

Henderson Holdings at Sugar Hill, LLC

v.

Town of Sugar Hill

Docket No. 23853-07PT

DECISION

On December 1, 2009, the “Town” filed a “Motion to Dismiss” (“Motion”) this appeal on two grounds:

- (1) a ‘knowing’ violation of the requirement, stated in RSA 76:16, III and Tax 203.02(b), that the abatement application filed with the Town be signed by the “Taxpayer”; and
- (2) a “failure to produce discovery.”

On December 11, 2009, the “Taxpayer’s” representative, Mark Lutter of Northeast Property Tax Consultants, filed an “Objection” to the Motion and a copy of “responses” to the Town’s discovery requests, but did not contest the fact that the Taxpayer did not sign the abatement application. The discovery issue presented¹ is moot, however, because, based on Mr. Lutter’s knowing violation of RSA 76:16, II and Tax 203.02(b), the board grants the Motion and dismisses the appeal.

¹ The board has specific rules pertaining to discovery, Tax 201.19 and Tax 202.05, which require parties to make “diligent efforts” to work out their differences and then, if these differences are not resolved satisfactorily, the filing of a “discovery enforcement motion,” not a motion to dismiss.

As noted in the Motion, RSA 76:16, III, reads as follows:

The [abatement application] form shall include the following and such other information deemed necessary by the board: * * *

(g) a place for the applicant's signature with a certification by the person applying that the application has a good faith basis and the facts in the application are true.

In harmony with this statute, the board's rule, Tax 203.02(b), states the abatement application:

"shall . . . include[] all of the following: * * * (4) The taxpayer's signature on the abatement application certifying that the taxpayer has a good faith basis and the facts contained [in the application] are true." Further, Tax 203.02(d), as amended in 2007, provides:

The taxpayer shall sign the abatement application. An attorney or agent shall not sign the abatement application for the taxpayer. An attorney or agent may, however, sign the abatement application along with the taxpayer to indicate the attorney's or agent's representation. The lack of the taxpayer's signature and certification shall preclude an RSA 76:16-a appeal to the board unless it was due to reasonable cause and not willful neglect.

Mr. Lutter is very familiar with these provisions because:

- in 2005, he petitioned the board for a rule change regarding the taxpayer signature requirement, see BTLA Docket No. 20659-05, but his request was denied;
- in 2006, he was the subject of disciplinary proceedings, in part for not obtaining taxpayer signatures on multiple abatement applications, see BTLA Docket No. 21527-06OS; and
- in 2007, before amending Tax 203.02(d) (to specify dismissal is appropriate when a taxpayer fails to sign the abatement application), the board circulated a draft of the proposed rules and Mr. Lutter reviewed this draft but did not object or otherwise comment on this proposed amendment.²

The board amended this rule by following the procedures set forth in the Administrative Procedure Act, RSA ch. 541-A, which include circulation of the rule in draft form, a public comment period and review by the Joint Legislative Committee on Administrative Rules

² Instead, in his June 8, 2007 letter to the board, Mr. Lutter proposed modification of a different rule, Tax 203.05(j), pertaining to the timing of a motion to enforce an ordered abatement.

(commonly known as “JLCAR”), as well as a public hearing on the proposed rule before JLCAR. As noted in the Motion (¶17), the rule amendment was completed on September 24, 2007, five months prior to the filing of the abatement request in this appeal by Mr. Lutter.

Mr. Lutter gives no satisfactory explanation of why he chose not to comply with Tax 203.02(b)(4), except to state his disagreement with what it obligates him to do and his belief that operation of the rule, including the dismissal consequence in Tax 203.02(d), is an “unlawful abuse” of the board’s statutory authority. See Objection, ¶29. Mr. Lutter, however, has not appealed any of the board’s rulings in the above proceedings.

