

Milford-Bennington Railroad Co., Inc.

v.

Department of Revenue Administration

Docket Nos.: 19937-03RR and 20585-04RR

DECISION

The “Taxpayer” appeals the railroad tax assessed under RSA ch. 82 of \$2,093.90 for tax year 2003 and \$1,740.71 for tax year 2004. RSA 82:2 requires this annual tax to be levied by applying the “average rate of taxation” to the “actual value of [each railroad’s] property and estate” as of April 1 of each year.

The board has the authority to hear and decide railroad tax appeals. RSA 82:17. On July 28, 2006, the board issued a Preliminary Decision, summarizing the parties’ respective positions and making certain findings with respect to the Taxpayer’s arguments for a full abatement for both tax years. It also directed the State of New Hampshire Department of Revenue Administration (“DRA”) to prepare and submit revised and corrected assessments for tax years 2003 and 2004 within thirty (30) days in response to several points made in the Preliminary Decision and gave the Taxpayer thirty (30) days to submit written comments to the board in response to the DRA’s submission, noting and discussing in sufficient detail any proposed modifications or corrections. The board stated it would consider these respective submissions before making a final decision regarding the proper assessments for each tax year under appeal.

Some delays occurred in the submission of this information. The DRA requested and received an extension of time and then filed separate “revised and corrected tax assessments” on September 27, 2006 for each tax year (2003 and 2004), prepared by its Utility Appraiser, Scott Dickman.

The Taxpayer requested and received an extension of time and then filed its written comments on November 24, 2006 in the form of a “valuation review and commentary” by George T. O’Brien. As noted further below, Mr. O’Brien’s analysis challenges Mr. Dickman’s value conclusion for tax year 2004 only, but not tax year 2003.

Before focusing on these analyses in more detail to resolve the issue of a proper assessment for each tax year, the board incorporates by reference and briefly restates the pertinent findings contained in the Preliminary Decision.

First, the board finds the Taxpayer is subject to the RSA ch. 82 railroad tax assessed and collected by the state. Contrary to the Taxpayer’s arguments, the board finds the “user fees” paid to the state under the “Operating Agreement” (a percentage of revenues paid for using state owned real estate and trackage) are a separate and distinct fiscal obligation, not one “in lieu of” the railroad tax, an obligation the Taxpayer must also meet.

Second, RSA 82:7, as amended in 1999, confirms that “railroads operating on state-owned property” are subject to this separate state tax. This statute provides “the determination of value shall not include the value of the trackage and real estate owned by the state, but shall be based upon the value of the railroad operating agreement as determined by the user fees paid...”

Third, while RSA 82:7, as amended, does reference in its last sentence the “user fees” paid by “railroads operating on state-owned property,” it states they are to be used to determine the value of the operating agreement (instead of an alternative assessment based on “the value of the trackage and real estate owned by the state”). By referring to the “value of the railroad

operating agreement” in this manner, the legislature recognized it to be an asset subject to assessment of the tax on each railroad, which must be levied “upon the actual value of its property and estate.” Stated differently, the Operating Agreement confers a franchise on the railroad which the legislature has recognized has a value subject to taxation. All other things being equal, the lower the amount of user fees paid under the Operating Agreement, the higher will be its value to the railroad, as reflected in any income (“net receipts,” discussed below) it may generate (revenues augmented by the Operating Agreement less expenses, which include the user fees).

Fourth, the board reviewed the statutory framework to conclude use of an income approach is appropriate in these appeals. In particular, RSA 82:7 directs the DRA to consider the “net receipts” of the company subject to the tax, where “the market value of the company’s stocks and bonds... cannot be ascertained for want of actual sales, or for any other reason.” The parties are in agreement that the market value of the Taxpayer’s stocks and bonds cannot be directly ascertained because the company is closely held and its securities are not publicly traded (no “actual sales” of similar companies have been identified).

Net receipts are defined by this statute to mean: “the difference between the gross earnings, whether by lease or by operation, and the operating expenses and taxes of the preceding year, capitalized at such percentage as appears to be equitable.” This suggests use of an income approach is appropriate to assess the railroad tax in these appeals.

Mr. Dickman used the income approach and did not establish a value based upon the cost approach, the “stock and debt approach” or the “sales or market comparison approach.” Mr. O’Brien reviewed Mr. Dickman’s work and also applied only an income approach. These experts also have only minor differences regarding the historical revenue and expense information used in their analyses.

The following is a comparative grid based upon the figures used by each expert:

	DRA (Dickman)	Taxpayer (O'Brien)	Difference
Gross Earnings (Gross Income)			
(Fiscal Year Ending July 31, ____)			
1999	\$247,384	*	n/a
2000	\$273,246	\$273,246	\$0
2001	\$252,674	\$252,674	\$0
2002	\$287,523	\$287,523	\$0
2003	\$251,327	\$250,327	\$1,000
2004	**	\$219,034	n/a
Operating Expenses & Taxes (Expenses)			
(Fiscal Year Ending July 31, ____)			
1999	\$236,895	*	n/a
2000	\$251,862	\$251,862	\$0
2001	\$211,568	\$211,568	\$0
2002	\$230,180	\$230,180	\$0
2003	\$254,718	\$253,718	\$1,000
2004	**	\$285,934	n/a
Net Receipts (Net Operating Income)			
(Fiscal Year Ending July 31, ____)			
1999	\$10,489	*	n/a
2000	\$21,384	\$21,384	\$0
2001	\$41,106	\$41,106	\$0
2002	\$57,343	\$57,343	\$0
2003	-\$3,391	-\$3,391	\$0
2004	**	-\$66,900	n/a
Notes:			
1. The Taxpayer's fiscal year ends on July 31 of each year.			
2. The railroad tax is assessed annually as of April 1 of each year under RSA 82:2.			
3. Mr. O'Brien did not provide or use data for 1999, denoted by a " * ".			
4. Mr. Dickman states the Taxpayer did not provide "the required DRA forms or an IRS tax return for tax year 2003."			
5. The nominal \$1,000 difference is not material when net receipts are calculated, because it relates to whether certain other income is included in gross receipts or is treated as an offset to operating expenses for fiscal year 2003.			
Sources: Reports submitted by Scott Dickman and George T. O'Brien.			

