378 D.W. Highway Trust

v.

Town of Merrimack

Docket Nos.: 7790-89 and 9801-90

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1989 and 1990 assessments of $1,085,300 (land, $387,500; buildings, $697,800), on Map 4D-3, Lot 004, consisting of a strip mall on 1.85 acres (the Property). For the reasons stated below, the appeal for abatement is granted.

The Taxpayer has the burden of showing the assessment was disproportionately high or unlawful, resulting in the Taxpayer paying an unfair and disproportionate share of taxes. See RSA 76:16-a; Tax 201.04(e); Appeal of Town of Sunapee, 126 N.H. 214, 217 (1985). We find the Taxpayer carried this burden and proved disproportionality.

The Taxpayer argued the assessments were excessive because:

(1) the Property was only 50% complete on April 1, 1989;

(2) the actual construction costs for site work and building costs was $865,389;

(3) a cost calculation estimated the costs at $916,200;

(4) the Property's income analysis cannot support the assessment given lower than expected rents and higher vacancy rates;

(5) the Property sold after foreclosure for $396,000 in May 1991; and

(6) the proper 1990 median ratio for commercial properties was 1.52 not the DRA's 1.05.

The Town argued the assessments were proper because:

(1) it was arrived at using the cost approach and the actual total investment in the Property was $1,300,000;

(2) the Taxpayer's cost and income analyses were flawed;

(3) the Taxpayer paid $500,000 for the land;

(4) the Property has a very good location and is adjacent to a very large shopping mall; and

(5) looking at this Property for the long term, this is a good Property as shown by the increase in occupancy at the Property and the adjacent mall.

Board's Rulings

For the following reasons, we find the correct assessment should be $911,500 (land, $387,500; and building, $524,000).

Both parties relied primarily on the cost approach to value because the strip mall building was partially completed for both tax years under appeal. The board reviewed the physical listing of the Property submitted by both parties, referenced the Marshal & Swift replacement cost manual and concludes the Town's replacement cost estimate is excessive for two reasons:

1) the Town's replacement cost price of $64.95 ($30.93 x 2.1) is excessive compared to the actual construction costs and general estimates of replacement costs by Marshall & Swift; replacement cost figures of $65 in Marshall & Swift are for good to excellent regional malls, much superior to the subject property; and

2) the Town's replacement cost of $94,480 ($2.31 per square foot) for the paving significantly exceeds cost estimates in Marshall & Swift.

The board finds the best evidence as to the replacement cost for both the building and the paving was the Marshall & Swift estimate submitted by the Taxpayer with following corrections:

1) the heating as indicated by the Town's assessment card is forced hot air, not "package A.C.";

2) the story height based on the Town's assessment card and the photographic evidence submitted with the Taxpayer's questionnaire is 18 feet, not 14 feet; and

3) the local multiplier should be 1.18 for the Nashua area, not 1.09.

These corrections result in a replacement cost for the building of $943,450 (18,070 square feet x $52.21) and a value at 50 percent complete (as agreed to by the parties) of $471,750. The paving and canopy were complete on the assessment dates and, therefore, the entire amount of $52,300, as estimated by the Taxpayer, should be added to the building value.

The board finds the Town's assessment value for the land is reasonable based upon the purchase price and the general assessment data supplied by the Town.

If the taxes have been paid, the amount paid on the value in excess of $911,500 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Member

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Ignatius MacLellan, Esq., Member

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Northeast Property Tax Consultants, Representative for the Taxpayer; and Office of the Assessor of Merrimack.

Dated: January 14, 1993

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Valerie B. Lanigan, Clerk

008

378 D.W. Highway Trust

v.

Town of Merrimack

Docket Nos. 7790-89 and 9801-90

ORDER

This order relates to the "Taxpayer's" February 18, 1994 and February 24, 1994 letters, requesting the board to order the "Town" to apply the board's 1990 decision to the 1991 tax year. The request is granted. The Town shall use the board's 1990 decision for the 1991 tax year with good faith adjustments. See RSA 76:17-c. If the taxes have been paid, the Town shall, within 20 days of the clerk's date below, refund any overpayment.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Member

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Ignatius MacLellan, Esq., Member

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Michele E. LeBrun, Member

CERTIFICATION

I hereby certify that a copy of the foregoing order has been mailed this date, postage prepaid, to Northeast Property Tax Consultants, representative for the Taxpayer; and the Office of the Assessor of Merrimack.

