

**Eleanor Turetsky**

**v.**

**Town of Gilsum**

**Docket No.: 9972-90**

**DECISION**

The "Taxpayer" appealed, pursuant to RSA 76:16-a, her 1990 assessment of \$36,030 on her home. The Taxpayer requested an abatement of all taxes and interest due for the 1990 tax year. The Taxpayer also filed an appeal for 1991, but she did not first file with the "Town", and thus filed too early with the board. Unfortunately, the board's past clerk did not return the Taxpayer's 1991 appeal but simply placed it in the 1990 file. When the board returns such appeals, we inform the party of the necessary corrective steps. Therefore, if the board's past clerk had not erred, the Taxpayer would have been told how to correctly file, and given the timelines she would have had sufficient time to do so. The board rules it has jurisdiction over the 1991 appeal. We find the Taxpayer is entitled to full abatements for 1990 and 1991 due to financial hardship.

The Town failed to appear, but consistent with our rule, TAX 102.03(g), the Town was not defaulted. This decision is based on the evidence presented to the board at the hearing.

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RSA 76:16-a empowers the board to order abatements "as justice requires," which includes abating taxes for poverty and inability to pay. The standards for making such an order are enunciated in Ansara v. City of Nashua, 118 N.H. 879 (1978). Thus, the board queried the Taxpayer concerning: 1) her financial condition and her asserted inability to pay the taxes; and 2) whether she had any equity in her home and if so, whether it would be unreasonable to require her "to relocate, refinance, or otherwise obtain additional public assistance." Id. at 881.

The Taxpayer stated that she had no assets, other than her home, and that she had spent her limited income on essentials. In a letter to the board, the Taxpayer's psychologist described the Taxpayer's debilitating psychological condition. The Taxpayer's behavior at the hearing was consistent with the psychologist's observations. While expressing a desire to be productive and employed, the Taxpayer's condition renders her unable to work. Because of her disability, the Taxpayer receives \$422/month for social security disability and \$90 in food stamps. She spends her money on living expenses and on home maintenance, leaving no money to pay her taxes. Thus, we find the Taxpayer has shown poverty and inability to pay.

The Taxpayer's property was assessed at \$36,030, but some of her land was assessed in current use. Based on the property-record card, the assessment would be \$40,630 if all the land was assessed at ad valorem values.

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This results in a \$94,488 equalized value. The property has at least the following liens: \$25,000 medicare lien; \$10,000 state-welfare lien and \$4,000 property-tax liens. This leaves approximately \$59,492 in equity. (This is

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only an estimate. There was no evidence on the property's full value. Moreover, the Taxpayer was unsure about the current balances for the liens, and she was unsure if there were other liens.)

While there is equity in the property, it would be unreasonable to require the Taxpayer "to relocate, refinance, or otherwise obtain additional public assistance." Id. This is the Taxpayer's home. It is one of the few stable parts of her challenging life. To require the Taxpayer to relocate would have detrimental effects on the Taxpayer's condition and would increase the societal costs for housing the Taxpayer. The Taxpayer is unable to work, and thus, she cannot refinance.

We find nothing to show the Taxpayer could obtain additional public assistance. The only possible assistance would be funding from the Town. The Taxpayer, however, felt the Town was against her and would not help her. The Town did not appear and did not even write the board to explain its position. The Town's inattention to this matter certainly supports the Taxpayer's assertion. Therefore, not having the Town's input, the board is limited to the Taxpayer's evidence and the board's observations.

Based on the above, the Town is ordered to abate the Taxpayer's entire 1990 and 1991 taxes without filing any lien, see RSA 72:38-a; RSA 165:28. We are abating the entire amount without allowing the Town a lien because the Taxpayer testified the liens on her property exacerbate her mental condition.

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The Taxpayer's psychologist confirmed this. Within 10 days of the clerk's date below, the Town shall also record at the registry of deeds a release of any lien for the 1990 and 1991 taxes, sending a copy of the release to the board.

