

Fall Mountain Regional School District

v.

Town of Langdon

Docket No.: 12282-91 EX

DECISION

Fall Mountain Regional School District (District) appeals, pursuant to RSA 76:16-a, the 1991 assessment of \$83,950 resulting from the "Town's" denial of an RSA 72:23 I governmental tax exemption on a building owned by the District. For the reasons stated below, the appeal for abatement is granted in part.

Facts

The District, which is comprised of the five towns of Acworth, Alstead, Charlestown, Langdon and Walpole, has its high school located in the town of Langdon. In 1990 in an attempt to reduce busing costs for the District and at the same time not incur the capital construction costs, the District formed what they have called an innovative public/private partnership by signing an agreement (Agreement) with Richard S. Daniels individually and RSD Leasing, Inc. (RSD) of West Lebanon, New Hampshire for the construction of a garage facility adjacent to the District's high school. The Agreement included the following provisions:

Fall Mountain Regional School District

v.

Town of Langdon

Docket No.: 12282-92EX

Page 2

- 1) RSD would construct, at its sole expense, a 50' x 60' garage facility with a 600 square foot loft office area;
- 2) the District would grant RSD the right to use the facility without charge for 80 months;
- 3) if during the 80 month period the District denied RSD use of the Property, the District would pay RSD in the amount of \$80,000 minus \$1,000 for each month that RSD had use of the building;
- 4) if RSD continued to occupy the garage after 80 months, it would agree to pay a rental fee of \$750 per month for an additional 10 month period;
- 5) RSD would be limited in its use of the garage to service the District buses and buses leased by RSD to the Springfield, Vermont school system;
- 6) RSD would insure the building and hold the District harmless from any claims arising from the construction or use of the building; and
- 7) the District would become the owner of record of the building once constructed.

The first floor of the building (3000 square feet) is used primarily by RSD and the second story loft office area (600 square feet) is used exclusively by the District. The District also has shared access to the sole bathroom facilities on the first floor of the garage building.

Arguments

The Taxpayer argued the assessment was improper because:

Fall Mountain Regional School District

v.

Town of Langdon

Docket No.: 12282-92EX

Page 3

(1) the school District is a tax-exempt entity and the building is owned and utilized by the District to provide transportation services to students;

Fall Mountain Regional School District

v.

Town of Langdon

Docket No.: 12282-92EX

Page 4

(2) the building was constructed on the District's tax-exempt property and the District gave RSD the right to use a portion of the facility without charge for 80 months commencing December 1, 1990;

(3) RSD's only allowable use of the building is to provide services to vehicles leased to the District or the Springfield, Vermont school system;

(4) the facility serves as the District's dispatch center, is staffed by District employees, and is an integral part of the District's daily operations; and

(5) RSA 72:23, I provides that the property is exempt from ad valorem taxation.

The Town argued the assessment was proper because:

(1) RSD is a private for-profit New Hampshire corporation and has been using and occupying the building as provided in the Agreement;

(2) the District uses only a small portion of the building for coordinating its transportation services within the District;

(3) the Agreement between the District and RSD contained no express provisions for payment of taxes by the party using and occupying the property as required by RSA 72:23 I and therefore the Agreement is an illegal contract; and

(4) the assessment of real estate taxes by the Town upon a building owned by a tax-exempt entity and being utilized by a non-exempt entity is proper.

Fall Mountain Regional School District

v.

Town of Langdon

Docket No.: 12282-92EX

Page 5

Board's Rulings

Introduction

This case tests how the trend in government for "privatization" and "private/public partnerships" integrates with New Hampshire's property tax laws. Stephen J. Varone, Business Administrator for the District, testified his goal is to make the financial pie of the District smaller, rather than to be concerned with how it is divided. Indeed from his perspective, any public/private partnership that makes the pie smaller is laudable and should be encouraged. However, when entering in such public/private partnerships, the issue of who is liable or not liable for taxation must be considered. In contrast to Mr. Varone's responsibility, the selectmen's responsibility as assessors, is to properly assess property and divide the tax burden amongst persons and property liable for taxation pursuant to RSA ch. 72. While at times these may be perceived as conflicting goals, they in the future must be integrated to result in both efficient government and proper taxation.

Law

This case pivots on the interpretation of RSA 72:23 I which reads in part:

"The following real estate and personal property shall, unless otherwise

provided by statute, be exempt from taxation:

- I. Lands and the buildings and structures thereon and therein and the personal property owned by the state, cities, towns, school districts and village districts unless

Fall Mountain Regional School District

v.

