

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

VEOLIA ENERGY BOSTON, INC.

v.

BOARD OF ASSESSORS OF
THE CITY OF BOSTON

Docket No.: F328538

Promulgated:
May 17, 2017

This is an appeal filed under the formal procedure, pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the Board of Assessors of the City of Boston ("appellee" or "assessors") to abate a tax on certain personal property in Boston, owned by and assessed to Veolia Energy Boston, Inc. ("appellant") under G.L. c. 59, §§ 11 and 38, for fiscal year 2015 ("fiscal year at issue").

Chairman Hammond heard the assessors' Motion to Dismiss; Commissioners Scharaffa, Rose, Chmielinski, and Good joined him in allowing the Motion to Dismiss and 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.

Kathleen Saunders Gregor, Esq. and Loretta R. Richard, Esq., for the appellant.

Laura Caltenco, Esq., for the appellee.

FINDINGS OF FACT AND REPORT

The issue raised in the present appeal is whether the appellant timely filed an abatement application with the assessors for the fiscal year at issue in accordance with the jurisdictional requirements of G.L. c. 59, § 59 ("§ 59"). Tracking the operative language of § 59, the Appellate Tax Board ("Board") must determine whether the appellant applied: (1) "to the assessors"; (2) "on a form approved by the commissioner, for an abatement"; (3) "on or before the last day for payment, without incurring interest . . . of the first installment of the actual tax bill."

The operative facts are not disputed. For the fiscal year immediately preceding the fiscal year at issue, the appellant timely filed its abatement application with the assessors on February 3, 2014 and its appeal with this Board on July 24, 2014 (Docket Number F325148). The appellant maintained in its fiscal year 2014 appeal that its personal property employed in the manufacture and distribution of steam was exempt under G.L. c. 59, § 5, cl. 16(3).

For the fiscal year at issue in this appeal, the appellant made timely payment of each quarterly tax bill on July 25, 2014, October 14, 2014, January 21, 2015, and April 20, 2015. The payments were made to the City of Boston Collector of Taxes ("Collector"). The appellant included with each quarterly tax

payment a cover letter to the Collector, which included the following language:

Please note that Veolia Energy Boston, Inc. has filed a Petition under Formal Procedure with the Appellate Tax Board (filed July 24, 2014; Docket No. F325148), the outcome of which may affect the tax assessment for this period and others.

On May 14, 2015, the appellant's Vice President of Finance, Steven Weafer, received a voicemail message from Charles Claybaugh of the City of Boston Assessor's Office, which indicated that the assessors "have no record of a Fiscal '15 abatement being filed." After receiving the voicemail, Mr. Weafer spoke with Mr. Claybaugh and "referenced the 2014 Petition" and indicated that it was Mr. Weafer's "belief that the 2014 Petition would apply to all tax years, including fiscal year 2015."

On May 28, 2015, the appellant filed an abatement application with the assessors for the fiscal year at issue. The appellant used a form approved by the Commissioner of Revenue ("commissioner"), State Form 128, for its May 28, 2015 abatement application, which it claimed was a "protective" filing. The assessors denied the May 28, 2015 abatement application on the next day, May 29, 2015. The appellant then filed the present appeal with the Board on July 28, 2015.

The assessors filed a Motion to Dismiss the present appeal on the ground that the May 28, 2015 abatement application was

filed late. The appellant argued in opposition that its January 21, 2015 letter to the Collector constituted a valid abatement application because, *inter alia*, it provided notice to the assessors that the appellant objected to the assessment, it incorporated by reference the appellant's fiscal year 2014 application and petition, and there was no prejudice to the assessors resulting from the appellant's use of a letter rather than an approved form to apply for an abatement.

On the basis of these findings of fact and for the reasons explained below, the Board found and ruled that the appellant failed to satisfy the jurisdictional requirement of § 59 that it "apply in writing to the assessors, on a form approved by the commissioner, for an abatement" on or before the February 6, 2015 deadline.¹ The appellant did not, by sending a letter to the Collector on January 21, 2015, "apply in writing to the assessors" and, in any event, the letter was not "a form approved by the commissioner."

For the fiscal year at issue, the only abatement application filed with the assessors on a form approved by the Commissioner was the May 28, 2015 abatement application, which was filed over three months after the statutory due date.

¹ For the fiscal year at issue, the due date for payment of the first installment of the actual tax bill without incurring interest, and therefore, the due date of abatement applications, was February 6, 2015. See St. 2015, c. 10, § 62 (extending the due dates for fiscal year 2015 due to a severe blizzard on the initial due date).