Finally, this is a very unusual case. The board struggled with this appeal. The Taxpayer's needs are compelling. Yet, we are mindful of the burden this order places on other Town taxpayers. We see this decision as a short-term solution. For future years, the Town should work with the Taxpayer to handle this matter at the local level. This may include granting the Taxpayer an RSA 72:38-a lien. If the Town and Taxpayer act ahead of time, the Taxpayer's anxiety should be lessened because she will know she can remain in her home even with the liens on the property. One of the problems here was that the Taxpayer did not apply under RSA 72:38-a. Thus, the existing tax liens are RSA 80:58 et seq; tax liens for which the Taxpayer could lose her home due to nonpayment of taxes.

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

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I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Eleanor Turetsky, Taxpayer; and Chairman, Selectmen of Gilsum.

Dated: November 9, 1992  
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Valerie B. Lanigan, Clerk

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**Eleanor Turetsky**

**v.**

**Town of Gilsum**

**Docket Nos.: 9972-90 and 13733-92PV**

**ORDER**

This order follows the board's December 6, 1993 hearing and the "Taxpayer's," motion for various relief. For the reasons stated below, some of the Taxpayer's requests are granted, some are denied, and some are taken under advisement.

**INTRODUCTION**

These appeals involve the Taxpayer's requests for abatement based on poverty and inability to pay. On November 9, 1992, in Docket No. 9972-90, the board issued an order that granted the Taxpayer's abatement request and ordered the "Town" to abate all of the 1990 and 1991 taxes and to release any tax liens for the 1990 and 1991 tax year. The board also ordered the Town to

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work with the Taxpayer to resolve this matter in the future at the local level. The Town, misinterpreted the board's order, and only abated the unpaid taxes rather than the full amount of taxes. The Town, in compliance with the order, released the 1990 and 1991 tax liens. The Taxpayer's attorney then began writing to the Town, requesting full compliance with the board's order, i.e., a full refund, but the Town was not responsive. Finally, the Taxpayer's attorney spoke with the Town's attorney, and in May 1993, the Town's own attorney advised the Town to fully refund all of the 1990 and 1991 taxes, whether paid or unpaid. Nonetheless, the Town has not refunded the paid 1990 and 1991 taxes.

For the subsequent tax years, the Taxpayer did not file for an RSA 72:38-a disabled lien but rather she appealed to this board and requested a partial abatement. The Taxpayer testified she does not want an RSA 72:38-a lien placed on her property because such a lien would cause her serious psychological and physical stress.

**TAXPAYER'S REQUESTS FOR RELIEF**

The following discusses the lettered requests in the Taxpayer's motion to enforce.

A. The Town shall, within 10 days of the clerk's date below, refund to the Taxpayer all taxes paid for 1990 and 1991 with interest at 6% from the date paid to the refund date. This order is consistent with the board's

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November 9, 1992 order, which the Town misinterpreted and which issue is more fully discussed below.

B. The Town has already released the 1990 and 1991 liens, and therefore no order is required on this point.

C. and D. The board takes these issues under advisement since they involve tax years after 1991. As indicated at the hearing, the board will receive written evidence and arguments from the parties, and then the board will issue a decision concerning the 1992 abatement appeal. The timeline established at the hearing was the Taxpayer would file her supplemental material by January 7, 1994, copying the Town with the material, and the Town would file its response by January 28, 1994, copying the Taxpayer's attorney.

After receipt of the material, the board will issue a written decision on the Taxpayer's partial-abatement request. Note: the board asks the Taxpayer to file with the board a letter from her psychologist stating: 1) the Taxpayer's present mental condition with reference to any specific diagnosis; and 2) the Taxpayer's history of mental condition. This letter will put in writing what the board and the parties observed at the hearing concerning the Taxpayer's mental condition. A copy of this letter shall be supplied to the Town, and the Town shall not reveal the letter or its contents to anyone. The board's copy shall be sealed after review with the sealed envelope stating, "Sealed per board order. Any party wishing to break the seal and review the document may file with the board a motion to break the seal." If such a motion were filed, the board would then rule on the request, applying the standards of RSA

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ch. 91-A and Petition of Keene Sentinel, 136 N.H. 121 (1992).

