

George and Barbara Elms

v.

City of Concord

Docket No.: 24027-09EX

DECISION

The “Taxpayers” appeal, pursuant to RSA 72:34-a, the “City’s” 2009 denial of the Taxpayers’ request for “Elderly Exemption” as provided under RSA 72:39-a. For the reasons stated below, the appeal for abatement is denied.

The Taxpayers have the burden of showing, by a preponderance of the evidence, they were entitled to the statutory exemption for the year under appeal. See RSA 72:34-a; RSA 72:39-a; and Tax 204.05. We find the Taxpayers failed to carry this burden.

The Taxpayers argued they were entitled to the Elderly Exemption because:

- (1) they qualified for the exemption for over 10 years before the City removed it and advised them they would need to reapply to determine eligibility;
- (2) the City noticed them they were ineligible for the exemption because their income exceeded the City’s \$39,000 limit;
- (3) in determining their eligibility, the City disallowed expenses incurred in the rental of their apartment;

(4) the rental of the apartment is operated as a “Ma and Pa” business and although they have been less than diligent in keeping accurate records of their income and expenses, the IRS has not questioned the expense deductions and thus the City should consider them reasonable; and

(5) even if the expenses for utilities calculated at 50% of the home’s overall expenses were reduced to the City’s estimate, which they concur is more accurate, their total income would still be below the City’s \$39,000 limit thus qualifying them for the Elderly Exemption.

The City argued the denial of the Elderly Exemption was proper because:

- (1) the Taxpayers failed to provide a true, signed copy of their income tax return for the City to review;
- (2) no lease agreement for the rental apartment was provided to the City to show what the actual income was based on, nor was the City provided with verification of the expenses listed by the Taxpayers; more specifically, the Taxpayers initially indicated to the City the \$2,000 expense for repairs was for a refrigerator and widening a doorway to get the refrigerator into the apartment and at the board hearing indicated it was for roof repairs;
- (3) the Taxpayers admitted there was a separate electric meter for the apartment yet merely adjusted the total utility bill by 50% for the apartment usage, an apportionment of the expense which is simply not appropriate given the size of the apartment; and
- (4) it is reasonable and fair for the City to require the Taxpayers to produce sufficient information verifying their income and expenses and without such verification they have failed to meet their burden in showing the City was incorrect in denying the Elderly Exemption.

Board's Rulings

Based on the evidence, the board finds the Taxpayers are not eligible for an RSA 72:39-a Elderly Exemption because they failed to provide adequate documentation to support their net income as below the City's net income requirement of \$39,000.

Prior to 2009, the Taxpayers received the Elderly Exemption for a period of approximately 10 years. Through a review of the City's assessing files, it was determined the Taxpayers' application for Elderly Exemption was denied in 2004; however, due to a procedural error, they continued to receive the exemption. The error was discovered in December 2008 when the City determined the Taxpayers did not qualify for the Elderly Exemption. See Affidavit of Kathryn Temchack.

There is no dispute the Taxpayers have resided in the state (at 10 Academy Street) for a period of three consecutive years. RSA 72:39-a, I(a). The dispute before the board is whether the Taxpayers' total net income exceeds the \$39,000 amount determined by the City for purposes of RSA 72:39-b. RSA 72:39-a, I(b) states in part:

The net income shall be determined by deducting from all moneys received, from any source including social security or pension payments, the amount of any of the following or the sum thereof:

- (1) Life insurance paid on the death of an insured;
- (2) Expenses and costs incurred in the course of conducting a business enterprise;
- (3) Proceeds from the sales of assets.