Town of Langdon

Docket No.: 12282-92EX

Page 6

said real or personal property is used or occupied by other than the state or a city, town, school district or village district under a lease or other agreement the terms of which provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property. The exemption provided herein shall apply to any and all taxes against lands and the buildings and structures thereon and therein and the personal property owned by the state, cities, towns, school districts, and village districts, which have or may have accrued since March 31, 1975, and to any and all future taxes which but for the exemption provided herein, would accrue against lands and buildings and structures thereon and therein and the personal property owned by the state, cities, towns, school districts, and village districts. All leases and other agreements, the terms of which provide for the use or occupation by others of real or personal property owned by the state or a city, town, school district, or village district, entered into after July 1, 1979, shall provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property no later than the due date. All such leases and agreements shall include a provision that "failure of the lessee to pay the duly assessed personal and real estate taxes when due shall be cause to terminate said lease or agreement by the lessor.

The board has determined that the issues in this case can be analyzed in two distinct fashions both arriving at the same conclusion. An outline of the two methods follows:

The first method can be called "the strict reading" analysis of the law.

Under RSA 72:23 I, the strict reading would determine that there has to be a provision relative to the payment of taxes in the lease or agreement for the property to be taxable. In the case before the board, the Agreement allows

Fall Mountain Regional School District

v.

Town of Langdon

Docket No.: 12282-92EX

Page 7

RSD occupancy of the property but contains no provision related to property taxes. Therefore, under the strict reading analysis the property would be exempt because the agreement did not include a tax provision. However, the analysis can not end with that conclusion because it would result in a private entity operating for profit to occupy public property and be exempt from taxes. This conclusion is contrary to the constitutional equal protection provisions which require similarly situated persons be treated similarly. Therefore, to conclude that the property is exempt would be an unconstitutional interpretation of the statutes and not appropriate. State v. Johnson, 134, N.H. 570 (1991); City of Claremont v. Truell, 126 N.H. 30 (1985).

The second method is to analyze the statute under the rules of construction which require statutes that could be viewed as having more than one meaning be interpreted so as to be constitutional. By this methodology, RSA 72:23 I must be interpreted to mean that governmental property is exempt unless it is occupied and used by a private taxable entity regardless of whether there was the inclusion of a property tax payment provision in the lease or agreement. The board concludes this second method is the appropriate analysis given its constitutional adherence.

Analysis

The board's analysis of the parties' arguments and the law can be best

Fall Mountain Regional School District

v.

Town of Langdon

Docket No.: 12282-92EX

Page 8

addressed by answering the three following questions raised by the facts of this case:

- 1) is the Agreement between the parties an agreement as envisioned under RSA 72:23 I;
- 2) does the Town have authority to assess the District for the tax since the Agreement does not include a provision relative to nonpayment of real estate taxes; and
- 3) if the owner of the property is the District and if the user and occupier of the property performs a function consistent with the exempt nature of the District, is the property exempt from taxation?

Question #1

Yes, this Agreement, while not of the exact format perhaps envisioned by the Legislature, is an agreement with similar terms to a lease so as to be considered an "agreement" under RSA 72:23 I.

It is clear from reading RSA 72:23 I that the legislature envisioned there be financial arrangements in the form of agreements that are not leases as traditionally known. The Agreement between the parties is indeed such an agreement. The Agreement creates a financial relationship between the parties with a potential benefit to both parties as is common in a lease. The buy-down of the lease during the first 80 months and the \$750 per month rental fee for the next 10 months are equivalent to consideration elements of a lease.

Fall Mountain Regional School District

v.

Town of Langdon

Docket No.: 12282-92EX

Page 9

Further the insurance and hold harmless requirement of RSD is very common in leases. In short the Agreement has all the financial considerations and respective rights and limitations that one would expect to find in a lease even though no money initially exchanged hands. These provisions create a lessor/lessee relationship similar to those that the court found existed in Town of Franconia v. Granite State Concessions, 122 N.H. 684, 686 (1982).

Question #2

Yes, the Town has the statutory and constitutional requirements to assess the tax.

