

**Linda E. Ferris**

**v.**

**City of Manchester**

**Docket No.: 24207-09EX**

**DECISION**

The “Taxpayer” appeals, pursuant to RSA 72:34-a, the “City’s” 2009 denial of the Taxpayer’s request for 100% disability exemption as provided under RSA 72:37-b. The City granted the Taxpayer a 50% disability exemption based on the proration provisions of RSA 72:41. For the reasons stated below, the appeal is granted.

The Taxpayer has the burden of showing, by a preponderance of the evidence, she was entitled to the statutory exemption or credit for the year under appeal. See RSA 72:34-a; RSA 72:37-b and Tax 204.06.

The Taxpayer argued she was entitled to a 100% disability exemption because:

- (1) RSA 72:37-b contains no provisions to prorate the disability exemption based on the Taxpayer’s joint tenancy ownership of the Property;
- (2) the proration provisions of RSA 72:41 are not applicable to RSA 72:37-b because RSA 72:41 contains no reference to any statute except RSA 72:39-b, the elderly exemption statute;
- (3) the paragraphs both preceding and following RSA 72:41 relate solely to RSA 72:39-b elderly exemptions;

- (4) RSA 72:41 was enacted in 1969 as part of the then elderly exemption statute and has remained substantially unchanged to present with only changes in reference to the applicable elderly exemption statutes;
- (5) because RSA 72:37-b was enacted in 1993, 24 years subsequent to RSA 72:41, the legislature could have, but did not, make reference in RSA 72:37-b to a specific proration statute or provide one within the disability exemption statute itself;
- (6) the New Hampshire Department of Revenue Administration's ("DRA") rule REV 402.02 is ultra vires in that it lumps together credits, exemptions and deferrals as being prorated pursuant to RSA 72:30 because RSA 72:30 relates solely to proration of a tax credit;
- (7) the permanent application for personal exemptions, PA 29, as prescribed by the DRA, makes no reference of any proration applicable to the disability exemption;
- (8) a BTLA decision relied upon by the City, LaPointe v. City of Nashua, BTLA Docket No.: 21802-06EX (April 10, 2007), is not controlling because the facts in LaPointe were different than those on appeal and the parties in LaPointe stipulated to a 50% proration for a disability exemption; and
- (9) because the Taxpayer was forced to litigate to obtain her full disability exemption, that is clearly a right under the proper review of the law, the Taxpayer should be awarded expenses and attorney fees in the amount of \$9,039 as detailed in Taxpayer Exhibit No. 4.

The City argued granting a 50% disability exemption was proper because:

- (1) the RSA 72:41 proration provisions do apply to disability exemptions because RSA 72:41 has a broad statement that prorations are applicable to "any entitled person..." that "own[s] a fractional interest in residential real estate...";

(2) the DRA's rules REV 401.08 and REV 402.02 provide for proration of credits, exemptions and deferrals;

(3) the board's holding in LaPointe supports the City's position that disability exemptions can be prorated when multiple parties have interest in the qualifying residential property but only one person is eligible for the disability exemption;

(4) to grant 100% exemption to the Taxpayer would provide greater relief than what the legislature envisioned when multiple parties own fractional interests in the qualifying property and to do so could potentially result in a "stacking up" of elderly and disabled exemptions by multiple owners of one property so that the aggregate exempt value is greater than 100% of the total exempt value provided for by the City; and

(5) the Taxpayer's request for attorney expenses and fees should be denied because the City's practice is recommended by the DRA and consistent with other municipalities' practices throughout the State.

### **Board's Rulings**

For the reasons that follow, the board finds the City erred in denying the full exemption and the board orders the Taxpayer be granted the 100% eligible exemption. First, several rules of statutory interpretation and construction are important to be mindful of.

The board's powers and jurisdiction are solely statutory (Appeal of Land Acquisition, 145 N.H. 492, 494 (2000)) and the board must first examine the statute's language and "ascribe the plain and ordinary meanings to the words used" unless the statute itself suggests otherwise.

Appeal of Astro Spectacular, Inc., 138 N.H. 298, 300 (1994); Appeal of Campton School District, 138 N.H. 267, 269 (1994). The board must read the language at issue in the context of the entire statute as a whole and the statutory scheme, not simply by looking at isolated words or phrases.

Pennelli v. Town of Pelham, 148 N.H. 365, 366 (2002); Barksdale v. Town of Epsom, 136 N.H. 511, 514 (1992); and Great Lakes Aircraft Co. v. City of Claremont, 135 N.H. 270, 277 (1992).

The statute's words are the touchstone of the legislature's intention. Thus, the legislative intent is based not on what the legislature might have intended but rather on what was stated in the statute. State v. Dushame, 136 N.H. 309, 314 (1992). Appeal of Walsh, 156 N.H. 347, 355 (2007).

The facts in this case are largely uncontested. The Taxpayer owns the qualifying Property with Ellen P. Conroy as joint tenants with rights of survivorship. The Taxpayer qualifies for an RSA 72:34-b exemption due to disabilities she has sustained and because she qualifies for and receives Federal Social Security Act benefits referenced in RSA 72:37-b. The Taxpayer had received 100% disability exemption until 2009 when the City reviewed all RSA 72:37-b exemptions where title to the property was held in joint tenancy and applied the RSA 72:41 proration statute to such properties.

