COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

FORRESTALL ENTERPRISES, INC. v. BOARD OF ASSESSORS OF THE TOWN OF WESTBOROUGH

Docket Nos. F317708, F318861 Promulgated: December 4, 2014

These are appeals 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 appellee, the Board of Assessors of the Town of Westborough ("appellee" or "assessors"), to abate tax on certain personal property in the Town of Westborough owned by and assessed to Forrestall Enterprises, Inc. ("Forrestall Enterprises" or "appellant") under G.L. c. 59, §§ 11 and 38 for fiscal years 2012 and 2013.

Chairman Hammond heard these appeals. Commissioners Scharaffa, Rose, Chmielinski, and Good joined him in the decisions for the appellant.

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

James E. Tashjian, Esq. and *Kenneth J. Mickiewicz*, Esq. for the appellant.

Kenneth W. Gurge, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

Based on an agreed statement of facts and exhibits offered into evidence at the hearing of these appeals, the Appellate Tax Board ("Board") made the following findings of fact.

I. INTRODUCTION AND JURISDICTIONAL BACKGROUND

The appellant, Forrestall Enterprises, is a Massachusetts corporation wholly owned by Bruce Forrestall. On January 1, 2011, Forrestall Enterprises was the assessed owner of an approximately 5-acre parcel located at 113 Milk Street in Westborough ("Milk Street Property"), on which a 240 kW solar photovoltaic system was installed, made up of approximately 856 panels ("Solar PV System"). For fiscal year 2012, the assessors valued the Solar PV System at $1,316,550 and assessed a personal property tax thereon, at the rate of $19.21 per thousand, in the amount of $25,290.93. For the fiscal year 2013, the assessors valued the Solar PV System at $748,370 and assessed a personal property tax thereon, at the rate of $18.97 per thousand, in the amount of $14,196.58. The appellant timely paid the taxes assessed for both fiscal years without incurring interest. Because the appellant timely paid the assessed personal property tax for each fiscal year at issue, it necessarily complied with the jurisdictional requirement

that at least one-half of the tax be paid prior to the filing of an appeal. *See* G.L. c. 59, §§ 64 and 65.

The appellant filed an application for abatement for fiscal year 2012 on January 27, 2012, arguing that the Solar PV System was statutorily exempt from property tax. The assessors denied the application on April 24, 2012 and the appellant timely filed a petition for fiscal year 2012 with the Board on July 19, 2012 (Docket No. F317708). The appellant similarly filed an application for abatement with the assessors for the fiscal year 2013 on February 1, 2013. The assessors denied that application on February 26, 2013 and the appellant timely filed a petition for fiscal year 2013 with the Board on April 16, 2013 (Docket No. F318861). Based on the foregoing, the Board found that it had jurisdiction to decide these appeals.

II. FORRESTALL ENTERPRISES NET METERING AGREEMENT

In addition to Forrestall Enterprises, Mr. Forrestall also wholly owns two other corporations which lease property in Westborough: Westborough Automotive Service, Inc., which leases property at 128 Turnpike Road, and Car Wash & Detailing of Westborough, Inc., which leases property at 126 Turnpike Road. Mr. Forrestall also directly owns a personal residence at 11 Isaac Miller Road and eight

condominium units at Westborough Suites Condo at 17 South Street in Westborough.[1]

In 2008, Mr. Forrestall contracted for the installation of an 18.81kW system of 99 solar panels which were placed at Car Wash & Detailing of Westborough, Inc.'s facility to generate solar energy for that property. As Mr. Forrestall wished to further expand his use of solar power, the appellant purchased the Milk Street Property on October 6, 2010, which at the time was a vacant property consisting mostly of wetlands, and contracted for the installation of the Solar PV System. By January 1, 2011, the Solar PV System was substantially installed and was then connected to the electric grid maintained by a subsidiary of National Grid USA, Inc. (referred to herein with its subsidiaries collectively as "National Grid") in March of 2011.

The appellant and National Grid entered into an "Interconnection Service Agreement," more commonly referred to as a "net metering" agreement, effective November 26, 2010. Net metering allows a customer which owns or leases solar panels to connect those panels to the electrical grid. The customer's meter is engineered to record each

[1] Hereinafter all properties owned either directly by Mr. Forrestall or owned by corporations of which he is the sole owner are collectively referred to as the "Forrestall Westborough Properties."

kilowatt hour of energy generated by the solar powered system and each kilowatt hour of energy actually used by the customer. Under a net metering agreement, the customer is only liable for payment of the net difference of the value of electricity he or she used from the grid, after crediting the value of electricity which he or she produced and made available to the electrical grid. The Milk Street Property did not contain any property other than the Solar PV System. Instead, the Board found that appellant intended for the credits received from the energy produced to be used to offset a substantial portion of the electricity usage of the Forrestall Westborough Properties. Accordingly, as part of its agreement with National Grid, the appellant allocated a specified percentage of its credits to each of the Forrestall Westborough Properties via Schedule Z to the Interconnection Service Agreement.

