

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

JOHN M. CORNISH, et al., v.  
TRUSTEES

BOARD OF ASSESSORS OF  
THE TOWN OF CARLISLE

Docket No. F266636

Promulgated:  
July 26, 2006

This is an appeal under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 61, § 3 from the refusal of the appellee to abate a withdrawal penalty tax assessed against the appellants, under G.L. c. 61, § 7, for the ten-year period from fiscal year 1993 through and including fiscal year 2003.

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

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

*John M. Cornish, Esq., Eric W. Wodlinger, Esq., and Kristin W. Terry, Esq.* for the appellant.

*John Richard Hucksam, Jr., Esq.* for the appellee.

## **FINDINGS OF FACT AND REPORT**

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

The Trustees of the South Street Nominee Trust (the "appellants") have owned four parcels of real estate known as Parcel 7 (Lot O), Parcel 47 (Lot B), Parcel 48 (Lot X), and Parcel 51 (Lot X) on Map 5 in the Town of Carlisle (collectively, the "subject property"). Between January 1, 1978 and December 31, 2002, the subject property was classified as "forest land" under G.L. c. 61 pursuant to three separate Forest Management Certificates ("Certificates"): (1) the Certificate signed on August 29, 1977 and in effect from January 1, 1978 to December 31, 1982; (2) the Certificate signed on October 13, 1982 and in effect from January 1, 1983 to December 31, 1992; and (3) the Certificate signed on August 31, 1992 and in effect from January 1, 1993 to December 31, 2002.

By letter dated June 25, 2002, the appellants notified the Board of Assessors of Carlisle (the "assessors") of their intention to allow the then-current forest management plan governing the subject property to expire, with the withdrawal from forest land classification to take effect on January 1, 2003. In that letter, the appellants

advanced their argument that the subject property should not be subject to the withdrawal penalty tax under G.L. c. 61, § 7. The assessors responded by letter dated August 16, 2002, stating their contrary position that the appellants would owe the withdrawal penalty tax on the subject property, in the amount of \$216,300.06.

On September 10, 2002, the Collector of Taxes for Carlisle sent the appellants a copy of a Special Warrant dated August 15, 2002 demanding payment of the \$216,300.06 penalty by October 11, 2002. On September 26, 2002, the appellants filed an application for abatement with the appellee. The appellants paid the withdrawal penalty tax on October 9, 2002. On December 16, 2002, the appellants, having not heard about any action on the application for abatement, filed their petition with the Board. By letter dated December 30, 2002, the appellee notified the appellants that their application for abatement had been deemed denied on December 27, 2002.<sup>1</sup> On January 3, 2003, the appellee filed a motion to dismiss with the Board, claiming that the petition had been filed prematurely. The Board denied this motion to dismiss on January 13, 2002. On the basis of the foregoing facts, and as will be

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<sup>1</sup> Pursuant to G.L. c. 59, § 64, an application for abatement filed with the assessors is deemed denied three months from its filing. Three months following September 26, 2002 is December 26, 2002.

explained in the following Opinion, the Board found it had jurisdiction over the subject appeal.

The Board further found that the subject property was governed by three separate forest management plans, as reflected by three separate Certificates with their own distinct time periods and expiration dates. For the reasons explained in the Opinion, the Board found and ruled that the subject property was governed by the current version of G.L. c. 61, including the withdrawal penalty tax provision at § 7. The Board thus issued a decision for the appellee in this appeal.

#### OPINION

This appeal raises two issues: (1) whether the Board has jurisdiction over the appeal because the appellants filed their petition before their application for abatement was deemed denied under G.L. c. 58A, § 6; and (2) whether a withdrawal penalty tax was due in the circumstances of this appeal.

- 1. The appellants filed their petition timely within the requirements of G.L. c. 61, § 3.**

In *W.D. Cows, Inc. v. Board of Assessors of Shutesbury*, 34 Mass. App. Ct. 944, 945 (1993) ("*W.D. Cows*"), the Massachusetts Appeals Court held that appeals

concerning the annual tax assessed under G.L. c. 61, § 3 must be filed within the time constraints of that section, which provides as follows:

Any person aggrieved by the refusal of the assessors to so abate a tax in whole or in part or by their failure to act on such application may appeal to the appellate tax board within thirty days after the date of notice of decision of the assessors **or within** three months of the date of the application for abatement, whichever date is later.

(emphasis added). The appellant in ***W.D. Cowls*** filed its appeal with the Board more than three months after it had filed two applications for abatement with the assessors, to which the appellant had received no responses. ***W.D. Cowls***, 34 Mass. App. Ct. at 945. In affirming the Board's finding that it lacked jurisdiction over the appeal, the Appeals Court found that "if the assessors do nothing, they are assumed to have refused a tax abatement and the taxpayer must file with the Appellate Tax Board within three calendar months of the application for abatement." *Id.*

The Appeals Court specifically noted that the time restrictions under G.L. c. 61, § 3 differ from those under G.L. c. 58A, § 6, the general provision addressing jurisdiction before the Board. *Id.* at 946. General Laws c. 58A, § 6 provides that if the assessors fail to act on an application for abatement, it is "deemed to be denied"

at the expiration of three months, and the taxpayer then has an additional three months to file its petition with the Board. However, G.L. c. 61, § 3 provides that a taxpayer must appeal **within** three months of its application for abatement. As explained by the Appeals Court, the deadline specifically provided by G.L. c. 61 controls:

The forest product and land tax statute, however, was enacted later than the Appellate Tax Board jurisdiction statute and for that reason the filing deadlines in the forest product and land tax statute must be taken as superseding the general deadlines earlier provided in G.L. c. 58A, § 6. . . . It is also a principle of statutory construction that a specifically applicable provision trumps one of general applicability.