With some reservations and concerns that the board will mention later, the board finds, on balance, the most persuasive argument is that presented by the Taxpayer's attorney, Mr. Hodes, that: 1) RSA 72:37-b contains no proration provisions within its paragraph; and 2) RSA 72:41, due to its statutory history and origination in the elderly exemption statute, does not relate to an RSA 72:37-b disabled exemption.

As pointed out by Attorney Hodes, the legislature has in other paragraphs of RSA ch. 72 made specific references to various exemptions, credits and deferrals where it deemed necessary and could have done so when it enacted the disability exemption in RSA 72:37-b. The board need not even surmise, as Attorney Hodes did, that the legislature did not do so for the disabled exemption because it is a class of individuals who have an even lesser ability to support themselves than elderly citizens being provided relief under RSA 72:39-b. The simple fact the

legislature did not include a proration provision in RSA 72:37-b is evidence the legislature did not intend to provide for such a proration for the disabled exemption. Also, as Attorney Hodes noted, because the elderly exemption statutes (RSA 72:39-a and its predecessors), including RSA 72:41, predated the addition of RSA 72:37-b by 24 years, the legislature could have easily made a reference to RSA 72:41, but did not do so.

The City argued that the wording of RSA 72:41 can be read fairly broad to include “any entitled person” to relate to anyone receiving any tax relief provided for in RSA ch. 72. However, the board finds the Taxpayer’s argument more compelling that RSA 72:41 has always existed within the context of the elderly exemption statute that originated in 1969 and continues to date to be physically located within the statutory scheme embodied amongst other elderly exemption provisions.

The board recognizes the concern expressed by the City that such an interpretation could lead to potential “stacking up” of elderly and disability exemptions of multiple owners of a single qualifying residential property that would exceed the sum total of 100% of such exemption. While the board acknowledges that such a scenario could potentially occur, it would not be the common occurrence and it does not outweigh the requirement the board apply the plain and ordinary meaning of the words of the statutes as discussed above. If indeed the legislature believes this reading and application of the law results in some inequities, it has the ability to prospectively correct them.

The board has reviewed its decision in LaPointe and gives little precedential weight to its holdings in that decision. First, it appears as if the facts and holdings were not on all four with the facts and issues presented in this appeal. Second, the statutory history and construction of

RSA 72:37-b and RSA 72:41 have been briefed extensively in this appeal while they were not in the LaPointe appeal; rather in LaPointe, the board relied on the stipulation of the parties to apply a proration of the disabled exemption.

The board is unable to place any weight on the DRA's REV 402.02(b) statement that "[t]he credit, exemption or deferral shall be prorated as required by RSA 72:30." It appears as if DRA's rule is broader than what the statutory authority of either RSA 72:30 or RSA 72:41 provides.

"[A]dministrative officials do not possess the power to contravene a statute[] [and] ... administrative rules may not add to, detract from, or modify the statute which they are intended to implement.' Appeal of Anderson, 147 N.H. 181, 183, 784 A.2d 1205 (2001)." Formula Development Corporation v. Town of Chester, 156 N.H. 177, 182 (2007).

The Taxpayer requested costs and attorney's fees in the amount of \$9,039.00 (Taxpayer Exhibit No. 4). RSA 71-B:9 provides in part that, "[c]ost and attorney fees may be taxed as in the superior court." Further, Tax 201.39 provides for the board to order costs if "the matter was frivolously brought, maintained or defended...." Further, attorney fees are granted only when "an individual is forced to seek judicial assistance to secure a clearly defined and established right..." and the opposing party has acted in bad faith. Harkeem v. Adams, 117 N.H. 687, 691 (1977). See also Borroughs, 121 N.H. 590, 601 (1981).

Here, we find the City neither acted in bad faith nor was the right that the Taxpayer sought to secure clearly defined. As the board has noted in this Decision, the statute has room for differing interpretations and the City's interpretation that RSA 72:41 applied more universally to the entire RSA ch. 72 is not one made out of bad faith, is not unreasonable, nor was it intended to frivolously maintain the appeal. Thus, the board denies the Taxpayer's request for costs and attorney fees.

Last, as the board noted during the hearing, regardless of the board's conclusions here and any subsequent conclusion on appeal, the board would encourage the City and DRA to consider whether legislative clarification of this issue would benefit taxpayers and municipalities in understanding the extent of the disability exemption in these situations. Because this ruling could impact how other municipalities administer an RSA 72:37-b exemption and DRA's rule REV 402.02(b), the board has added DRA to its certification.

If the taxes have been paid on the 50% of the exemption not granted, the City shall reimburse the taxes plus six percent per annum from date paid to refund date. RSA 76:17-a.

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

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Paul B. Franklin, Chairman

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Michele E. LeBrun, Member

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Douglas S. Ricard, Member

**Certification**

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Jay L. Hodes, Esq., HageHodes, PA, 440 Hanover Street, Manchester, NH 03104, counsel for the Taxpayer; Chairman, Board of Assessors, City of Manchester, One City Hall Plaza-West Wing, Manchester, NH 03101; and Stephen W. Hamilton, Property Appraisal Division, DRA, 109 Pleasant Street, Concord, NH 03301.

Date: January 5, 2010

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Anne M. Stelmach, Clerk