

MAV Realty Trust

v.

City of Lebanon

Docket No. 25612-10PT

ORDER

On April, 9, 2013, the board held a noticed hearing on the “City’s” Motion to Dismiss (“Motion”) in order to receive “all relevant testimony, documents and arguments” pertaining to the Motion and the “Objection” to the Motion filed by the “Taxpayer.”¹ (See January 29, 2013 Order.) The Motion (p. 1) contends one board rule [Tax 203.02(d)] “requires the dismissal” of this appeal because a trustee of the Taxpayer (MAV Realty Trust) “did not sign the abatement application” (Municipality Exhibit A). The Motion is denied for the reasons stated below and in the Objection.

Tax 203.02(d), based on RSA 76:16, III(g), requires the “taxpayer” to sign the abatement application, does not permit an attorney or (non-attorney) tax representative (authorized by RSA 71-B:7-a) to sign in place of the taxpayer and precludes an appeal to the board unless the lack of

¹ The only individuals who attended the hearing were the attorneys: Joshua M. Pantesco, Esq. of Gardner, Fulton & Waugh PLLC, for the City; and Barry C. Schuster, Esq. of Schuster, Buttrey & Wing, P.A., for the Taxpayer.

a taxpayer signature “was due to reasonable cause and not willful neglect.”²

The Motion therefore requires examination of how the Taxpayer’s abatement application was filled out and signed. Section A identifies MAV Realty Trust as the applicant (the ‘owner/taxpayer’). Section H, which embodies the taxpayer signature requirement in the board’s rule, is signed by an individual (Stephen P. Steinberg) identified as the “Manager” of the trust; it is not signed by either of the two trustees (Michael A. Valerio and Helen J. Valerio). Mr. Steinberg also filled in Section B (which requests the name, address and phone number of the party’s “representative”) and added an “Attorney” appellation to his name (perhaps because he is admitted to practice law in Massachusetts, but not New Hampshire).

Notably, Section I of the abatement application form was left blank by Mr. Steinberg: this is a “Certification and Appearance” to be filled out by the applicant’s “Representative,” if the applicant has hired an attorney or taxpayer representative. It bears emphasis that Section I, like Section B, need not be filled out in every instance because a taxpayer is not required to retain an attorney or tax representative in order to seek a tax abatement.

² Tax 203.02(d) reads as follows:

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 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.

Another rule, Tax 102.03, defines “Agent” to mean the taxpayer’s representative in the abatement and appeal process when the representative “is not an attorney.” Out of state attorneys (not also admitted to practice law in New Hampshire) who seek to represent taxpayers have additional responsibilities under Tax 201.09.

RSA 76:16, III(g), for its part, states the board’s “abatement application form” shall include “[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.”

The following undisputed facts were presented at the hearing. The Valerio trustees are a married couple in their 80's. They purchased the "Property" (located at 192 South Main Street, a commercial building with a restaurant they once operated) many years ago, placed the Property in a trust created in 1974 (naming themselves as trustees) and hired Mr. Steinberg to manage the day-to-day operations, including finding suitable tenants and leasing space, receiving the rent, paying the bills and doing the "accounting" for the Property.

Mr. Steinberg's role as property manager is further confirmed by the written trustee affidavit signed by the Valerios (attached as Exhibit B to the Motion). In this affidavit (signed on July 18, 2012 in response to a request from the City's attorney), the Valerios state they are the trustees of MAV Realty Trust, are authorized, under the terms of the trust, "to delegate duties, powers and investment and management functions . . . to any person" and have done so to Mr. Steinberg with respect to the Property "since prior to 2010." This affidavit further mentions delegation of a right to file a tax abatement application "on behalf of the Trust."

