

Ballinger Properties, LLC, et al.

v.

Town of Londonderry

Docket No.: 18208-99GT

ORDER

The board held a limited hearing on March 5, 2003 with respect to the Motion to Compel (“Motion”) filed by the “Taxpayer” and the response (“Objection”) filed by the “Town.” The Motion seeks to require the Town to pay interest on one component of an “overpayment” collected by the Town pertaining to a tax year 1999 excavation activity tax. Acknowledging the “overpayment,” the Town remitted the principal sum, plus accrued interest on the principal and the associated RSA 76:13 interest paid by the Taxpayer, but objects to paying what it calls ‘interest on interest.’¹ The board grants the Motion for the reasons indicated below.

¹ The parties appear to agree the sum in dispute is relatively nominal in amount (“less than \$1,000”). This sum consists of accrued interest (at 6 percent per annum) on the interest paid by the Taxpayer (at 12 percent per annum) when it tendered the tax assessed somewhat later than the due date.

Under RSA 76:17-a, a taxpayer who has been overassessed or has paid an improper tax, in this case an excavation activity tax later determined to be unconstitutional,² is entitled to “an abatement of taxes” and an “award [of] interest on the amount of taxes abated at the rate of 6 percent per annum from the date the taxes were paid to the date of the refund.” In this case, the undisputed facts are that the Taxpayer paid the excavation activity tax late, including the interest amount due on late payment under RSA 76:13 (at “12 percent per annum”).

In responding to the Motion, the Town argues: (i) it is only obligated to pay interest on the principal amount of taxes assessed and collected; (ii) if for some reason taxes are paid late, and interest is collected for late payment, the Town should not be required to pay “interest on interest” when the tax is abated. These arguments fall short of the mark.

Of direct application to the issues raised is TAX 202.08. This regulation, in effect since 1993, clearly sets forth the Town’s obligation to add “RSA 76:13 interest” (6 percent per annum) “on both the excess taxes and interest” previously paid by the Taxpayer. See TAX 202.08(b). (Emphasis added). On its face, TAX 202.08 (b) applies “when the board grants an abatement

² The excavation activity tax was enacted by the Legislature in 1997. See former RSA Ch. 72-B (Excavation Tax and Excavation Activity Tax). The taxpayer, along with another party from another town, successfully challenged its constitutionality in Nash Family Investment Properties v. Town of Hudson, 147 N.H. 233, 237 (2001) (“[o]n its face, the statute is unconstitutional . . .”). The Legislature proceeded to repeal the excavation activity tax provisions in 2002. See RSA Ch. 72-B (Excavation Tax) (Supp. 2002). As a result, the Town was obligated to refund the excavation activity tax collected from the Taxpayer.

and the taxpayer has paid the tax and/or any interest.” The board has consistently interpreted this regulation to require a municipality’s refund of taxes paid to include not only the principal and any late-payment interest, but also accrued interest on both these components.

The Town admitted its practice has been to avoid this requirement. The Town’s attorney questioned the board’s authority to enact this regulation and further argued that even if the regulation is valid, the board’s interpretation and application cannot be sustained. The board will address these arguments by examining in some detail the applicable statutes and case law.

While RSA 76:17-a explicitly refers to “taxes abated” and “taxes” in general, but does not specifically mention interest paid on late taxes, the board finds this omission is without operative significance because of other statutory provisions and a plain reading of their meaning.³

Under RSA 76:13, taxpayers have the option of not paying taxes by their due date, provided they then pay interest on the unpaid balance (at twice the rate prescribed in RSA 76:17-a); it further provides this interest is computed and collected from the date the taxes are due

³ The relevant principles of statutory interpretation are well established. Most recently, the supreme court in Rensburg v. Docusearch, Inc., ___ N.H. ___, 2003 WL 346260 (2003), stated:

“On questions of statutory interpretation, this court is the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole.’ Franklin Lodge of Elks v. Marcoux, 147 N.H. 95, 96, 782 A.2d 907 (2001) (quotation omitted). We begin by considering the plain meaning of the words of the statute. Snow v. American Morgan Horse Assoc., 141 N.H. 467, 471, 686 A.2d 1168 (1996). In conducting our analysis ‘we will focus on the statute as a whole, not on isolated words or phrases.’ Id. ‘[W]e will not consider what the legislature might have said or add words that the legislature did not include.’ Minuteman, LLC v. Microsoft Corp., 147 N.H. 634, 636, 795 A.2d 833 (2002) (quotation omitted).”

“with the taxes as incident thereto.” The board reads the “incident thereto” language in RSA 76:13 to mean the late payment interest becomes a part of the tax for all intents and purposes.

This reading is supported by the tax lien statutes enacted by the Legislature,⁴ as well as by long-standing case law.

In Western Union Tel. Co. v. State, 64 N.H. 265 (1887), a case cited by the board in TAX 202.08, the supreme court observed that interest on a tax not paid by the due date is “a part of the tax to be collected.” The tax at issue in Western Union contained the same “incident thereto” language (regarding interest) noted in RSA 76:13. See also Winnipiseogee Lake Cotton & Woolen Manufacturing Co. v. Gilford, 64 N.H. 514, 517 (1888) (“interest is as much a part of the defendant’s claim as the tax itself”).