E. The Town indicated it would comply with the board's order to refund the 1990 and 1991 taxes. The Taxpayer, therefore, agreed not to request certification to the superior court provided the Town complies with the refund order.

F. The Taxpayer asked the board to find the Town in civil contempt for the Town's failure to comply with the board's November 9, 1992 decision. The board denies this request, concluding the board apparently does not have contempt powers because such powers have not been granted by statute. See Appeal of Gillin, 132 N.H. 311, 313 (1989) (board's powers are entirely statutory). Even if the board had contempt powers, we probably would not have exercised it in this case given the Town's explanation of its action (more fully discussed below) and the board's view that a finding of contempt is unnecessary to accomplish justice here.

G. As discussed below, the board grants the Taxpayer's request for costs and attorney's fees (collectively "fees"). The fees shall be limited to those fees attributable to the Taxpayer's attempts to obtain compliance with the board's November 1992 decision. No fees shall be presently awarded for the 1992 appeal.

**ATTORNEY'S FEES**

This section discusses the request for fees. Under RSA 76:16-a, the board is authorized to make such orders "as justice requires \*\*\*." Additionally, RSA 71-B:9 states: "Costs may be taxed as in the superior

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court." Finally, TAX 201.39 authorizes the board to award fees as in the superior court. Therefore, we must first examine the standard to be applied in deciding the requests for fees. The seminal case is Harkeem v. Adams, 117 N.H. 687, 690-91 (1977). In Harkeem the court stated that ordinarily the prevailing litigant is not entitled to collect fees; however, when certain situations arise "the award of fees lies within the power of the court and is an appropriate tool in the court's arsenal to do justice and vindicate rights." (Emphasis added.) Id. Specifically, where a party has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons \*\*\*" the award of fees has been considered appropriate. Id. Specifically, fees are awardable "where it should have been unnecessary for the successful party to have brought the action." Id. The court has since stated, "[t]he test for bad faith is an objective one." Treisman v. Town of Bedford, 135 N.H. 573, 575 (1992). This objective test requires the tribunal to find, that viewed objectively, the party's legal position was without merit and was not based on any good faith argument or reasonable interpretation.

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Based on the circumstances in this appeal, we find, based on an objective standard, the Town acted in bad faith, and therefore, we award the Taxpayer her fees. Specifically, the board concludes the November 1992 decision was not ambiguous, especially when read in its entirety. The decision began by stating: "The Taxpayer requested an abatement of all taxes and interest due for the 1990 tax year. \*\*\* We find the Taxpayer is entitled to full abatements for 1990 and 1991 due to financial hardship." Decision at page 1, paragraph 1. The decision then discussed the specifics of the Taxpayer's financial situation, and it concluded: "Based on the above, the Town is ordered to abate the Taxpayer's entire 1990 and 1991 taxes \*\*\*." Decision at page 3, paragraph 3. The Town did not file a rehearing motion, and thus that decision is final and must be complied with.

At the hearing on this motion, the Town argued it interpreted the decision to only require the abatement of taxes that had not been paid. The Town did not read the decision to require the refund of taxes already paid. The board disagrees with this interpretation and finds it objectively unreasonable, especially when the decision is read in its entirety and in the context of the Taxpayer's appeal. Even if the decision were ambiguous, the Town did not take any steps to seek clarification of the order. More importantly, even the Town's own attorney instructed the Town to refund the taxes, but the Town still did not comply with the order. The Town's failure to comply with the board's decision required the Taxpayer to file a motion to enforce and such motion and proceedings thereon should have been unnecessary.

