Lane W. Gorton

v.

Town of Bennington

Docket No.: 20909-05EX

DECISION

The "Taxpayer" appeals, pursuant to RSA 72:34-a, the "Town's" 2005 denial of the Taxpayer's request for a veteran's tax credit as provided under RSA 72:28 on his residential property located at 44 Greenfield Road. For the reasons stated below, the appeal is denied.

The Taxpayer has the burden of showing, by a preponderance of the evidence, he was entitled to the statutory credit for the year under appeal. See RSA 72:23-m; TAX 204.06.

The Taxpayer argued he was entitled to the veteran's exemption because:

(1) he served under the National Defense Act of 1951 and the Armed Forces Act of 1952 with an 8-year contractual service at the discretion of the military; this 8-year commitment (October 13, 1957 through August 1, 1963) constitutes active service during the periods required by RSA 72:28 IV (a) and V (g) which qualifies him for the veteran's exemption;

(2) both the Towns of Amherst and Peterborough, New Hampshire were audited when he was living in those towns and he received a veteran tax credit in each town after reapplying; Dennis Viola, Director of New Hampshire Veteran's Council, participated in the audits during the time period the Taxpayer's eligibility status was reapproved;

(3) the approval of the Taxpayer's eligibility status over a period of 40 years in several states and specifically in Amherst and Peterborough is legal precedent and cannot be challenged; and

(4) the Taxpayer was essentially federally activated for the 8-year period and could have been called upon for military duty at any time which is considered service under the provisions of the statute.

The Town argued the denial of the veteran's exemption was proper because:

(1) according to the United State Department of Defense Form 214 ("DD 214"), the Taxpayer's date of entry into the armed services was October 13, 1957 and the effective date of discharge from active service was April 12, 1958;

(2) pursuant to RSA 72:28, VI, the Taxpayer does not meet the criteria for service in a qualifying war or armed conflict; and

(3) the Town believes it is using the correct dates based on its understanding of the statutes and certification by the department of revenue administration ("DRA").

Board's Rulings

For the reasons that follow, the board finds the Taxpayer has not "served" in active duty for more than 90 days during a "qualifying war or armed conflict" enumerated in RSA 72:28, VI.

The primary issue before the board is whether the Taxpayer's commitment to the U.S. Army in the reserve status that spanned the period from October 13, 1957 through August 1, 1963 contained at least 90 days of active duty service during a qualifying war or armed conflict. To answer this question, both the term and nature of the Taxpayer's service need to be reviewed as well as the requirements of RSA 72:28 and rules enacted by DRA in Rev 400 relative to credits and exemptions.

Summary of Taxpayer's Military Service

The Taxpayer, after graduating from college in May 1957, attended eight weeks of basic training at Fort Groton, Georgia. He was briefly then stationed at Fort Devens, Massachusetts and later at Fort Mammoth, New Jersey there completing the U.S. Army Signal Corps Officer Basic Introductory Course. In April 1958, the Taxpayer was assigned to a reserve unit at Fort Devens and later in 1961 to a unit in St. Louis, Missouri, a move necessitated by a change in his private employment. From April 1958 to discharge from the U.S. Army Reserve on August 1, 1963, the Taxpayer testified he was employed full-time in the private sector and attended reserve functions on weekends with the understanding he could be called up to full-time service at any time during his 8-year commitment. The Taxpayer argues because he could be contractually required to serve at any time during this 8-year period, such time qualifies as "served" and would overlap the armed conflict period in RSA 72:28 (g) for the Vietnam Conflict.

Review of Applicable Statutes and Rules

RSA 72:28 does not specifically define what "service" means, it simply states at paragraph IV: "The following persons shall qualify for the standard veterans' tax credit or the optional veterans' tax credit: (a) Every resident of this state who served not less than 90 days in the armed forces of the United States in any qualifying war or armed conflict listed in this section …" (emphasis added).

To facilitate implementation of this statute (see RSA 541-A:1, XV), the DRA under its general rulemaking authority promulgated rules, CHAPTER Rev 400, Credits and Exemptions from Property Taxes. Several of the rules are applicable to the issue at hand in this appeal. Rev 401.01 defines active duty and Rev 401.03 defines discharge as follows:

"Rev 401.01 'Active duty' means day-by-day service, other than for training, where a person is subject to full military discipline and regulation on a 24-hour basis in the armed forces of the United States during a war or armed conflict as prescribed under RSA 72:28."

"Rev 401.03 'Discharge' means the termination of a period of active duty service." (Emphasis added).

Further, Rev 403.02 enumerates a number of qualifying service requirements.