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Date: Valerie B. Lanigan, Clerk

0009

378 D. W. Highway Trust

v.

Town of Merrimack

Docket No.: 7790-89

ORDER

On May 14, 1993, the board of tax and land appeals (board) received a motion for reconsideration (motion) from the Town of the board's order of May 4, 1993 (order).

The board's order resulted from a written request by the Taxpayer, subsequent to an abatement decision by the board, for the board to order the Town to refund the interest charges on the excessive amount of the assessment. To more fully allow the Town and the Taxpayer to present their positions, the board held a telephone conference with the parties on May 25, 1993.

The board denies the motion and affirms its earlier rulings in the order.

Further, the board rules that the term "tax" as used in RSA 76:16 and 76:16-a (the abatement and appeal process) is inclusive of the initial tax assessment and any interest for late payment incident to the tax. RSA 76:13. Therefore, any abatement of the "tax" inherently includes a refund pursuant to RSA 76:17-a of:

1) the amount of the tax associated with the excess assessment; and

2) the amount of the interest for late payment associated with the excess assessment.

This conclusion is arrived by a complete reading of the statutes related to assessment, abatement and collection of taxes including RSA 76:13, 76:16, 76:16-a, 76:17-a, 80:27 and 80:64. (See RSA 21:1 consistent statutory construction; See also Blue Mountain Forest Ass'n v. Town of Croydon 119, N.H. 202,204 (1979) (A statute must be read as a whole; all of its sections must be considered together.)

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Member

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Ignatius MacLellan, Esq., Member

CERTIFICATION

I hereby certify a copy of the foregoing order has been mailed this date, postage prepaid, to Northeast Property Tax Consultants, representative for the Taxpayer; and Office of the Assessor of Merrimack.

Dated: _____

378 D.W. Highway Trust

v.

Town of Merrimack

Docket No.: 7790-89

ORDER

On March 22, 1993, the Board of Tax and Land Appeals (Board) received a letter from the Taxpayer requesting the board order the Town to refund the interest and penalties on the ordered abatement. The board has received no response or objection from the Town. However, the Taxpayer in their letter indicated the Town had stated it was unaware of any statute that required such a refund and would not issue a refund unless ordered by the board.

The board orders the Town to refund with interest at six percent from the date of payment to the date of refund the interest the Town has calculated pursuant to RSA 76:13 and RSA 80:69 on the value in excess of the proper

assessment of $911,500 (See boards decision dated January 14, 1993) for both tax years 1989 and 1990.

Specifically, the Town shall:

(1) refund the 12% and 18% interest incorrectly charged on the excess amount of the assessment; and

(2) pay 6% interest on the excess amount of the assessment and any incorrectly calculated incidental interest from the date the Taxpayer paid their taxes to the date the refund in (1) is made.

Interest calculated on a properly assessed tax is incident to the tax. RSA 76:13; Western Union Telegraph Co. v. State, 64 N.H. 265 (1886). Because interest is incident to the tax, any tax that is found to be excessive and is abated must also have any interest incident to it abated.

Proper bookkeeping procedures within the town should also dictate that there be no interest due on the portion of the assessment found to be excessive. Following an ordered abatement, the assessors should issue an abatement slip with the proper copy going to the tax collector. That abatement slip would authorize the tax collector to reduce the amount of tax due by the Taxpayer on the original warrant. Therefore, when the Taxpayer did pay their taxes, the tax collector would calculate the interest due only on the abated assessment.

The Town shall refund the interest due as outlined by this order and shall provide evidence that the refund has occurred within sixty days of the clerk's signature on this order.

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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Paul B. Franklin, Member

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Michele E. LeBrun, Member

CERTIFICATION

I hereby certify a copy of the foregoing order has been mailed this date, postage prepaid, to Northeast Property Tax Consultants, Representative for the Taxpayer; and Office of the Assessor of Merrimack.

Dated: May 4, 1993

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Valerie B. Lanigan, Clerk