Dairy Queen of Concord
v.
Department of Revenue Administration

Docket No. 7606-89

DECISION

Introduction

The "Taxpayer" appeals, pursuant to RSA 78-A:13 I, the "DRA's" dismissal of its RSA 78-A:12 petition for reconsideration of the DRA's assessment of $3,627 ($2,687 tax; $940 interest) in additional rooms and meals tax (RSA ch. 78-A). In this appellate proceeding, see RSA 78-A:13I; cf. RSA 77-A:4 (de novo), the Taxpayer has the burden of showing the DRA erred in dismissing the petition and/or in not abating the additional assessment. TAX 203.04(c); see Cargan's, Inc. v. New Hampshire Department of Revenue Administration, 128 N.H. 180, 185 (1988). For the reasons that follow, the appeal is denied.

Facts

The facts are generally stated in the DRA's memorandum and are set forth in the documents in the record. The only additional facts added by the Taxpayer's representative was that he believed he did not have to show up at the DRA hearing and that he thought he would have an automatic appeal to the board regardless of what he did or did not do at the DRA.

Issues

This appeal raises several issues, but only one issue is dispositive: Did the DRA properly dismiss the Taxpayers's RSA 78-A:12 petition for reconsideration? We answer, yes.

Discussion:

The DRA dismissed the petition because the Taxpayer failed to appear at the DRA's noticed hearing. Moreover, the dismissal occurred because the Taxpayer did not file anything in writing to support the appeal. See REV. 204.08. We find the Taxpayer's failure to appear or provide written submissions was not due to any valid reason but due to the Taxpayer's own neglect. It is the Taxpayer's job, not the DRA's job, to prepare and present a proper petition for reconsideration and to either attend the hearing or obtain a continuance or alternatively, submit a written statement in lieu of attending the hearing. Here the DRA had nothing from the Taxpayer from which to make a decision. The DRA, therefore, applied its rule REV. 204.08(b) and dismissed the petition. After the DRA's dismissal, the Taxpayer had an opportunity to move for reconsideration pursuant to REV. 206.02, but the Taxpayer did not so move. Thus, the DRA's dismissal became a final order that was appealed to the board.

The Taxpayer did not present evidence to the board supporting its appeal. The Taxpayer testified it called the DRA the day before the DRA hearing and was told: (1) he did not have to attend the hearing and (2) a hearings officer would call him. We find this testimony to lack persuasiveness and credibility. The only other reason given to the board was the Taxpayer's assertion that it assumed it could appeal to the board regardless of what it did or did not do at the DRA hearing. This argument is wrong as a matter of law.

The cumulative evidence supports only one conclusion -- the Taxpayer is fully responsible for the dismissal. The Taxpayer failed to comply with the DRA's hearing process and by doing so did not give the DRA any basis to reconsider. This board reviews the DRA's decision here as an appellate board. Since nothing was presented below and since the DRA dismissed the petition because of the Taxpayer's complete failure to follow the rules, we deny the appeal.

Costs

RSA 78-A:13 III authorizes the board to award the DRA its cost when the board denies the appeal. This means the board can order the Taxpayer to pay the DRA for the DRA's time and expense in defending this appeal. Given the Taxpayer's attitude and failure to give this matter any effort, the board will entertain the DRA's motion for costs if one is filed within 10 days of the clerk's date below. The Taxpayer shall then have 10 days from the date the motion is filed to object. The Taxpayer is forewarned that if it objects to the awards of costs to the DRA, it must file a written objection, and the objection must provide sufficient and specific reasons to support the objection.

Conclusion

Appeal denied. DRA may move for costs with Taxpayer having right to object.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Ignatius MacLellan, Esq., Member

Michele E. LeBrun, Member

I certify that copies of the within Decision have this date been mailed, postage prepaid, to Bernard H. Gray, Jr., representative for Dairy Queen, Taxpayer; and the Department of Revenue Administration.

Melanie J. Ekstrom, Deputy Clerk

Date: January 31, 1992

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ORDER

This order relates to the "DRA's" motion for costs, which is granted. The board orders the "Taxpayer" to pay the DRA $74.40 (2 witness fees $30.00 each and copying $14.40) within twenty (20) days of the clerk's date below. If the Taxpayer fails to comply, the DRA may request certification to the superior court for enforcement. The board has denied the DRA's request for attorney's fees.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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George Twigg, III, Chairman

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Ignatius MacLellan, Esq., Member

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Michele E. LeBrun, Member

I certify that copies of the foregoing order has been mailed this date, postage prepaid, to Bernard H. Gray, Jr., representative for Dairy Queen, Taxpayer; and the Department of Revenue Administration.

Dated:

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Melanie J. Ekstrom, Deputy Clerk