

University of New Hampshire School of Law

v.

City of Concord

Docket No.: 26400-11EX

DECISION

The “Taxpayer” appeals, pursuant to RSA 72:34-a, the “City’s” 2011 denial of its request for an educational exemption as provided under RSA 72:23, IV of the “Property” on Map/Lot 48/4/6/A located at 2 White Street.

The Taxpayer has the burden of showing, by a preponderance of the evidence, it was entitled to the statutory exemption for the year under appeal. See RSA 72:23-m; Tax 204.05. For the reasons stated below, the RSA 72:23, IV exemption is granted.

Background:

The Taxpayer filed its appeal with the board on August 29, 2012. After the board determined the application for exemption was timely filed with the City, a hearing on the merits was scheduled for March 7, 2013. On March 5, 2013, the parties requested leave to submit a joint statement of facts and separate legal memoranda in lieu of attending the March 7, 2013 hearing. The board granted the parties’ request and the following documents were subsequently filed with the board:

- March 7, 2013: “Agreed Statement of Facts”;
- March 22, 2013: University of New Hampshire School of Law’s Memorandum (“Taxpayer’s Memorandum”);
- March 22, 2013: City of Concord’s Memorandum of Law (“City’s Memorandum”);
- April 2, 2013: University of New Hampshire School of Law’s Reply Memorandum (“Taxpayer’s Reply”); and
- April 2, 2013: City of Concord’s Reply Memorandum of Law (“City’s Reply”).

The board has thoroughly reviewed these documents as well as the case law cited and makes its findings based not on any single piece of evidence but on the totality of evidence.

The “Property” on which the exemption is being sought is 2 White Street (formerly known as 92 Washington Street, a portion of Map/Lot 48/4/6) and now known as Map/Lot48/4/6/A. The entire first floor and a portion of the second floor of 92 Washington Street received an educational exemption from the City in tax year 2010 and in prior years, however, a portion of the second floor was not tax exempt.¹

Subsequent to the Taxpayer’s² Board of Trustees’ August 27, 2010 approval of the proposed building project and receipt of conditional site plan approvals from the City on October 20, 2010, demolition began at the Property on October 28, 2010. Construction of the new building known as the “Intellectual Property Center” (“IPC”) began on December 22, 2010 and continued until August 25, 2011 when the City issued a Temporary Certificate of Occupancy.

¹ The first floor of 92 Washington Street “housed the New Hampshire Appellate Defender clinic which provided indigent representation to criminal defendants, and also provided practical training for law students. That portion of the building received a tax exemption. The remaining part of the second floor... was available to be used for visiting faculty housing. The apartment was not, in fact, used for faculty housing during the 2010 tax year. The apartment on the second floor and a portion of the land was taxed... during tax years 2008, 2009 and 2010.” (Agreed Statement of Facts, p. 2.) and “most of the building and land at 92 Washington Street were treated as tax exempt by Concord in 2010. The apartment on the second floor of 92 Washington Street and 3% of the land associated with 92 Washington Street were treated as taxable.” (Taxpayer’s Memorandum, p. 2.)

² The Taxpayer was previously known as the “Franklin Pierce Law Center”. (See Agreed Statement of Facts, p. 1 and Tab C.)

The Taxpayer began to occupy the faculty offices in the building in mid-August 2011 and began using the IPC for classes on August 29, 2011. The Taxpayer sought an exemption for its main building (Map/Lot 48/4/6) and the adjacent site containing the IPC for the 2011 tax year. The exemption on Map/Lot 48/4/6 was granted and the City denied the exemption request for the IPC (Map/Lot 48/4/6/A). (See Agreed Statement of Facts, pp. 2-3, Addendum D.)

Board's Rulings:

Based on the evidence, the board finds the Taxpayer carried its burden of proving the Property is entitled to an RSA 72:23, IV educational exemption and the appeal is therefore granted.

Part II, Article 83 of the New Hampshire Constitution states:

Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions....

Qualification for an educational exemption requires fulfillment of the requirements set forth in RSA 72:23, IV. This statute provides an exemption from taxation for:

[t]he buildings and structures of schools, seminaries of learning, colleges, academies and universities organized, incorporated or legally doing business in this state and owned, used and occupied by them directly for the purpose for which they are established....

The sole reason for the denial of the exemption was the City's belief the "use and occupancy" requirement for an educational exemption cannot be met while the Property was under construction and the physical structure being built was not yet ready for occupation and until such time as an occupancy permit was granted. Under the specific facts presented in this appeal, the board disagrees.

The City was advised the IPC “would be used for educational purposes, specifically a center for conferences, research and classes on intellectual property law.” (Taxpayer’s Memorandum, p. 2.) There is no dispute the IPC, once completed, satisfies the requirements for an educational exemption as stated in RSA 72:23, IV, and in fact received a 100% exemption in tax year 2012. (Id., p. 6.)

Here, the board makes note of the relatively short time construction period of the IPC “and the applicable date for determining the tax exemption as a factor which helps mitigate against an overly rigid application of the use and occupancy requirements of the statute.” Tri-County Community Action Program, Inc. v. Town of Dummer, BTLA Docket No. 18329-99EX (August 6, 2001.)

Granting this appeal for an educational exemption is consistent with several prior decisions. In Sovereign Grace Fellowship v. Town of Boscawen, BTLA Docket No. 19595-02EX (May 12, 2004), the board granted the appeal of the denial of an RSA 72:23, III religious exemption (where the statute has similar statutory ownership, use and occupancy language). The board considered and rejected a municipality’s argument in Sovereign Grace Fellowship that denial of the exemption was proper until an occupancy permit could be issued since the church “could not technically be occupied until construction was completed.” Id. at p. 2. The board found construction of the church was part of the fulfillment of the church’s mission and thus, the taxpayer was using and occupying the property for the purposes for which it was intended.

