

Infinity Sherwood Properties, Ltd, Prt.

v.

Town of Tilton

Docket No.: 24298-08PT

DECISION

The board held a limited hearing on March 18, 2010 to consider additional evidence and arguments regarding the “Town’s” January 5, 2010 Motion to Dismiss (“Motion”) the 2008 appeal of the abated assessment on the “Property,” a Wal-Mart shopping center on 18.75 acres of land, and the “Taxpayer’s” January 14, 2010 “Objection” to the Motion.

The Motion seeks dismissal because the Town (through its assessment company) and the Taxpayer (thorough its tax representative company) agreed, at a meeting on June 4, 2007 (hereinafter, the “June Settlement Meeting”), to a specific settlement that resolved two pending appeals and also encompassed subsequent years, including 2008. According to the Town, this settlement resolved both the tax year 2004 and 2005 appeals (BTLA Docket Nos. 20907-04PT and 21732-05PT) and future tax years with abated assessments, as follows: “7,356,400 for 2004 and \$10,400,000 for 2005, 2006 and subsequent years” (see Motion, ¶¶2-3); and consequently this 2008 appeal should be dismissed.

The Objection does not deny the parties reached a settlement at the June Settlement Meeting on how the assessments on the Property would be abated, but disputes whether the

settlement applies to tax year 2008 because it states “2004, 2005 and 2006 were the only tax years at issue.” (See Objection, ¶¶1, 4 and 5.A.) The Objection therefore contends the Taxpayer can proceed with a tax year 2008 appeal and no dismissal is warranted.

The board has the inherent authority to determine whether this 2008 appeal has been settled. See Appeal of Land Acquisition, 145 N.H. 492, 494 (2000). Ideally, settlements should be embodied or confirmed in one clear document, signed by each party or its representative, and stating all material terms, but an “oral settlement agreement” can also be valid, id. at 496, even if there is no writing signed by the party to be bound by the settlement. The board’s authority to act includes the ability to “mark[] the case as ‘settled’ on its docket” when it finds a settlement has been reached. Id. at 495. The board has reviewed all of the evidence presented, including the differing recollections of the Town and Taxpayer representatives who were involved in negotiating the settlement.

While the evidence is somewhat mixed and not free of all doubt, the board finds the Town met its burden of proving by a preponderance of the evidence (Tax 201.27(f)) that the settlement orally agreed to at the June Settlement Meeting included the subsequent year of 2008, as well as prior years. As a result, the Taxpayer is precluded from seeking a further abatement in tax year 2008. The Motion is therefore granted and the appeal is dismissed for the reasons discussed further below.

Whether oral or written, “[s]ettlement agreements are contractual in nature” and require, in addition to offer, acceptance and consideration, a “meeting of the minds” which “occurs when there is mutual assent to the essential terms of the contract. (Citations omitted.)” See, e.g., Poland v. Twomey, 156 N.H. 412, 414 (2007). Deciding whether a settlement was entered into and making findings regarding its terms are mixed questions of law and fact and a tribunal’s

determination will not be overturned unless it is clearly erroneous. Id.

The legal elements of offer, acceptance and consideration are not in dispute regarding the settlement. The central question is therefore whether there was a meeting of the minds regarding its terms. As noted above, the board finds it is more likely than not that the parties, represented by Avitar Associates of New England, Inc. (“Avitar”) and Commercial Property Tax Management, LLC (“CPTM”), had such a meeting of the minds and agreed the negotiated abated assessment on the Property (\$10,400,000) would apply to subsequent years (including 2008).

At the limited hearing, the board heard testimony from Loren J. Martin and Gary Roberge of Avitar. Ms. Martin is president of “Assessing Operations” for Avitar and Mr. Roberge is the chief executive officer of the company. Their testimony is entirely consistent with the facts stated in the Motion, including what occurred at the June Settlement Meeting attended by them, on behalf of the Town, and tax representative William (“Bill”) Boatwright of CPTM, on behalf of the Taxpayer.

