

Lloyd and Anita Cate

v.

Town of Warren

Docket No. 7848-89

DECISION

The "Taxpayers" appeal, pursuant to RSA 74:7-a the "Town's" 1989 decision to impose a \$900 land use change tax (10% of the ad valorem value of \$9000).

The Taxpayers have the burden of showing the assessment was improper or unlawful. We find the Taxpayers carried this burden and proved that they had satisfactorily filed the required inventory form necessary to appeal their 1989 land use change tax property assessment.

At the hearing regarding this appeal on January 2, 1992, the Selectmen claimed that the Taxpayer failed to file a complete inventory blank for tax year 1989, thus constituting reason for denial of any appeal under RSA 74:7-a. This claim was made in a letter to the Board dated February 11, 1991.

Owing to the fact that the Town failed to send a copy to the Taxpayers of their claim that a complete inventory form was not filed with the Town, the Board of Tax and Land Appeals allowed both parties the opportunity to file position papers by January 16, 1992.

The Taxpayers presented the following arguments:

(1)"Any person who fails to file a fully completed inventory form on or before April 15, unless granted an extension under RSA 74:8, shall pay a penalty of one percent of the property tax for which he is liable. In no case, however, shall the penalty be less than \$10 or more than \$50". This raises two issues in this case - a) was the 4/11/90 inventory a fully completed inventory?, and b) was the penalty assessed as required?

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(2)"Any person who fails to file an inventory form AND who becomes liable to pay the penalty specified in this section shall lose his right to appeal any matter pertaining to the property tax for which he is liable and his right to appeal any exemptions to which he may be entitled but has not yet received".

This sentence pertains ONLY to a person who FAILS TO FILE an inventory. The word "AND" (emphasis added) is very important - the person must fail to file an inventory AND must be liable for the penalty. The word "or" was not used, and thus both conditions must be met.

The Taxpayers DID file an inventory form on 4/11/90, as admitted by the Selectmen on the Checklist dated 11/6/90. THUS, THE TAXPAYER HAS NOT LOST HIS RIGHT TO APPEAL THE LAND USE CHANGE TAX.

If the Board has further questions on the filing of a fully completed inventory form, consider the following:

- A.The Selectmen accepted the inventory form dated 4/11/90 as "completed" according to the Checklist.
- B.The Taxpayers were not notified of failure to file a complete inventory form as required by RSA 74:7-c. Thus it can be assumed that the inventory was complete.
- C.Was the inventory form alleged to be incomplete because no changes were reported? The inventory form asks "Owners of land classified as current use are required to indicate whether any changes in the use of the land have been made (RSA 74:4, V)". What is the definition of "changes in the use of the land"?

(a)RSA 79-A:2 VI Definitions - "Land use change tax means a tax that shall be levied when the land use changes from open space use to a non-qualifying use". Land use change can be interpreted to mean a change from a qualifying use to a non-qualifying use. The Taxpayers' contention in this appeal, based upon a prior decision of the Board, is that a land use change did not occur, and thus

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the inventory form was filled out correctly.

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(b)RSA 79-A:5 IV - this statute works in conjunction with RSA 74:4 V by requiring assessing officials to "determine if previously classified lands have been reapplied or have undergone a change in use so that the land use change tax may be levied against lands changed in use, according to RSA 79-A:7." Thus, the intent of these two statutes is to determine if changes in use have been made that would levy the use change tax. The Taxpayers' appeal contends that no change of use occurred in this inventory tax year of 4/1/89 to 3/31/90.

(c)REV 1204.05 speaks to "Change of Classification". The Taxpayers contend in this appeal that what occurred on the Property and as submitted on the current use application dated 4/11/90 is a change of classification, and not a change in use. Thus, no change needed to be reported on the inventory form.

(d)RSA 79-A:5 V-a also works in conjunction with RSA 74:4. The inventory form question also is intended to enable assessors to determine change in assessments. A change in classification may or may not effect a change in assessment. In this case, an updated current use application was submitted to the assessors at the same time as the inventory form. Thus, the assessors had the necessary information in hand to make a proper assessment on the Property.