*Id.* at 946 (citations omitted).

Under the facts of this appeal, the assessors never provided the appellants with any notification finalizing their determination with respect to the appellants' liability for a withdrawal penalty tax prior to the appellants' appeal to this Board. Moreover, the appellants filed their petition with the Board on December 16, 2002, a date within three months of when they filed their application for abatement with the assessors. Pursuant to G.L. c. 61, § 3, the appellants filed their petition with the Board in a timely manner. See **W.D. Cows**, 34 Mass. App. Ct. at 946-47; **ADDA Realty Trust v. Board of Assessors**

*of the Town of Berlin*, ATB Findings of Fact and Reports 2000-621, 634 ("**ADDA Realty Trust**"). Furthermore, in **ADDA Realty Trust**, the Board found that G.L. c. 61, § 3 also granted it jurisdiction over appeals concerning the withdrawal penalty tax assessed under § 7 as well as the annual tax assessed under § 3: "Such a reading [of § 3] is consistent with the Legislature's intent to confer jurisdiction to the Board of withdrawal penalty tax assessments." **ADDA Realty Trust**, ATB Findings of Fact and Reports 2000 at 634.

Accordingly, the Board found and ruled that it had jurisdiction over this appeal.

**2. The appellants are liable for the withdrawal penalty tax on the subject property.**

Chapter 768 of the Acts of 1981 ("Chapter 768") repealed the prior version of G.L. c. 61 ("repealed c. 61") and inserted G.L. c. 61 in its current form ("c. 61"). Section 7 of c. 61 provides a withdrawal penalty tax when the owner of classified land voluntarily withdraws the land from classification.<sup>2</sup> However, Section 2 of Chapter 768

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<sup>2</sup> The penalty is equal to the difference between the amount of taxes which would have been paid under G.L. c. 59 and the sum of the products tax under G.L. c. 61, § 3 plus the taxes paid from the last prior certification under c. 61 or the last preceding five years, whichever is greater. Interest is also added at the rate established under G.L. c. 62C, § 32. The parties do not dispute the amount of the withdrawal tax penalty as assessed by the appellee.

provides the following exclusion from c. 61:

[c. 61] shall not apply to land classified prior to the effective date of this act until the expiration of the term of the forest management plan governing such land or until one year after the withdrawal of such land from classification, whichever period is longer.

The appellants argued that the above exclusion applied to the subject property because it had been continuously classified as forest land under three successive Certificates since January 1, 1978, and therefore it qualified as "land classified prior to the effective date" of c. 61. Assuming this premise, the exclusion provides that the subject property would not be governed by c. 61, including its withdrawal penalty tax provision, until one year after the withdrawal of the subject property from classification.

The appellants also argued that the subject property was eligible for a one-time exclusion. The appellants cited the following language in support of this argument: "Notwithstanding the provisions of any laws to the contrary, the owner of such land, prior to the end of said period, may elect to remove such land from classification without imposition of a withdrawal tax . . . ." St. 1981, c. 768, § 2.



As the assessors pointed out, however, the subject property's "expiration of the term of the forest management plan" foils the appellants' exemption. At the time that c. 61 came into effect, January 2, 1982, the subject property was governed by the Certificate signed on August 29, 1977 and in effect from January 1, 1978 to December 31, 1982. After that first Certificate expired, the subject property was then subject to the Certificate signed on October 13, 1982 and in effect from January 1, 1983 to December 31, 1992. The appellants could have timely withdrawn from classification before the expiration of the first Certificate. However, the appellants reclassified the subject property under the second Certificate. This second Certificate was governed by c. 61, the law in effect at that time, as evidenced by the new ten-year classification period of the second Certificate, longer than the five-year period prescribed under repealed c. 61. In fact, the appellants twice reclassified under a new Certificate, with a new ten-year forest management plan period. The Board thus found and ruled that, after reclassification, the subject property was governed by c. 61, including the withdrawal penalty tax provision of § 7. See Massachusetts Department of Revenue, Division of Local Services, Information Guideline Release 82-209.

Moreover, the one-time exclusion in section 2 requires timely removal from forest classification. To qualify for the one-time withdrawal tax exclusion, the owner must remove land from classification "prior to the end of said period." "[S]aid period" must refer to a previously-specified term, and in the preceding sentence of section 2, "period" is specified as the longer of (1) the expiration of the term of the current forest management plan or (2) one year after withdrawing the land from classification. If the owner does not remove the land from classification prior to the end of this period, the owner forfeits the availability of the withdrawal exemption period. Thus, the creation of a new forest management plan, pursuant to a new Certificate, waives the right of the landowner to qualify under the exemption.

### **Conclusion**

Under the circumstances of this appeal, the Board found and ruled that the subject property was governed by c. 61, including the penalty provision in § 7. The Board thus upheld the appellee's imposition of a withdrawal penalty tax against the appellants.

Accordingly, the Board issued a decision for the appellee in this appeal.

**THE APPELLATE TAX BOARD**

By:

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Frank J. Scharaffa, Commissioner

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Donald E. Gorton, III, Commissioner

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Nancy T. Egan, Commissioner

\_\_\_\_\_  
James D. Rose, Commissioner

A true copy,

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