

Thermo-Fisher Scientific, Inc.

v.

Town of Hampton

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

DECISION

The board held a limited hearing on the “Town’s” Motion to Dismiss (“Motion”) on May 11, 2009 based on the threshold jurisdictional issue of whether “Thermo Fisher,” the named Taxpayer in these two appeals has the requisite standing. Under New Hampshire law, only a “person aggrieved” by an assessment can pursue an appeal seeking an abatement. RSA 76:16-a; cf. RSA 76:17. Upon consideration of all of the written and oral evidence and arguments presented,¹ the board grants the Motion and dismisses the appeals.

The Motion rests on facts, largely undisputed, pertaining to divergences between the two entities owning the “Property” in tax year 2006 and tax year 2007 and the party filing the abatement requests and appeals. As noted in the board’s April 2, 2009 Order, Thermo-Fisher “was not, as of April 1, 2006 or at any time thereafter, the property owner.” The actual owner of

¹ The board held the record open until May 20, 2009 to receive additional information from the parties regarding whether Thermo-Fisher or any of its subsidiaries owned any other property within the Town in these tax years. The board has reviewed the timely responses submitted by the parties, which indicate a property at 263 Drakeside Road was purchased by Fisher Scientific Company, LLC in August, 2005, transferred to Drakeside Real Estate Holding Company, LLC in August, 2006 and sold in June of 2007 to an unrelated party. The Town granted an abatement on the assessment of this property for tax year 2006.

the Property (as also confirmed in Thermo-Fisher's Memorandum of Law, pp. 1-2, the two Quitclaim Deeds attached to the Motion and the assessment-record cards) was:

- (a) "Fisher Scientific Co., LLC" in tax year 2006; and
- (b) "Liberty Lane Real Estate Holding Company, LLC" in tax year 2007.

Thermo-Fisher further acknowledges the Fisher Scientific LLC (limited liability company) transferred the Property to the Liberty Lane LLC by deed on June 30, 2006, duly recorded on August 4, 2006. As it turns out, the Town was aware of the existence of these entities, as reflected in the tax bills that were sent, addressed to these entities, in each year. (See Exhibits F and G to Affidavit of Robert Estey, submitted by the Town.)

The Town emphasizes, however, these LLC's are separate and legally distinct entities from Thermo-Fisher, the sole party named in the abatement requests filed with the Town and the appeals filed with the board for tax years 2006 and 2007 by a tax representative, Cushman & Wakefield, located in Rosemont, Illinois. The Town therefore seeks dismissal of the appeals for lack of standing by Thermo-Fisher.

Thermo-Fisher responded to the Motion by providing information regarding a corporate merger "in the fourth quarter of 2006" between two corporations, Fisher Scientific and Thermo Electron, Inc., which resulted in the formation of Thermo-Fisher. Thermo-Fisher's attorney explained it is the surviving corporation resulting from this merger and is the parent company for a number of other entities that previously were subsidiaries of the merging parties. He stated the above LLC's who owned the Property "during the relevant time periods" are now, in effect, "wholly owned subsidiaries" of Thermo-Fisher, along with many others. See Taxpayer's

Objection, Exhibit C, pp. 17 and 18 (excerpts from the “10-K” filed with the SEC listing many subsidiaries of Thermo-Fisher, including the above two LLC’s).

In arguing against dismissal, Thermo-Fisher asserts the abatement and appeal statutes, RSA 76:16 and 76:16-a, give standing to a “person aggrieved” by the tax with no mention the person has to be the record “owner” of the Property or the “taxpayer” identified in the Town’s records. While this is certainly true as to RSA 76:16-a,² the board cannot find the concept of a “person aggrieved” is elastic and expansive enough to embrace Thermo-Fisher given the facts presented in these appeals, especially in circumstances where there was no mistake or confusion on anyone’s part regarding which other entities owned the Property and were therefore liable for the tax in each year.

In order to hold Thermo-Fisher liable for the tax, rather than each LLC named above, the Town would have had to ‘pierce the corporate veil’ which normally shields an owner of a corporation or an LLC, such as a shareholder or a member, from personal liability for that entity’s obligations. The Town cites a Delaware Court of Chancery decision for this principle (see p. 1038 of the “Allied Chemical” case attached to the Town’s Memorandum of Law), but it is a clearly understood and universal principle of corporate law that the separate legal existence of corporate entities and their shareholders is generally respected, unless there are facts, not present here, that the entity is an “alter ego” used to “promote injustice or fraud.” See, e.g., The Village Press, Inc. v. Stephen Edward Company, Inc., 120 N.H. 469, 471 (1980) (“the fact that

² In fact, RSA 76:16, I and RSA 76:16, II does use the word “taxpayer” in connection with the filing of an abatement request.

one person controls two corporations is not sufficient to make the two corporations and the controlling stockholder the same person under the law. (Citation omitted.)”).

