

John W. Latvis

v.

City of Nashua

Docket No. 25480-11EX

AMENDED AND RESTATED DECISION

Pursuant to the September 21, 2011 Order, the board scheduled and held a December 1, 2011 hearing on the merits of this appeal in response to the “City’s” August 30, 2011 Motion to Reconsider the board’s August 2, 2011 Decision (the “Prior Decision”) which had been issued on the pleadings submitted (without a hearing).¹ Upon fuller consideration of the additional documents, testimony and arguments presented at the December 1, 2011 hearing, the board finds the Prior Decision should be withdrawn and replaced in its entirety by this Amended and Restated Decision.

At issue in this RSA 72:34-a appeal is whether the “Taxpayer” is entitled to a 2011 tax credit under RSA 72:35 (“Tax Credit for Service-Connected Total Disability”). The board finds merit in the City’s position that the Taxpayer did not qualify in tax year 2011 because of the

¹ The Prior Decision resulted from a June 28, 2011 Order which asked the City to respond in writing as to why, on the facts presented and the apparent similarities to a prior decision (Jarry v. City of Nashua, BTLA Docket No. 21476-05EX (February 27, 2006), “the board should not grant the appeal without a hearing.” The board was unpersuaded by the City’s July 6, 2011 “Response” to the June 28, 2011 Order that Jarry was distinguishable on the “accident, mistake or misfortune” issue discussed further below. Upon review of the City’s Motion to Reconsider, however, the board decided to hold a hearing on the merits of the appeal.

“true and lawful owner” requirement in RSA 72:33, I. In Section I, the board will state its findings as to why the Taxpayer did not meet his burden of proof on this issue, resulting in a denial of the appeal on the merits. In Section II, the board will discuss further why it does not agree with the City’s interpretation of the “accident, mistake or misfortune” exception to the timely filing requirement in RSA 72:33, I-a.

I. The True and Lawful Owner Requirement in RSA 72:33, I

At the December 1, 2011 hearing on the merits, the City presented and developed with more clarity one of its arguments regarding why the Taxpayer did not qualify for the tax credit in 2011. The City maintains a review of the two recorded deeds and one trust document it has submitted establishes the Taxpayer was not the “true and lawful owner” of the “Property” (17 Chester Street), as required by RSA 72:33, I, as of the operative April 15, 2011 filing date. On balance, and while not free of doubt, the board agrees.

This statute applies to many statutory tax exemptions and credits (including the RSA 72:35 tax credit at issue in this appeal) and states the applicant must show he or she “is the true and lawful owner of the property on which the exemption or tax credit is claimed.” The burden of proof rests with the Taxpayer, as it does for all of the eligibility requirements established by the legislature. See RSA 72:34-a; and Tax 204.05 (“The Taxpayer shall have the burden to prove (he) was entitled to the statutory exemption, deferral or tax credit for the year under appeal”); and, e.g., Heinz v. Town of Hampstead, BTLA Docket No. 24973-10EX (January 24, 2011) (taxpayer bore burden of proving he was entitled to RSA 72:28 veteran’s tax credit). The board has no authority to waive or modify these statutory requirements. See Appeal of Land Acquisition, 145 N.H. 492, 494 (2000).

The City presented two recorded deeds at the hearing to establish that, from October 23, 1995 through July 8, 2011, the Taxpayer's wife's trust (not the Taxpayer or his own trust, for that matter) held legal title to the Property. See Municipality Exhibits A and C (conveying title first to the Maida M. Latvis Revocable Trust and then, 16 years later, to the John W. Latvis Revocable Trust). The date when the Taxpayer's trust acquired title to the Property (July 8, 2011) was almost three months after the April 15, 2011 date for determination of the Taxpayer's eligibility to receive the tax credit.

The City relies on the plain and ordinary meaning of the term "true and lawful owner" as the person who has legal title to the Property. Plainly, the Taxpayer did not have legal title as of the April 15, 2011 filing date. Legal title did change later in the year from his wife's trust to his own trust (presumably to help qualify himself for the tax credit, which the City denied for 2011 but has apparently granted for tax year 2012).

The legislature, in RSA 72:29, VI, defines ownership to "include those who have equitable title or beneficial interest for life in the subject property," and this concept explicitly applies to RSA 72:33 and RSA 72:35. The problem for the Taxpayer is that there are insufficient facts to establish he meets the "equitable title or beneficial interest for life" provisions in this statute during the time his wife's trust held legal title to the Property. The Taxpayer is mentioned in his wife's trust, a document they stated was created for estate planning purposes ("to avoid probate"), not to change the fact they are a "happily married couple for over 65 years (who) have lived (on the) Property for over 60 continuous years." (See the Taxpayer's July 8, 2011 letter to the board.) None of the provisions in the trust document, however, either when viewed separately or as a whole, allows the board to conclude the Taxpayer held equitable title or a beneficial interest for life in the Property. (See Municipality Exhibit B.)