Accordingly, the Board had no jurisdiction to hear and decide this appeal and it therefore granted the assessors' Motion to Dismiss and entered a decision for the appellee.

OPINION

The relevant language of § 59 provides that:

A person upon whom a tax has been assessed . . . if aggrieved by such tax, may . . . **on or before the last day for payment, without incurring interest in accordance with the provisions of section fifty-seven or section fifty-seven C, of the first installment of the actual tax bill** issued upon the establishment of the tax rate for the fiscal year to which the tax relates, **apply in writing to the assessors, on a form approved by the commissioner, for an abatement thereof**, and if they find him taxed at more than his just proportion or upon an improper classification, or upon an assessment of any of his property in excess of its fair cash value, they shall make a reasonable abatement.

(emphasis added).

The Board has only that jurisdiction conferred on it by statute. ***Stilson v. Assessors of Gloucester***, 385 Mass. 724, 732 (1982). "Since the remedy of abatement is created by statute, the board lacks jurisdiction over the subject matter of proceedings that are commenced at a later time or prosecuted in a different manner from that prescribed by statute." ***Nature Church v. Assessors of Belchertown***, 384 Mass. 811, 812 (1981) (citing ***Assessors of Boston v. Suffolk Law School***, 295 Mass. 489, 495 (1936)). Adherence to the statutory prerequisites is

essential "to prosecution of appeal from refusals to abate taxes." ***New Bedford Gas & Edison Light Co. v. Assessors of Dartmouth***, 368 Mass. 745, 747 (1975). See also ***Old Colony R. Co. v. Assessors of Quincy***, 305 Mass. 509, 511-12 (1940).

An abatement application is a "constituent part of the statutory remedy" and is the "method by which the statutory proceeding is begun." ***Assessors of Brookline v. Prudential Insurance Co.***, 310 Mass. 300, 308 (1942). The abatement proceeding "must be begun by a proper application within the period fixed by the statute . . . and the failure to apply within the prescribed period destroys the right." ***Id.*** See also ***MacDonald v. Assessors of Mashpee***, 381 Mass. 724, 725 (1980).

The appellant failed to properly apply for an abatement under § 59 in three respects, any one of which is sufficient to warrant dismissal of this appeal: (1) the January 21, 2015 letter that it claims was an abatement application was sent to the Collector, not to the assessors; (2) the January 21, 2015 letter was not on a form approved by the Commissioner; and (3) the May 28, 2015 abatement application filed with the assessors, on a form approved by the Commissioner, was filed long after the statutory due date. Following is a discussion of each of these deficiencies.

A. THE APPELLANT'S JANUARY 21, 2015 LETTER TO THE COLLECTOR WAS NOT A VALID ABATEMENT APPLICATION BECAUSE IT WAS NOT AN APPLICATION "TO THE ASSESSORS"

The explicit language of § 59 makes clear that it is the assessors who are authorized to receive and consider an abatement application, as well as to make determinations regarding abatements. Section 59 provides that a taxpayer wishing to invoke an abatement remedy must "apply in writing to the **assessors**" and if "**they** find" that the taxpayer is improperly taxed, "**they** shall make a reasonable abatement." (emphasis added).

In contrast, a municipality's tax collector issues tax bills based on the valuation list that the assessors submit to the collector and receives payment of those bills from taxpayers. See G.L. c. 59, §§ 52 through 57C. A tax collector has no statutory role in the receipt, consideration or determination of abatement requests.

It has therefore long been recognized that an abatement application must be submitted to the assessors in order to be effective:

An application for abatement is directed to the official board that made the original assessment. It seeks revision by that board of its original action which was taken without the person assessed having an opportunity for a hearing.

Prudential Insurance Co., 310 Mass. at 310. The nature of the abatement application is a "'notice' by which 'information' is

given to the assessors 'in reference to a possible pecuniary liability,' . . . a 'request' or 'claim' for reduction of the tax assessed by them and, as incidental thereto, for an opportunity to be heard by them as to the propriety of the original assessment and, if denied, a foundation for later proceedings before an appellate board." *Id.* at 312 (internal citations omitted). A letter to a tax collector does not provide notice to the assessors that a request or claim has been made for a reduction in the assessment or that a taxpayer wishes to discuss the propriety of the assessment and it therefore does not provide a proper jurisdictional foundation for the present appeal.

The explicit language of § 59, the statutory scheme of assessment and collection, as well as case law construing the nature of the abatement application, make clear that the appellant's letter to the Collector is not a valid abatement application. Because an abatement application must be filed with the assessors, the appellant did not "apply in writing to the assessors" by mailing its January 21, 2015 letter to the Collector with its tax payment.