Their sworn testimony is that Mr. Boatwright agreed to settle on abated assessments of \$10,400,000 for 2006 and subsequent years (as well as abatements for the two years then under appeal -- \$7,356,400 for 2004 and \$10,400,000 for 2005) and their recollection is supported by the handwritten notes each took of that meeting, particularly those of Ms. Martin (see Municipality Exhibit A), and her follow-up June 26, 2007 letter with enclosures to Mr. Boatwright. She sent this correspondence to him shortly after the Town’s Board of Selectmen “accepted” the settlement and each selectman signed the Settlement Agreements she had drafted for them.

During their testimony, Mr. Roberge and Ms. Martin explained why a settlement applicable to subsequent years was important, and why they would not have recommended the

selectmen accept a settlement without it: they testified the Town was confronted with a number of large tax abatement appeals at that time and did not want to “keep coming back” to the issue of defending the fairness and reasonableness of the assessments on the Property in future years. The settlement terms as represented to the selectmen by Ms. Martin and memorialized in the Settlement Agreements signed by the selectmen are consistent with Ms. Martin’s recollection and notes of the June Settlement Meeting.

The Taxpayer’s key witness at the limited hearing was Mr. Boatwright, who is no longer employed by CPTM and appeared because of a subpoena. He acknowledged participating in the June Settlement Meeting and reaching a settlement, but did not have any notes to confirm or support his recollections of the June Settlement Meeting, which differed from what Mr. Roberge and Ms. Martin remembered.

It is fair to conclude from the totality of Mr. Boatwright’s testimony that he agreed with CPTM, contrary to Avitar, that the settlement should not apply to 2008. Based on his answers to a number of questions, the board finds Mr. Boatwright believed the \$10,400,000 assessed value he negotiated with Avitar for the 2005 appeal would apply to 2006 and 2007, but not to 2008. In presenting his recollections, Mr. Boatwright noted the “ratios” (level of assessment) and tax rate for 2008 would not have been known at the time of his meeting with Ms. Martin and Mr. Roberge (June 4, 2007) and there would have been too many ‘unknowns,’ including the future value of the Property, to have a settlement cover a future year (2008). While his conjectures are plausible, in the board’s experience it is not uncommon for settlements entered into by tax representatives with municipalities to include subsequent years, notwithstanding the general uncertainties mentioned by Mr. Boatwright.

Further, Mr. Boatwright's testimony is at odds with the statements in the Objection filed by CPTM that there was no agreement on a \$10,400,000 assessment "past the **2006 tax year**" and "**2004, 2005 and 2006** were the only tax years at issue." (See Objection, ¶¶1 and 2, emphasis in original). In other words, Mr. Boatwright's recollection that the agreement reached with the Town applied to 2007 casts doubt upon the inconsistent assertion in the Objection that the settlement did not apply beyond 2006.

The assessment CPTM appealed for tax year 2008 is the abated value of \$10,400,000 agreed upon by the Town only as a result of the June Settlement Meeting. The Town complied with all of its obligations under the settlement. These are both factors supporting the Town's position that the Taxpayer is bound by the settlement for tax year 2008. In other words, but for its compliance in good faith with the agreement, the Town would have assessed the Property at a higher value (\$10,816,000) for 2008 and would not have had any reason to lower it to \$10,400,000. Both CPTM and the Taxpayer, its client, materially benefited from the Town's compliance, not just for tax years 2004 through 2007, but also for 2008.

Also in evidence is an invoice dated July 5, 2007 (see Taxpayer Exhibit No. 2). In this document, CPTM billed its client (Wal-Mart) for the tax year 2004 through 2007 abatements, but not for 2008. This document confirms the Town's original assessments on the Property were \$9,117,400 for 2004 \$10,816,000 for 2005, 2006 and 2007 and that "[t]his invoice does not include the interest portion of the tax savings," which would be billed later by CPTM when the Town completed its "calculations."¹

¹ CPTM did not submit this document at the limited hearing to oppose the granting of the Motion. Instead, the document was presented for the board's inspection, and introduced as a Taxpayer exhibit, only as a result of the board's further questioning of Mr. Boatwright and his review of the CPTM file during the course of his extended testimony.

