

Francis X. Turcotte Trust and Rosemarie V. Turcotte Trust

v.

Town of Londonderry

Docket No.: 23389-08EX

DECISION

The “Taxpayers” appeal the “Town’s” denial of an application for an RSA 72:28 veteran’s credit for tax year 2008. The appeal is granted for the reasons stated below.

The Taxpayers have the burden of showing, by a preponderance of the evidence, they applied for and were entitled to receive the statutory credit for the year under appeal.

See RSA 72:33; RSA 72:34-a; and Tax 204.05.

The Taxpayers argued they are entitled to a veteran’s tax credit on the “Property” because:

- (1) one of the Taxpayers, Mr. Turcotte, is qualified to receive the credit (based on his military service from 1953 – 1955 as shown on his application) and they have received the credit annually for about 28 years (on residences they have owned in two other municipalities);
- (2) they were not aware of the April 15 filing deadline because they had previously lived in the City of Laconia (before buying the Property and moving to the Town in November, 2007) and Laconia had followed a different practice;
- (3) this prior practice, reflected in the submitted tax bills from Laconia (see Taxpayer Exhibit No. 1), required the filing of an application (by March 15 following the notice of tax) and this

caused Mr. Turcotte to believe he could wait until after receiving the tax bill from the Town to file for the credit;

(4) when he received the tax bill from the Town in June, 2008, he promptly filed for the veteran's credit in the Town assessor's office;

(5) the Town's assessor (Karen Marchant) refused to accept the application for tax year 2008, provided him with a copy of RSA 72:33, explaining this statute has been amended, and treated the application as one for tax year 2009;

(6) this statute contains a provision that the application can be filed and accepted at any time until the time the local tax rate has been set if the applicant was prevented by accident, mistake, or misfortune from filing by April 15 (see RSA 72:33, I-a); and

(7) the application should therefore have been granted by the Town for tax year 2008.

The Town, represented by its assessor, argued the denial of the veteran's tax credit was proper because:

(1) prior law was changed to require filing by April 15 of the year for which the exemption is sought;

(2) the Town has followed this change in the law, effective April 1, 2005, by posting notice of the change in the newspaper and on its own website when the change occurred, and has followed a consistent practice with respect to all taxpayers seeking the credit;

(3) the Taxpayers cannot satisfy the accident, mistake or misfortune exception in the statute because, under the board's rules (Tax 102.02), this means "something outside the party's own control and not due to neglect, or something that a reasonably prudent person would not be expected to guard against or provide for"; and

(4) the appeal should be denied.

Board's Rulings

Based on the evidence and arguments presented, the board finds the Taxpayers met their burden of proving they were entitled to receive a tax year 2008 veteran's tax credit on the Property. The appeal is therefore granted.

The pivotal issue in this appeal centers on whether the accident, mistake or misfortune exception in the statute, RSA 72:33, I-a, should be applied to relax the April 15, 2008 filing deadline relied upon by the Town. The statute does not contain a further explanation or examples of when this exception should be applied, but there is a body of case law (discussed below) that provides the board with guidance regarding how to decide this appeal.

At the hearing, the Town's assessor argued forcefully the Taxpayers do not satisfy this statutory exception and referred to her understanding of it from reading the general definition of "accident, mistake or misfortune" contained in Tax 102.02 (quoted above). The Taxpayers disagree with the Town's interpretation of this phrase and its decision to defer consideration of their tax year 2008 application until tax year 2009 simply because they filed for the credit after April 15. The board finds merit in the Taxpayers' arguments, especially in light of the largely undisputed facts and special circumstances involved in this appeal.

As a preliminary matter, the board finds the Town did not have the statutory authority to act as it did in not accepting and considering further the Taxpayers' exemption application for tax year 2008. RSA 72:33, I-a, which the Town otherwise relies on, is quite clear regarding what the Town needed to do, when it states as follows:

If any person, otherwise qualified to receive an exemption or credit, shall satisfy the selectmen or assessors that he or she was prevented by accident, mistake, or misfortune from filing a permanent application or amended permanent application on or before April 15 of the year in which he or she desires the exemption to begin, said officials may receive the application at a later date and grant an exemption or credit for that year; but no such application shall be received or exemption or credit granted after the local tax rate has been approved.

