

Robert J. Lemer and William H. Stiles

v.

Town of Pittsfield

Docket No.: 11088-91 LC

DECISION

The "Taxpayers" appeal, pursuant to RSA 76:16-a, the "Town's" November 8, 1990 land-use-change-tax (LUCT) assessment of \$28,320 (resulting in a LUCT of \$2,832) on a 29.5-acre lot (the Property). The 29.5 acres is part of an approximately 50 acre lot of which 1.5 acres is not in current use, 6 acres in farmland current use, 13 acres in "forest land" current use and 29.5 acres in "unmanaged forest land". For the reasons stated below, the appeal for abatement is granted.

The Taxpayers have the burden of showing the assessment was disproportionately high or unlawful, resulting in the Taxpayers 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 Taxpayers met their burden of proof.

The Taxpayers argued the LUCT should not have been assessed because:

- (1) the Taxpayer's neglect of notifying the Town of their intent to cut timber and change the classification from "unmanaged forest land" to "forest land" does not cause a LUCT to be assessed; and

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(2) in the alternative if a LUCT should be assessed, the value of the land, due to its wetness, is less than that assessed by the Town.

The Town argued the assessment was proper because:

(1) the Taxpayers have at an earlier time followed the proper procedure of notifying the Town of a change in the classification and should have at this time; and

(2) the selectmen were under the impression when the Intent to Cut was filed that it only pertained to the land in "forest land" category.

Board's Rulings

The facts in this case are similar and result in the same conclusion as was found by the board in Beth Jordan Robinson and Barbara H. Wood v. Town of Tilton , Docket No. 4134-88 (Tilton case). The current use rules in 1990 are different than those that applied in the Tilton case, but the result is the same. The rules related to this issue are Rev 1204.05 and 1204.06 which read: Rev. 1204.05 Change of Classification

- (a) Land owners shall be permitted to change the classification of their land from one qualifying use to another qualifying use, as follows:
- (1) Prior to a change in classification, and prior to initiating a physical change to the land, the land owner shall notify and secure the approval of the local assessing officials, except as provided in Rev 1204.06.

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- (2) A change in classification may occur at any time during the tax year; however, the land shall be assessed in accordance with the category under which it was classified as of April 1 of the tax year.
- (b) A change in the classification of the land shall not cause the 10% use-change penalty to be imposed, so long as the land owner complies with the established criteria of the category to which the land is changed.

Rev 1204.06 Forest Land Classification Change

- (a) Forest land, classified under Rev 1205.03, shall be permitted to be reclassified as unmanaged forest land, described under Rev 1205.04, (a), (2), a., as follows:
 - (1) The land owner shall first [secure the approval of the] NOTIFY the local assessing officials, as provided in Rev 1204.05, (1) above.
 - (2) Once the land is reclassified as unmanaged forest land,
 - a. It shall not be permitted to be reclassified as forest land, as described by Rev 1205.03, for at least 5 years, beginning with the date on which it became classified as unmanaged forest land.
 - b. Any forest management, silviculture or other activities not consistent with the category of unmanaged forest land, conducted on the reclassified land shall disqualify the land from the category of unmanaged forest land the use change penalty shall be imposed.
- (b) Failure to comply with the requirements of Rev 1205.03 or with any existing silviculture plan, shall not constitute a change in use, provided the land owner has first complied with Rev 1204.06, (a), above.

First, Rev. 1204.06 does not apply in this case because the land as of the date of the assessment was in the "unmanaged forest land" category.

Second, Rev 1204.05 states that no LUCT should be imposed as long as the criteria of the new category is being met. The evidence submitted supports

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that the land qualifies as forest land after the selective logging.

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Even more important are the provisions in RSA 79-A:2 and RSA 79-A:7 stating that no LUCT should be assessed.

RSA 79-A:2 **Definitions.** . . .

VI. "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. RSA 79-A:7 Land Use Change Tax.

I. Land which has been classified as open space land on or after April 1, 1974 pursuant to this chapter 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)

Further, as stated by the board in the Tilton case:

The process of notifying and receiving approval was not done but that in itself does not disqualify the resulting condition of the tract from being eligible for current use nor is the severity of assessing the change use tax proportional to the transgression of not following the process. The N.H. Supreme Court decision Michael H. Foster v. Town of Henniker of August 9, 1989, clearly states that the change to the land must be viewed in the context of the spirit of the current use statutes.

"In determining whether a change in status has occurred, the assessing officials are not limited by a literal application of the regulatory criteria promulgated by the current use advisory board, RSA 79-A:3, :4 (Supp. 1988), which functions within the department of revenue administration. See N.H. Admin. Rules, Rev 1201.01-1205.07. The regulatory criteria did not modify the statute, but served to effectuate its purpose. Reno v. Town of Hopkinton, 115 N.H. 706, 707-08, 349 A.2d 585, 586 (1975); McGraw, 18 N.H.B.J. at 112. The criteria in this instance are instructive

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in determining when a change has taken place and when the use change tax may be assessed, but they do not have a limiting effect upon the scope of the statute."

Therefore, the Board rules that no change in use took place as a result of either logging operation or the lack of notification to the Town and the tract continues to be eligible for open space assessment under the forest land category.

If any land use change taxes have been paid, the amount paid 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

George Twigg, III, Chairman

Paul B. Franklin, Member

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Robert J. Lemer and William H. Stiles, Taxpayers; and Chairman, Selectmen of Pittsfield.

Dated: August 19, 1993

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Valerie B. Lanigan, Clerk