Resport LLC

v.

City of Portsmouth

Docket No.: 23195-06PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "City's" 2006 assessment of $8,555,100 on Map 303/Lot 2, 1 International Drive, a 90-room "Residence Inn" on approximately 10 acres of land leased from the Pease Development Authority (the "Property"). For the reasons stated below, the appeal for abatement is denied.

The Taxpayer has the burden of showing, by a preponderance of the evidence, the assessment was disproportionately high or unlawful, resulting in the Taxpayer paying a disproportionate share of taxes. See RSA 76:16-a; Tax 201.27(f); Tax 203.09(a); Appeal of City of Nashua, 138 N.H. 261, 265 (1994). To establish disproportionality, the Taxpayer must show the Property's assessment was higher than the general level of assessment in the municipality. Id. We find the Taxpayer failed to prove disproportionality.

The Taxpayer argued the assessment was excessive because:

(1) the assessment of the Property increased by 49.6% in tax year 2006;

(2) assessments on other properties in the City also increased, but at lesser rates (about 10-20% City-wide), as shown in Taxpayer Exhibit No. 3;

(3) an analysis of hotel properties indicates other properties increased by an average of only 16.6% in their assessments as shown in the Taxpayer's Prehearing Statement at section F, attachment 5;

(4) according to the Taxpayer's controller, Robert Garcia, the City followed inconsistent assessment practices in valuing hotels, as shown in the summary and assessment-record cards included in the Taxpayer's Prehearing Statement;

(5) except for the Property and an affiliated property (the "Courtyard," also managed by Ocean Properties, Ltd.), all other hotel properties were assessed by the City using the cost approach; and

(6) the assessment should be abated for the reasons shown in the Taxpayer's Prehearing Statement.

The City argued the assessment was proper because:

(1) a municipal revaluation was performed in tax year 2006;

(2) prior year valuations have no relevance for arriving at new assessments because the purpose of a revaluation is to establish new assessed values, not to keep the relative assessments between properties constant or increase or decrease them at the same rate, and therefore assessments on individual properties when a revaluation is performed can change at different rates for any number of reasons;

(3) on cross-examination, Mr. Garcia, the Taxpayer's only witness, agreed individual property values can change at different rates;

(4) the City followed a consistent approach in 2006 and used the income approach for hotels and other commercial properties when there was no fee simple ownership interest in the land (such as a hotel in a condominium development like the Courtyard or a property on leased land), making it harder to value separately;

(5) the City hired a qualified, independent appraiser, James G. Bragg, Jr. of Resort Realty Advisors, well experienced in valuing hotel properties, who prepared an appraisal (the "Bragg Appraisal," Attachment #2 in Municipality Exhibit D) estimating the market value of the fee simple interest of the Property (excluding business value and personal property) to be $11,000,000 as of the assessment date;

(6) the Bragg Appraisal considered all three approaches to value and concluded the cost approach was not appropriate for a hotel property that was eight years old, relied primarily on the income approach, but also employed several analyses based on the sales comparison approach to test the reasonableness of the income approach's value conclusion; and

(7) the Taxpayer did not present any appraisal or other market value evidence and did not meet its burden of proving disproportionality.

The parties agreed the level of assessment for tax year 2006 was 89.6%, the median ratio computed by the department of revenue administration.

Board's Rulings

Based on the evidence, the board finds the Taxpayer failed to prove the Property was disproportionally assessed. The appeal is therefore denied.

Assessments must be based on market value. See RSA 75:1. The Taxpayer, who has the burden of proof in this appeal, chose not to present an independent appraisal or other expert opinion of value. Instead, in presenting its arguments for an abatement, the Taxpayer relied

solely on the testimony of Robert Garcia, employed as the Controller of an affiliated entity, who is a CPA (certified public accountant). The City's objection to the Taxpayer's attempt to qualify Mr. Garcia as an "expert witness" (in assessing and hotel valuation) was sustained by the board. Mr. Garcia was permitted to testify as a fact witness in support of the Taxpayer's position.

