that the appellants had "attached

request letter from [the Department of Revenue] along with [federal] adjustment letter for 2007." The First CA-6 did not include any materials substantiating the appellants' Schedule C deductions. Its sole enclosure was a copy of a one-page document issued by the IRS reflecting that the appellants were due a refund from their 2007 Form 1040A of $1,755. The IRS document did not include any information regarding the determination of the appellants' federal taxable income; it merely revised the amount of the appellants' credit for tax previously withheld and reflected the resulting refund.

The Commissioner issued a Notice of Abatement Determination ("First Determination Letter") on March 27, 2012, notifying the appellants that their Application for Abatement was denied for failure to respond to a request for documentation. The First Determination Letter stated that the appellants had the right to appeal the decision to the Appellate Tax Board ("Board") within 60 days or to submit a new, substantiated claim "if the statute of limitations for filing for an abatement ha[d] not expired." It informed the appellants that "[a] second filing of an abatement application will not be acted upon by the Department [of Revenue] if: 1) the application does not contain information previously requested by the Department [of Revenue]; or 2) the application contains the same information submitted with the prior filing without additional information..."

The appellants did not appeal the Commissioner's denial to the Board but instead filed a second application for abatement, nearly eight months later, on November 2, 2012 ("Second CA-6"). As part of the Second CA-6 filing, the appellants provided the following statement in support of their claim of refund: "2007 [t]axes were filed on my behalf. I filed them after they were filed on my behalf. I was in bankruptcy for an extended period of time. It has since been discharged." The Second CA-6 included an IRS Account Transcript which showed that the appellants had sustained a federal taxable loss of $154,249 for the tax year at issue and had been issued a refund of $1,755. However, the Second CA-6 did not include any of the information to support the Schedule C deductions that had been previously requested by the First Determination Letter. The Board found that the Second CA-6 was not responsive to the areas of insufficient substantiation which the Commissioner had highlighted in her First Determination Letter. The Commissioner similarly denied the Second CA-6 in a Notice of Abatement Determination dated May 29, 2013 ("Second Determination Letter"). The Second Determination Letter stated that the Second CA-6 was denied for failure to substantiate a claim of abatement and provided further explanation and detail regarding the calculation of the assessment and the disallowance of the appellants' business loss deductions.

The appellants filed the instant appeal with the Board on July 26, 2013. The Commissioner moved to dismiss this appeal on the ground that the appellants failed to file their appeal within 60 days of the March 27, 2012 denial of the First CA-6 and that the Second CA-6 did not offer a second opportunity to appeal. For the reasons explained in the following Opinion, the Board found and ruled that the Second CA-6 did not provide a basis for appeal. Accordingly, the Board allowed the Commissioner's Motion and dismissed the appeal for lack of jurisdiction.

OPINION

General Laws c. 62C, § 37 ("Section 37"), the statute which governs the period in which taxpayers may file applications for abatement of tax, was amended, effective July 1, 2011. St. 2011, c. 68, §§ 68 and 221. Therefore, as a threshold question, the Board must determine which version of Section 37 applies to the instant appeal. The prior version of Section 37 provided that a taxpayer had until the latest of: (1) three years from the due date of the original return; (2) two years from the date tax was assessed or deemed to be assessed; or (3) one year form the date tax was paid to file an application for abatement. Accordingly, under the prior rule, the appellants would have only had until December 28, 2011, or two years from the issuance of the Notice

of Assessment on December 28, 2009, to submit an application for abatement. Thus, the November 2, 2012 Second CA-6 would have been beyond the statute of limitations.

However, the Legislature revised the first of the three testing periods under Section 37 in 2011 to allow taxpayers three years from the date of actual filing of a tax return to request an abatement, instead of the three years from the original due date provided by the prior version. The newly amended language specifically applied to "requests for refund or applications for abatement filed with the commissioner on or after the effective date of this act [July 1, 2011]; provided however, that [the amended statute] shall not apply with respect to tax periods where the statute of limitations for refund or abatement, as applicable, had expired prior to the effective date of this act." St. 2011, c. 68, § 209. Because the statute of limitations for the tax year at issue did not close under the prior rule until December 28, 2011, the tax year at issue was still open as of the July 1, 2011 effective date of the amended Section 37. As the appellant's Second CA-6 was filed after July 1, 2011, the Board found and ruled that the amended version of Section 37 applied in this instance. Accordingly, the appellants had until three years from the July 6, 2010 filing of their Form 1, or July 6, 2013, to file a properly substantiated application for abatement.

