

Ned and Theresa Wilson

v.

Town of Sugar Hill

Docket No. 24093-08PT

DECISION

On December 18, 2009, the “Town” filed a “Motion to Dismiss” (“Motion”) this appeal based on 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.” On December 28, 2009, the “Taxpayers” representative, Mark Lutter of Northeast Property Tax Consultants, filed an “Objection” to the Motion, but did not contest the fact that the Taxpayers did not sign the abatement application. The board grants the Motion and dismisses the appeal.

As noted in the Motion, the statute, 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 quite 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 applications), the board circulated a draft of the proposed rule for public comment and Mr. Lutter reviewed this draft but did not object or otherwise comment on this proposed amendment.¹

The board amended this rule by following the procedures set forth in the Administrative Procedures 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 (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.

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

¹ 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.

abuse” of the board’s statutory authority. See Objection, ¶22. 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 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 Order has this date been mailed, postage prepaid, to: Mark Lutter, Northeast Property Tax Consultants, 14 Roy Drive, Hudson, NH 03051, representative for the Taxpayers; 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

Ned and Theresa Wilson

v.

Town of Sugar Hill

Docket No. 24093-08PT

ORDER

The board has reviewed the “Motion for Rehearing, Reconsideration and Clarification” (“Rehearing Motion”) filed by the “Taxpayers.” The Rehearing Motion seeks reversal of the board’s January 22, 2010 Decision (“Decision”) granting the “Town’s” December 18, 2009 motion to dismiss this tax year 2008 appeal.

The suspension order issued by the board on March 4, 2010 is hereby dissolved. The Rehearing Motion is denied for the reasons indicated below.

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.

In the Rehearing Motion, the Taxpayers’ representative, Mark Lutter, repeats (in more or less verbatim fashion²) 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 (¶36) 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 Taxpayers’ signature on the abatement application 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.

Any appeal must be by petition to the supreme court filed within thirty (30) days of the date on this Order with a copy provided to the board in accordance with Supreme Court Rule 10(7).

² Compare, e.g., Rehearing Motion, ¶¶8, 11-12, 14-20, and 22-24, with the Taxpayers’ “Objection to Motion to Dismiss,” ¶¶15, 20-21, 25-31, 33 and 35-36.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Albert F. Shamash, Esq., Member

Certification

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Date: April 5, 2010

Anne M. Stelmach, Clerk