

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

ALAN SLISKI

v.

COMMISSIONER OF REVENUE

Docket No. C328816

Promulgated:  
July 10, 2018

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39 from the refusal of the appellee, the Commissioner of Revenue ("Commissioner"), to abate income taxes assessed against Alan Sliski ("appellant") for the tax year ended December 31, 2009 ("tax year at issue").

Chairman Hammond heard this appeal. Commissioners Scharaffa, Rose, Chmielinski, and Good joined him in the decision for the appellee.

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

*Alan Sliski, pro se*, for the appellant.

*Diane M. McCarron, Esq.* for the appellee.

## **FINDINGS OF FACT AND REPORT**

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

### **Jurisdiction**

The appellant and his spouse timely filed a Joint Massachusetts Resident Income Tax Return, Form 1, for the tax year at issue ("2009 Return"). On April 11, 2014, having been notified by the Internal Revenue Service ("IRS") of a federal-change assessment that the appellant did not report to the Massachusetts Department of Revenue, the Commissioner issued a Notice of Intent to Assess Personal Income Tax ("NIA") against the appellant for the tax year at issue. On May 29, 2014, the Commissioner timely issued an assessment consistent with the terms of the NIA, the basis of which was the appellant's failure to report the federal-change assessment.

On August 1, 2014, the appellant filed an Application for Abatement on Form CA-6, seeking abatement of the assessed tax. Pursuant to the appellant's request, the Department of Revenue's Office of Appeals conducted a hearing regarding the appellant's Application for Abatement on August 26, 2014. Having concluded that the assessment was proper, the Commissioner issued a Notice of Abatement

Denial on October 14, 2015. On November 16, 2015, the appellant seasonably filed a Petition Under Formal Procedure with the Board. Based on the foregoing, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

### **Factual Background**

Throughout the tax year at issue and thereafter, the appellant has been a co-owner of Orbital Therapy, LLC ("Orbital"), a Massachusetts-based medical-device company that develops products for the treatment of breast cancer. Accordingly, the appellant reported certain income and expenses associated with his interest in Orbital on the 2009 Return.

During 2010, Orbital applied for grants that had been made available under the Federal Patient Protection and Affordable Care Act, Pub. L. 111-148 (the "Act"). The Act, which was passed in 2010 and made retroactive to taxable years beginning in 2009, afforded credits or grants to entities involved in qualifying therapeutic projects.<sup>1</sup>

Consistent with applicable federal procedures, during 2010, Orbital filed IRS Form 8942, "Application for Certification of Qualified Investments Eligible for Credits

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<sup>1</sup> These were codified in Internal Revenue Code ("IRC" or "Code") § 48D, which is entitled "Qualifying Therapeutic Discovery Credit."

and Grants Under the Qualifying Therapeutic Discovery Project Program" ("Form 8942"). Pursuant to the Act and Grant Election Information provided on Form 8942, Orbital sought certification for a grant for tax years 2009 and 2010. Ultimately, Orbital received a grant.

Under federal tax law, the grant was not included in income. See IRC § 48D. However, in 2013, the IRS reduced 2009 expenses related to the appellant's interest in Orbital pursuant to the Act and the Code, thereby increasing his federal taxable income. See IRC § 48D and the Act § 9023. These reductions, along with other adjustments not relevant to this appeal, resulted in a federal-change assessment to the appellant's 2009 federal income tax return, which the appellant did not contest and, as noted above, did not report to Massachusetts.

Based on the foregoing, the Board found and ruled that the appellant did not demonstrate his right to an abatement for the tax year at issue. Accordingly, the Board issued a decision for the appellee in this appeal.

## OPINION

General Laws c. 62C, § 30 provides, in pertinent part:

If the federal government finally determines that there is a difference from the amount previously reported in (1) the taxable income of a person subject to taxation under chapter 62 . . . the final determination **shall be reported, accompanied by payment of any additional tax due with interest** as reported in section 32, to the commissioner within one year of receipt of notice of such final determination. (emphasis added).

In the present appeal, the appellant did not dispute that the IRS made a final determination that increased his taxable income for the tax year at issue. Neither did he contest that determination. Rather, generally alleging ambiguity in applicable law, and emphasizing that the Act was not passed until 2010, the appellant argued that the consequent Massachusetts assessment was improperly based on grant "income not received and non-taxable" in the tax year at issue. The Board found that the appellant's argument lacked a foundation in fact or law.

As a threshold matter, neither the federal change nor the assessment at issue in this appeal resulted from additions to income as the federal grant received by Orbital under the Act was not included in either federal or Massachusetts gross income. See IRC § 48D(f)(3) and G.L. c. 62, § 2. Rather, as required by the Act and the

IRC, expenses that had been claimed by Orbital were reduced after Orbital had sought and received a grant affecting the tax year at issue. See IRC § 48D. The reason for these adjustments is simple. Deduction limitations require addback of expenses associated with a grant under the Act because a taxpayer would otherwise reap a double benefit of excluding income received from a grant and claiming related expenses. See IRS Notice 2010-45; see also IRC § 48D. As noted above, the appellant did not contest the application of these deduction limitations, which ultimately resulted in a federal-change assessment.

Massachusetts adjusted gross income includes some but not all of the deductions allowable under the Code. G.L. c. 62, § 2(d). Further, a taxpayer bears the burden of demonstrating his or her entitlement to claim deductions against Massachusetts income. See *Horvitz v. Commissioner of Revenue*, 51 Mass. App. Ct. 386, 391-92 (2001). In the present appeal, the expense deductions that gave rise to the contested assessment were not allowable under the Code and the appellant provided no basis for their allowance under Massachusetts law for the tax year at issue.

Once an assessment has been issued, a taxpayer bears the burden of proving his or her right, as a matter of law, to an abatement. See *M & T Charters, Inc. v. Commissioner*

*of Revenue*, 404 Mass. 137, 140 (1989); *Stone v. State Tax Commission*, 363 Mass. 64, 65-66 (1973); see also *Staples v. Commissioner of Corps. and Taxation*, 305 Mass. 20, 26 (1940). In this appeal, the Commissioner issued an assessment based on a final determination by the federal government that the appellant's income was different than that originally reported, a determination that the appellant was required, but failed to report to the Commissioner. See G.L. c. 62C, § 30. The appellant contested the assessment, but offered no persuasive authority for the proposition that the assessment was improper. To the contrary, the record and applicable law indicate that certain expense deductions were properly disallowed. Thus, the Board found and ruled that the appellant failed to demonstrate his right to an abatement and issued a decision for the appellee in this appeal.

**THE APPELLATE TAX BOARD**

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

A true copy,

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