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Upon receipt of the Taxpayer's itemization of fees the board will issue an order concerning the specific amount of fees.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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George Twigg, III, Chairman

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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 Jonathan P. Baird, Attorney for the Taxpayer; Chairman, Gilsum Board of Selectmen, and Susan J. King, Town Clerk and Tax Collector.

Dated: January 11, 1994

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Valerie B. Lanigan, Clerk

**Eleanor Turetsky**

**v.**

**Town of Gilsum**

**Docket Nos.: 9972-90 and 13733-92PV**

**ORDER AND DECISION**

This decision and order addresses two issues:

- 1) the "Taxpayer's" 1992 request for partial abatement; and
- 2) the Taxpayer's request for costs and fees associated with her 1990 appeal. For the reasons stated below, the Taxpayer's request for partial abatement is granted, and the board awards her \$375 in attorney's fees.

1992 Partial Abatement Request

The Taxpayer asked the board to grant her a partial abatement of her 1992 taxes based on her poverty and inability to pay. The Taxpayer's situation has not changed since the board's 1990 decision. Additionally, the legal standard for such an abatement has not changed. Therefore, we incorporate the 1990 decision here.

For the 1992 tax year, the Taxpayer requested an abatement of all taxes over \$1,000 for the year. The Taxpayer again argued that her financial condition prevented her from making full payment of her taxes and her psychological condition rendered it unreasonable to require that a lien be placed on her Property for the unpaid taxes. The Town stated it would grant

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the Taxpayer an RSA 72:38-a disability lien for the full amount of 1992 taxes.

The Town argued this was a fairer way to proceed because such a lien would ensure future payment of the unpaid taxes.

The board concludes the Taxpayer's request for partial abatement should be granted without any lien being placed on her Property. The basis for the board's decision is contained in the board's 1990 decision. Again, the board reiterates that normally a lien, including a lien under RSA 72:38-a, should be placed on the Property. However, this case presents a most unique set of circumstances -- a Taxpayer with a mental condition who's psychologist supported the Taxpayer's statements and demeanor that a lien on her Property would adversely affect her already tenuous mental health.

Therefore, the board orders the following.

- 1) The Taxpayer shall, within 30 days of this decision, pay the Town \$1,000 for her 1992 Property taxes.
- 2) The Town shall accept the \$1,000 as the total payment for the 1992 taxes, interest and costs, provided the Taxpayer makes payment within the 30 days. Any amount of taxes, interest and costs in excess of \$1,000 shall be abated.
- 3) Upon payment, the Town shall release the 1992 RSA 80:59 lien.

Costs and Attorney's Fees

In the board's January 11, 1994 Order, the board found the Town had objectively acted in bad faith by failing to comply with the board's 1990 decision. The Taxpayer's attorney submitted an itemized bill for approximately \$1,600 (16 hours at \$100 per hour). The Town objected to this

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bill, claiming it had not acted in bad faith and had simply misinterpreted the board's decision. The Town also objects to the amount of fees requested by the Taxpayer. The board had previously decided the Town had objectively acted in bad faith and thus, the board is only left with determining the amount of the attorney's fees.

The supreme court, taking its cue from Code of Professional Responsibility, has established eight guiding factors for use in determining whether an attorney's fee was reasonable.

The amount involved, the nature, novelty, and difficulty of the litigation, the attorney's standing and the skill employed, the time devoted, the customary fees in the area, the extent to which the attorney prevailed and the benefit thereby bestowed on his clients. Funtown USA, Inc. v. Town of Conway, 129 N.H. 352, 356 (1987)

The board has decided to award the Taxpayer \$375 in attorney's fees, allowing five hours at \$75 per hour for what should have been sufficient to file the motion to enforce and to attend the hearing on that motion. The amount to be awarded was subject to a significant amount of board deliberation. Some board members thought a higher amount was appropriate and some board members thought even the \$375 figure was too high. The \$375 figure appears reasonable in light of the board's deliberations and the application of the above-quoted factors.