Mr. Lutter has also chosen not to use the remedy prescribed in the Administrative Procedure Act for challenging the validity or applicability of agency rules. See RSA 541-A:24 (permitting a declaratory judgment action in the Merrimack County Superior Court to contest the validity or applicability of a rule). The Administrative Procedure Act further provides the rules adopted by the board “are valid and binding on [the] persons they affect, and shall have the force of law” unless and until they are amended, revised or “a court of competent jurisdiction determines otherwise.” RSA 541-A:22.

Instead, Mr. Lutter simply repeats the same arguments he has made previously (in the prior proceedings described above) as a basis for avoiding the consequence of dismissal. The board finds these arguments are without merit and, based on his knowing refusal to comply with the statute and rule, dismissal of the appeal is therefore appropriate. Mere disagreement with a rule is not a valid ground for non-compliance with it, especially when the clear consequence of non-compliance (dismissal) has been prescribed. In brief, the board finds no reasonable cause has been shown for non-compliance and willful neglect on the part of Mr. Lutter with respect to the taxpayer signature and certification requirement. See Tax 203.02(b) and (d), quoted above.

The Taxpayer signature and certification requirement on the abatement application is equivalent, in purpose, to an affidavit requirement because it requires a taxpayer, not his attorney, tax representative or other agent, to certify (swear under the penalties for perjury and other false statements set forth in RSA ch. 641 (Falsification in Official Matters)) that the abatement application has been filed in good faith on the truth and not on some frivolous or false basis. See the abatement application filed in this appeal and Tax 203.02 (b) (the taxpayer is certifying with his signature “that the taxpayer has a good faith basis” for filing the abatement application “and the facts contained (in the application) are true). Just as an attorney or other representative would not be allowed to sign an affidavit on behalf of a party attesting to that party’s personal knowledge of the truth of relevant facts,, even with authorization to do so, it is impermissible to allow a tax representative to ignore the requirement that the taxpayer must sign and certify to the facts stated in the abatement application.

For all of these reasons, the appeal is 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(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

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 foregoing Decision has this date been mailed, postage prepaid, to: Mark Lutter, Northeast Property Tax Consultants, 14 Roy Drive, Hudson, NH 03051, representative for the Taxpayer; Adele M. Fulton, Esq., Gardner, Fulton & Waugh, PLLC, 78 Bank Street Lebanon, NH 03766, counsel for the Town; Chairman, Board of Selectmen, Town of Sugar Hill, PO Box 574, Sugar Hill, NH 03585; and Brett S. Purvis & Associates, Inc., 3 High Street, 2A, PO Box 767, Sanbornville, NH 03872, Contracted Assessing Firm.

Date: January 22, 2010

Anne M. Stelmach, Clerk

Henderson Holdings at Sugar Hill, LLC

v.

Town of Sugar Hill

Docket No. 23853-07PT

ORDER

The board has reviewed the “Taxpayer’s” February 20, 2010 Motion for Rehearing, Reconsideration and Clarification (the “Motion”) and the “Town’s” February 26, 2010 Objection and Assented-to Motion to Expand Time to Respond (the “Assented-to Motion”) in the above appeal. The board grants the Assented-to Motion and, in accordance with RSA 541:5 and Tax 201.37(d), issues this suspension Order until it rules on the Motion.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Henderson Holdings at Sugar Hill, LLC v. Town of Sugar Hill

Docket No.: 23853-07PT

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Albert F. Shamash, Esq., Member

Certification

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Date: March 4, 2010

Anne M. Stelmach, Clerk

Henderson Holdings at Sugar Hill, LLC

v.

Town of Sugar Hill

Docket No. 23853-07PT

ORDER

The board has reviewed the February 20, 2010 “Motion for Rehearing, Reconsideration and Clarification” (“Rehearing Motion”) filed by the “Taxpayer” and the March 12, 2010 “Objection” filed by the “Town.” The Rehearing Motion seeks reversal of the board’s January 22, 2010 Decision (“Decision”) granting the Town’s December 1, 2009 motion to dismiss this tax year 2007 appeal and a “clarification” of the effect of the subsequent year statute (RSA 76:17-c) on the tax year 2007 assessment on the “Property” following dismissal in the Decision (“should it stand”).