The board finds the testimony presented regarding Thermo-Fisher’s internal corporate accounting practices is notable but insufficient to confer standing. In his affidavit, Michael Michaud, Director of Tax Compliance, stated “Fisher Scientific International, Inc.” paid the 2006 tax bills and “Thermo Fisher Scientific, Inc.” paid the 2007 tax bills. At the hearing, he further testified that while the separate LLC’s (Fisher Scientific and Liberty Lane) did exist, the corporate parent (Thermo-Fisher) had a ‘cash sweep’ account, consolidated excess cash every day and paid the bills for these and other entities owned and operated by the parent. (In response, the Town noted neither of the payors of these bills was Thermo-Fisher itself.)

In any event, simply paying the tax due (with a corporate check) on behalf of another person or entity (in this case a limited liability company), however, is not sufficient to qualify as a “person aggrieved” and confer standing. Otherwise, for example, a biological parent who paid the tax on a house owned by a son or daughter could claim to be a person aggrieved and to have standing to seek an abatement, which would be illogical and subvert the concept of what, in all likelihood, the legislature intended by using this language.³ Although statutory interpretation is never free of all doubt, the board is unpersuaded by the Taxpayer’s arguments that a corporate “parent” is a person aggrieved within the meaning of the statute, just as it would not be

³ The board must read the language at issue in the context of the entire statute as a whole and the statutory scheme, not simply by looking at isolated words or phrases. Pennelli v. Town of Pelham, 148 N.H. 365, 366 (2002); 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). A statute, however, will not be construed to lead to an absurd result. General Electric Co. v. Dole Co., 105 N.H. 477, 479 (1964).

persuaded that a human “parent” would be a person aggrieved by an assessment on property owned by a son or daughter. The case authorities cited by the Taxpayer to argue for a much “broader” reading of what “person aggrieved” means to have standing under the tax abatement and appeal statutes are readily distinguishable for the reasons discussed in the Town’s Memorandum of Law (at p. 4).⁴

Consequently, the board finds Thermo-Fisher does not have standing. In addition, no sufficient cause has been demonstrated to allow amendment of the appeal documents at this late stage of the proceedings and, in effect, overlook the avoidable errors and inexcusable neglect on the part of the Taxpayer’s tax representative (Cushman & Wakefield). This representative, experienced in real estate and tax matters, should have known the identity of the actual owners of the Property from information readily available from the assessment-record cards and the deeds which were matters of public record. No witness from Cushman & Wakefield attended the hearing or submitted an affidavit explaining why these errors occurred in identifying the correct party having standing to file these appeals. Negligence on the part of an agent is not a proper ground for disregarding or waiving a jurisdictional defect. Compare Arlington Am. Sample Book Co. v. Board of Taxation, 116 N.H. 575, 576 (1976) (dismissal of appeal proper even though taxpayer had instructed his attorney to file appeal, where appeal was prepared it “in proper form . . . with the intention that it be filed,” but actual filing was delayed beyond the filing

⁴ These case authorities involved differing facts and issues, such as:

(1) the level of detail required regarding the grounds for abatement in an abatement application to make dismissal an inappropriate remedy (GGP Steeplegate, Inc. v. City of Concord, 150 N.H. 683, 686 (2004)); and
(2) whether a part owner (Appeal of Town of Plymouth, 125 N.H. 141, 145 (1984)), or an owner purchasing the property after the April 1 assessment date, where the prior owner had filed an inventory (Langford v. Newton, 119 N.H. 470, 472 (1979)) or an assignee of the property owner (Wise Shoe Co., Inc. v. Town of Exeter, 119 N.H. 700, 702 (1979)) should have standing to seek an abatement.

In contrast, the present appeals involve much more substantive considerations that cannot be overlooked.

deadline”); and Pelham Plaza v. Town of Pelham, 117 N.H. 178, 182 (1977) (“[w]e think inexcusable neglect accounts for the plaintiff’s noncompliance. ‘If judgment goes against a litigant by reason of his neglect . . ., he has not thereby suffered an injustice, but rather the natural consequence of his own neglect.’ (Citations omitted.)”). While the legislature has allowed non-attorneys to commonly represent taxpayers (RSA 71-B:7-a), such agents must act in accordance with “the statutes, rules and case law relating to property taxation and abatement....” (Tax 207.03) or potentially be denied the ability to represent taxpayers. RSA 71-B:7-a

For all of these reasons, the Motion is granted and the appeals are dismissed.

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(g). 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 above Decision 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: June 9, 2009

Anne M. Stelmach, Clerk