Future Years

The board hopes the 1990 decision and this decision will guide the parties for future years. Failing that, the Taxpayer can again appeal to this

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board or the superior court.

A motion for rehearing, reconsideration or clarification (collectively "rehearing motion") of this decision must be filed within twenty (20) days of the clerk's date below, not the date this decision is received. RSA 541:3; TAX 201.37. The rehearing motion must state with specificity all of the reasons supporting the request. RSA 541:4; TAX 201.37(b). A rehearing motion is granted only if the moving party establishes: 1) the decision needs clarification; or 2) based on the evidence and arguments submitted to the board, the board's decision was erroneous in fact or law. Thus, new evidence and new arguments are only allowed in very limited circumstances as stated in board rule TAX 201.37(e). Filing a rehearing motion is a prerequisite for appealing to the supreme court, and the grounds on appeal are limited to those stated in the rehearing motion. RSA 541:6.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Member

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Ignatius MacLellan, Esq., Member

**DISSENTING OPINION**

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I must respectfully disagree and be recorded as dissenting from the majority opinion.

Mrs. Turetsky is in need of statutory relief with respect to her property tax obligations to her Town. The question is, under which statute is that relief most properly available?

RSA 72:38-a (Tax Lien for Elderly and Disabled), was written expressly for situations like hers.

- \* She has owned her homestead for at least five (5) years.
- \* She is eligible under the Federal Social Security Act for benefits to the totally and permanently disabled.
- \* She is living in her home.
- \* The Selectmen of Gilsum testified that they would grant Ms.

Turetsky a tax lien under the provisions of RSA 72:38-a (for all or part of the taxes due, plus annual interest at 5%) because they agreed that the tax liability causes the taxpayer an undue hardship or possible loss of her property.

When the owner of a property subject to a tax lien dies, the heirs, heirs at law, assignee or devisee shall have first priority to redeem the estate by paying in full the tax lien plus any interest due. This is eminently fair to the appellant as well as the other taxpayers who must shoulder her share until the property is sold and the deferred taxes satisfied.

There are many other taxpayers in Gilsum who find it difficult or

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impossible to pay their taxes in whole or in part, who are just as stressed as Ms. Turetsky, who may also suffer some psychological impairment from an adverse financial condition who could lose their homes to a tax collector's deed. Unlike the Taxpayer however, they may not qualify for the safety net which the legislature provided under RSA 72:38-a for the elderly and disabled.

RSA 72:38-a is a win-win solution for towns and taxpayers as it provides relief when it is needed in the form of a deferred tax for the taxpayer which is later collected by the town when the taxpayer no longer needs the property.

Other taxpayers in town are not required to permanently assume the tax obligations of one of their number who has real estate with value which can repay the town at a future date when the asset can be liquidated or the balance due can be paid by heirs or assignees. As a matter of fairness an abatement, full or partial, is inappropriate in this case.

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George Twigg, III, Chairman

**CERTIFICATION**

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Jonathan P. Baird, Attorney for the Taxpayer; Chairman, Gilsum Board of Selectmen, and Susan J. King, Town Clerk and Tax Collector.

Dated: April 6, 1994

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Valerie B. Lanigan, Clerk

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**Eleanor Turetsky**

**v.**

**Town of Gilsum**

**Docket No.: 9972-90PV**

**ORDER**

This order responds to the "Town's" rehearing motion, which is denied.

The Town raised three general issues:

- 1) the board did not properly apply the standards of Ansara v. City of Nashua, 118 N.H. 879 (1978) (See rehearing motion paragraphs 8, 9, 5, 6, and 11.);
- 2) the board erred by not requiring the Taxpayer to obtain an RSA 72:38-a lien (See rehearing motion paragraphs 5-7 and 10-18.); and
- 3) the board erred by not requiring a municipal lien because medicaid liens continue to accumulate on the Property, thereby depriving the Town of any opportunity to collect unpaid taxes (See rehearing motion paragraphs 1-4 and 15.).