The suspension order issued by the board on March 4, 2010 (granting the Town’s assented-to request for additional time to brief the “clarification” issue with the filing of the Objection) is hereby dissolved. The Rehearing Motion is denied for the reasons indicated below (in Section A). Also in this Order (in Section B) the board will discuss and clarify the effect of RSA 76:17-c on the 2007 assessment in light of questions arising from the somewhat unique procedural facts pertaining to this appeal.

A. Denial of Rehearing Motion

Rehearing motions are governed by RSA 541:6 and Tax 201.37. As stated in Tax 201.37(e), the statutory “good reason” requirement consists of “a showing (by the moving party) . . . that the board overlooked or misapprehended the facts or the law and such error affected the board’s decision.” Cf. Tax 201.37(g) (requiring parties to present “all arguments at the hearing” and stating the board will not “consider new arguments that could have been raised at the hearing”). The board finds the Rehearing Motion fails to make the requisite showing for multiple reasons.

The Taxpayer, through its representative, Mark Lutter, repeats (in more or less verbatim fashion³) arguments already presented in opposition to the Town’s motion to dismiss, including invocation of portions of the legislative history when RSA 76:16 was amended in 1994. The board granted the Town’s motion after a full consideration and discussion of all the issues presented, including the plain meaning of RSA 76:16, III(g) and IV and Tax 203.02(b) and (d), and therefore it is not necessary to restate the board’s reasoning here. See Decision, pp. 2-4. In addition, the board finds nothing in the cited legislative history that is inconsistent with the taxpayer signature requirement at issue in this appeal.

The statement in the Rehearing Motion (¶44) that Mr. Lutter “ultimately changed his practice and began submitting abatement applications with the taxpayer’s signature” is noteworthy, but unavailing on the issue of whether this appeal was properly dismissed. Mr. Lutter intentionally chose not to obtain the Taxpayer’s signature on the abatement application

³ Compare, e.g., Rehearing Motion, ¶¶22-23, 28-29, 32-39, 41, 43-45 with the Taxpayer’s “Objection to Motion to Dismiss,” ¶¶13-14 and 17-32.

and the board finds there is no showing he made this choice based on “reasonable cause and not willful neglect.” See Tax 203.02(d).

The Rehearing Motion is therefore denied.

B. Clarification of Application of Subsequent Year Statute to Tax Year 2007 Assessment

The parties raise more complicated questions regarding the effect of the subsequent year statute, RSA 76:17-c, when, as here, an appeal previously filed with the board is dismissed at a preliminary stage on procedural grounds (prior to a hearing and a ruling on the merits). These questions pertain to the Town’s reluctance to apply the subsequent year statute and abate the 2007 assessment on the Property to the amount previously ordered by the board (in the September 26, 2008 Decision in BTLA Docket Nos. 21034-04PT and 22385-05PT).

In response to an October 27, 2008 “Motion for Partial Reconsideration” filed by the Town in those appeals, the board ruled: “the effect of RSA 76:17-c on any subsequent but non-appealed years is to abate to the ordered 2005 assessment until an RSA 75:8 reappraisal or reassessment occurs.” (See the “December 19, 2008 Order,” id., pp. 5-6, and the April 7, 2009 and May 20, 2009 Orders quoting from it.)

The Town has apparently complied with this ruling and applied the 2005 ordered assessment (\$1,742,428) to tax year 2006, but not to tax year 2007 (because this appeal was at that time pending before the board). In 2007 the assessment on the Property was approximately \$2.1 million (the same as in 2005 and 2006.) The board will therefore clarify the effect of its prior rulings on the tax year 2007 assessment.

As noted above, the procedural context for these questions is the granting of the Town’s motion to dismiss the tax year 2007 appeal in the Decision because the Taxpayer did not sign the abatement application at the municipal level, clear noncompliance with the board’s rules. (See

Tax 203.02(b) and (d).) This noncompliance resulted in a lack of jurisdiction which prevented the board from hearing and deciding the tax year 2007 appeal on the merits and making a substantive ruling on whether the Property was proportionally assessed in 2007.

