Colin and Mary Robinson

v.

Town of Lyme

Docket No.: 19983-03LC

DECISION

The "Taxpayers" appeal, pursuant to RSA 79-A:10, the "Town's" October 20, 2003 land-use-change tax ("LUCT") of $6,730 on a vacant 5.92-acre lot (the "Property"). The LUCT was based on a $67,300 full-value assessment. For the reasons stated below, the appeal for abatement is denied.

The Taxpayers have the burden of showing, by a preponderance of the evidence, the Town's LUCT assessment was erroneous or excessive. See TAX 205.07. We find the Taxpayers failed to carry this burden.

The Taxpayers argued the LUCT was erroneous or excessive because:

(1) the Taxpayers purchased the Property on May 14, 2001;

(2) the Town was noticed of the Property's transfer on June 11, 2001, when the Town received and date stamped a copy of the Taxpayers' deed from the Grafton County Registry of Deeds (Taxpayer Exhibit No. 2);

(3) the Town mailed a LUCT bill to the Taxpayers on October 20, 2003, well beyond the 12 month time frame prescribed by RSA 79-A:7, II (c); and

(4) the Town should abate the entire amount of the LUCT due to noncompliance with the statute.

The Town argued the LUCT was proper because:

(1) the receipt of the deed by the Town in June, 2001 did not constitute actual discovery that the LUCT was due and payable;

(2) the Town did not "discover" the Property was no longer in current use until May, 2003 when the Town was reviewing all the properties owned by the Bailey estate, with one of the Bailey estates heirs;

(3) the Taxpayers never contacted the Town to advise it they purchased the Property and it no longer qualified for current use assessment; and

(4) the LUCT bill was sent to the Taxpayers in October, 2003, within 12 months of the Town's actual discovery of the Property's transfer.

Board's Rulings

Based on the evidence, the board finds the Taxpayers failed to prove the LUCT assessment was untimely.

The Taxpayers contend the Town was not in compliance with the statute and inappropriately assessed the Taxpayers a LUCT because the LUCT bill was mailed more than 12 months after the Property transferred and no longer qualified for current use assessment due to its size.

RSA 79-A:7, II (c) reads in pertinent part:

> Upon receipt of the land use change tax warrant and the prescribed forms, the tax collector shall mail the duplicate copy of the tax bill to the owner responsible for the tax as the notice thereof. Such bill shall be mailed, at the latest, within 12 months of the date upon which the local assessing officials receive written notice of the change of use from the landowner or his agent, or within 12 months of the date the local assessing officials actually discover that the land use change tax is due and payable.

Taxpayers' Position

The Taxpayers contend the Town was given "written notice" of the Property's change of use when the Town was sent a copy of the deed from the county registry denoting the Property's transfer. The Taxpayers assert the deed served the Town with sufficient notice the Property had changed in ownership, and, when coupled with the fact the Property consists of less than six acres, should no longer have qualified for current-use assessment due to size. Further, the Taxpayers testified the fact the Town stamped the copy of the deed with a June 11th date and made some other notations on it relative to the Town's practice of processing a deed after it is received from the registry is supporting evidence the Town received the deed and should have started the clock ticking for the Town to meet its statutory 12 month deadline to issue the LUCT. Because the Town did not assess the LUCT within 12 months of the Town's receipt of the deed from the registry, the Taxpayers maintain the Town is barred from collecting the LUCT.

Town's Position

The Town stated it was its practice to assemble in a folder all deeds received from the registry during the course of the year. Shortly after April 1 of each year the Town sends a copy of each of the deeds to the company that maintains the Town's tax maps. No review is done at

the local level to see if any LUCT bills are warranted for the properties that have transferred prior to them being sent to the tax map company. The Taxpayers' deed was signed May 14, 2001 and recorded at the Grafton County Registry of Deeds on May 18, 2001. The deed was forwarded to the Town and stamped as received on June 11, 2001. Included with the stamp are some interoffice codes that apparently are used to maintain the file. Further, the Town testified that during the relevant time period for issuing the LUCT bill in this appeal there were some unfortunate health-related circumstances involving several of the Town office personnel including serious illnesses and the untimely death of one of the Town's employees. These circumstances resulted in several Town employees filling in and doing jobs they had not been trained to complete. The Town acknowledges it should have been more diligent in its review of the deeds coming from the registry in order to determine if any transactions resulted in properties no longer qualifying for current use, and therefore, being subject to a LUCT assessment. In this case, the Town testified it did not "discover" the Property's change in use until it was assisting the heirs of the grantor in identifying the residual parcels owned by the grantor's estate. The Town testified it was during this review in May 2003 the Property was discovered to have transferred and that a LUCT should be assessed.