None of these grounds warrant a rehearing or a change in the decision.

1) Ansara Standards

The Town argued the board did not properly apply the standards enunciated in Ansara v. City of Nashua, 118 N.H. 879 (1981). The board disagrees. Specifically, the board's April 6, 1994 decision incorporated the

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board's November 9, 1992 decision, which carefully followed the Ansara standards. Moreover, the April 6, 1994 decision filled in the details to the extent the facts had changed since the prior decision. The board concludes the April 6, 1994 decision, when read in conjunction with the November 9, 1992 decision properly stated and applied the Ansara standards.

2) Mandatory RSA 72:38-a Lien

The Town argued the board erred by not requiring the Taxpayer to file for and obtain an RSA 72:38-a lien. This argument had two general bases:

A) the Taxpayer was required to avail herself of RSA 72:38-a as a form of public assistance; and

B) the board erred in concluding the Taxpayer would have suffered psychological problems if an RSA 72:38-a lien had been placed on the "Property."

Ansara requires a "reasonable" analysis based on balancing the equities.

The court held the following. "We hold that plaintiffs who claim that they are entitled to an abatement because of poverty and inability to pay, and who have some equity in their homes must show that it is not reasonable for them to relocate, refinance, or otherwise obtain additional public assistance."

Id. (Emphasis added.) The equities involved are as follows:

1) Town -- payment of proportionate share property taxes by all property owners and obligation to assist those unable to pay taxes; and

2) Taxpayer -- relief from taxes due to poverty and inability to pay and inability to see the benefit of RSA 72:38-a due to her psychological problems.

The board concluded in this case, given the Taxpayer's serious

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psychological problems as evidenced by the Taxpayer's behavior at the hearing and as evidenced by the psychologist's letters, it would be unreasonable to require her to seek a lien under RSA 72:38-a. The Taxpayer's reaction to an RSA 72:38-a lien may not be rational, but it is her reaction due to her psychological problems.

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In reaching this conclusion, the board has also reviewed Briggs' Petition, 29 N.H. 547 (1854). Specifically, the court in Briggs' Petition, 29 N.H. at 552, recognized that taxes can be abated when it is just and reasonable to grant such abatements to assist a mentally disabled person. The board acknowledges that Ansara has added new analysis to Briggs', but the board concludes that under Ansara and Briggs', the board is within its authority to grant an abatement without a lien when such a lien would be unreasonable to the taxpayer.

We note that this case presented a very unusual situation. Most taxpayers would be required to have a lien placed on their property. However, it is not reasonable to require a mentally disabled person, who presents competent and uncontroverted expert evidence, to have a lien placed on her property when such a lien would result in unreasonable psychological problems.

### 3) Medicaid Liens

The Town's rehearing motion raises for the first time the issue that the board's order ignored the continuing accumulation of medicaid liens. The Taxpayer responded that she no longer receives assistance that would result in medicaid liens. Therefore, the Town is mistaken in its factual basis. Moreover, this issue was not previously raised and it is not appropriate to raise new arguments and new facts in a rehearing motion. TAX 201.37 (e). However, we have concluded that additional liens will not be accumulating.

### Conclusion

For the reasons stated above, the board denies the rehearing motion. To

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the extent the motion raised issues not addressed here, the board finds no error in law or in fact for granting the motion.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Ignatius MacLellan, Esq., Member

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Paul B. Franklin, Member

**DISSENTING OPINION**

I concur with the board on issues one and three, but I dissent on issue number two for the reasons stated in my previous dissent.