If the total electricity usage at each Forrestall Westborough Property exceeded its allocated amount of Solar PV System energy credits, it would only be billed for the net usage. Conversely, if the Solar PV System generated more energy than was needed, each of the Forrestall Westborough Properties' allocated excess would be carried forward to be offset against future use. Thus, the Board found that Forrestall Westborough Properties effectively

used the equivalent of 100 percent of the energy produced by the Solar PV System, even if the actual electricity used to power the Forrestall Westborough Properties drawn from the electrical grid could have been generated from different originating sources and the electricity produced by the Solar PV System could be directed to other customers. None of the Forrestall Westborough Properties compensated the appellant for the use of the credits or received cash value from National Grid for any excess allocated credits.

The appellant asserted that the Solar PV System was exempt from tax pursuant to G.L. c. 59, § 5, cl. 45 ("Clause Forty-Fifth"), which provides an exemption for certain solar powered systems. The appellee argued that Clause Forty-Fifth only applied to solar powered systems which were installed on the same parcel or a contiguous parcel to the property they powered. Based on the reasons set forth in the following Opinion, the Board found and ruled that Clause Forty-Fifth did not contain such a precondition. Therefore, the Board entered a decision for the appellant, granting an abatement of tax of $25,290.93 for fiscal year 2012 and $14,196.58 for fiscal year 2013.

OPINION

All property, real and personal, situated within the Commonwealth is subject to local tax, unless expressly exempt. G.L. c. 59, § 2. Such an exemption is provided in Clause Forty-Fifth for a:

> solar or wind powered system or device which is being utilized as a primary or auxiliary power system for the purpose of heating or otherwise supplying the energy needs of property taxable under this chapter; provided, however, that the exemption under this clause shall be allowed only for a period of twenty years from the date of the installation of such system or device.

G. L. c. 59, § 5, cl. 45. A taxpayer seeking an exemption bears the burden of proving that the subject property qualifies "according to the express terms or the necessary implication of a statute providing the exemption." ***New England Forestry Foundation, Inc. v. Assessors of Hawley***, 468 Mass. 138, 148 (2014).

I. THE SOLAR PV SYSTEM IS EXEMPT FROM TAX UNDER THE PLAIN MEANING OF CLAUSE FORTY-FIFTH

Courts interpret a statute in accordance with the plain meaning of its text. ***Reading Coop. Bank v. Suffolk Constr. Co.***, 464 Mass. 543, 547-548 (2013)(citing ***Massachusetts Community College Council MTA/NEA v. Labor Relations Comm'n,*** 402 Mass. 352, 354 (1988)). As the primary source of insight into the intent of the

Legislature is the language of the statute, if the language of the statute is unambiguous, a court's function is to enforce the statute according to its terms. ***Id.*** at 548; ***International Fid. Ins. Co. v. Wilson***, 387 Mass. 841, 853 (1983). By the plain, literal meaning of the text, the exemption provided in Clause Forty-Fifth requires that the subject property be: (1) a solar or wind powered system or device; (2) utilized as a primary or auxiliary power system for the purpose of heating or otherwise supplying energy; and (3) utilized to supply the energy needs of property that is subject to Massachusetts property tax. The Board found and ruled that the Solar PV System was at all material times: (1) a solar powered system or device within the meaning of Clause Forty-Fifth; (2) used as a primary or auxiliary power system to supply energy to the Forrestall Westborough Properties; and (3) the Forrestall Westborough Properties, which received 100 percent of the credit for the energy produced by the Solar PV System and thus effectively used all of its power, are all located in Massachusetts and subject to property tax. Therefore, the Board found and ruled that the Solar PV System conforms to all of the express requirements of Clause Forty-Fifth.

The assessors, in their denial of the appellant's application for abatement, cited to the policy position of

the Department of Revenue ("Department"), the agency responsible for advising cities and towns regarding their obligations under the property tax laws. *See, e.g.,* G.L. c. 58, § 3. The Department has interpreted Clause Forty-Fifth so as to limit its application only to solar property that is located either on the same parcel or a contiguous parcel to the property it is intended to power and that is not connected to the grid. *See* Opinion Letter No. 2013-296 (May 14, 2013); Opinion Letter No. 99-753 (Dec. 6, 1999). While the Department of Revenue is charged with administering the tax laws of the Commonwealth, "principles of deference are not . . . principles of abdication," and an incorrect interpretation of a statute by an administrative agency is entitled to no deference. ***Town Fair Tire Centers, Inc. v. Commissioner of Revenue***, 454 Mass. 601, 605 (2009)(citations omitted). The duty of statutory interpretation rests ultimately with the courts. ***Id.*** The Board found and ruled the Department's limitation of the statutory exemption to solar property located on the same or a contiguous parcel to be an illusory distinction, which finds no basis in Clause Forty-Fifth.