Board's Findings

The board finds the Town did not "discover" the land had changed in use until May 2003 and the Town's October 20, 2003 LUCT bill was mailed to the Taxpayers within the 12 month statutory time frame. The board's opinion is based on a thorough review of the evidence and testimony including the following factors: 1) the Town did not change the names of the

Property's owners on the assessment-record card after receiving the deed from the registry in 2001 although the Town did send a courtesy copy of the tax bill to the Taxpayers in 2002; 2) the Town assessor, Ms. Diana Calder, created a new assessment-record card on June 27, 2001 listing the Property as still part of the Bailey estate; 3) the Town never sent an ad valorem tax bill to the Taxpayers in 2002, further evidence of the Town not "discovering" until later the change in ownership; and 4) the fact the two different printings of the Property's assessment-record cards, one with and one without the "$NAL" notation, the Town's acronym for signifying the sale was not an "arm's-length transaction," bracket the time frame when the Town fills out the data sheet qualifying or certifying sales to fulfill the Town's RSA 21-J:9-a, V reporting obligation to the department of revenue administration in the fall of each tax year.

The board finds the previously outlined sequence of events, when considered in conjunction with the unfortunate death of one Town employee along with the serious illnesses of others, indicates that while the ownership information was available for the Town to perform a timely review, the Town performed no such review, and, therefore, the actual discovery of the change in use did not occur until May 2003.

At the end of the hearing, it was clear to the board, and the Town acknowledged, that a more timely and thorough review of all deeds as they are received from the county registry needs to be performed to ensure the properties that should be assessed a LUCT are discovered. Further, and as part of a more timely review, the Town's practice of holding deeds for the tax map company's review should be revisited and modified to allow for the more timely, initial review at the Town offices.

The Taxpayers argued the board's rulings in the Susan D. Brothers v. Town of Rumney case [(BTLA Docket No.: 19414-02LC)(July 23, 2003)] are applicable to the instant case as timely mailing of the LUCT bill was the controlling factor. The board finds the facts in the Brothers case are distinguishable from the Taxpayers' situation. In Brothers, a building permit initially triggered the assessment of a LUCT, but the Town at that time did not assess a LUCT on the lengthy driveway accessing the building site. The Town of Rumney should have (but did not) remove the driveway at the same time the building site was removed from current use. Nine years later, however, as part of a reassessment review, the Town attempted to assess the "missed" driveway area. In that case, the board found the discovery of the change in use occurred with the initial building permit and the Town's nine year late correction of its methodology was barred by the 12 month provision of RSA 79-A:7, II (c). Another case involving the timely mailing of a LUCT bill is Michael and Michelle Magee v. Town of Ossipee [(BTLA Docket No.: 19992-03LC and Docket No.: 20001-03LC)(February 25, 2005)]. The taxpayers in Magee asked, on more than one occasion, to pay the LUCT bill but were told by the Town of Ossipee a LUCT bill would not be issued until the construction was complete. At the Magee hearing, the Town of Ossipee admitted it waited approximately 14 months after having knowledge of the change in use before mailing the LUCT bill. The facts in Brothers and Magee are clearly different from those in this appeal.

It was evident from the Taxpayers' testimony they knew they would be subject to a LUCT. They were knowledgeable of basic current use regulations because they owned property in current use in another town in the state. Further, they were given a courtesy copy of the

Property's tax bill in 2002. The board finds the Taxpayers knew they were subject to a LUCT but did not notify the Town. In addition, not only were they liable for a LUCT but the annual property tax for 2002 should have been based on the ad valorem value rather than the current use value. As knowledgeable citizens,[1] the Taxpayers should have recognized their obligation to pay both the LUCT bill and the 2002 ad valorem assessment. The board finds this is some evidence of bad faith on the part of the Taxpayers as they knew they were not paying their fair share of the tax burden although they were knowledgeable of their obligations. The board finds the Taxpayers' testimony on this point to be disingenuous.