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George Twigg, III, Chairman

**CERTIFICATION**

I hereby certify a copy of the foregoing order has been mailed this date, postage prepaid, to Jonathan P. Baird, Attorney for the Taxpayer; Chairman, Gilsum Board of Selectmen, and Susan J. Kin, Town Clerk and Tax Collector.

Dated: May 31, 1994

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Valerie B. Lanigan, Clerk

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**Eleanor Turetsky**

**v.**

**Town of Gilsum**

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**ORDER**

This order follows the board's December 6, 1993 hearing and the "Taxpayer's," motion for various relief. For the reasons stated below, some of the Taxpayer's requests are granted, some are denied, and some are taken under advisement.

**INTRODUCTION**

These appeals involve the Taxpayer's requests for abatement based on poverty and inability to pay. On November 9, 1992, in Docket No. 9972-90, the board issued an order that granted the Taxpayer's abatement request and ordered the "Town" to abate all of the 1990 and 1991 taxes and to release any tax liens for the 1990 and 1991 tax year. The board also ordered the Town to work with the Taxpayer to resolve this matter in the future at the local level. The Town, misinterpreted the board's order, and only abated the unpaid

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taxes rather than the full amount of taxes. The Town, in compliance with the order, released the 1990 and 1991 tax liens. The Taxpayer's attorney then began writing to the Town, requesting full compliance with the board's order, i.e., a full refund, but the Town was not responsive. Finally, the Taxpayer's attorney spoke with the Town's attorney, and in May 1993, the Town's own attorney advised the Town to fully refund all of the 1990 and 1991 taxes, whether paid or unpaid. Nonetheless, the Town has not refunded the paid 1990 and 1991 taxes.

For the subsequent tax years, the Taxpayer did not file for an RSA 72:38-a disabled lien but rather she appealed to this board and requested a partial abatement. The Taxpayer testified she does not want an RSA 72:38-a lien placed on her property because such a lien would cause her serious psychological and physical stress.

**TAXPAYER'S REQUESTS FOR RELIEF**

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B. The Town has already released the 1990 and 1991 liens, and therefore no order is required on this point.

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C. and D. The board takes these issues under advisement since they involve tax years after 1991. As indicated at the hearing, the board will receive written evidence and arguments from the parties, and then the board will issue a decision concerning the 1992 abatement appeal. The timeline established at the hearing was the Taxpayer would file her supplemental material by January 7, 1994, copying the Town with the material, and the Town would file its response by January 28, 1994, copying the Taxpayer's attorney.

After receipt of the material, the board will issue a written decision on the Taxpayer's partial-abatement request. Note: the board asks the Taxpayer to file with the board a letter from her psychologist stating: 1) the Taxpayer's present mental condition with reference to any specific diagnosis; and 2) the Taxpayer's history of mental condition. This letter will put in writing what the board and the parties observed at the hearing concerning the Taxpayer's mental condition. A copy of this letter shall be supplied to the Town, and the Town shall not reveal the letter or its contents to anyone. The board's copy shall be sealed after review with the sealed envelope stating, "Sealed per board order. Any party wishing to break the seal and review the document may file with the board a motion to break the seal." If such a motion were filed, the board would then rule on the request, applying the standards of RSA ch. 91-A and Petition of Keene Sentinel, 136 N.H. 121 (1992).

E. The Town indicated it would comply with the board's order to refund the 1990 and 1991 taxes. The Taxpayer, therefore, agreed not to request certification to the superior court provided the Town complies with the refund

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order.

F. The Taxpayer asked the board to find the Town in civil contempt for the Town's failure to comply with the board's November 9, 1992 decision. The board denies this request, concluding the board apparently does not have contempt powers because such powers have not been granted by statute. See Appeal of Gillin, 132 N.H. 311, 313 (1989) (board's powers are entirely statutory). Even if the board had contempt powers, we probably would not have exercised it in this case given the Town's explanation of its action (more fully discussed below) and the board's view that a finding of contempt is unnecessary to accomplish justice here.

