

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

JAMES K. HEGARTY

v.

COMMISSIONER OF REVENUE

Docket No. C321132

Promulgated:  
June 22, 2017

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 Commissioner of Revenue ("appellee" or "Commissioner"), to abate the Responsible Person Deemed Assessment against James K. Hegarty ("appellant") for the monthly periods ending May 31, 2005 through and including October 31, 2005 ("periods at issue").

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

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

*James K. Hegarty, pro se, for the appellant.*

*Michael P. Clifford, Esq. and John J. Connors, Jr., Esq. for the appellee.*

## FINDINGS OF FACT AND REPORT

On the basis of all of the evidence, including a Statement of Agreed Facts as well as testimony and documents offered at the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact.

This appeal arose from the determination by the Commissioner that the appellant was personally responsible for certain sales taxes on meals ("meals tax"), plus interest and penalties thereon, assessed against Dunlow Corporation ("Dunlow") for the periods at issue. During the periods at issue, the appellant was the General Manager, sole shareholder, and sole corporate officer for Dunlow. The parties stipulated that: the appellant had the authority to, and did in fact, sign checks on behalf of Dunlow; the appellant had the authority to hire and fire employees of Dunlow; and the appellant performed accounting and bookkeeping tasks on behalf of Dunlow.

During the periods at issue, Dunlow was a domestic corporation doing business as Pilot House restaurant in Bourne, Massachusetts. Dunlow sold meals and collected meals taxes on the sale of those meals. Dunlow did not file meals tax returns with the Commissioner within twenty days after the expiration of any of the periods at issue and did not remit meals taxes.

The Commissioner mailed to Dunlow a Notice of Failure to File on October 26, 2005 and a second Notice of Failure to File

on March 8, 2006. On January 31, 2008, the Commissioner mailed to Dunlow a Notice of Assessment relating to the periods at issue. On March 25, 2008, the Commissioner mailed to Dunlow a Demand for Payment relating to the periods at issue. On June 3, 2010, the appellant, on behalf of Dunlow, filed an Application for Abatement challenging the Commissioner's assessment of interest and penalties for the periods at issue. On September 10, 2010, the Commissioner issued a Notice of Abatement Determination denying Dunlow's Application for Abatement because no returns were filed for the periods at issue.

On December 12, 2010, in response to the Notice of Abatement Determination issued to Dunlow, the appellant submitted, on behalf of Dunlow, copies of meals tax returns, Forms ST-MAB-4, for each of the periods at issue. The appellant signed these returns and wrote "0" on each line of the meals tax returns. However, the parties agreed that Dunlow did, in fact, collect meals taxes during each of the periods at issue. On May 24, 2011, the Commissioner issued a second Notice of Abatement Determination, denying Dunlow's Application for Abatement, this time for the reason that it was filed beyond the statute of limitations as provided in the applicable version of G.L. c. 62C, § 37 -- the later of: three years from the date the

return was due;<sup>1</sup> two years from the date the tax was assessed; or one year from the date the tax was paid.

On March 5, 2012, the Commissioner mailed to the appellant a Notice of Determination of Personal Liability and Deemed Assessment relating to Dunlow's meals tax liabilities for the periods at issue. On April 27, 2012, the appellant filed an Application for Abatement with the Commissioner challenging the Commissioner's determination of responsible person liability. After a statutory hearing with the Department of Revenue's Office of Appeals on November 1, 2012, the Commissioner, on February 6, 2013, issued a Notice of Abatement Determination, denying the appellant's Application for Abatement requesting relief from the responsible person assessment. On July 10, 2013, which was beyond the sixty-day period from the Commissioner's abatement denial, as prescribed in G.L. c. 62C, § 39, the appellant filed with the Board a Petition Under Formal Procedure appealing the Commissioner's denial of his abatement request. The appellant attached a copy of the Notice of Abatement Determination to his Petition, but he contended that he never received the Notice until after he requested a copy on June 26, 2013.

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<sup>1</sup> The current version of § 37, which allows abatement applications to be filed, *inter alia*, within three years of the filing of a return, was not applicable in this appeal. See St. 2011, c. 68, §§ 68 and 209.

At the hearing of this appeal, the Board first addressed as a preliminary matter the appellee's Motion to Dismiss this appeal for lack of jurisdiction. The Commissioner called as a witness Stephen Malane, who was employed as a Tax Auditor 1 for the Department of Revenue during the periods at issue. Mr. Malane testified to the procedures that he followed with respect to issuing and mailing a Notice of Abatement Determination. Mr. Malane testified that when a decision is made on a taxpayer's Application for Abatement, he drafts a Notice of Abatement Determination and mails it to the taxpayer, as well as to the taxpayer's attorney if the taxpayer is represented by counsel. Mr. Malane testified that he sends the Notice of Abatement Determination to the address that is on file for the taxpayer. Mr. Malane testified that he prepares the letters and mails them himself.