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. 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.

[1] Mr. Robinson is an attorney licensed to practice in New Hampshire.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

_____
Paul B. Franklin, Chairman

_____
Michele E. LeBrun, Member

_____
Douglas S. Ricard, Member

Addendum A

The "Requests" received from the Taxpayer are replicated below, in the form submitted and without any typographical corrections or other changes. The board's responses are in bold face. With respect to the Requests, "neither granted nor denied" generally means one of the following:

a. the Request contained multiple requests for which a consistent response could not be given;

b. the Request contained words, especially adjectives or adverbs, that made the request so broad or specific that the request could not be granted or denied;

c. the Request contained matters not in evidence or not sufficiently supported to grant or deny;

d. the Request was irrelevant; or

e. the Request is specifically addressed in the Decision.

Taxpayer

1. The Appellants took title to the parcel at issue in this matter by warranty deed dated May14, 2001, and recorded in the Grafton County Registry of Deeds on May 18, 2001, in Book 2539, Page 210. See, Exhibit 1.

Granted.

2. The Town received a copy of the deed into Appellants from the Register of Deeds on June 11, 2001, date-stamped and made other marks on the copy, and placed it in a new tax card file. See, Exhibit 2.

Neither granted nor denied.

3. The first sentence of the description of the parcel contained in the deed states, "The Property is shown as Lot 1.1 comprising 5.92 acres..."

Granted.

4. Lyme Tax map 402 was revised by Cartographic Associates, Inc., effective April 1, 2002, and shows parcel at issue in this matter as lot 1.2. See, Exhibit 3.

Granted.

5. The parcel from which the parcel at issue in this matter was subdivided is shown on Lyme Tax map 402 as Lot 1.1.

Granted.

6. The Town cannot locate the original or a copy of the original current use application for the parcel from which the parcel at issue in this matter was subdivided, but it appears that one was submitted by the owner thereof, Morton B. Bailey.

Granted.

7. The parcel from which the parcel at issue in this matter was subdivided was approved for current use assessment in approximately July, 1980, and was shown at that time as lot 42 on map 9. See, Exhibits 4 & 5.

Granted.

8. There is no record of how the parcel from which the parcel at issue in this matter was subdivided was classified under N.H. Code Admin. Rules 304.01 (Acreage Requirement).

Denied.

9. The Town created a new tax card for the parcel at issue in this matter, which card included the following notation in the "Visit/Change History" section under the "Purpose/Result" column dated 6/27/01: "Land Change." See, Exhibit 6.

Granted.

10. The Town issued tax bills dated November 5, 2001, for the 2001 tax year which showed the area of the parcel at issue in this matter to be 5.92 acres, as recited in the deed. See, Exhibit 7.

Granted.

11. The Lyme Board of Selectmen are the "assessing officials" for the Town of Lyme.

Granted.

12. Carole Bont and Dina Cutting are employed by the Lyme Board of Selectmen and their duties include dealing with landowners' property tax files.

Granted.

13. No additional information about the parcel in question came to the assessing officials' attention between approximately "early to mid-summer" 2002, when the revised tax map was received, and approximately May 2003, when Cutting testified she "discovered" that the parcel did not qualify for current use assessment.

Granted.

14. On October 20, 2003, the Lyme Tax Collector mailed a bill for the change in use tax assessed against the parcel under the provisions of RSA 79-A on Form A-5. See, Exhibit 8.

Granted.

15. On November, 19, 2003, the Appellants paid the LUCT of $6,730.00 billed on October 20, 2003. See, Exhibit 9.

Granted.

16. On December 19, 2003, Appellants filed an Application for LUCT Abatement, as defined in N.H. Code Admin. Rules Tax 102.01, with the Lyme Board of Selectmen.

Granted.

17. The abatement application was filed, as defined NH Code Admin. R. Tax 102.26, within the time prescribed by RSA 79-A,I.

Granted.

18. By letter dated February 20, 2004, the Selectmen denied the abatement application.

Granted.

