

Patrick Picardi

v.

Town of Loudon

Docket No.: 23994-08LC

DECISION

Following review of this RSA 79-A:10 land use change tax (“LUCT”) appeal filed on May 28, 2009 on behalf of the “Taxpayer” by his representative, Anthony A. Merullo, and further communications from Mr. Merullo and the “Town,” the board dismisses the appeal.

LUCT appeals have specific statutory timelines that must be addressed since they raise the fundamental issue of jurisdiction. In Appeal of Estate Van Lunen, 145 N.H. 82, 84-86 (2000), the supreme court discussed the timelines in RSA 79-A:10 for LUCT appeals and noted filing timelines “have historically been strictly enforced” and “failure to timely submit an appeal is fatal regardless of accident, mistake or misfortune. (Citations omitted.)” See, e.g., Gould v. Town of Bethlehem, BTLA Docket No. 23658-07PT (January 22, 2009) (LUCT appeal dismissed as untimely).

Specifically at issue here is whether this LUCT appeal was filed with the board “within 8 months of the notice of tax date and not afterwards,” as required by RSA 79-A:10, III (b). “For purposes of this section, ‘notice of tax date’ means the date the taxing jurisdiction mails the land use change tax bill.” RSA 79-A:10, IV. The LUCT bill indicates the three selectmen all signed it on September 16, 2008 and this is the “Date of Bill” shown on the document.

In his July 16, 2009 letter to the board, Mr. Merullo contends “the notice was not received (presumably by the Taxpayer) until the first of October, 2008.” Even if accepted at face value, however, this somewhat ambiguous “contention” does not excuse the late filing of the LUCT appeal with the board on May 28, 2009 for a number of reasons.

First, the operative date clearly provided in the statute is the date of mailing of the LUCT bill by the Town, not the date it might have been “received.” In any event, the Town was not obligated to send the LUCT bill by certified mail or otherwise prove beyond all doubt when it was mailed to the Taxpayer or, for that matter, guarantee he actually “received” it by a specific date.

Second, and in this regard, the board does not agree with Mr. Merullo’s conclusion that there is a “lack of evidence” or material uncertainty (“serious doubt”) regarding “when” the LUCT bill was mailed. The Town’s evidence is reasonably complete and quite consistent in supporting a finding the LUCT bill was signed by the selectmen on September 16, 2008 and mailed by the Town’s tax collector the next day, September 17, 2008. September 16 was a Tuesday and the minutes reflect the selectmen met that evening (starting at 6:30 p.m.). While Mr. Merullo states there is “no mention” of this item in the selectmen’s meeting minutes, this is not probative and does not mean the selectmen did not sign the LUCT bill or other documents that evening. The Taxpayer has made no showing the Town’s minutes would ordinarily include such an amount of detail and the board has no reason to expect that the minutes would, unless the issuance or amount of the bill was an issue subject to discussion (in a hearing, for example). In other words, while the Town could, in theory, have noted in the minutes all the documents

pertaining to Town business the selectmen may have signed that evening in a routine or ministerial capacity, no negative inference can be drawn because they did not do so.

Third, as David Wiley, the Town's contract assessor, explained in his June 30, 2009 letter to Mr. Merullo, LUCT bills are signed by the selectmen on the evening of their meeting and given to the "Tax Collector the following morning for her to process and mail the next day," leading to the conclusion the LUCT bill was "mailed September 17th." While it is no doubt better practice for the Town to date the LUCT bill on the date it was actually mailed (September 17th) rather than the evening it was signed by the selectmen (for mailing the next day), the Town's inadvertence is inconsequential to the facts of this appeal: it does not change the outcome for the simple reason the Taxpayer's appeal document was filed with the board 11 days late (on May 28, 2008), not one day late.

Fourth, even if the LUCT bill was not "received" until October 1, 2008 by the Taxpayer or someone else, the Taxpayer was on notice regarding the statutory filing deadlines because of the date and timeline shown on the LUCT bill and acted accordingly. He paid the LUCT bill on October 17, 2008, exactly 30 days after it was mailed. (A 30-day period for payment is prescribed in the notice.). He then filed for an abatement with the Town on November 13, 2008 – just within the two months prescribed by statute, RSA 79-A:10, I (from September 17, 2008). The Town responded promptly and denied the abatement request. See Mr. Wiley's November 26, 2008 and January 29, 2009 letters to the Taxpayer.

Finally, it is the Taxpayer who has the burden of proof in a LUCT appeal, as he would in other property tax appeals, and the standard of proof is by a preponderance of the evidence. See Tax 205.06, 203.08 and 201.27(f). The board finds the Taxpayer, through his representative, Mr.

Merullo, has failed to meet his burden of establishing by a preponderance of the evidence this LUCT appeal was filed within the eight month period prescribed by statute.

In summary, the board finds it does not have jurisdiction and the appeal is therefore 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.

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 above Decision has this date been mailed, postage prepaid, to: Anthony Merullo, PO Box 548, Epsom, NH 03234, representative for the Taxpayer; Chairman, Board of Selectmen, Town of Loudon, PO Box 7837, Loudon, NH 03307; and Current Use Board, c/o Department of Revenue Administration, 109 Pleasant Street, Concord, NH 03301, Interested Party.

Dated: July 28, 2009

Melanie J. Ekstrom, Deputy Clerk

Patrick Picardi

v.

Town of Loudon

Docket No.: 23994-08LC

ORDER

The board has reviewed the August 27, 2009 Motion for Rehearing (“Motion”) filed on behalf of the “Taxpayer” by his representative Anthony A. Merullo, with respect to the July 28, 2009 Decision dismissing the appeal for lack of jurisdiction because of untimely filing. Rehearing motions are governed by RSA 541:3 and Tax 201.37.¹ The board finds the Motion is without merit and it is therefore denied for all the reasons stated in the Decision.

In addition, merely questioning the ‘certainty’ of when the land use change tax (“LUCT”) bill was mailed does not carry the Taxpayer’s burden of proof. Even if his representative is correct in speculating and supposing (without any postmarked envelope or other persuasive evidence) that the bill was not mailed on September 17, 2008, as the Town contends, but rather

¹ The Motion “shall only be granted for ‘good reason,’ pursuant to RSA 541:3” based upon a required showing “the board overlooked or misapprehended the facts or the law and such error affected the board’s decision.” Tax 201.37(e). In addition, “rehearing motions shall not be granted to consider evidence previously available to the moving party but not presented at the original hearing or to consider new arguments that could have been raised at the hearing.” Tax 201.37(g).

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on September 23, 2008, the appeal filed on May 28, 2009 is untimely and dismissal is mandatory under the LUCT appeal statutes. See RSA 79-A:10, III(b) and IV (specifying taxpayer must file appeal within 8 months of the mailing date of the notice of tax “and not afterwards”).

Any appeal must be by petition to the supreme court filed within thirty 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

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Dated: September 4, 2009

Anne M. Stelmach, Clerk