The Taxpayer recognized its burden of proving disproportionality and further acknowledged that each taxpayer is obligated to pay its "fair share" of taxes. In New Hampshire, the yardstick for proportionality and fair share is market value adjusted by the level of assessment. See Porter v. Town of Sanbornton, 150 N.H. 363, 367-68 (2003). Because this is the yardstick, even if a taxpayer can show the municipality might have used a "flawed methodology" to arrive at an assessment, or one that was not the same for every property in a certain class (hotels, for example), such evidence is not sufficient to prove disproportionality under applicable law. Id. at 369 ("While it is possible that a flawed methodology may lead to a disproportionate tax burden, the flawed methodology does not, in and of itself, prove the disproportionate result.").

In lieu of presenting any market value evidence, the Taxpayer dwelt on various comparisons between the Property's assessment and assessments on other hotel properties in the City in the appeal document and also submitted Mr. Garcia's analysis and various assessment-record cards as part of its Prehearing Statement. The testimony indicated the City used a CAMA system to assess these properties and employed the cost approach for hotel properties owned in fee simple. The Property, operated as a "Residence Inn," and an affiliated Courtyard hotel, were both assessed during the City's revaluation using an income approach because, as the City's assessor explained, they were not owned in fee simple and therefore a cost of land estimate was not readily available. (The Property is on land leased from the Pease Development Authority

and the Courtyard is part of a condominium development.) The board finds the City was not necessarily constrained to use only one approach[1] to assess each hotel property or any other type of property for that matter, provided that whichever approach (or combination of approaches) is chosen does not result in overassessment.

In addition, because the benchmark is market value, it is not sufficient for the Taxpayer to argue a tax abatement is warranted simply because the assessment on the Property may be higher, in comparative terms, than assessments on some other hotel properties. It is well-established that the underassessment of others does not prove disproportionality. Appeal of Cannata, 129 N.H. 399, 401 (1987). To lower the assessment on the Property because one or more other hotel properties in the City may be underassessed would not lead to greater proportionality because proportionality is measured based on market value and the level of assessment in the City as a whole, not necessarily in relation to one or a few other properties. The proper remedy if one or more other properties is underassessed is to raise their assessments, not lower the assessment on the Property (below the market value benchmark adjusted by the level of assessment).

As noted by the City, there are various reasons why the assessments on individual properties may increase or decrease at different rates as a result of a municipal revaluation. Looking at relative rates of increase in assessments alone is therefore not probative of the need

[1] Three general approaches to value are widely recognized and accepted: 1) the cost approach; 2) the comparable sales approach; and 3) the income approach. Appraisal Institute, The Appraisal of Real Estate, Ch. 4, p. 49-50 (12th ed. 2001). In New Hampshire, the supreme court has recognized that no single method is controlling in all cases, Demoulas v. Town of Salem, 116 N.H. 775, 780 (1976). Arriving at a proper assessment is not an exact science, but a process requiring use of informed judgment and experienced opinion. See, e.g., Brickman v. City of Manchester, 119 N.H. 919, 921 (1979) (use of judgment in selecting valuation methodology and assumptions). There is never one exact, precise or perfect assessment; rather, there is an acceptable range of values which, when adjusted to the municipality's general level of assessment, represents a reasonable measure of each property owner's tax burden. See Wise Shoe Co. v. Town of Exeter, 119 N.H. 700, 702 (1979).

for a tax abatement. Increases from past assessments are not evidence that any taxpayer's property is disproportionally assessed compared to that of other properties in general in the taxing district in a given year. See Appeal of Town of Sunapee, 126 N.H. 214 (1985).

The Taxpayer could have presented an appraisal of its own, but chose not to do so even though it had the burden of establishing disproportionality and needed to present a credible market value estimate, which could then have been compared to the Property's assessment and the general level of assessment in the City. See, e.g., Appeal of Net Realty Holding Trust, 128 N.H. 795, 803 (1986); Appeal of Great Lakes Container Corp., 126 N.H. 167, 169 (1985); and Appeal of Town of Sunapee, 126 N.H. 214, 217-18 (1985).

