

Thermo-Fisher Scientific, Inc.

v.

Town of Hampton

Docket Nos.: 22992-06PT and 23519-07PT

ORDER

The board has reviewed the Motion for Rehearing (“Motion”) and “Memorandum” filed by the “Taxpayer” with respect to the June 9, 2009 “Decision” dismissing both appeals and the “Objection” filed by the “Town” to the Motion. The suspension order issued on July 1, 2009 is dissolved and the Motion is denied for the following reasons.

First, there is no “good reason” to grant it because the board does not agree with the Motion that the board “overlooked or misapprehended the facts or the law...” in the Decision. See RSA 541:3; and Tax 201.37(e). The Motion is largely a restatement of the Taxpayer’s arguments previously made at the May 11, 2009 limited hearing which have been sufficiently addressed in the Decision. See Appeal of Nashua, 138 N.H. 261, 263-64 (1994). The board does not believe standing principles are so elastic as to allow a “parent company” to appeal the assessments on property legally owned by wholly owned limited liability companies (“LLC’s”) that, by their very nature, were created to limit the liability of the “parent company.” If the creating of an LLC cloaks the “parent company” with some protective veil, how can it be selectively pierced to allow standing in a tax appeal of the LLC’s property?

Second, the Motion makes a wholly new argument that the Town should be “equitably estopped” from seeking dismissal of the two appeals. Motion, pp. 6-8. Circumstances where this principle can be applied against a municipality are quite limited, as spelled out in City of Concord v. Tompkins, 124 N.H. 463, 467-68 and 470 (1984) (“four essential elements of estoppel” must be established and “a party bringing a governmental estoppel claim ‘cannot treat want of objection (by governmental officials) as a basis for an inference of consent because of silence.’ (Citation omitted.)”). The four essential elements are also stated in the board’s own rules. Cf. Tax 203.04(d) (these elements are: incorrect information supplied by municipality; taxpayer unaware of correct information; municipality should have known taxpayer would rely on incorrect information; and taxpayer detrimentally relied on incorrect information). The Motion fails to allege, let alone establish, all four of these elements.

Finally, the board does not agree that the Taxpayer should “be allowed to substitute one party for another” (Memorandum, p. 8) where no excusable neglect has been shown, as the cases cited in the Decision (pp. 5-6) make clear. In other words, the Taxpayer’s problem has arisen through no fault of anyone except itself and its own representative, who erred by filing the abatement applications and appeals for the Taxpayer in its own name, rather than in the names of the entities that actually owned the Property and are shown in the Town’s records. As noted by the Town in the Objection (at paragraph 5), the representative (Cushman & Wakefield) has not even bothered to file an affidavit “to explain why these errors occurred in identifying the correct party having standing to file these appeals.”

For all of these reasons, the Motion is denied. Any appeal to the supreme court must be filed within thirty (30) days of the Clerk’s date shown below. RSA 541:6.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

DISSENTING OPINION

I respectfully dissent in part from the majority holding denying the Motion. Upon review of the record and recognizing that it is an argument not raised by the Taxpayer in the Motion, I would find that “Thermo Fisher Scientific, Inc.” (hereafter “Thermo-Fisher”) (through its predecessor companies of Fisher Scientific International Inc. (“Fisher Scientific”) and Thermo Electron, Inc. (“Thermo”)) is the “person aggrieved” by having been “in the possession and actual occupancy” of the Property and having consented to pay the taxes. I recognize this is a case of first impression and while I do not disagree with most of the majority’s detailed findings, I do with its conclusion.

Two statutes are key to reaching this determination. First, collectively RSA 76:16 and 16-a provide that “any person aggrieved by the assessment of a tax” (emphasis added) has standing to request an abatement from a municipality and to file an appeal, if dissatisfied with the municipality’s response, to the board or the superior court. A well-established line of cases (see, e.g., Appeal of Town of Plymouth, 125 N.H. 141, 144-45 (1984); Wise Shoe Co. v.

Town of Exeter, 119 N.H. 700, 702-03 (1979); and Langford v. Town of Newton, 119 N.H. 470, 472 (1979)) has established a “person aggrieved” can be anyone who has “allegedly suffered the injury of being disproportionately assessed.” In Langford, the supreme court further noted “[t]o construe the statute differently would lead to unreasonable and unjust results.” Id.

Second, RSA 73:10 states:

Real and personal property shall be taxed to the person claiming the same, or to the person who is in the possession and actual occupancy thereof, if such person will consent to be taxed for the same; but such real estate shall be taxed in the town in which it is situate.

Accordingly, the statute allows a person to be taxed even if the person does not have actual title to the property, provided that such person consents to the taxation. “For the purpose of taxation, it is immaterial who is the ultimate owner of the fee. The title is not the test of taxability.”

Piper v. Meredith, 83 N.H. 107, 109 (1927); quoted in Lin-Wood Dev. Corp. v. Town of Lincoln, 117 N.H. 709, 711 (1977); Quimby v. Quimby, 118 N.H. 907, 910 (1978); and Appeal of Reid, 143 N.H. 246, 249 (1998). The board must read the language at issue in the context of the entire statute and the statutory scheme. See, e.g. Barksdale v. Town of Epsom, 136 N.H. 511, 514 (1992); and Great Lakes Aircraft Co. v. City of Claremont, 135 N.H. 270, 277 (1992).

At the May 5, 2009 hearing, Michael Michaud, Director of Tax Compliance for Thermo-Fisher testified the Property was occupied as office space by Thermo-Fisher as of April 1, 2006 and 2007 and not until late 2007 was it vacated and listed for sale. (See also Tab C of “Appellant’s Objection to Motion to Dismiss”). The 2006 taxes were paid for by Fisher Scientific. In 2007 after the late 2006 merger of Fisher Scientific and Thermo, Thermo Fisher paid the 2007 taxes. Based on these straightforward facts and the combined application of

RSA 73:10 and RSA 76:16-a, I would conclude Thermo Fisher has standing.

I acknowledge I signed the Decision that is contrary to this dissent; however, the RSA 541:3 rehearing provision is intended to allow the trier of fact to rehear or reconsider its decision if it erred in its factual or legal conclusions. After review of the record, including the testimony of Mr. Michaud and review of RSA 73:10,¹ I believe the Decision's conclusion is in error and I would reverse it for the reasons stated above and proceed to schedule the appeal for a hearing on its merits.

Paul B. Franklin, Chairman

CERTIFICATION

I hereby certify a copy of the above Order has this date been mailed, postage prepaid, to: Andrew J. Piela, Esq., Hamblett & Kerrigan, P.A., 146 Main Street, Nashua, NH 03060, counsel for the Taxpayer; and Mark S. Gearreald, Esq., Hampton Town Office, 100 Winnacunnet Road, Hampton, NH 03842, counsel for the Town of Hampton.

Dated: July 24, 2009

Melanie J. Ekstrom, Deputy Clerk

¹ This ruling is also consistent with the board's rulings in similar, albeit not identical, facts presented in Wal-Mart Stores, Inc. v. City of Lebanon, BTLA Docket Nos.: 21162-04PT/21677-05PT/22703-06PT (May 23, 2008) and Colonial Plaza Realty Trust v. City of Lebanon, BTLA Docket Nos.: 22815-06PT/23886-07PT and Walgreen Company v. City of Lebanon, BTLA Docket Nos. 22988-06PT/23504-07PT (May 13, 2009).