Also relevant to excavation activity tax appeals (see former RSA 72-B:12-a) is RSA 76:16-a. This statute authorizes the board to make such orders “as justice requires.” Requiring the municipality to pay interest on the entire amount collected from the Taxpayer, including interest collected on late payment of the tax, is more just and equitable than the Town’s position, which attempts to avoid paying interest on anything other than the principal amount of tax collected. The board finds merit in the Taxpayer’s position that it can only be made “whole” if interest is awarded on the late-payment interest associated with the tax.

In Kaemmerling v. State, 81 N.H. 405 (1924), the supreme court first reviewed with

⁴ See, e.g., RSA 80:64 (interest, as well as the principal amount of the tax and other chargeable fees and costs, becomes part of the “total amount of each tax lien”); and RSA 80:69 (Redemption).

approval the holding in Western Union, supra, and then noted the statutory power to make such orders as justice requires “has been construed to include the allowance of interest at the normal rate on taxes paid and abated. Boston & M. Railroad v. State, 63 N.H. 571, 4 A. 571; Amoskeag Mfg. Co. v. Manchester, 70 N.H. 336, 47 A. 74.” Id. at 407. In Kaemmerling, the tax statute at issue was silent on the issue of whether the taxpayer was entitled to receive interest.

City of Franklin v. Coleman Bros. Corp., 152 F.2d 527 (1st Cir. 1945) is also on point and further helps rebut the Town’s arguments regarding the board’s authority and interpretation of TAX 208. In that case, a taxpayer was successful in challenging a tax collected by a New Hampshire municipality in a federal diversity action. The First Circuit, applying New Hampshire law, held that the plaintiff was “entitled to interest on the taxes it paid,” even in the absence of a statute authorizing the award of interest. Id. at 531. The court went on to review the import of prior New Hampshire decisions, as follows:

“[I]n Boston & Maine R.R. v. State, 63 N.H. 571, 4 A.571, an abatement proceeding, the Supreme Court allowed interest at six per cent, R.L. Ch. 367 Sec. 1 on taxes paid under protest and recovered back, and this in spite of lack of statutory authority therefor, on the ground that it would be unfair and inequitable to do otherwise. It said (63 N.H. at page 573, A. at page 572):

‘It is not just that a tax-payer should be compelled to bear more than his share of the public expense. He would bear more than his share i[f] he lost, and the public gained, a year’s use of an excess by him paid. It could not have been the intention [of the Legislature] to impose an unjust loss of a year’s interest. Justice requires that there should be an equitable adjustment of that loss. In actions at common law, involving like questions, interest would be allowed as part of the damages, and we think it should be in this case.’

“To the same effect, see Amoskeag Manufacturing Co. v. Manchester, 70 N.H. 336, 348, 47. A. 74.”

Id.

Although not cited by the Taxpayer, this long line of authority supports the granting of

the Motion and the board's interpretation and application of TAX 208. To rule otherwise would perpetuate a double burden on taxpayers. First, they are charged interest on taxes not paid by the due date, even if those taxes are not proper. Then, if an abatement is granted, they are not compensated for the loss of use of any late payment interest included with the tax paid.

In the board's view, the Legislature did not intend to impose such a penalty on taxpayers who could not pay their taxes when due, but simply wanted to establish a reasonable mechanism for compensating the municipality (with interest) for the time value of money if payment was delayed beyond the tax due date for taxes properly assessed. If it is later determined that all or part of a tax should be "abated" – in this case because of constitutional infirmities in the excavation activity tax statute, see fn. 2 *supra* -- then taxpayers should likewise be compensated for the time value of money previously tendered to the municipality. Cf. fn. 5 *supra*. This reasoning is supported by the statutes and case law quoted above. If the Legislature intended a different result, it could have modified the relevant statutes at any time since the Western Union decision in 1887.

For all of these reasons, the Motion is granted. The Town is ordered to pay the Taxpayer, within 10 days, interest at six percent per annum on the amount previously paid by the Taxpayer as late-payment interest with respect to the tax at issue in this case. To ensure the Town complies with the requirements of TAX 208 stated in this Order when dealing with all other taxpayers, the board is forwarding a copy of this order to the Department of Revenue Administration ("DRA"). The DRA is authorized to review the Town's abatement procedures as part of its 2005 certification review of the Town. See RSA 21-J:11-a, I: "[t]he commissioner shall certify that the assessments of a municipality comply with the provisions of RSA 75:1 when the commissioner determines that: . . . (c) [e]xemptions, credit, and abatement procedures

substantially comply with applicable statutes and rules;” (Emphasis added.)

A motion for rehearing, reconsideration or clarification (collectively “rehearing motion”) of this Order must be filed within thirty (30) days of the clerk’s date below, not the date this Order 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 Order 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

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing order has been mailed this date, postage prepaid, to: John F. Bisson, Esq., Wenger & Cronin, P.C., 722 Chestnut Street, Manchester, New Hampshire, 03104, counsel for the Taxpayer; Robert Upton II, Esq., Upton & Hatfield, Post

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Office Box 1090, Concord, New Hampshire, 03302, counsel for the Town; Karen Marchant, Assessor of Londonderry, 50 Nashua Road - Suite 100, Londonderry, New Hampshire, 03053; and Director Robert M. Boley, Community Services Division, Department of Revenue Administration.

Date: April 9, 2003

Anne M. Bourque, Deputy Clerk