In this case, unlike other cases decided by the New Hampshire Supreme Court -- CHEA Realty v. City of Nashua, 136 N.H. 695 (1993); Town of Franconia v. Granite State Concessions, 122 N.H. 684 (1982); Oscar G. Piper v. Meredith, 83 N.H. 107 (1927) -- the Agreement has no provision for the liability of property taxes. However, the board rules that this does not preclude the District from being liable for properly assessed real estate taxes. RSA 72:23 I requires any agreement entered into after July 1, 1979, include a clause relative to taxable liability and failure to pay the taxes. The Agreement's omission of such a clause does not extinguish the taxability of the Property, but does change the party liable for the taxes. Since RSD has not contractually consented to be taxed (RSA 73:10), the District is liable for the taxes.

Fall Mountain Regional School District

v.

Town of Langdon

Docket No.: 12282-92EX

Page 10

To find that there is no tax liability would allow innovative public/private partnerships to create private tax-exempt enterprises if located in public buildings while taxing similarly private businesses if located on private property. This situation is exactly what RSA 72:23 I was set up to avoid. RSA 72:23 I fulfills the constitutional requirement that similarly situated property be taxed similarly. Under New Hampshire Constitution pt. 1 art. 12, individuals are accorded the right of equal protection and reciprocal taxation. To determine there is no tax liability simply due to the omission of the tax liability clause in the agreement would run contrary to this equal protection provision that persons similarly situated are to be treated similarly. Opinion of the Justices, 126 N.H. 554 (1985); Gazzola v. Clements, 120 N.H. 25 (1980).

Fall Mountain Regional School District

v.

Town of Langdon

Docket No.: 12282-92EX

Page 11

Question #3

The board finds that the second story loft area of 600 square feet and partial utility of the first floor bathroom are used by the District and should be considered tax exempt. However, the 3,000 square feet of the first floor garage facility are used and occupied by RSD and should be taxed regardless of their related function to the District.

RSA 72:23 V-a reads:

The real estate and personal property owned by any organization described in paragraphs I, II, III, IV or V of this section and occupied and used by another organization described in said paragraphs, but only to the extent that such real estate and personal property would be exempt from taxation under said paragraphs if such property were owned by the organization occupying and using the property, as long as any rental fee and repairs, charged by the owner, are not in clear excess of fair rental value.

By reading section I and section V-a together, it can be inferred the legislature did not intend to exempt a private business occupying a governmentally owned property, even if it was using it for the purpose that a governmental unit was set up to perform. Under section V-a two factors must exist for the property to be exempt: 1) the entity occupying and using the property would have to qualify for an exemption under paragraphs I-V; and 2) the property would have to be used for purposes exempt under sections I-V.

In this case, the second factor exists as the use is an accessory function of the District, however, the first factor does not because the

Fall Mountain Regional School District

v.

Town of Langdon

Docket No.: 12282-92EX

Page 12

occupier, RSD, is not an organization that would be exempt under sections I-V.

The District argued that it made no sense that the District be ultimately liable for the taxes because it would create a circular payment arrangement where the District would pay the taxes out of school revenues which are largely derived from real estate taxes. While that argument may have merit if we were dealing with a district with the same physical bounds as the town in which the property is located, that is not the case in this situation. Again, we are dealing with how the pie is divided. In this case the Town of Langdon pays only approximately 6% of the total District taxes. Therefore any taxes that the District is liable for would be proportionately spread amongst the member towns of the District rather than the Town of Langdon bearing the brunt of this public/private partnership.

Conclusion

Therefore the board finds that 75% of the total assessed valuation of \$83,950 or \$62,950 is taxable to the District. The balance 25% of the assessed value is found by the board to be exempt to reflect the portion of the building both owned and used by the District. These percentages are derived from comparing the replacement cost value of the office area as listed on the assessment record card to the replacement costs of the garage area and adding approximately 2% to account for the District's access to the bathroom facilities in the garage portion of the facility.

Fall Mountain Regional School District

v.

Town of Langdon

Docket No.: 12282-92EX

Page 13

If the taxes have been paid, the amount paid on the value in excess of \$62,950 shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a.

Fall Mountain Regional School District

v.

Town of Langdon

Docket No.: 12282-92EX

Page 14

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

George Twigg, III, Chairman

Paul B. Franklin, Member

Michele E. LeBrun, Member

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Margaret H. Nelson, Esq., Attorney for Fall Mountain Regional School District, Taxpayer; and Chairman, Selectmen of Langdon.

Dated: August 13, 1993

0008

Valerie B. Lanigan, Clerk