In the Objection, the Town presents three discrete arguments regarding why the subsequent year statute should not apply to the tax year 2007 assessment:

- (1) what is portrayed as the “law of the case” (asserted by the Town to be that the abatement granted for tax year 2005 should only apply to “subsequent but non-appealed years,” emphasizing some language in prior board rulings);
- (2) the dismissal should be considered “a decision on the merits”; and
- (3) the Taxpayer’s “motion to clarify the decision is untimely.”

The board disagrees with each of these arguments and will clarify below why the Property is entitled to application of the subsequent year statute in tax year 2007, as it was in 2006 (to the ordered abated assessment for tax year 2005).

First, the language from the board’s April 7 and May 14, 2009 Orders (quoting from page 6 of the December 19, 2008 Order in the 2004 and 2005 tax appeals, recited on page 2 of the Objection⁴) should not be read out of context and was not, in hindsight, intended to express a “law of the case” applicable to the specific circumstances now at issue. At the time of those rulings, the Taxpayer still had a pending tax year 2007 appeal and the Town had not yet raised any question regarding whether the board lacked jurisdiction to hear and decide it. (The Town’s motion to dismiss was not filed until approximately seven months later on December 1, 2009.)

Upon review of the “law of the case” materials cited by the Town in the Objection (pp. 3-4), it is fair to conclude this judicially created doctrine, articulated by the supreme court with

⁴ The Objection misstates the dates of several pleadings, including the date of the April 7, 2009 Order which it refers to as “April 17.”

respect to its own prior appellate rulings, is only narrowly applied in limited circumstances and in contexts not relevant here. Indeed, this doctrine was discussed but not applied in either of the two cases the Town has cited. See Merrimack Valley Wood Prods. v. Near, 152 N.H. 192, 201-02 (2005) (“doctrine is not applicable”); and Taylor v. Nutting, 133 N.H. 451, 454, 455 (1990) (doctrine does not apply “where different evidence is presented on the subsequent appeal” or “where the issue before the court was not ‘fully briefed and squarely decided’ (citations omitted); and “attempt to apply the law of the case doctrine to the present case fails”). “Furthermore, the law of the case doctrine is a rule of practice and not a limit on an appellate court’s authority to reconsider a decision previously made by that court. (Citation omitted.)” Id. at 457.⁵

In hindsight, the board’s reasoning in its prior rulings was not intended to foreclose the operation of the subsequent year statute if the tax year 2007 appeal was either voluntarily withdrawn or, at some future point, dismissed on procedural grounds (rather than decided on the merits). In electing not to withdraw the appeal, the Taxpayer no doubt reasonably expected a ruling on the merits of the 2007 appeal (regarding whether the Town’s assessment on the Property was proportional), an expectation shared by the board when it issued the April 7, 2009 Order and the subsequent May 20, 2009 Order. By electing not to withdraw the 2007 appeal voluntarily, the Taxpayer assumed the risk that, after a hearing on the merits,⁶ the board might rule substantively, based on the facts presented regarding market values and the level of assessment, that the Town’s 2007 assessment was not disproportional after all.

⁵ Moreover, notwithstanding the law of the case doctrine, the supreme court can correct errors if the court finds the first decision “is palpably wrong.” Id.

⁶ See also the April 2, 2009 Report of Settlement Meeting signed by the Taxpayer’s representative (Mr. Lutter) and the Town’s attorney (Adele M. Fulton, Esq.), stating the appeal “did not settle . . . and a hearing would be necessary.”

The Town's motion to dismiss the 2007 appeal, however, ultimately granted by the board on procedural grounds, was a superseding event that altered these reasonable expectations and the predicate for the board's statements. Thus, it is simply not true that "the factual scenario in the 2007 appeal has not changed" or that the board's "prior decision is the law of the case." (See Objection, ¶11.)