19. This appeal was filed, as defined NH Code Admin. R. Tax 102.26, within the time prescribed by RSA 79-A,III(b).

Granted.

20. Statutory interest of $1.11 per day is due to the Appellants. See, N.H. Code Admin. Rules Tax 202.07.

Denied.

II. RULINGS OF LAW

21. The acts of Bont, Cutting and others employed to deal with landowners' tax files are imputed to Lyme's Board of Selectmen because their actions were of the kind they were employed to take, they occurred substantially within authorized time and space limits, and were motivated by a purpose to serve the employer. *Porter v. City of Manchester,* 151 N.H. 30, ___, 849 A.2d 103, 115 (2004) (municipal vicarious liability standard).

Neither granted not denied.

22. Facts or circumstances learned or discovered by Bont, Cutting and others employed to deal with landowners' tax files while they were on the job are imputed to Lyme's Board of Selectmen because the Board employed them, and they were acting within the scope of their employment when they learned or discovered such facts or circumstances. *Leclerc v. Prudential Ins. Co. of America*, 93 N.H. 234, 235, 39 A.2d 763, 764 (1944) (re-stating rule, and exception, that knowledge of agent imputed to principal).

Neither granted nor denied.

23. The controlling decision in this case is *Brothers v. Town of Rumney*, Docket No. 19414-2002LC (N.H.Bd.Tax.Land.App.) (Decided July 23, 2003), wherein the Board held that receipt by the town of an inventory form from the landowner stating that a driveway and cabin had been constructed on current use land gave the assessing officials enough facts to trigger their obligations under RSA 79-A:7, II(c).

Denied.

24. Unless a parcel is classified as a) agricultural or horticultural producing income of $2,500 or more, or b) a certified tree farm, or c) wetland, then it must be 10 or more acres in area to qualify for open space designation, pursuant to the provisions of N.H. Code Admin. Rules 304.01.

Granted.

25. Within a few months following the date the parcel in question was transferred to the Appellants the Town's assessing officials had sufficient information in their possession from which they could "actually discover" that it did not conform to the minimum acreage requirement set out in N.H. Code Admin. Rules 304.01, which permitted the assessment of the LUCT pursuant to the provisions of RSA 79-A:7,IV(c).

Neither granted nor denied, addressed in Decision.

26. The Town failed to comply with the provisions of RSA 79-A:7,II(c) because they did not mail the LUCT bill "at the latest, within 12 months of the date upon which [they]... actually discover[ed] that the land use change tax [was] due and payable."

Denied.

Town

Findings of Fact

1. By deed dated May 14, 2001, Colin Robinson and Mary L. Robinson acquired a parcel of property from Morton B. Bailey.

Granted.

2. Although Mr. Robinson was aware that the land use change tax was due and owing on the property he received from Mr. Bailey, he did not notify the town that the change of ownership had occurred, in writing or otherwise.

Granted.

3. The town received a copy of the deed from the registry of deeds and date stamped it on June 11, 2001.

Granted.

4. The town does not and cannot realistically review each deed which is returned to it to determine if it triggers the assessment of the land use change tax.

Neither granted nor denied, addressed in Decision.

5. In the normal course, buyers of land subject to the land use change tax apply for a building permit for the new lot, thus notifying the town in writing of the change of ownership and/or use and the fact that the land use change tax is due and owing.

Neither granted nor denied.

6. When deeds arrive from the registry of deeds, they are either sent directly to the tax mappers (transfers before April 1 of that year) or are saved to be sent to the tax mappers the following year.

Neither granted nor denied.

7. The Bailey to Robinson deed, because it was for a transfer after April 1, 2001, was saved and sent to the tax mappers in 2002.

Neither granted nor denied.

8. The tax mappers return the new tax maps to the town during the summer, in this case, the summer of 2002.

Granted.

9. During the summer of 2002, the Lyme Selectmen's office was understaffed due to illnesses of two staff members with primary responsibility for reviewing transfers of property when the deeds were received from the registry.

Granted.

10. As such, the town did not discover the transfer from the Mr. Bailey to the Robinsons had occurred when it was generating the 2002 tax bills.

Granted.

11. The Robinsons were aware that the town was unaware of the transfer, because he received a copy of the 2002 tax bill issued by the town to the Estate of Morton Bailey, which included the current use taxes for the parcel then owned by the Robinsons.

