Marguerite F. Valliere

v.

Department of Revenue Administration

Docket No.: 18158-99HR

DECISION

The "Taxpayer" appeals, pursuant to RSA 198:54, the department of revenue administration's ("DRA") determination of the Taxpayer's 1999 property tax hardship relief application. For the reasons stated below, the appeal is remanded to the DRA for determination of the appropriate amount of property tax hardship relief.

While Chapter 338 (the statewide education property tax law) contains no specific provision as to who has the burden in this type of appeal, it is well settled that in civil actions the burden of proof is generally on the plaintiff to establish its case by a preponderance of the evidence. Dunlop v. Daigle, 122 N.H. 295 (1982); Jodoin v. Baroody, 195 N.H. 154 (1958); TAX 201.27(f).

The Taxpayer asked to be excused from attendance at the hearing, but submitted written

information indicating she was entitled to relief because:

(1) she has owned a home in Moultonborough, New Hampshire since 1957 and this is her homestead;

(2) she only moved to Montclair, Virginia temporarily to take care of the children of her divorced son but maintains the Moultonborough homestead as her domicile; and

(3) she, therefore, meets the residency requirement and is qualified for education property tax hardship relief.

The DRA argued the denial was proper because:

(1) the Taxpayer's residence is Virginia, not New Hampshire;

(2) the Taxpayer has the burden of showing that if she was temporarily away from New Hampshire she maintains the homestead in New Hampshire as her primary domicile;

(3) the Taxpayer's claim and her property tax bills show the Virginia address the contrary conclusion of her intention to change her residence from New Hampshire to Virginia;

(4) the Taxpayer's return-address rubber stamp shows the Virginia address; and

(5) while the residency requirement involves factual questions, no facts support the Taxpayer's claim that she was a resident of New Hampshire for the relevant period of time.

Board's Rulings

The singular issue on appeal is whether the Taxpayer in this case meets certain statutory residency requirements, including a specific definition of "homestead":

> **RSA 198:50, II.** "Homestead" means the dwelling owned by a claimant or, in the case of a multi-unit dwelling, the portion of the dwelling which is owned and used

> as the claimant's principal place of residence and the claimants's domicile for purposes of RSA 654:1. "Homestead" shall not include land and buildings taxed under RSA 79-A or land and buildings or the portion of land and buildings rented or used for commercial or industrial purposes. In this paragraph, the term "owned" includes a vendee in possession under a land contract and one or more joint tenants or tenants in common.

Further, RSA 654:1, referenced in RSA 198:50, II, reads as follows.

> **RSA 654:1 Legal Voter; Office Holder.**
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> I. Every inhabitant of the state, having a fixed and permanent established domicile, being a citizen of the United States, of the age provided for in Article 11 of Part First of the Constitution of New Hampshire, shall have a right at any meeting or election, to vote in the town, ward, or unincorporated place in which he is domiciled. The determinant of one's domicile is a question of factual physical presence incorporating an intention to reside for an indefinite period. This domicile is the voter's residence to which, upon temporary absence, he has the intention of returning. This domicile is that place in which he dwells on a continuing basis for a significant portion of each year.

The education property tax hardship relief statute requires residence in the homestead for a one-year period, except for claimants on active duty in the United States armed forces or claimants who "are temporarily away from such homestead but maintain the homestead as a primary domicile." RSA 198:51, III (b). Since there is no question that the Taxpayer has been in Virginia to take care of her divorced son's children, the factual issue to be determined is whether she is 'temporarily away but maintain[s] the [New Hampshire] homestead as a primary domicile.' To help resolve this issue, the board posed 5 additional questions as to the Taxpayer in its order dated July 27, 2000.

The Taxpayer's responses indicated:

1) in 1998 and 1999 she was registered for voting purposes in Moultonborough and

intends to vote by absentee ballot in this fall's election;

2) her sister has been staying in the home without paying rent and is looking after the maintenance of the home and the contents owned by the Taxpayer; and

3) her personal legal documents have been maintained in a safe deposit box in a bank in New Hampshire but were recently transferred to a deposit box jointly owned with another son living in Maine.

The board concludes from these answers that the Taxpayer's actions generally support her intention to maintain the homestead in New Hampshire as her primary domicile. While her sister occupies the Property, the Taxpayer's household effects remain in the house and her sister's belongings are mainly stored in the garage. The Taxpayer has maintained her status as a legal voter in Moultonborough and plans on exercising that right through absentee ballot in 2000. It certainly would appear that if the Taxpayer intended to establish residency at her son's home in Virginia she would change her voter registration and the location of personal legal documents to facilitate long-term residency in Virginia.

In short, looking at the totality of the facts, the board finds she has retained a physical presence in Moultonborough with many of her personal effects with the intent of returning to Moultonborough after some temporary absence to help her son in Virginia. While the facts are somewhat mixed on this question, the board finds the Taxpayer has met her burden of proof by a preponderance of the evidence that she meets the residency requirement contained in the statute. See RSA 198:51, III (b) and RSA 198:50, II.

Therefore, the board remands the case to the DRA for determination of the exact amount of the education property tax hardship relief which the Taxpayer is eligible to receive. The DRA shall make such determination within 30 days of the date of this order, copying the board with its notice to the Taxpayer. The Taxpayer shall, upon receipt of the DRA's ruling, notify this board in writing whether it is still necessary to proceed further with the appeal.

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 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

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Paul B. Franklin, Chairman

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Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

CERTIFICATION

I hereby certify that a copy of the foregoing decision has this date been mailed, postage prepaid, to Marguerite F. Valliere, Taxpayer; and Kathleen J. Sher, Esq., Counsel for the Department of Revenue Administration.

Date: August 21, 2000

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Lynn M. Wheeler, Clerk

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