In other words, the Town should have considered whether accident, mistake or misfortune prevented the Taxpayers from filing for the tax year 2008 exemption by April 15 rather than holding the application and deferring any consideration of it until the next tax year (2009).

This quoted provision was added to the statute effective April 1, 2005, the same date as the amendment to the filing deadline which the Town relies upon. It prescribes in very direct language what the “selectmen or assessors” should do when “a permanent application or amended permanent application” is filed after April 15 and before “the local tax rate has been approved”: in such circumstances, the selectmen or assessors should consider whether the accident, mistake or misfortune exception should be applied to grant the exemption. For reasons not satisfactorily explained, the Town’s assessor did not do that here. The board finds this failure is not in keeping with either the letter or the spirit of the statute.

Turning to the question of accident, mistake or misfortune itself, the board has decided at least one recent appeal where it ruled in favor of a taxpayer on this issue, where he had missed the April 15 deadline (by filing his application almost two months later). In Jarry v. City of Nashua, BTLA Docket No. 21476-05EX (February 27, 2006), the board applied the accident, mistake or misfortune exception contained in RSA 72:33, I-a, quoted above, to grant a tax credit, stating:

Administrative convenience and concerns in processing such applications, however, should not defeat the clear provision contained in RSA 72:33, I-a, which provides an explicit statutory basis (“accident, mistake or misfortune”) for extending the deadline for a limited period of time in appropriate cases. [Footnote omitted.] The board believes the legislature may have envisioned circumstances such as these where otherwise qualified veterans were delayed, through no fault of their own, in receiving and then providing the documentation requested by the City. [Footnote omitted.] Pelham Plaza v. Town of Pelham, 117 N.H. 178 (1977).

The board is mindful of the cases found and cited by the supreme court in Pelham, some of which excused a late filing where the taxpayer acted “nonnegligently and without intent to deceive the assessor” or had “no knowledge of the statutory requirement.” See, e.g., H.J.H., Inc.

v. State Tax Commission, 108 N.H. 203, 204 (1967), where our own supreme court quoted and applied words from a U.S. Supreme Court decision (by Justice Oliver Wendell Holmes) to excuse a late filing, as follows:

The cases construing our tax abatement statutes over a long period of time do not encourage the slothful, are designed to penalize the contumacious but also indicate some concern for the taxpayer. The reminder ‘that the machinery of government would not work if it were not allowed a little play in its joints.’ (Bain Peanut Co. of Texas v. Pinson, 282 U.S. 499, 501, 51 S.Ct. 228, 229, 75 L.Ed. 482) has relevance here.¹

As these authorities confirm, each case involving a claim of accident, mistake or misfortune necessarily turns on its own facts in an area of the law where judgment and discretion must be the touchstone, both at the municipal or trial level and at the appellate level. Here, the board is persuaded, under the preponderance of the evidence standard, that the Taxpayers have met their burden of proof on this issue.² In this and in other respects, the board is cognizant of its own rules and its ability to waive the application of its rules where justice so requires. Cf. Appeal of Land Acquisition, 145 N.H. 492, 494 (2000) (“the board has reserved the right to waive its own rules,” citing former Tax 103.02(a)); and Tax 201.41(b).

The board is, of course, mindful of the Town’s position. The assessor noted the Town’s prior efforts to publicize the law change that moved up the date for filing the exemption application and why she chose to be inflexible regarding the new April 15 deadline (in order to be consistent towards other taxpayers who may have also missed it). These efforts included posting notice in a local newspaper and on the Town’s website, but the Taxpayers presented credible and undisputed testimony that they had no actual knowledge of the change in the timely filing date when they resided in Laconia (where they had filed the “permanent” application in

¹ See also Juniper Fells LLC v. City of Concord, BTLA Docket Nos.: 23355-07LC, 23356-07LC, 23357-07LC and 23358-07LC (November 21, 2008); and Albanese v. Town of Lisbon, BTLA Docket No. 19438-02PT (September 16, 2003). These are examples of recent appeals where the board quoted and applied the same dictum to grant relief to affected taxpayers.