B. THE APPELLANT'S JANUARY 21, 2015 LETTER FAILED TO SATISFY THE § 59 REQUIREMENT THAT AN ABATEMENT APPLICANT MUST APPLY "ON A FORM APPROVED BY THE COMMISSIONER"

In 1933, § 59 was amended to the present language that requires abatement applications to be submitted to the assessors "in writing . . . on a form approved by the commissioner." See St. 1933, c. 266, § 1. Prior to that amendment, there was no requirement that an abatement application be in writing, let alone on a form approved by the Commissioner. In analyzing this change to § 59, the Supreme Judicial Court held that:

It cannot rightly be said that the requirement that an application to the assessors for an abatement be "in writing . . . on a form approved by the commissioner" as a condition of jurisdiction to abate a tax is so unreasonable that the statute is not to be given its natural meaning as imposing such a condition. . . . It follows that an application in the form prescribed by St. 1933, c. 266, § 1, is a prerequisite to the jurisdiction of the board of tax appeals of a case like the present.

Suffolk Law School, 295 Mass. at 494 (internal citations omitted). In **Suffolk Law School**, the taxpayer's purported abatement application was "typewritten on a plain sheet of paper" which the assessors denied. **Id.** at 494-95. Although the Board of Tax Appeals, the predecessor to this Board, ruled that the assessors had "accepted and acted upon the application" and "treated it as properly before them," the court nevertheless ruled:

The lack of an application in the statutory form is not excused by the good faith of the taxpayer, or acceptance by the assessors of an application in some other form nor by the fact that the assessors are not inconvenienced or misled. Such considerations are material on the issue whether an application meets the requirements of the statute, but do not excuse clear noncompliance with these requirements.

Id. at 494. Accordingly, the court ruled that the typewritten paper submitted to the assessors was not a "form approved by the commissioner" and, therefore, the Board of Tax Appeals had no jurisdiction over the appeal. *Id.* at 498.

The appellant's arguments in the present appeal that its January 21, 2015 letter was a "good faith application for abatement" providing adequate information to the assessors and that the assessors waived the requirement that applicants use a form approved by the Commissioner cannot stand in light of ***Suffolk Law School***. Putting aside the fact that the letter to the Collector provided no information to the assessors, good faith attempts by taxpayers or waiver by the assessors cannot bestow jurisdiction on the Board where there is "clear noncompliance" with the requirement of § 59 that an abatement application must be on a form approved by the Commissioner. *Id.* at 494. The appellant's January 21, 2015 letter was not a "form approved by the commissioner," and, therefore, it did not satisfy the requirements of § 59.

Accordingly, because the January 21, 2015 letter was neither an application "to the assessors" nor an application "on a form approved by the commissioner," it was not a valid abatement application within the meaning of § 59. The only remaining issue is whether the appellant's May 28, 2015 abatement application satisfied the jurisdictional requirements of § 59.

C. THE APPELLANT'S MAY 28, 2015 ABATEMENT APPLICATION WAS FILED BEYOND THE § 59 DEADLINE

In order for the Board to have jurisdiction over an appeal, a taxpayer must first file an abatement application with the assessors "on or before the last day for payment, without incurring interest in accordance with the provisions of section fifty-seven or section fifty-seven C, of the first installment of the actual bill issued upon the establishment of the tax rate for the fiscal year to which the tax relates." For the fiscal year at issue, the due date for payment of the first installment of the actual tax bill without incurring interest, and therefore, the due date of abatement applications, was February 6, 2015. See St. 2015, c. 10, § 62 (extending the fiscal year 2015 due dates for payment and abatement applications due to a severe blizzard on the due date).

Although, unlike the January 21, 2015 letter to the Collector, the May 28, 2015 abatement application was an application in writing to the assessors on a form approved by the Commissioner, it was filed more than three months beyond the § 59 due date. Accordingly, the appellant's May 28, 2015 filing of an abatement application did not satisfy the jurisdictional requirements of § 59.

Timely filing of an abatement application is an "integral part of the right, and the failure to apply in writing in the prescribed time destroys the right." **Prudential Insurance Co.**, 310 Mass. at 308. See also **MacDonald**, 381 Mass. at 725; **New Bedford Gas & Electric Light Co.**, 368 Mass. at 748 ("Adherence to the statutory prerequisites is essential to [an] 'effective application for abatement of taxes and to [the] prosecution of appeals from refusals to abate taxes.'" (internal citations omitted)).

Because the appellant failed to timely file a valid abatement application with the assessors, the Board has no jurisdiction over this appeal. Accordingly, the Board allowed the assessors Motion to Dismiss and entered 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