

**United States Postal Service**

**v.**

**Town of Derry**

**Docket No. 5047-88**

**DECISION**

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1988 assessment of \$516,500 (land \$72,000; buildings \$444,500) on a building leased by the Taxpayer and used as a post office (the Property). Under the lease for the Property, the Taxpayer pays the real estate taxes and is authorized to seek tax abatements. For the reasons stated below, the appeal is denied.

Property Interests Subject to Appeal

An initial issue to be addressed is what interest(s) are properly before the board for review. The Taxpayer has requested the board to separately examine and analyze two interests--the lessor's and the lessee's (the Taxpayer's). The Taxpayer argued that RSA 75:2 authorizes the board to look at these interests separately. The Taxpayer then argued: 1) its interest as lessee is immune from taxation as a governmental agency; and 2) the lessor's interest must be analyzed as a fee interest encumbered by the lease that has below market rents and an option at below market value. The Town asserts only one interest--the fee interest--is properly before the board. The board finds only one interest is before the board--the fee interest.

Finding an answer to this inquiry begins with RSA 72:6, which states, "All real estate, whether improved or unimproved, shall be taxed except as otherwise provided." (Emphasis added.) RSA 72:6 is intended to provide municipalities with broad taxing powers, and thus all real estate interests are taxable unless explicitly excepted by statute. King Ridge, Inc. v Town of Sutton, 115 N.H. 294, 299 (1975). Turning now to RSA 75:1 and 2, it is clear

that municipalities

are to assess properties as a whole, i.e., considering all interests therein, unless requested to separately assess the various interests in the realty.

Given the above, the question is whether the Taxpayer is entitled to require the Town to separately assess the lessor's and the lessee's interest even though no one ever requested this separate assessment. The answer is no; the Taxpayer is not entitled to now be separately assessed because the Town was never requested to separately assess the interests as required by RSA 75:2.

Two other reasons support this conclusion. First, the board's jurisdiction is limited by the subject of the Taxpayer's original request to the Town and to the board. See Appeal of Sunapee, 126 N.H. 214, 216-17 (1985).

It is indisputable that the Taxpayer never raised this issue of assessing the separate interests until the hearing. Having not previously presented this argument to the Town or the board, the board, as an appellate tribunal, is without jurisdiction to consider this issue. See Id.

The second supporting reason is that only one taxpayer appealed to the Town and to the board--the Taxpayer as agent for the Property's owner. Under RSA 76 and RSA 76:16-a, to be entitled to review by this board each taxpayer must have filed their own abatement application and appeal. For the board to allow the Taxpayer to give birth to another taxpayer at the hearing and to let them both now pursue separate appeals would violate RSA 76:16, 16-a and the law governing this board. See, e.g., Appeal of Gillin, 132 N.H. 311, 313 (1989) (Board's jurisdiction limited to that expressly provided by statutes, and the board cannot act outside its jurisdiction); Appeal of Sunapee, 126 N.H. at 216. This is what the Taxpayer's request amounts to, i.e., a request that the board allow two taxpayers with distinct interests to appeal where only one filed the required appeal documents.<sup>1</sup>

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<sup>1</sup> In its request for memorandum from the parties, the board asked the parties to address the standing issue. Unfortunately, both parties missed the focus of the board's inquiry, which was whether one taxpayer could appeal for the holders of two separate interests. We have answered this question in the negative. There was never an issue as to whether the Taxpayer could appeal as the lessee and agent of the owner because the Taxpayer certainly is a "person aggrieved" under RSA 76:16, 16-a.

The Abatement Issue

The final issue to be answered is whether the Town's assessment warrants granting this appeal. The Taxpayer has the burden of showing the assessment was disproportionately high or unlawful, resulting in the Taxpayer paying a disproportionate share of taxes. See RSA 76:16-a; TAX 201.04(e); Appeal of Town of Sunapee, 126 N.H. 214, 216 (1985). We find the Taxpayer failed to carry this burden.

Having rejected the Taxpayer's argument that the board must separately value the lessor's and lessee's interests, the board is left with valuing the Property as a whole. The Taxpayer submitted an appraisal report based on the income approach that indicated a full market value of \$315,300 as of April 1, 1988. In employing the income approach, the appraiser used the actual rents being paid under the lease. The Taxpayer argued using the actual rents rather than market rents was correct because: 1)the Property is a special-use property; and 2)the existence of the long-term lease with a below market rent and option price justified using the actual rents.

The Town presented an appraisal report that indicated a full value as April 1, 1988, of \$1,120,190. This report used the cost approach, and the methodology was discussed on page 5 of the report. The Town's appraiser rejected the income approach since the actual rents were below market and because this is a special-use building for which a market rent survey could not be conducted.

The board finds the Taxpayers arguments unpersuasive, especially since it posits two positions contrary to New Hampshire. First, in assessing properties, economic rent, not actual rent, must be used unless the taxpayer establishes that the actual rents are economic rent. E.g., Coliseum Vickerry Realty Co., 126 N.H. 368, 369-70 (1985). This rule emanates from Gowen v. Swain, 90 N.H. 383, 387-88 (1939), in which the court eloquently stated that a taxpayer who executes a long-term lease for one dollar a year cannot claim the property should be assessed based on rent of one dollar a year. For assessing purposes, the question is the property's full true value, not the value resulting from poor business decisions or other voluntary factors that have decreased the property's ability to produce



a market stream of income. See Demoulas v. Town of Salem, 116 N.H. 775, 782 (1976). This rule is not changed by the existence of a below market purchased option.

The second issue is how to value special-use buildings. Several cases reject the Taxpayer's argument concerning the valuation of special-use properties. These cases ,however, support the Town's methodology. See, e.g., Public Service of New Hampshire v. Town of Seabrook, 126 N.H. 740, 742 (1985).

In that case, the court stated in valuing special-use properties, the owner can be viewed as a hypothetical buyer whose idea of fair value would be the cost to build a new equivalent building.

Given the law and the evidence presented to us, the board finds the Taxpayer did not prove disproportionality. Moreover, the Town supported its assessment, using an accepted methodology and reaching a supportable conclusion of value.

Finally, the board considered but rejected the use of the 1989 assessment because there was insufficient evidence as to its methodology and supporting data. On the other hand, there was adequate evidence to support the methodology and assessment for 1988. Finally, each tax year must be separately examined to determine whether disproportionality can be shown. See Appeal of Public Service Company of New Hampshire, 120 N.H. 830, 832-33 (1980).

Conclusion

For the reasons stated above the appeal is denied.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Peter J. Donahue, Member

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Paul B. Franklin, Member

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Ignatius MacLellan, Member

Date: March 25, 1991

I certify that copies of the within Decision have been mailed this date, postage prepaid, to Joseph J. Mulvey, representative for United States Postal Service, taxpayer; and Barbara F. Loughman, Esq., counsel for the Chairman, Selectmen of Derry.

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Michele E. LeBrun, Clerk

Date: March 25, 1991

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