Board's Rulings

For the reasons explained below, the board finds the railroad tax levied for tax year 2003 (\$2,093.90) is not excessive and no abatement is warranted, but the railroad tax for tax year 2004 should be zero (resulting in an abatement of \$1,740.71). Therefore, the Taxpayer's tax year 2003 appeal is denied and its tax year 2004 appeal is granted.

It is noteworthy the Taxpayer's expert (Mr. O'Brien) did not submit any analysis to challenge the DRA's submission for tax year 2003, but did do so only for tax year 2004. Whether this was intentional or an oversight is not clear, but it does provide an independent ground for finding the Taxpayer failed to meet its burden of proving overassessment for that year, separate and in addition to the primary reason noted below.

While both parties' experts used the income approach, they did so by first normalizing the income stream in different ways from the multiple years of actual financial information shown in the grid, either by looking at a historical "trend" (Dickman) or by devising a "weighted" average (O'Brien). While normalizing techniques are commonly employed in other types of appraisals to derive "projected" or "sustainable" income and expense figures, such as those performed under RSA 75:1 for the property tax, the board finds language in the railroad tax statute requires focus on the railroad's financial information for the preceding year only, not for multiple years.

More specifically, this conclusion is mandated by the wording used by the legislature in RSA 82:7 which the board has highlighted below. The DRA is directed in the second sentence of this statute to consider the "gross earnings..., and the operating expenses and taxes of the preceding year" if the market value of the stocks and bonds of the company cannot be ascertained "for want of actual sales". For a railroad where such market value is ascertainable, the first sentence of this statute directs the DRA to consider "the fair average market value of the

stocks and bonds for one year prior to April 1 preceding the assessment.” (Emphasis added to both sentences.) This recurring statutory language persuades the board the legislature intended the DRA to consider only the available financials for the year preceding the assessment date.

As of the April 1, 2003 assessment date, the Taxpayer’s net receipts of \$57,343 for the fiscal year ending July 31, 2002 should have been considered. Whether these net receipts are capitalized at the higher rate estimated by Mr. O’Brien on behalf of the Taxpayer (26.11% computed only for 2004) or the lower rate estimated by Mr. Dickman on behalf of the DRA (15.8215% computed for 2003), the resulting values (approximately \$219,600 and \$362,400, respectively) are each much higher than the value originally computed by the DRA as the basis for the tax year 2003 assessment (\$150,000¹). Thus, the Taxpayer did not sustain its burden of proving any abatement is warranted for tax year 2003, even if the multiple year method actually employed by the DRA is in conflict with the wording of the statute.

By the same token, as of April 1, 2004 assessment date, the Taxpayer’s net receipts for the fiscal year ending July 31, 2003 should have been considered. In that year, the parties do not appear to dispute the Taxpayer had negative net receipts (-\$3,391), since its expenses exceeded its earnings. The DRA made no attempt to adjust or restate this figure, but instead accepted it at face value. A zero assessment for tax year 2004 is therefore indicated, irrespective of whether the Taxpayer’s or the DRA’s capitalization rate is employed. The board therefore finds the Taxpayer is entitled to a complete abatement (full refund) for tax year 2004. The basis for this fluctuation in the Taxpayer’s tax liability from a positive amount to zero may be surprising at

¹ The DRA used this \$150,000 market value, multiplied it by an average level of assessment (78.6%) and an average rate of taxation (\$17.76 per \$1,000 of property valuation) to compute the tax assessed of \$2,093.90 for tax year 2003. In these appeals, the Taxpayer has not challenged the level or rate of taxation calculations, but only the market value.

first glance, but it comports with the legislature's directive for the DRA to consider the actual operations of the railroad in each preceding year to determine the amount of annual tax due. The variation is also logically explained in the O'Brien analysis as resulting from weather impacted start and end dates in the preceding fiscal year of the seasonal hauling of aggregate material.

Consequently, the board is able to decide these appeals without resolving the conflicting arguments presented regarding the capitalization rate. Therefore, those arguments need not be addressed here.

If the Taxpayer has paid the railroad tax for tax year 2004, it is entitled to a refund from the state treasurer. See RSA 82:20 (Notice of Tax; Payments; Declaration of Estimated Tax) and RSA 82:22 (Final Adjustment, Refund).

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(f). 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. See RSA 82:18 and 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

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: William R. Drescher, Esq., Drescher & Dokmo, P.A., PO Box 7483, Milford, NH 03055, counsel for the Taxpayer; Michael R. Williams, Esq., State of New Hampshire Department of Revenue Administration, 45 Chenell Drive, Concord, NH 03301, counsel for DRA; John F. Hayes, Esq., State of New Hampshire Department of Revenue Administration, 45 Chenell Drive, Concord, NH 03301, counsel for DRA; and Stephen G. LaBonte, Esq., State of New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301-6397, Interested Party.

Date: 1/23/07

Anne M. Stelmach, Clerk