The board finds the election to pursue the tax year 2007 appeal should not result in forfeiture of the Taxpayer's rights under the subsequent year statute, for the reasons stated at length in the December 19, 2008 Order discussing the rationale and intent of this statute and the overall statutory framework. That Order, as noted above, responded to the Town's "Motion for Partial Reconsideration" and stated why the board disagreed with the Town's reading of RSA 76:17-c (to the effect the abatement ordered in tax year 2004 should apply to tax year 2005 and subsequent years until the Property is reappraised or there is a general reassessment, notwithstanding the 2005 appeal filed by the Taxpayer and decided by the board concurrently with the 2004 appeal). The Town has complied with that ruling and applied the subsequent year statute to 2006, but the board finds the statute also applies to tax year 2007 and beyond, until there is a good faith reappraisal of the Property or a general reassessment. See RSA 76:17-c, I.

Such forfeiture is contrary to the remedial purpose of the subsequent year statute for the reasons explained and in light of the considerations expressed by the board in denying the Town's prior partial clarification motion. (See December 19, 2008 Order, pp. 2-6.) In effect, a dismissal of the tax year 2007 appeal on procedural grounds is equivalent, for purposes of application of the subsequent year statute at least, to what should occur when no appeal was filed (as in 2006). The Taxpayer should not be penalized further (through non-application of the subsequent year statute) because its representative failed to comply with a jurisdictional

requirement necessary to pursue the 2007 appeal. The board finds this outcome, application of the subsequent year statute to the 2007 assessment, is more palatable and reasonable than the alternative outcome urged by the Town (keeping the assessment of the Property at a higher level than ordered by the board for tax year 2005 and already applied by the Town for tax year 2006), because of the Town's overriding obligation to make assessments as proportional as possible, notwithstanding the "law of the case" doctrine it has cited.

Second, the board does not agree with the Town's conclusion (Objection, pp. 5 - 7) that dismissal of the tax year 2007 appeal in the Decision (because the Taxpayer did not sign the abatement application) was a "decision on the merits." To the contrary, the dismissal occurred because of a lack of jurisdiction to proceed with the appeal.

Even the authorities cited in the Town's own Objection indicate, contrary to its legal argument, that a dismissal for lack of jurisdiction is not a decision on the merits. See, e.g., Opinion of the Justices, 131 N.H. 573 (1989); and Berg v. Kelley, 134 N.H. 255 (1991). The passage quoted from the first cited case (in paragraph 20 of the Objection) supports the conclusion that a "dismissal for lack of jurisdiction" (unlike a "judgment based on statute of limitations") is not "a judgment on the merits. See 131 N.H. at 580-81 (where the supreme court cites the Federal Rules of Civil Procedure for this principle). Berg is even clearer in restating the established principle that "a dismissal for lack of jurisdiction . . . does not constitute a judgment on the merits." 134 N.H. at 258-59.

Further, the Town's analogy to a dismissal based on a statute of limitations is inapt. The statute of limitations is an affirmative defense that must be raised by a party, cf. Opinion of the Justices, 131 N.H. at 577, or else it is waived. See Superior Court Rule 28, quoted in Kalil v. Town of Dummer Zoning Board of Adjustment, ___ N.H. ___, Nos.: 2009-017, 2009-018, slip

op. (February 11, 2010): “Failure to plead affirmative defenses, including the statute of limitations, within this time (30 days following the writ return date) will constitute waiver of such defenses.” The statute of limitations defense is substantive rather than procedural in nature. See Donnelly v. Eastman, 149 N.H. 631, 633 (2003) (“Compliance with statutes of limitations . . . is not a mere procedural technicality.”)

In contrast, lack of jurisdiction is a procedural defect that can be raised at any time. See, e.g., Porter v. Coco, 154 N.H. 353, 357-58 (2006) (lack of jurisdiction can be raised at any time, even with a “collateral attack on a prior judgment (citation omitted)”); and Onway Village, Inc. v. Town of Raymond, BTLA Docket No. 6242-89 (1992) (jurisdictional matters can be raised sua sponte and “at any time during the proceedings,” citing Cooperman v. MacNeil, 123 N.H. 696, 700 (1983)).