The City was aware of Mr. Steinberg's active management of the Property and communicated and dealt with him (rather than the two trustees) at all relevant times pertaining to this tax year 2010 appeal. This is evident, for example, from the assessment-record card in the board's file which shows the address of Mr. Steinberg's property management company (Acton Management) as the "ownership address," not the address of the trustees. In response to board questions at the hearing, the City's attorney acknowledged the question of Mr. Steinberg's capacity to sign the abatement application for the Taxpayer was not raised when the City denied the abatement application (on substantive grounds) in May, 2011. This procedural issue was

raised for the first time in the Motion, more than one year after the Taxpayer's appeal was filed with the board by Attorney Schuster (the trust's New Hampshire attorney in this appeal).

While there is no dispute "[t]he [t]rustees did not sign the [abatement] application" and the City emphasizes this fact in seeking a dismissal of the appeal (Motion, p. 1), the board is not persuaded a trustee holding "legal title" for a trust obligated to pay property taxes must always sign Section H of the abatement form or else lose the right to appeal an allegedly disproportional tax assessment. Here, Mr. Steinberg signed Section H as the person in charge of directly managing the Property. He has specific, delegated powers to invest and manage the trust property and, on the facts presented, is likely to have more knowledge of the relevant facts pertaining to the Property's market value (such as its rental history, revenues and expenses) than the trustees. The board finds, in these circumstances, it was reasonable for Mr. Steinberg to sign Section H of the abatement application to comply with Tax 203.02(d).

The Objection (pp. 2-3) and Taxpayer Exhibit No. 1 are persuasive in discussing the rights of trustees under the Uniform Trust Code (enacted as RSA ch. 564-B) to delegate management authority over trust property to another person, Mr. Steinberg in this instance. The Objection also establishes the City's reliance on Appeal of Wilson, 161 N.H. 659 (2011) as support for the Motion is misplaced.

Wilson, *id.* at 660-61, involved a tax representative (authorized to represent taxpayers under RSA 71-B:7-a) who filed an abatement application for two individual taxpayers and intentionally did not provide any taxpayer signature on Section H of the form. This individual is engaged full-time in the business of tax representation (as "Northeast Property Tax

Consultants”). He simply referenced an “agent form” that gave him specific, limited authority to pursuing a tax abatement and appeal on the taxpayers’ behalf. This form pertained solely to the tax abatement and appeal process and made him an agent only for this purpose. The tax representative in Wilson was not, in any respect, the actual manager of the property and did not hold himself out to either the municipality or the general public as acting in such a role. On these facts, the supreme court sustained the board’s findings that “there was no reasonable cause” for the taxpayers’ “failure to sign the [tax abatement] form” and the tax representative’s “failure to obtain their signatures constituted willful neglect [and] dismissal of their appeal was warranted.” Id.

The facts in this appeal are clearly different from Wilson. The Taxpayer’s abatement application filed with the City does contain a signature in Section H to comply with the board’s rules. Mr. Steinberg signed Section H, not as a tax representative (or even as an attorney), but in his role as the Taxpayer’s “Manager” of the Property, a role the City was clearly aware of even before it processed and denied the abatement application.

In addition, and unlike Wilson, the facts in this appeal do not support a finding of lack of “reasonable cause” or “willful neglect” on the part of the Taxpayer with respect to the signature requirement (by having Section H signed by Mr. Steinberg rather than by one of the trustees). In hindsight, it was no worse than an inadvertent error for Mr. Steinberg to also fill out Section B of the form (which is related to Section I, as noted above, not Section H). The inadvertent error of filling out Section B was acknowledged by the Taxpayer’s attorney at the hearing (Attorney

Schuster) and does not diminish the board's finding that the Taxpayer satisfied the Section H signature requirement.

A trust (like a corporation or a limited liability company) has no physical ability to sign Section H for itself and can only do so through an individual (natural person, not a legal entity). That individual could have been either of the trustees, as the City asserts, but it could also be the manager of the trust property: in this instance, Mr. Steinberg, who had direct management responsibilities for the Property. Consequently, the board finds the Taxpayer did not violate the board's rule requiring a taxpayer signature on the abatement application.