The Town submitted the following statement signed by three Selectmen:

"In regards to our response to your charge of the Board of Selectmen, stating our stance on your right to hear the appeal of Lloyd and Anita Cate we would like to refer you to State Statues (sic) 74:7 it states "Any person who fails to file a fully complete inventory form on or before April 15.....etc". Then in the same Statue it later states "Any person who fails to file an inventory form an who becomes liable

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to pay the penalty specified in this section shall lose his right to appeal any matter pertaining to the property tax for which he is liable....etc". Lloyd Cate did not file a "fully completed inventory form". Your file contains a copy of that inventory. Although the Board of Selectmen incorrectly stated that he did in its written answer to your Board, that doesn't matter. The bottom line is the fact that he did not file a completed form as specified by statute (sic).

Secondly, 74:7-c states that "Notice of failure to file the property inventory form, or failure to file a complete property inventory form, shall first be sent to the property owner of record as of April 1, before the applicable monetary penalty in RSA 74:7-1 shall apply". This is indicating that before the monetary penalty is assessed the owner be notified. The Board waived the monetary penalty so we were not compelled by law to notify Mr. Cate. The law states "Monetary penalty". not the penalty of not being able to appeal.

Therefore, it is our contention that the Board of Land & Tax Appeals has no right to hear the appeal of Mr. Cate.

We have enclosed affidavits (sic) stating our waiving of the penalty at a Selectmen's meeting on April 18, 1990."

The BTLA finds the facts simple and uncontroverted. The Taxpayers had 113 acres in current use and in December of 1989 and January of 1990 clear cut 10 acres to expand pasture land on his dairy farm. The Town assessed the penalty on April 24, 1990.

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On the question of whether the Taxpayers filed a completed inventory, the Board finds the Taxpayers were not 'slothful' nor did they withhold pertinent information which the Town needed to properly assess the property. See H.J.H., Inc. v. State Tax Commission, 108 N.H. 203 (1967).

The Taxpayers' inadvertent failure to check a box indicating a change of classification did not deceive or otherwise hinder the assessors from administering the current use statute. We therefore rule the Taxpayers do not lose the right to appeal their 1989 assessment.

The Taxpayers intended to keep the Property in current use but to change its classification to permanent pasture, which is within the farmland classification. See Rev. 1205.02(2)(b). Nonetheless, the Town unilaterally removed 10 acres from current use for the 1989 tax year and assessed the penalty. The Taxpayers submitted an application revising land in permanent pasture on April 11, 1990.

The Town based its decision to levy the tax on DRA rule Rev. 1204.05(b)(1988), which states, "Prior to a change in classification, and prior to initiating any physical change to the land, the land owner shall notify and secure the approval of the local assessing officials."

In deciding this appeal, we must begin our analysis with the statute, not the DRA rule. RSA 79:A:7 ("Land Use Change Tax") states clearly: "Land which has been classified as open space land on or after April 1, 1974, pursuant to [RSA chapter 79-A] shall be subject to a land use change tax when it is changed to a use which does not qualify for open space assessment."

Emphasis added. The DRA rules cannot alter RSA 79-A:7. Rather the DRA rules serve only to effectuate the meaning and intent of RSA 79-A:7. See Foster v. Town of Henniker, 132 N.H. 75, 82 (1989). Based on RSA 79-A:7's clarity, we conclude the Taxpayers' failure to comply with Rev. 1204.5(b) did not justify the Town's actions. RSA chapter 79-A does not make the Taxpayers' change of classification contingent on the notifying the Town and obtaining the Town's approval before changing the current use classification. Property in current

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use can be changed to another classification without imposition of the change

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in use tax. Municipalities must, if the property qualifies, change the classification upon the taxpayer's request. Rev. 1204.5(b) implies municipalities have discretion about whether a taxpayer may change classification. This rule is inconsistent with RSA 79-A:7, and we will not enforce it.

Based on the above, the Town shall: 1) refund the \$900 Tax; and 2) abate the 1989 and any subsequent tax year's taxes to the extent the loss of current use status increased the Property's assessment, refunding the excess taxes paid. These refunds shall include 6% interest from the payment date to the refund date.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Paul B. Franklin, Member

I certify that copies of the within Decision have this date been mailed, postage prepaid, to Tom Hahn/FORECO, Representative for the Taxpayers; and Chairman, Selectmen of Warren.

Valerie B. Lanigan, Clerk

Date: April 21, 1992

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