The board considered, but placed no determinative weight, on the fact this document, generated by someone else at CPTM (but not Mr. Boatwright), does not mention tax year 2008, an omission that could lead to an inference CPTM did not intend the settlement to apply to 2008. Another CPTM representative, Robert Lisk, testified the Taxpayer was never billed by CPTM for tax savings from the 2008 abated assessment. This could have been due to the fact CPTM chose to file a new abatement request and appeal for that year.

In the Objection (¶¶5.B and 5.C) and at the limited hearing, CPTM emphasized the documents sent to Mr. Boatwright by Ms. Martin of Avitar “were not signed” by CPTM or the Taxpayer and no “follow up” occurred, contending “the additional terms were not material to the settlement.” These arguments are without merit for several reasons. As noted above, a settlement embodying all material terms does not have to be in a writing signed by CPTM in order to be valid and enforceable. The board finds the documents sent by Ms. Martin to CPTM simply confirmed the terms agreed to orally at the June Settlement Meeting, rather than being a new or modified written settlement proposal or offer containing additional terms requiring explicit acceptance or rejection.

According to Mr. Boatwright’s testimony, he did not follow-up with Ms. Martin because he never ‘saw’ her letter or its enclosures. He explained that, although Ms. Martin’s letter was addressed to him, it was probably opened and processed either by Patrick Bigg, CPTM’s president, or his administrative assistant, Kelly Auger-Foti, neither of whom notified him of its arrival or contents. In this regard, Mr. Lisk, an officer of CPTM and the “primary account representative for Wal-Mart,” also testified that he did not recall seeing these documents. (Notably, neither Mr. Bigg nor Ms. Auger-Foti appeared to testify at the limited hearing on the Taxpayer’s behalf to explain why there was no follow-up to Ms. Martin’s letter.)

Instead of communicating with Ms. Martin at Avitar regarding the letter or its contents, CPTM, through Ms. Auger-Foti, notified the board's staff by mail of the settlement of the 2004 and 2005 appeals. The board has in its files a July 3, 2007 letter with enclosures from her, a communication she also copied to a Wal-Mart employee (David Hebert) and the Town's "Assessing Department." She did not send a copy to Avitar, the Town's representative, and neither Ms. Martin nor Mr. Roberge was aware of it. This letter indicates the 2004 and 2005 appeals had been settled and encloses three other documents completed by the Town and signed by the selectmen: a Disposition of Abatement Application ("Disposition") for 2004, 2005 and 2006. Each Disposition refers to a "Settlement Agreement," which CPTM had in its possession (identified by Mr. Boatwright at the hearing as being part of CPTM's file), but CPTM chose not to forward any such document to the board or indicate it had any question or disagreement with its terms.

Although not critical to the board's findings, it is reasonable to conclude the specific reference to a "Settlement Agreement" in each Disposition forwarded by CPTM confirms CPTM had that document in its possession when it notified the board of the settlement and, further, can be construed to bind CPTM to the terms stated because of the doctrine of incorporation by reference.² These terms include paragraph (3), which states the abated \$10,400,000 "assessment shall be used until revised in good faith pursuant to RSA 75:8 or until a municipal-wide reassessment."³

² This doctrine is defined as "the method of making one document of any kind become a part of another separate document" by referring to it. See Black's Law Dictionary 907 (rev. 4th ed. 1968); and Kellom v. Beverstock, 100 N.H. 329, 331 (1956) ("The doctrine of incorporation by reference is recognized in this state.").

³ Both Avitar and CPTM are familiar with this settlement form, available on the board's website. Use of the form is not required and parties and their representatives are free to modify the form provisions (like paragraph (3)) should they agree on different settlement terms. Paragraph (3) is patterned on RSA 76:17-c, the subsequent year statute.