> Rev 403.02 Service Requirements. Service requirements for establishing eligibility shall be as follows:
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> (a) Forms issued by the United States Department of Defense, serving as evidence that an individual's active duty has been terminated, and which indicate the service member's date of entry into service, date of discharge and character of discharge, include but are not limited to:
>
> (1) DD Form 214;
> (2) WD AGO 53-55; or
> (3) NAVPERS 553;
>
> (b) To achieve the 90 days of active duty, as required under RSA 72:28, I (a), the dates shall include the date of enlistment, induction or the date an officer reports for active duty, and the date of discharge as shown on the DD Form 214 or its precursors, as referenced in Rev 403.02(a);
>
> (c) A discharged individual may re-enlist immediately, but having been discharged, if only momentarily, he or she shall qualify for the veteran's tax credit;
>
> (d) Time served in a National Guard unit or an active reserve unit called to active duty by federal authority shall count toward eligibility for the veteran's tax credit;
>
> (e) American merchant seamen in active ocean-going service during the period 12/7/41 to 8/15/45, and having been issued a DD Form 214 or its precursors, as referenced in Rev 403.02(a), shall be eligible for the veteran's tax credit, in accordance with Laws of 1993, 304:1; and

> (f) Individuals applying for the veteran's tax credit based on having received the "Armed Forces Expeditionary Medal" or the "Theater of Operation Service Medal", as referenced in RSA 72:28,VI, (i), shall provide assessing officials with a copy of their DD Form 214 verifying the receipt of such medal.

The Taxpayer's DD 214 indicates active service was for only 6 months and that the period was from October 13, 1957 through April 12, 1958. This period of active service was not during war or period of armed conflict as defined in RSA 72:28, III. The board finds the balance of the Taxpayer's service was in standby reserve status until discharge on August 1, 1963 and, as such, does not meet the active duty and service requirement definitions of Rev 401.01 and 403.02. Further, Rev 401.03 defines discharge as the termination from active duty service which the Taxpayer's DD 214 places as April 12, 1958 (see boxes 11A and C of Taxpayer's DD 214 in Taxpayer's Exhibit 2). As Rev 403.02 defines, "active duty" means active service in the military service on a day-by-day 24-hour basis where an individual is committed to the armed forces of the United States in an active fashion. In this case, while the Taxpayer was contractually required to be available for active duty, he was during the 8-year period, in a reserve status not requiring day-by-day 24-hour commitment and allowing full-time private employment. Thus, as his DD 214 indicates, the Taxpayer's active duty service was terminated on April 12, 1958 and he was never again called to active duty during the 8-year period.[1]

While the DRA rules were not referenced by either party at the hearing and thus may not have been directly brought to the Taxpayer's attention by either the Town or other individuals with whom the Taxpayer conferred, they have the effect of law and are in concert with the clear and simple meaning of reading of RSA 72:28. Further, the board notes a companion exemption statute, RSA 72:32, which provides for an exemption for individuals who were not United States

[1] The Taxpayer testified that several months prior to his final terminal date of reserve obligation on August 1, 1963, he was to be called for active duty but because of the limited time remaining to his commitment, he was not called.

citizens at the time of their service with an allied force but who are now United States citizens, requires them to have "served on active duty in the armed forces of any of the governments associated with the United States in the wars, conflicts or armed conflicts set forth in RSA 72:28 …" (emphasis added) to be entitled to such tax credit. The wording in RSA 72:32 of "active duty" comports with the plain meaning of RSA 72:28 and the definition contained in Rev 401.01.

The board can certainly understand the Taxpayer's frustration in having received the tax credit in two other towns in New Hampshire and subsequently being denied in the Town of Bennington. However, each tax year creates a separate action and requires a separate determination of eligibility for exemptions by the assessing officials in each separate taxing jurisdiction. See RSA 76:2. Selectmen in each taxing jurisdiction have their statutory responsibility to assess and grant exemptions and to review those on an annual basis for continuing eligibility. See generally RSA 72:33 and 34. The fact the Taxpayer received the tax credit in two other New Hampshire towns does not establish any precedence or any binding requirement on the Town of Bennington to also grant the tax credit. No precedence is gained by administrative acts of selectmen. Precedence only occurs in the judicial system and generally only by decisions issued at the highest level of appeal within each jurisdiction (e.g. New Hampshire Supreme Court and United States Supreme Court). Therefore, the board gives no weight to the Taxpayer's extensive argument that precedence was established due to the earlier granting of the tax credit in two other New Hampshire municipalities.

In summary, while no doubt the Taxpayer was diligent in his contractual commitment to the U.S. Army, those commitments do not meet the qualifications of active duty service as required by the statutes and applicable rules during a period of armed conflict or war; and thus

the Taxpayer failed in his burden to show the Town was incorrect in denying the veteran's tax credit for 2005.

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.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Michele E. LeBrun, Member

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Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Lane W. Gorton, 44 Greenfield Road, Bennington, NH 03442, Taxpayer; and Chairman, Board of Selectmen, Town of Bennington, 7 School Street, Unit #101, Bennington, NH 03442.

Date: 4/12/06

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Anne M. Stelmach, Clerk