The Taxpayers completed a 2009 Elderly Exemption worksheet (the "Worksheet") on June 2, 2009. Included in the Worksheet was the income and expenses related to the lease of the approximately 743 square foot apartment (second floor of the Taxpayers' residence) at 10 Academy Street (the "Property"). Of the \$9,860 income received in 2008, the Taxpayers stated

expenses were \$7,459 for a net income of \$2,401. In reviewing the application for Elderly

Exemption, the City sought the following documentation from the Taxpayers:

- An authentic signed copy of their 2008 federal tax return including Schedule E;
- Verification of their claimed 2008 apartment income of \$9,860 and expenses attributable to the apartment; i.e., copies of utility bills, receipts, checks or rental payments for the apartment;
- Copies of balance statements for checking accounts, savings accounts, certificate of deposit accounts as of December 31, 2008; and
- A statement showing vehicles owned by year, make, and mileage.

The Taxpayers provided the City with a signed “copy” of the handwritten Form 1040 IRS income tax return previously provided (unsigned). They further provided copies of the utility bills and stated although there is a separate electric meter for the apartment, the Taxpayers paid all utility bills and merely apportioned 50% to the apartment usage. The Taxpayers indicated to the City and at hearing that copies of rent checks were not made but indicated the tenant had resided at the apartment for a period of three years until he graduated from Franklin Pierce College in June 2009.

First, the board finds the lack of a signed photocopy of the Form 1040 is not fatal in determining the Taxpayers’ eligibility in this case. The testimony of Mr. Elms at hearing was credible wherein he stated the Form 1040 filed with the IRS was merely copied by hand and that was what was provided to the City. While a photocopy of the signed return would have been ideal, given the fact the Taxpayers neglected to make such a copy should not bar them from providing the evidence they had to the City. Next, given the tenant had rented the apartment for a period of three years, it is not unreasonable for the Taxpayers to rent on a month to month basis without a lease. While the Taxpayers lacked written documentation of the gross income, the board finds the testimony of Mr. Elms to be credible as to the total rent received for 2008. Nonetheless, it would be prudent for the Taxpayers in the future to maintain a better, more

complete level of documentation (copies of rent checks, income ledger, etc.) of the rental income.

Thus, the main issue for the board to decide is whether the expenses related to the rental of the apartment (the business enterprise) listed on the Schedule C and as testified at hearing are credible and thus would result in the Taxpayers qualifying for the Elderly Exemption. Based on his submission to the City and his testimony to the board, Mr. Elms indicated all expenses were apportioned 50/50 between the Taxpayers' home and the apartment. Before commenting on the expenses themselves, the board finds apportionment of 50/50 is not reasonable based on the units' sizes alone. The Property's total living area is 2,021 square feet with the Elms' apartment containing 1,278 square feet and the tenant apartment containing 743 square feet, approximately 37% of the total Property's area. The Taxpayers testified to a separate meter for the electricity yet no records were kept as to the electric expenses incurred for the apartment usage. Mr. Elms testified other expenses (such as advertising, auto and travel, cleaning and maintenance, cleaning supplies and repairs) listed were either merely a "guess," he didn't remember or were based on expenses filed in 2007. While the board finds the Taxpayers should not be held to such high levels of accounting practice as to be absurd, there should be some level of accurate, supportable documentation of income and expenses for their business for the City to review and, in this case this board, to determine eligibility. Business expenses are appropriate deductions in determining net income (RSA 72:39-a, I(b)(2)), but these expenses must be reasonably documented and allocated for that portion of the business. The board finds the Taxpayers failed to provide adequate documentation to support their expenses and, thus, failed to prove their income was below the City's \$39,000 limitation.

Therefore, based on the evidence, the board finds the Taxpayers failed to prove they were entitled to the Elderly Exemption for tax year 2009 and grants the City of Concord's Motion to Deny [the Elderly Exemption] filed on December 2, 2009. This ruling does not prevent the Taxpayers from applying for the Elderly Exemption in subsequent years providing they submit accurate and supportable documentation of their income and expenses to the City.

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

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Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: George and Barbara Elms, 10 Academy Street, Concord, NH 03301, Taxpayers; and Chairman, Board of Assessors, City of Concord, 41 Green Street, Concord, NH 03301.

Date: December 24, 2009

Anne M. Stelmach, Clerk