In summary, the board finds the Taxpayer did not meet his burden of proving he was the true and lawful owner of the Property as of the April 15, 2011 filing date. His appeal for a 2011 tax credit is therefore denied.

II. The Accident, Mistake or Misfortune Exception in RSA 72:33, I-a

When the Taxpayer submitted his 2011 application, the City gave him only one reason for denial on June 22, 2011: “Untimely filing, application received after the deadline of April 15th.” (See Municipality Exhibit D.) In denying the appeal solely on this procedural ground, the City gave no indication that it even considered the accident, mistake or misfortune exception to the timely filing requirement in RSA 72:33, I-a at all. As noted in the Prior Decision (pp. 1-3), the Taxpayer did not file by April 15 because he did not receive the DVA certification of his disability until after that date.

The City’s representatives stated the City has changed its “policy” (based on the Jarry decision) and will accept applications for processing if they are filed by the statutory deadline (April 15) even if not all the required documentation (such as a DVA disability certification) has been received by that date. Mr. Marino, who signed the denial of the Taxpayer’s application, did not attend the hearing.² Mr. LeMay, the Deputy Assessor, testified there is no written notice that he knows of (such as a posting on the City’s website, for example) informing residents of this change in policy. The board is concerned by the apparent lack of communication and public notice to affected property owners. In other words, there is no evidence the Taxpayer or any

² Mr. Marino’s August 26, 2011 affidavit, attached to the City’s reconsideration motion, does not state whether any notice of when and how the City “modified its procedures” was given to the public. He simply states what the City “would have” done if the Taxpayer’s application had been filed by April 15 (without the DVA certification). There is no evidence to suggest any taxpayer would have reason to know what the City would have done if he or she had attempted to file an incomplete application; in the past, such applications had been rejected by the City and taxpayers have been discouraged from filing without the certification, as noted in the Jarry decision. Andrew LeMay, the Deputy Assessor, testified the City in the past few years has accepted a total of “four” applications after the April 15 date in circumstances such as when the applicant was out of the country (serving in the military) or had a serious medical condition preventing him or her from meeting the April 15 deadline.

other property owner would have had notice of this change in the City's policy prior to the April 15, 2011 filing deadline.

The City further argued the "accident, mistake or misfortune" provision in RSA 72:33, I-a is worded permissively ("may") and therefore the board has no authority to set aside the City's exercise of "discretion" in deciding what circumstances constitute accident, mistake or misfortune. The board does not agree.

While a municipality has some discretion to determine, based upon the specific facts pertaining to each applicant, what is or is not sufficient to meet the accident, mistake or misfortune exception for a late filing, this discretion is not absolute and is subject to review by either the board or the superior court (under RSA 76:16-a and RSA 76:17, respectively) if a taxpayer decides to appeal the City's denial. In other words, a municipality's decision regarding whether or not it will apply the accident, mistaken or misfortune provision can be challenged on appeal. Cf. Pelham Plaza v. Town of Pelham, 117 N.H. 178, 181-83 (1977) (reviewing "accident, mistake or misfortune" exception in RSA 74:8 and affirming board of taxation's decision). If this was not true, a taxpayer would have no recourse if a municipality issued blanket denials of all applications filed after April 15 and refused to consider any facts that might constitute accident, mistake or misfortune. The City's somewhat contrary interpretation of this exception undermines the rationale for the right of appeal granted in RSA 72:34-a and is not consistent with the entire statutory framework governing tax abatement and appeals established by the legislature and basic notions of due process.

In summary, the board finds taxpayers were entitled to reasonable notice of this change in the City's policy and the City should therefore have considered the Taxpayer's tax credit application based on the accident, mistake or misfortune provision in RSA 72:33,I-a, instead of

denying it in a summary fashion because it was not filed by April 15. In light of the RSA 72:33, I “true and lawful owner” requirement, however, the board finds, as discussed in Section I, there is no basis for rejecting this alternative argument for denial by the City and the appeal is denied because the Taxpayer did not meet his burden of proof on this issue.

III. Further Proceedings

If the Taxpayer seeks seeking a rehearing, reconsideration or clarification of this Amended and Restated Decision, he must file a motion (collectively “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

Michele E. LeBrun, Chair

Albert F. Shamash, Esq.

CERTIFICATION

I hereby certify that a copy of the foregoing Amended and Restated Decision has this date been mailed, postage prepaid, to: John W. Latvis, 17 Chester Street, Nashua, NH 03064, Taxpayer; and Stephen Bennett, Esq., City of Nashua, 229 Main Street, Nashua NH 03061, Counsel for the City.

Date: February 16, 2012

Anne M. Stelmach, Clerk