Ms. Martin noted in her testimony the Town had no reason to question the documentation received from Ms. Auger-Foti at CPTM. Avitar did not know of CPTM's contrary view on the question of whether the settlement should apply to 2008 until CPTM filed an abatement request in 2009, at which point Avitar advised the Town to deny the request because of the agreed-upon settlement. (See Municipality Exhibit C.)

The board finds no merit in two other arguments made by CPTM in the Objection (¶¶5.C. and 6): (1) the Town's "failure to address this issue until now constitutes a waiver of any right it may have had to bind the taxpayer to the \$10,400,000 assessment"; and (2) the Town performed an "annual update under RSA 75:8" which constitutes a "revised value" making the settlement inapplicable to tax year 2008. CPTM, on behalf of the Taxpayer, presented no legal authorities to support a waiver argument. In fact, the Town acted promptly and consistently with the settlement and the board finds there is nothing to suggest a waiver or relinquishment of the Town's rights under the settlement occurred. See Municipality Exhibit C (where Avitar, on April 15, 2009, advised the Town to deny the 2008 abatement application because of the settlement and its applicability to tax year 2008). Regarding the "annual update" argument, CPTM's counsel conceded at the hearing that it was a "weak" one. In fact, the Town did not perform any "annual update" of assessments in 2008, but did do a statistical update in tax year 2009.

In summary, the board finds there was a "meeting of the minds" and agreement by the parties that abated assessments would apply as follows: \$7,356,400 for 2004 and \$10,400,000 for 2005 and subsequent years, including 2008, until such time as the Town revised the assessment in good faith or performed a reassessment. No such reassessment occurred before 2009.

Consequently, this tax year 2008 appeal is dismissed.

In hindsight, both sides, in representing their respective clients, could have been more diligent in following through with the settlement negotiated on June 4, 2007 and such diligence would have obviated the need to spend the additional time needed to resolve the questions addressed in this Decision. For example, if CPTM disagreed or took issue with anything contained in the Settlement Agreements prepared later, signed by the Town selectmen and forwarded by Avitar, CPTM could have, and should have, responded in some way to Ms. Martin, either by telephone or in writing, rather than not addressing her letter at all. A reasonably prudent tax representative would have noted the contents of Ms. Martin's letter and raised with her any points of disagreement or any questions regarding it. Avitar, for its part, should have had some sort of 'tickler file' system in the office to remind the company to follow up when Mr. Boatwright of CPTM did not respond to Ms. Martin's letter. On balance, however, these lapses by each party are not sufficient grounds for the board to conclude an oral settlement was not reached at the June Settlement Meeting that encompassed subsequent years, including 2008.

Finally, the board noted at the hearing, and considered further during its deliberations, that Attorney Paul J. Alfano filed a Limited Appearance on March 16, 2010, two days before the hearing. In his words, he did so "to assist [CPTM] only with this Thursday's hearing with respect to the [T]own's Motion to Dismiss." This Limited Appearance indicates he was not acting as an attorney for the Taxpayer. Attorney Alfano also did not disclose he was the CEO of CPTM until questioned by the board. The board is still unclear as to why CPTM's interests needed to be specifically represented by Attorney Alfano, rather than the interests of the Taxpayer. At best, this practice is irregular because CPTM is not a "party" in this appeal, but simply a tax representative of a party. See Tax 201.07, 207.02(a)(5), 207.03 and 102.37.

Any party seeking a rehearing, reconsideration or clarification of this Decision must file a motion (“rehearing motion”) 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 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

CERTIFICATION

I hereby certify copies of the above Decision have been mailed this date, postage prepaid, to: Paul J. Alfano, Esq., attorney for Commercial Property Tax Management, 10 Commerce Park North - Suite 13B, Bedford, NH 03110-6959; Robert Lisk, Commercial Property Tax Management, 10 Commerce Park North - Suite 13B, Bedford, NH 03110-6959, Representative for the Taxpayer; Chairman, Board of Selectmen, Town of Tilton, 257 Main Street, Tilton, NH 03276; and Loren J. Martin, Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, NH 03258, Contracted Assessing Firm.

Date: 4/19/10

Anne M. Stelmach, Clerk