

Alan Phenix

v.

Town of Tamworth

Docket No.: 17203-96PV

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" November 7, 1996 denial of the Taxpayer's March 1995 and March 1996 applications for abatement of taxes based on poverty and inability to pay. The Taxpayer owns a 5.09-acre lot with a single-family home assessed at \$98,600 (land \$60,000; buildings \$38,600) (the Property). For the reasons stated below, the appeal for abatement is denied.

The Taxpayer argued the assessment was excessive because:

- (1) the Taxpayer filed for and most likely qualified for a conservation easement yet the Town never responded to his request;
- (2) the Taxpayer's income is below poverty level, does not qualify for public assistance and it is unreasonable for him to refinance (has severe allergies; would not qualify for a loan);
- (3) the Taxpayer was divorced in 1993 which further contributed to his poverty level; and

(4) the Taxpayer's child is home schooled at the Taxpayer's expense; therefore, the school portion of the tax should not be assessed.

The Town argued the assessment was proper because:

(1) the reason for the increase in the land assessment was a result of the 1993 town-wide revaluation;

Page 2

Phenix v. Town of Tamworth

Docket No.: 17203-96PV

(2) many others in Town home school their children and the remaining taxpayers should not have to carry the school tax burden;

(3) the Taxpayer's decision to not find more work is not a reason for an abatement; and

(4) the Town has no private trust funds to offset the Taxpayer's needs.

Board's Rulings

This decision addresses three related issues: 1) whether the Taxpayer had timely filed an abatement application for 1996 and whether the board should assert jurisdiction for tax year 1995; 2) whether the Taxpayer should receive an abatement of taxes for tax years 1995 and 1996 based on poverty and inability to pay; and 3) whether his RSA 76:16-a I filing fee should be waived based on inability to pay.

In short, the board finds the Taxpayer did timely file for 1996 and the board asserts RSA 71-B:16 II jurisdiction for the 1995 tax year. The board finds no abatement of taxes is warranted due to inability to pay, and consequently, the board does not waive the Taxpayer's filing fee. The board will now address each one of these issues in greater detail.

Timely Filing

The board finds the Taxpayer did timely file for the 1996 tax year.

Based on the record and testimony, the Taxpayer had communicated with the Town several times prior to March 3, 1997 (the deadline for filing a 1996 abatement application). This is clearly evidenced by the Town's response of November 7, 1996 (misdated 1997) denying the request for abatement. The Town was well aware of the Taxpayer's request for an abatement due to inability to pay as early as March of 1995; thus, the Town is not prejudiced by the ruling of the Taxpayer being timely for 1996.

The board asserts RSA 71-B:16 II jurisdiction for the 1995 tax year. There was some confusion and misunderstanding between the Town and the Taxpayer as to the filing procedure and forms to be applicable for filing for an abatement due to inability to pay. The board recognizes that such requests

Page 3
Phenix v. Town of Tamworth
Docket No.: 17203-96PV

to municipal officials are not common and confusion as to how to handle such requests, while hopefully also not common, is understandable. The board also recognizes that taxpayers' arguments relative to being unable to pay taxes due to poverty is usually an accumulative issue of financial hardship which at some point prompts the request for an abatement. Consequently, in order to render a decision "as justice requires" given the cause of the appeal, the board asserts jurisdiction over the 1995 tax year.

Abatement Due to Inability To Pay

Pt. 1, art. 12th of the New Hampshire Constitution requires that each member of society contribute their share to paying for the government that provides the protection for society.

[Art.] 12th. [Protection and Taxation Reciprocal.] Every member of the community has the right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary. ***.

The courts have provided, however, that if a taxpayer can show they are unable to pay taxes due to lack of financial resources, a good cause exists for selectmen to abate taxes under RSA 76:16. See Ansara v. City of Nashua, 118 N.H. 879 (1978); Briggs' Petition, 29 N.H. 547 (1854).

Based on the facts in this case, the board finds the Taxpayer is not warranted an abatement due to inability to pay for a number of reasons.