Neither granted nor denied.

12. The Robinsons did not notify the town after their receipt of the 2002 tax bill, in writing or otherwise, that they were the owners of the parcel, and that the tax bills, and the land use change tax bill, should be sent to them.

Granted.

13. In approximately May 2003, the town reviewed all of the Bailey properties, and discovered that the transfer to the Robinsons had taken place and first recognized that the parcel no longer qualified for current use taxation.

Granted.

14. The selectmen did not have actual knowledge that the parcel no longer qualified for current use taxation until 2003.

Granted.

15. A land use change tax bill was sent to the Robinsons in October, 2003, within twelve months of the selectmen actually discovering the transfer of the property from Mr. Bailey to the Robinsons.

Granted.

Rulings of Law

1. In land use change tax appeals, the Taxpayer shall have the burden to prove the municipality erred in assessing the tax. Tax 205.07.

Granted.

2. RSA 79-A:7, II(c) states, in relevant part and with emphasis added:
Upon receipt of the land use change tax warrant and the prescribed forms, the tax collector shall mail the duplicate copy of the tax bill to the owner responsible for the tax as the notice thereof. Such bill shall be mailed, at the latest, within 12 months of the date upon which the local assessing officials receive written notice of the change of use from the landowner or his agent, or within 12 months of the date the local assessing officials actually discover that the land use change tax is due and payable.

Granted.

3. RSA 79-A:7 puts the onus on the taxpayer to notify the local assessing officials in writing of any change of use or ownership which disqualifies a parcel of land for current use taxation.

Neither granted nor denied.

4. In the absence of written notice from the landowner, RSA 79-A:7 provides that the twelve month time frame in which the land use change tax must be assessed runs from the time the local assessing officials actually discover that the land use change tax is due and payable.

Granted.

5. Actual discovery is exactly that–actual discovery. Constructive knowledge does not trigger the twelve month period, nor does an event which arguably should have provided the requisite discovery.

Granted.

6. The Town of Lyme did not actually discover that the land use change tax was due and payable on Appellants' property until 2003.

Granted.

7. The land use change tax bill was mailed within twelve months of the town's actual discovery that the land use change tax was due and payable. The land use change tax bill was therefore timely mailed and the Robinsons are responsible for the land use change tax.

Granted.

8. The decision of the selectmen to refuse to abate the land use change tax is affirmed.

Granted.

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Colin & Mary Robinson, Post Office Box 329, Lyme, New Hampshire 03768, Taxpayers; Chairman, Board of Selectmen, Town of Lyme, Post Office Box 126, Lyme, New Hampshire 03768; Walter L. Mitchell, Esq. and Laura Spector, Esq., Mitchell & Bates, P.A., 25 Beacon St. East, Laconia, New Hampshire 03246, counsel for the Town; and Current Use Board, c/o Department of Revenue Administration, Post Office Box 457, Concord, New Hampshire 03302, Interested Party.

Date: May 5, 2005

_____
Anne M. Stelmach, Clerk

Colin & Mary Robinson

v.

Town of Lyme

Docket No. 19983-03LC

ORDER

On June 2, 2005, the "Taxpayers" filed a Motion for Reconsideration ("Motion") of the board's May 5, 2005 Decision ("Decision").

The Motion is denied because it raises substantially the same arguments presented at hearing and did not demonstrate the board erred in its Decision and, thus, the Motion failed to show any "good reason" to grant a rehearing. See RSA 541:3.

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 Order has this date been mailed, postage prepaid, to: Colin & Mary Robinson, Post Office Box 329, Lyme, New Hampshire 03768, Taxpayers; Chairman, Board of Selectmen, Town of Lyme, Post Office Box 126, Lyme, New Hampshire 03768; Walter L. Mitchell, Esq. and Laura Spector, Esq., Mitchell & Bates, P.A., 25 Beacon St. East, Laconia, New Hampshire 03246, counsel for the Town; and Current Use Board, c/o Department of Revenue Administration, Post Office Box 457, Concord, New Hampshire 03302, Interested Party.

Date: June 14, 2005

_____
Anne M. Stelmach, Clerk