G. As discussed below, the board grants the Taxpayer's request for costs and attorney's fees (collectively "fees"). The fees shall be limited to those fees attributable to the Taxpayer's attempts to obtain compliance with the board's November 1992 decision. No fees shall be presently awarded for the 1992 appeal.

**ATTORNEY'S FEES**

This section discusses the request for fees. Under RSA 76:16-a, the board is authorized to make such orders "as justice requires \*\*\*." Additionally, RSA 71-B:9 states: "Costs may be taxed as in the superior court." Finally, TAX 201.39 authorizes the board to award fees as in the superior court. Therefore, we must first examine the standard to be applied in deciding the requests for fees. The seminal case is Harkeem v. Adams, 117 N.H. 687, 690-91 (1977). In Harkeem the court stated that ordinarily the

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prevailing litigant is not entitled to collect fees; however, when certain situations arise "the award of fees lies within the power of the court and is an appropriate tool in the court's arsenal to do justice and vindicate rights." (Emphasis added.) Id. Specifically, where a party has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons \*\*\*" the award of fees has been considered appropriate. Id. Specifically, fees are awardable "where it should have been unnecessary for the successful party to have brought the action." Id. The court has since stated, "[t]he test for bad faith is an objective one." Treisman v. Town of Bedford, 135 N.H. 573, 575 (1992). This objective test requires the tribunal to find, that viewed objectively, the party's legal position was without merit and was not based on any good faith argument or reasonable interpretation.

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Based on the circumstances in this appeal, we find, based on an objective standard, the Town acted in bad faith, and therefore, we award the Taxpayer her fees. Specifically, the board concludes the November 1992 decision was not ambiguous, especially when read in its entirety. The decision began by stating: "The Taxpayer requested an abatement of all taxes and interest due for the 1990 tax year. \*\*\* We find the Taxpayer is entitled to full abatements for 1990 and 1991 due to financial hardship." Decision at page 1, paragraph 1. The decision then discussed the specifics of the Taxpayer's financial situation, and it concluded: "Based on the above, the Town is ordered to abate the Taxpayer's entire 1990 and 1991 taxes \*\*\*." Decision at page 3, paragraph 3. The Town did not file a rehearing motion, and thus that decision is final and must be complied with.

At the hearing on this motion, the Town argued it interpreted the decision to only require the abatement of taxes that had not been paid. The Town did not read the decision to require the refund of taxes already paid. The board disagrees with this interpretation and finds it objectively unreasonable, especially when the decision is read in its entirety and in the context of the Taxpayer's appeal. Even if the decision were ambiguous, the Town did not take any steps to seek clarification of the order. More importantly, even the Town's own attorney instructed the Town to refund the taxes, but the Town still did not comply with the order. The Town's failure to comply with the board's decision required the Taxpayer to file a motion to enforce and such motion and proceedings thereon should have been unnecessary.

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Upon receipt of the Taxpayer's itemization of fees the board will issue an order concerning the specific amount of fees.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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George Twigg, III, Chairman

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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 Jonathan P. Baird, Attorney for the Taxpayer; Chairman, Gilsum Board of Selectmen, and Susan J. King, Town Clerk and Tax Collector.

Dated: January 11, 1994

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Valerie B. Lanigan, Clerk

December 22, 1993

Chairman, Board of Selectmen  
Town Office, PO Box 67  
Gilsum, NH 03448

RE: Turetsky v. Town of Gilsum, Docket Nos.: 9972-90 and 13733-92PV

Dear Board of Selectmen:

This letter concerns your December 13, 1993 letter, which discussed the Taxpayer's request for attorney's fees. The board will not consider that letter now, because the board had concluded the hearing and written its decision. You may, however, reference the letter in a rehearing motion if you choose to file one.

Thank you.

Very truly yours,

VBL/np  
cc: Mr. Jonathan P. Baird

Valerie B. Lanigan, Clerk