The primary finding by the board is that the Taxpayer did not show an inability due to poverty to pay his taxes. The Taxpayer's financial inability is based on lifestyle choices he has made rather than an inability to earn an adequate income to pay the taxes. The Taxpayer has chosen to home school his child and to live a simple lifestyle raising much of his own food and earning income as a jeweler, carpenter/caretaker and musician. The Taxpayer specifically responded as to why he did not earn additional income by stating "there aren't any jobs that represent me".

Page 4
Phenix v. Town of Tamworth
Docket No.: 17203-96PV

The board finds the Taxpayer has the physical and mental abilities to earn additional income but simply chooses not to due to a commitment to a certain lifestyle. While the pursuit of a certain lifestyle is a right guaranteed him under the New Hampshire Constitution, Pt. 1, art. 2nd (natural right), it comes with the responsibility in Pt. 1, art. 12th of also contributing his share towards the government that provides the social structure that allows the pursuit of his lifestyle. To allow the Taxpayer to receive an abatement due to his lifestyle choice would also be an infringement on all other taxpayers by requiring them to pay a portion of his share of the

common good.

The board's analysis could end here because for there to be a good cause to abate, there has to be an inability to pay the taxes due to poverty. The board has found that does not exist; however, to further address some of the Taxpayer's other arguments, the board will proceed further.

Ansara Test

The Taxpayer's land was originally a gift and he constructed his house mostly with his own labor. Therefore, his investment in the Property was minimal relative to its value. His investment in the Property was approximately \$20,000 and the Town's assessment, when equalized, provides an indicated market value of \$85,740 (assessed value \$98,600 ÷ 1996 equalization ratio 1.15). In Ansara at 881 the court held that "plaintiffs who claim 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." The Taxpayer argued it would not be feasible to relocate because his ex-wife lives nearby which facilitates the home schooling and caregiving of their joint custody child. Further, he argued that refinancing would not be possible because of his low income (no bank would extend a loan). Lastly, he argued that he would not accept any public assistance because of the possible review by various social services coming into his home to see if he was using

Page 5

Phenix v. Town of Tamworth
Docket No.: 17203-96PV

the funds wisely. He argued that this review violated his right under the fourth amendment of the U.S. Constitution (searches and seizures).

The board finds that relocation and sale of the Property would be

feasible despite it being disruptive to the family. Disruption and inconvenience are not criteria in Ansara for determining the feasibility of selling and relocating. It would liquidate certain assets to then be available to pay his taxes. The board agrees that refinancing may be difficult given his choice of low income. But again, this is by choice as opposed to some innate inability to earn income. Lastly, his refusal to accept additional public assistance flies in the face of logic because that is exactly what he is choosing to do by requesting an abatement. While granting an abatement may not have as rigorous a review as associated with other types of public assistance, the net effect is the same in that public funds are being allocated to his benefit.

Thus, the board finds that Mr. Phenix has not met the requirements in Ansara for granting an abatement.

Home Schooling

One of the primary arguments the Taxpayer raised in requesting an abatement was that because of home schooling his child he should be relieved of the burden of paying the school portion of local taxes. A similar argument was addressed by the supreme court in Barksdale v. Epsom, 136 N.H. 511 (1992).

While certainly compensation for individuals home schooling is an issue being addressed in the political and legislative arenas, this currently is not a basis for granting an abatement. There are two other reasons the board is denying an abatement due to inability to pay. First, the Property is still jointly owned with his ex-wife. Not enough evidence was submitted relative to her income and ability to pay to determine that the owners of the Property had a joint inability to pay the taxes. Second, the board finds that some of the Taxpayer's actions were inconsistent relative to his claims of being unable to earn additional income. While claiming to not have adequate funds to pay

taxes, Mr. Phenix did pay an accountant in preparing his relatively simple income tax return, and has paid (and performed some work in lieu of payments) his attorney in representing him in this appeal after New Hampshire Legal Assistance declined to take his case. These actions appear inconsistent with his argument of not being able to earn additional income to pay his taxes.