More generally, the board does not agree with the City's arguments that trustees who hold title to trust property are "taxpayers" because of this legal function and therefore "[t]he [t]rustees are the parties aggrieved by an allegedly disproportionate assessment," rather than the trust itself. (See Motion, p. 1.) The Motion states trustees act only in a "fiduciary" role and are the "holder[s] of the title to property, subject to an equitable interest of the beneficiary."³

Trustees, when they perform their duties prudently, have no personal obligation for taxes or other liabilities associated with holding ('owning') trust property. They do not pay the taxes or any other financial obligation of the trust with their own funds. The incidence and liability for property taxes falls on the trust, in the first instance, and ultimately on the beneficiaries of the trust, who may or may not be the same individuals as the trustees. As further noted in the Objection (p. 3), a trustee, in this role, "does not have a beneficial interest in the property" and is not the person "aggrieved" by the assessment. See also RSA 76:16 and RSA 76:16-a.

³ Motion, p. 3, citing 7 De Grandpre, New Hampshire Practice: Wills, Trusts, and Gifts §2.01 (4th ed. 2003). See also RSA 564-B:1-103(2) (defining a beneficiary as a person who has a "present or future beneficial interests in the trust").

The supreme court has specifically held that persons aggrieved by the property tax include those who bear and pay the tax, whether or not they hold legal title to the property. See, e.g., Appeal of Thermo-Fisher, 160 N.H. 670, 672-74 (2010) (corporation who paid taxes has standing to appeal even if title to property was held by a “wholly owned subsidiary”); and Appeal of City of Lebanon, 161 N.H. 463 (2011) (lessee who had obligation to pay tax had a ‘separate taxable estate,’ distinct from the lessor who held title and also owned another lot). Similarly, trustees who hold legal title to property are not necessarily the “taxpayer” for purposes of the tax abatement and appeal statutes.

Another argument made by the City (in the Motion, p. 5, but not at the hearing) involves the “policy” issue of whose signature on an abatement application might be “more trustworthy.” Where, as in this appeal, there is an active property manager (Mr. Steinberg), there is no reason to conclude, absent any evidence to the contrary, that his sworn certification in Section H concerning the “good faith basis” and the truth of the facts stated in the abatement application are any less trustworthy than statements made by either of the trustees (the Valerios) who have specifically delegated property management responsibilities to Mr. Steinberg.

Finally, even if, for the sake of argument, the City’s contrary reading of Tax 203.02(d) is correct, the board retains the authority, under Tax 201.41(b), to grant relief for failure to comply with its rules “when justice otherwise requires.” Justice would not be served by dismissing this appeal on the very technical ground urged by the City regarding who signed Section H of the abatement application. See, generally, GGP Steeplegate v. City of Concord, 150 N.H. 683, 685-86 (2004) (discussing the need to “ensure. . . tax abatement proceedings remain free from

technical and formal obstructions”), clarified in Wilson, 161 N.H. at 664; and Langford v. Town of Newton, 119 N.H. 470, 472-73 (1979) (cited in the Motion, pp. 3-4, and quoted in the Objection, p. 2): “to deny justice to one who, being in no fault, has been wronged in the assessment of taxes, would be a glaring departure from that course of justice for which the [abatement] statute was meant to provide. [Internal quotation and citation omitted.]”

For all of these reasons, the Motion is denied.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Michele E. LeBrun, Chair

Albert F. Shamash, Esq., Member

Theresa M. Walker, Member

CERTIFICATION

I hereby certify copies of the above Order have been mailed this date, postage prepaid, to: Barry C. Schuster, Esq., Schuster, Buttrey & Wing, PO Box 388, Lebanon, NH 03766, counsel for the Taxpayer; Adele M. Fulton, Esq., Gardner, Fulton & Waugh, PLLC, 78 Bank Street, Lebanon, NH 03766, counsel for the City; and Chairman, Board of Assessors, City of Lebanon, 51 North Park Street, Lebanon, NH 03766.

Dated: April 23, 2013

Anne M. Stelmach, Clerk