In Trinity Gospel Chapel v. Town of Sutton, BTLA Docket No. 3001-85 (August 5, 1986), the board also rejected a municipality’s argument that a church was not entitled to a religious exemption for that part of a tax year before it completed construction of its building. The board found Trinity “was proceeding in good faith, in a manner fully in keeping with its

religious and charitable purposes...that in the broad sense Trinity was using and occupying” the property for “the purpose intended.”

The Supreme Court has declared that the language of the statute is to be construed liberally in favor of exemptions. In Trustees of Phillips Exeter Academy v. Exeter, 90 N.H. 472, 504 (1940) the court stated:

In any event, classifications between taxable and non-taxable property are not to be tested by a hard and fast measure favoring taxability, and the statute under consideration is of classification, and not a special exemption. ... In determining whether a particular charity is within an exemption classification, or how much if its property comes within the exemption, resort to ‘rigorous strictness and a technique of narrowing application’ does not best construe the expression of legislative will.

The court found in St. Mary’s School for Girls v. Concord, 80 N.H. 436 (1922), real estate owned by a girl’s school, which “was purchased to be used as a site for new buildings and grounds”, and “held with the intention of moving its school thereto... as soon as the necessary funds can be raised” was entitled to tax exempt status.

In Hedding Camp Meeting Association v. Epping, 88 N.H. 321 (1937), the Court reiterated its holding in St. Mary’s School and added: “[R]eal estate owned and occupied by the institution and held either for investment or for eventual use in the direct service of its organic purposes shall be tax exempt” and “[i]t is use in aid of the final purpose rather than immediacy of use in such purpose that is determinative.” Id., pp. 323-324.

Additionally, in Spere Memorial Hospital v. Town of Plymouth, BTLA Docket No. 14996-94EX (March 20, 1995), the board granted the appeal of a denial of an RSA 72-23, V charitable exemption (with similar use and occupancy provisions) of a property that was in the process of being renovated as of the April 1st assessment date. The board found “the physical make-ready activity... indicates an orderly, continuing process to effectuate the plan” and

“[w]here property is owned by a qualifying organization with an immediate intent to use the property for its purposes and coincident with significant activities to fulfill the intent, such actions qualify as occupancy and direct use under the intent of RSA 72:23, V.”

This body of case law demonstrates an overly literal and narrow reading of the use and occupancy language in the statute is not warranted, nor will the statutory purpose be served if an exemption is denied when a school, such as the University of New Hampshire School of Law, demolishes a building with an established educational use and immediately proceeds with the uninterrupted construction process of a new, more intensive educational use to further its established educational purpose. “A tax exemption statute is construed not with rigorous strictness but ‘to give full effect to the legislative intent of the statute.’” Wolfeboro Camp School, Inc. v. Town of Wolfeboro, 138 N.H. 496 (1994); accord, Town of Peterborough v. MacDowell Colony, 157 N.H. 1, 5 (2008) (“[t]he legislative purpose to encourage charitable institutions is not to be thwarted by a strained, over-technical and unnecessary construction.” Young Women’s Christian Ass’n. v. Portsmouth, 89 N.H. 40, 42 (1937).”) As further noted in ElderTrust, 154 N.H. at 701 (quoting from “84 C.J.S. Taxation, § 323”), “each case must be decided on its own peculiar, or particular, facts.”

In support of its denial of the exemption in this appeal, the City cited several prior board decisions (e.g., Painters & Allied Trades District Council #35 Joint Training Program Trust v. Town of Brentwood, BTLA Docket No. 21255-05EX (November 13, 2006), Chinese Bible Church of Greater Nashua v. City of Nashua, BTLA Docket No. 25544-11EX (December 2, 2011) and Grace Fellowship of Nashua v. City of Nashua, BTLA Docket No. 23523-08EX (February 19, 2009)). In all of those cases, the properties for which the exemptions were sought were under construction or being renovated into uses that, when complete, would become

eligible for the appropriate exemptions; those properties were not eligible for exemptions prior to the construction and/or renovation process. The facts in this case are distinct from the facts in those cases, as the Property was predominantly exempt prior to the construction and 100% exempt after the construction was complete, indicating a continuing use of the Property for educational purposes.

Interpreting the statute as the City argues (that the Property is not exempt for the single tax year during which the IPC was being constructed), leads to an illogical result that the board finds contrary to the legislative intent of both Part II, Article 82 of the New Hampshire Constitution and RSA 72:23, V. “[C]onstruction of the Intellectual Property Center, if anything, expanded the educational use of the site by making it available for an even broader array of educational activities open to even more students than had been the case when the property was used principally for the New Hampshire Appellate Defender Clinic.” (Taxpayer’s Reply, pp. 2-3.)

For all these reasons, the board finds the land and buildings of the IPC is tax exempt as of April 1, 2011 and therefore the appeal of the RSA 72:23, V educational exemption is granted.

If the taxes have been paid for tax year 2011, the amount paid shall be refunded with interest at six percent per annum from date paid to refund date. RSA 76:17-a.

Any party seeking a rehearing, reconsideration or clarification of this Decision 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, Member

Theresa M. Walker, Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Margaret H. Nelson, Esq., Sulloway & Hollis, 9 Capitol Street, P.O. Box 1256, Concord, NH 03302, counsel for Taxpayer; Danielle L. Pacik, Esq., Deputy City Solicitor, 41 Green Street, Concord, NH 03301, counsel for the City of Concord; and City of Concord, Chairman, Board of Assessors, 41 Green Street, Concord, NH 03301.

Date: 10/8/13

Anne M. Stelmach, Clerk