Conservation Restriction Assessment

The Taxpayer argued that his land should qualify for a reduced assessment pursuant to RSA 79-B due to the conservation covenant agreement in place on the lot. While this may be an avenue for the Taxpayer to explore, no denial of a proper RSA 79-B:4 application for classifying his land in this manner occurred. Only after the proper application and review at the municipal level can an appeal on this issue occur under RSA 79-B:5.

Waiver of Filing Fee

TAX 501.02 provides for the waiver of fees when a party is financially unable to pay any fee.

Tax 501.02 Waiver of Fees.

When a Party is financially unable to pay any fee, that Party may File a request for waiver of the fee. Such request shall be accompanied with a financial affidavit, listing the Party's income and expenses. The Board shall grant the waiver when it concludes the Party cannot pay the fee due to financial hardship.

For all the reasons stated earlier in this decision, the board does not find a financial hardship exists to justify waiving the filing fee.

A motion for rehearing, reconsideration or clarification (collectively "rehearing motion") of this decision must be filed within thirty (30) 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 in law. Thus, new
Page 7

Phenix v. Town of Tamworth
Docket No.: 17203-96PV

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. Generally, if the board denies the rehearing motion, an appeal to the supreme court must be filed within thirty (30) days of the date on the board's denial.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Paula J. Werme, Esq., Counsel for Alan Phenix, Taxpayer; and Chairman, Selectmen of Tamworth.

Date: June 26, 1998

0006

Valerie B. Lanigan, Clerk

Alan Phenix

v.

Town of Tamworth

Docket No.: 17203-96PV

ORDER

This order responds to the Taxpayer's July 16, 1998 motion for reconsideration (Motion) which the board denies. The only issue raised in the Motion not specifically addressed in the board's June 26, 1998 decision (Decision) was the assertion of overall excessive assessment based on unfair valuation. A review of the record indicates that the assertion of unfair valuation was based on the property not receiving a conservation restriction assessment under RSA 79-B, the house being owner constructed and the increase in assessment due to the 1993 revaluation. The argument relative to RSA 79-B conservation restriction assessment was adequately addressed in the board's Decision.

The Taxpayer presented no specific evidence other than photographs to prove that the assessment of the building was inappropriate. The board notes the assessment-record card classified the building as a 2.5 (below average) and received depreciation for various unfinished aspects of the dwelling.

Lastly, increases from past assessments are not evidence that a taxpayer's property is disproportionately assessed compared to that of other properties in general in the taxing district in a given year. See Appeal of Sunapee, 126 N.H. 214 (1985). A greater percentage increase in an assessment following a town-wide reassessment is not a ground for an abatement because unequal percentage increases are inevitable following a reassessment.

Page 2

Phenix v. Town of Tamworth

Docket No.: 17203-96PV

Reassessments are implemented to remedy past inequities and adjustments will vary, both in absolute numbers and in percentages, from property to property.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Paula J. Werme, Esq., Counsel for Alan Phenix, Taxpayer; and Chairman, Selectmen of Tamworth.

Date: August 12, 1998

Valerie B. Lanigan, Clerk

0006

Alan Phenix

v.

Town of Tamworth

Docket No.: 17203-96PV

ORDER

As stated from the bench following the hearing on April 8, 1998, the board will delay issuing its decision until June 8, 1998 to allow the parties to discuss settlement.

The Taxpayer shall notify the board no later than June 8, 1998 whether or not a settlement has been reached and file the appropriate documents if one has been reached. If no settlement is reached, the board will issue its decision.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Page 2
Phenix v. Town of Tamworth
Docket No.: 17203-96PV

Certification

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Paula J. Werme, Esq., Counsel for Alan Phenix, Taxpayer; and Chairman, Selectmen of Tamworth.

Date: April 14, 1998

Valerie B. Lanigan, Clerk

0006