However, while the appellants' Second CA-6 may have fit within the time frame of the amended Section 37, a taxpayer is prohibited from filing a second application for abatement "which puts an identical item of tax at issue that has been the subject of a previous application unless there are newly discovered facts, the first application is a return which shows an overpayment, there is a second assessment, or there is a subsequent change in decisional law." ***National Grid USA Service Company v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2014-630, 642-643 (citing ***Liberty Life Assurance Company of Boston v. State Tax Commission***, 374 Mass. 25, 30 (1977) and ***Foccacia, Inc. v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2013-665, 668). None of those conditions is present in the instant appeal.

In the specific circumstance where an earlier application has been denied for lack of substantiation, a taxpayer may either appeal the denial to the Board within 60 days, as outlined by G.L. c. 62C, § 39, or the taxpayer may file a "new, properly substantiated abatement application" within the time limits of Section 37. 830 CMR 62C.37.1(6)(a)(5)(emphasis added). Nevertheless, the Commissioner will not act on such a subsequent abatement application with respect to an identical issue if the later application, *inter alia*, "does not contain information previously requested by the Department [of Revenue]" or the

application "contains the same information submitted with the prior filing without additional information." 830 CMR 62C.37.1(6)(a)(6). If a taxpayer's subsequent applications lack the necessary information, the 60 day window pursuant to G.L. c. 62C, § 39 for perfecting an appeal to the Board runs "from the date of the Department's first denial of an unsubstantiated abatement application and not from the denial of any later filed application." 830 CMR 62C.37.1 (6)(a)(7).

The Second CA-6 contained no more than a cursory and irrelevant statement regarding the appellants' bankruptcy status and a summary IRS Account Transcript and provided nothing whatsoever to support or corroborate the $92,494 of business related deductions that the appellants' claimed on their Form 1, despite the Commissioner's request. The Board thus found and ruled that the Second CA-6 did not contain the information previously requested by the Department and therefore was an impermissible second application with respect to the same item of tax. Accordingly, the Board found and ruled that the appellant had 60 days from the March 27, 2012 First Determination Letter to file an appeal. This period had expired prior to the date of the appellants' petition to the Board. "It has long been the law of this Commonwealth that, when a remedy is created by statute, and the time within which it may be availed of is one of the prescribed conditions for relief,

failure to meet that time limit deprives a judicial body, court, or administrative appeals board of jurisdiction to hear the case." ***Nissan Motor Corp. v. Commissioner of Revenue,*** 407 Mass. 153, 157 (1990); *see also* ***Good v. Commissioner of Revenue,*** 395 Mass. 686, 688 (1985) (affirming Board's dismissal of appeal where taxpayer failed to timely file an appeal with the Board within 60 days of the Commissioner's denial of an abatement application). The appellants may not simply file another application for abatement which was as lacking in substantiation as their first and revive their lapsed right to appeal. *See* ***Fredkin v. State Tax Commission,*** 369 Mass. 973, 974 (1973).[1]

[1] In the instant appeal, the Board found and ruled that the appellants' second Application for Abatement was fundamentally lacking in substantiation and was therefore not based on new facts which would justify a second application concerning the same item of tax. *See* ***Liberty Mutual,*** 374 Mass. at 30. However, the Board recognizes the inherent potential for unfairness with a process where a taxpayer can be invited after an initial denial to file a second application, where the consideration of the application can be delayed for an indeterminate period (in this case for over two years) after which a determination can be made that the second application was not responsive, and have that determination ultimately result in the potential loss of the right of appeal to the Board, as more than 60 days would have run since the date of the first denial. Therefore, in instances where a taxpayer's first Application for Abatement was denied by the Commissioner for lack of substantiation and the taxpayer timely files a second application within the statute of limitations under Section 37, the Board will review *de novo* the sufficiency of the substantiation of the second application. *See* ***Commissioner of Corporations and Taxation v. J.G. McCrory Company***, 280 Mass. 273 (1932).

Because the appellants failed to file a timely appeal from the Commissioner's denial of their first application for abatement and the appellants' filing of a second application did not afford them a second opportunity to file an appeal, the Board found and ruled that it has no jurisdiction over this appeal. Accordingly, the Board allowed the Commissioner's Motion and dismissed this appeal for lack of jurisdiction.

THE APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: _____
Clerk of the Board