² Cf. Pelham Plaza, 117 N.H. at 181: “Whether a person was prevented by accident, mistake or misfortune from complying with the inventory filing requirements is a question of fact.”

compliance with then current law), when they moved to the Town in November, 2007 or at any time thereafter until communicating with the Town's assessor in June, 2008.

In any event, the board is unpersuaded the 'consistency' concerns expressed by the Town's assessor at the hearing, in and of themselves, are so paramount as to require or justify the decision not to grant an exemption. While there may be a small subset of taxpayers in the Town who miss the April 15 deadline, it is unlikely that one or more of them would also be able to satisfy the statutory standard for accident, mistake or misfortune. For example, someone who simply "forgot" to apply by April 15 would have a difficult, if not impossible, hurdle to overcome if he or she wished to satisfy this statutory exception provision. While the legislature may have wanted municipalities to be "consistent" in their application of this and other deadlines, there can be little doubt the legislature intended the accident, mistake or misfortune exception to be applied in appropriate cases, since the exception is contained in the statute itself. (There are other statutory deadlines where the legislature has not prescribed an accident, mistake or misfortune exception. See, e.g., RSA 76:16 and RSA 76:16-a.)

The board is also influenced by the fact the statutory framework for this exemption contemplates a "permanent" application -- a one-time event, not a recurring, annual filing each year. As noted above, the Taxpayers filed a permanent application when they resided in Laconia and then attempted to file one in the Town for tax year 2008. In addition, the purpose of a timely filing requirement is also relevant to the board's considerations. The purpose appears to be to notify the municipality of the potential loss of revenue caused by the veteran's credit before the tax rate is set. This purpose is met by the Taxpayers' filing of their application in June, 2008 and the 'safety valve' provided by the accident, mistake or misfortune exception.

For all of these reasons, the appeal is granted. The Town is directed to accept the Taxpayers' permanent veteran's tax credit application filed in June, 2008 and to credit the appropriate amount for tax year 2008, refunding any excess taxes paid with appropriate interest from the date of payment to the date of refund.

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

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: Francis X. Turcotte, 29 Morrison Drive, Londonderry, NH 03053, representative for the Taxpayers; and Assessor's Office, Town of Londonderry, 268B Mammoth Road, Londonderry, NH 03053.

Date: February 10, 2009

Anne M. Stelmach, Clerk

Francis X. Turcotte Trust and Rosemarie V. Turcotte Trust

v.

Town of Londonderry

Docket No.: 23389-08EX

ORDER

In his March 9, 2009 letter, Francis X. Turcotte, the representative of the “Taxpayers,” states the “Town” has complied with the board’s February 10, 2009 Decision by making an “appropriate adjustment” to their 2008 taxes, but makes a request for a “refund” of the appeal filing fee. The request is denied.

Reimbursement of the filing fee is governed by RSA 76:17-b and Tax 201.39(b). The Taxpayers’ request does not satisfy these provisions because there is no showing the appeal was necessary only because the Town made “a clerical error, or a plain and clear error of fact” or that the Town defended the appeal on ‘frivolous’ grounds. Rather, the board finds the Town based its defense on an interpretation and application of the “accident, mistake or misfortune” provision in RSA 72:33, I-a that was plausible but not sustained by the board after consideration of all the relevant facts and the law. Consequently, ordering a refund of the filing fee is not warranted.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Order has this date been mailed, postage prepaid, to: Francis X. Turcotte, 29 Morrison Drive, Londonderry, NH 03053, representative for the Taxpayers; and Assessor's Office, Town of Londonderry, 268B Mammoth Road, Londonderry, NH 03053.

Date: March 19, 2009

Anne M. Stelmach, Clerk