"It is not the province of courts to add words to a statute that the Legislature did not choose to put there in the first instance." ***Global NAPs, Inc. v. Awiszus***,

457 Mass. 489, 496 (2010)(citing ***General Elec. Co. v. Department of Envtl. Protection***, 429 Mass. 798, 803 (1999)). Unlike other exemptions and tax credits granted to taxpayers related to their use of solar powered property, which the Legislature crafted to explicitly require that the solar system be used to power specific property, Clause Forty-Fifth has no such limitation. *See* G.L. c. 64H, § 6(dd) (sales tax exemption enacted in 1977 for "a primary or auxiliary power system for the purpose of heating or otherwise supplying the energy needs of an individual's principal residence in the commonwealth"); G.L. c. 62, § 6(d) (income tax credit originally enacted in 1979 for investment in a renewable energy source, including solar power, "when installed in connection with a dwelling"). Clause Forty-Fifth only requires that a solar system be used as a primary or auxiliary source of power for the "energy needs of ***property taxable under [Chapter 59].***" G.L. c. 59, § 5, cl. 45 (emphasis added). Therefore, if the Legislature intended to limit the property tax exemption of Clause Forty-Fifth, it is clear that it knew how to do so.[2]

[2] Clause Forty-Fifth was amended in 1978 to extend the term of the exemption from ten to twenty years. 1978 Acts. c. 388. No narrow definition of the property to be powered was included akin to the definition in the sales tax exemption which had been passed by the Legislature the year before.

Furthermore, just as the Board ruled that there is no distinction within the statute to differentiate between solar panels which are connected directly to the taxpayer's electrical service and those connected to that service through the electrical grid, the Board found and ruled that there was also no relevant factual distinction. In either situation, the taxpayer has invested in solar property in the Commonwealth to produce cost-effective energy that he or she may benefit from. In either situation, the Commonwealth derives the benefit of a shift of a portion of the production of energy to greener, more renewable sources. A taxpayer in either case would draw electricity for its use from its electrical service and would only ultimately pay for the power produced by the utility

company. Accordingly, there is no basis for making the distinction urged by the assessors where the Legislature has chosen not to make such a distinction.[3]

The appellee maintained that allowing the exemption to taxpayers practicing net metering will lead to unintended abuse as taxpayers could purchase solar property, enter into a net metering agreement, qualify for the exemption lasting for twenty years, and then sell the credits generated to third parties. While there may be potential instances where a net metering credit could be sold, the Board need not reach that issue, because the appellant is using its solar panels as a source of electricity for taxable property of its sole owner.

II. STATUTORY ALLOWANCE OF CLAUSE FORTY-FIFTH IN CONJUNCTION WITH PERSONAL EXEMPTIONS IS IRRELEVANT

G.L. c. 59, § 5, which includes the exemption of Clause Forty-Fifth, also includes a number of "personal

[3] The technology of solar power and its usage have advanced greatly since the original enactment of Clause Forty-Fifth in 1975. While the Board found and ruled that the Solar PV System was exempt according to the plain meaning of the statute, such a finding also comports with the Legislature's past support of solar energy use and net metering. The Legislature's aim in the enactment of an exemption from tax for solar powered systems was ostensibly to encourage the increased use of solar powered systems in the Commonwealth. Since the initial enactment of net metering in 1982, the Legislature has continued to expand the practice. *See* St. 2008, c. 169 (increasing the allowable capacity, increasing the value of credits, and allowing customers to allocate credits with express purpose of "provid[ing] forthwith for renewable and alternative energy and energy efficiency in the commonwealth"); *see also* St. 2014, c. 251; St. 2012, c. 209; St. 2010, c. 2010 (all expanding the use of net metering).

exemptions" that are specific to a type of property owner, such as property owned by a blind person or property used for charitable purposes. G.L. c. 59, § 5 generally limits these exemptions such that only one may apply per parcel of real estate. However, in enacting Clause Forty-Fifth, the Legislature amended the introductory paragraph of G.L. c. 59, § 5 to allow a Clause Forty-Fifth exemption in conjunction with other personal exemptions. The appellee argued that the Legislature would not have needed to amend the introductory paragraph if the exemption was not intended only for property to be placed on the same parcel of real estate where another personal exemption might be applicable, *e.g.*, residential property. However, this does not mean that the exemption ***must*** be used by a property owner for solar panels on his or her own property, only that it ***may*** be so used. Thus, the Board found and ruled that the fact that the Legislature amended the introductory paragraph to allow such use has no bearing on whether it is applicable to the appellant.

CONCLUSION

As the appellant's Solar PV System falls under the express language of the exemption from property tax provided by G.L. c. 59, § 5, cl. 45, the Board decided these appeals for the appellant and granted an abatement of tax of $25,290.93 for the fiscal year 2012 and $14,196.58 for the fiscal year 2013.

THE APPELLATE TAX BOARD

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

A true copy,

Attest: _____
Clerk of the Board