Third, the Town’s final argument that the Taxpayer’s “clarification” motion is untimely (Objection, p. 7) is without merit. The Taxpayer reasonably believed it had the choice of proceeding with the tax year 2007 appeal or withdrawing it and ‘accepting,’ for tax year 2007, the assessment ordered by the board for tax year 2005 (through operation of the subsequent year statute). Until the board’s January 22, 2010 Decision dismissing the tax year 2007 appeal, the Taxpayer would not have needed any further “clarification” regarding the effect of the subsequent year statute on the tax year 2007 assessment on the Property.

Tax 201.37(a) clearly gives the Taxpayer the right to seek “clarification” within thirty (30) days of the board’s Decision and the Taxpayer did so here. Further, RSA 76:17-c, III provides the board “shall retain continuing jurisdiction over any abatement granted . . . pursuant to RSA 76:16 . . . for purposes of enforcing the requirements of this section [the subsequent year statute].” Simply because each party (the Town, as well as the Taxpayer) filed earlier motions

seeking to clarify the operation of the subsequent year statute is not a valid basis for concluding the Taxpayer's request in the Rehearing Motion is "untimely."

The board will conclude with several observations addressed to the parties. The Town could have avoided the outcome it now objects to (application of the 2005 ordered assessment to 2007, not only 2006) by making a new assessment of the Property. See RSA 75:8: and, e.g., Appeal of Net Realty Holding Trust, 128 N.H. 795, 799 (1999) (quoted in the board's December 19, 2008 Order, p. 4, referring to the "constant process of correction and adjustment of assessments" that selectmen and assessors should undertake to help achieve "the ideal of fair and proportionate taxation"). According to the Taxpayer, the Town did not do so until 2009. (See fn. 5 infra).

Instead, the Town, in once again arguing against application of the subsequent year statute, seeks to turn the clock back (notwithstanding the board's findings of overassessment and the lower assessment the Town has applied in 2006) to keep in place a higher assessment for tax year 2007 (based entirely on a prior year determination which the board found was disproportional). Alternatively, if the Town disagreed with the board's ordered assessment for tax year 2005, or the application of the subsequent year statute, its remedy was to appeal the September 26, 2008 Decision or the board's application of the subsequent year statute in its December 19, 2008 Order denying the Town's partial reconsideration motion. The Town, however, did none of these things.

The Taxpayer, on the other hand, could have preserved its right to argue for an even lower assessment for tax year 2007 if its representative had not been remiss in failing to have the Taxpayer sign the abatement application filed with the Town. While the Property will receive the benefit of the subsequent year statute as a result of this Order, the Taxpayer, because of

dismissal of this 2007 appeal, has lost the right to establish the Property is entitled to an even larger abatement for that year.

In summary, and for the reasons noted above, the board finds each of the Town's arguments in opposition to "clarification" of the Decision is without merit. Because the 2007 appeal was dismissed for lack of jurisdiction rather than on substantive grounds, and because it was not a judgment on the merits, the subsequent year statute, RSA 76:17-c, applies and the Property is entitled to an abatement (based on the 2005 ordered assessment) for tax year 2007 (and tax year 2008, but not tax year 2009⁷).

C. Appeal

Any appeal must comply with RSA 71-B:12 and RSA ch. 541, with a copy provided to the board in accordance with Supreme Court Rule 10(7).

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Albert F. Shamash, Esq., Member

⁷ According to the Taxpayer, the Town performed a "general reassessment" in 2009, making the subsequent year statute no longer applicable. (See Rehearing Motion, ¶7.) This is also confirmed by the schedule of assessment reviews listed at:

http://www.nh.gov/revenue/munc_prop/documents/assessment_review_cycle_certification_years_2009_through_2013.xls; see also RSA 21-J:11-a and 21-J:11-b.

Certification

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Date: 4/5/10

Anne M. Stelmach, Clerk