In this appeal, however, the only relevant market value evidence was presented by the City, not the Taxpayer, in the Bragg Appraisal. The board finds the Bragg Appraisal was prepared by a qualified expert in hotel valuations and is well reasoned and amply supported by the evidence and estimates the taxable market value of the Property to be $11,000,000 as of the April 1, 2006 assessment date. Mr. Bragg's market value estimate adjusted by the level of assessment ($11,000,000 times 89.6% = $9,856,000) demonstrates the Property is not overassessed.

For all of these reasons, the appeal is denied.

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.

Attached as Addendum A hereto are the board's responses to the "City's Requests for Findings and Rulings."

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Douglas S. Ricard, Member

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Albert F. Shamash, Esq., Member

Addendum A

The "City's Requests for Findings of Fact and Rulings" 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 Proposed Findings of Fact, "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 overly broad or narrow so 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.

CITY'S REQUESTS FOR FINDINGS OF FACT AND RULINGS

1. In tax year April 1, 2006 the City of Portsmouth assessed Taxpayer's property which is the subject matter of this appeal at $8,555,100.00.

Granted.

2. The City's equalization ratio for 2006 was 89.6% which for purposes of this appeal will be rounded off to 90%.

Neither granted nor denied.

3. Applying the City's assessed value to that equalization ratio produces an implied fair market value of the subject property for April 1, 2006 of $9,505,666.67.

Neither granted nor denied.

4. Although the land on which the subject building has been constructed is leased by Taxpayer from the Pease Development Authority, pursuant to RSA 12-G:14 (II) the property…, "shall be taxable by the municipality in which the property is located as though such property were not owned by [an] exempt entity and were held in fee simple".

Granted.

5. In this case the Taxpayer Resport has the burden of proving that the City's assessment was disproportionate or illegal, resulting in the Taxpayer paying a disproportionate share of taxes, Tax 203.8, Appeal of the Town of Sunapee, 126 N.H. 214, at 217 (1985).

Granted.

6. When the Taxpayer filed an appeal with the City Assessor in this matter, the City retained an outside independent appraiser to test the reasonableness of the City's assessed valuation. The person the City retained is James Bragg of Resort Realty Advisors, 5 Blackburn Center of Gloucester, Massachusetts 01930.

Granted.

7. On February 4, 2008 Mr. Bragg advised the City Assessor that, "Based upon the investigations, data and analysis summarized in the attached report, it is concluded that the as-is market value of the defined interest on April 1, 2006 was $11,000,000.00".

Granted.

8. When the $11,000,000.00 market value is adjusted by the City's 90% equalization ratio, the implied assessed value would be $9,900,000.00.

Neither granted nor denied.

9. The 9,900,000.00 implied assessment exceeds the City's actual 2006 assessed valuation by $1,344,900.00. Thus, the City appears to have undervalued Taxpayer's property.

Neither granted nor denied.

10. The Taxpayer did not retain an appraiser to prepare a report for the Board.

Granted.

11. The Taxpayer's argument of disproportionality is based almost entirely on the percent changes of assessed valuation from prior years, especially year 2005 (which was based upon a tax year 2004 revaluation).

Neither granted nor denied.

12. The Taxpayer has failed to prove the value of the subject property, or of any other property.

Granted.

13. The Taxpayer has failed to carry its burden of proving disproportionate taxation in this matter.

Granted.

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Thomas M. Keane, Esq., Keane & MacDonald, 1000 Market Street - Suite 202, PO Box 477, Portsmouth, NH 03802-0477, counsel for the Taxpayer; Robert P. Sullivan, Esq., City of Portsmouth, 1 Junkins Avenue, Portsmouth, NH 03801, counsel for the City; and Chairman, Board of Assessors, City of Portsmouth, 1 Junkins Avenue, Portsmouth, NH 03801.

Date: July 2, 2009

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Melanie J. Ekstrom, Deputy Clerk