The February 6, 2013 Notice of Abatement Determination in the instant appeal was addressed to the appellant at 1 Water Street, Sandwich, Massachusetts, which the parties agreed was the appellant's mailing address on that date. Mr. Malane testified that he reviewed the appellant's records and did not find any indication that the Notice of Abatement Determination had been returned to the Department of Revenue for any reason. The Board found Mr. Malane to be a credible witness. The Board, therefore, found that the Notice of Abatement Determination was

mailed to the appellant on February 6, 2013, the date indicated on the Notice, and that, in the absence of credible contrary evidence from the appellant, the appellant received the Notice with sufficient time to file an appeal.

After the testimony of Mr. Malané, the Board did not immediately rule on the appellee's Motion to Dismiss but instead proceeded to hear the instant appeal on the merits. The appellee called as witnesses Brian Looney, Tax Auditor for the Department of Revenue, and Stephen Murphy, Tax Counsel for the Department of Revenue concentrating on bankruptcy cases. Mr. Murphy testified that, while the bankruptcy trustee had paid Dunlow's outstanding meals taxes plus interest that had accrued before the bankruptcy petition had been filed ("pre-petition interest"), applicable bankruptcy law prohibits the discharge of the interest that accrues after the petition of bankruptcy is filed ("post-petition interest") as well as penalties. The post-petition interest and penalties are at issue in this appeal.

For the reasons explained further in the following Opinion, the Board granted the Commissioner's Motion to Dismiss for lack of jurisdiction. Accordingly, the Board issued a decision for the appellee in this appeal.

## OPINION

The sales tax imposed under G.L. c. 64H is a tax that a vendor doing business in the Commonwealth collects from customers to whom taxable sales are made, including sales of meals, and then remits to the Commonwealth. Accordingly, it is commonly referred to as a "trustee tax." *Cole v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 2000-21, 30. General Laws c. 64H, § 16 provides for personal and individual liability on certain persons within a corporation for the corporation's failure to pay over sales taxes. Once the corporation has failed to pay a "trustee tax," the Commissioner may seek to collect the liability by making a determination that a "person" is under a duty to pay the corporate liability and then separately assessing that person as the responsible person. "The Massachusetts responsible person statute, G.L. c. 62C, § 31A, was designed to cut through the shield of organizational form and impose liability upon those actually responsible for a corporation's failure to pay over 'trustee taxes.'" *Delia v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 2004-36, 46.

In the instant appeal, the appellant is challenging the Commissioner's assessment against him as a responsible person for the unpaid post-petition interest and penalties of Dunlow. However, the Board did not reach a determination on the issue of

responsible person liability or the issue of post-petition interest and penalties in this appeal, because the appellant did not file his Petition with the Board until July 10, 2013, beyond the sixty-day period prescribed by G.L. c. 62C, § 37, as discussed above.

Mr. Malane testified, and the Board found, that the Commissioner issued the Notice of Abatement Determination on February 6, 2013 and mailed it to the appellant on the same day, to the address of record for the appellant. The Board further found that the Notice was not returned to the Commissioner. Where the Commissioner has complied with the statutory requirements related to mailing a notice of denial, the burden of proving that the Notice was not received lies with the appellant. *SCA Disposal Services v. State Tax Commissioner*, 375 Mass. 338, 341-42 (1977); *DiCato v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 2007-47, 55. The appellant here has provided no evidence aside from his statement that he did not receive the Notice shortly after it was issued. The Board has consistently ruled that a taxpayer's "bare assertion of non-receipt" is insufficient to establish that he did not receive a notice. *DiCato*, Mass. ATB Findings of Fact and Reports at 2007-55; see also *Morrill Equipment Sales v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 1996-181, 183 (appellant's unsupported affidavit does not



satisfy burden of proof); *Watjus Electric Inc. v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 1993-139, 143 (burden of proof is not satisfied where appellant did not introduce any documentary evidence, such as an envelope containing a postmark, supporting its allegation that the notice of denial was received late).

The Board's jurisdiction is created by statute, and the Board has no jurisdiction to consider an appeal filed at a time later than that dictated by the statute. *Commissioner of Revenue v. Pat's Super Market Inc.*, 387 Mass. 309, 311 (1982); see also *Peterson v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 1994-305; *Watjus Electric Inc. v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 1993-139; *Perry v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 1990-262 and cases cited therein. Neither the courts nor this Board have the authority to create an exception to the time limit specified by statute. *Sears Roebuck & Co. v. State Tax Commission*, 370 Mass. 127, 130 (1976); *Peterson*, Mass. ATB Findings of Fact and Reports 1994-305.

In the instant appeal, the Board found and ruled that the appellant failed to meet his burden of proving that he did not receive the February 6, 2013 Notice of Abatement Determination in a timely manner after its issuance. Therefore, the Board granted the Commissioner's Motion to Dismiss this appeal for lack of jurisdiction. Accordingly, the Board issued a decision for the appellee in the instant appeal.

APPELLATE TAX BOARD

By: 

Thomas W. Hammond, Jr., Chairman

A true copy:

Attest: 

Clerk of the Board

*Asst.*