THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

Docket Nos. 08-E-185 & 186

New Hampshire Resident Limited Partners of The Lyme Timber Company

v.

State of New Hampshire, Department of Revenue Administration

ORDER ON CROSS–MOTIONS FOR PARTIAL SUMMARY JUDGMENT

The petitioners, limited partners of The Lyme Timber Company (Lyme Timber), appeal pursuant to RSA 21-J:28-b, IV an order of the Department of Revenue Administration (DRA) that assessed taxes and interest against them. Both parties move for partial summary judgment in the case docketed under no. 08-E-186. For the reasons that follow, Lyme Timber's motion for partial summary judgment is GRANTED, and DRA's motion for partial summary judgment is DENIED.

The Court summarizes only those facts relevant to the pending motions. Lyme Timber is a limited partnership that owns, develops, and manages commercial real estate and timberland. In 2005, DRA's Audit Division (Audit) began a review of distributions from Lyme Timber to the petitioners. As a result of the review, Audit issued notices of assessment to the petitioners for tax years 2002, 2003, and 2004. The petitioners petitioned DRA for redetermination. On July 10, 2008, DRA gave notice of an order upholding Audit's assessment. This appeal followed.

The issue before the Court is whether Audit properly determined that the petitioners' beneficial interests in Lyme Timber are represented by transferable shares. Under RSA chapter 77, if the beneficial interests are represented by transferable shares,

then the petitioners (as limited partners receiving distributions) would be subject to a tax. If the beneficial interests are not represented by transferable shares, then Lyme Timber (the limited partnership, itself) and not the individual petitioners would be subject to the tax. The partnership agreement provides:

> 11. Assignment of Partnership Units. A Limited Partner may sell or assign his Partnership Units but only on the following terms and conditions:
> (a) The Limited Partner shall furnish the Partnership with an opinion of counsel satisfactory to the General Partner that the sale or assignment is in compliance with applicable securities laws and regulations.
> (b) The purchaser or assignee shall consent in writing, in form satisfactory to the General Partner, to be bound by the terms of this Agreement in the place and stead of the Limited Partner.
> (c) Such assignment is to another Partner or a member of the Limited Partner's family or (1) pursuant to a bona fide written offer, (2) the Limited Partner has given the Partnership 60 days to match the offer and (3) the Partnership has not done so.

A moving party is entitled to summary judgment if the pleadings, admissions and affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. "An issue of fact is material if it affects the outcome of the litigation." Horse Pond Fish & Game Club v. Cormier, 133 N.H. 648, 653 (1990) (quotation omitted). "The party opposing summary judgment must set forth specific evidence of a genuine issue of material fact." Pennichuck Corp. v. City of Nashua, 152 N.H. 729, 739 (2005). The Court must consider the evidence presented on summary judgment in the light most favorable to the non-moving party, giving the non-moving party the benefit of all favorable inferences that may be reasonably drawn from the evidence. Del Norte, Inc. v. Provencher, 142 N.H. 535, 537 (1997). Because the parties have filed cross-motions for summary judgment, the Court must

determine whether the undisputed facts entitle either party to judgment as a matter of law.

The parties disagree largely over interpretation of the relevant statutes and agency rules. "The interpretation of a statute is a question of law. . . ." Zorn v. Demetri, 158 NH. 437, 438 (2009). In interpreting a statute, courts

> look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. [Courts] interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. [Courts] construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. Moreover, [courts] do not consider words and phrases in isolation, but rather within the context of the statute as a whole.

Id. at 438-39 (citation omitted).

Courts generally follow the same guidelines when construing agency rules—"ascrib[ing] the plain and ordinary meanings to the words used" in the rules. Appeal of Flynn, 145 N.H. 422, 423 (2000) (quotation omitted). "Rules adopted by administrative agencies may not add to, detract from, or in any way modify statutory law and may fill in details to effectuate the purpose of the statute." State v. Elements Chem., 152 N.H. 794, 803 (2005). While courts afford some deference to an agency's interpretations of its own rules, that deference is not absolute, Appeal of Flynn, 145 N.H. at 424, and, under the applicable tax statute, the superior court's review remains de novo, RSA 21-J:28-b, IV. Moreover, any ambiguity in taxing statutes or regulations must be construed in favor of the taxpayer and against the government. Cagan's, Inc. v. Dep't of Rev. Admin., 126 N.H. 239, 248-49 (1985); Appeal of John Denman, 120 N.H. 568, 571 (1980).

RSA chapter 77 does not explain when beneficial interests are represented by

transferable shares.[1] Neither RSA 77:3 nor RSA 77:4 provides a definition or guidelines for how DRA will determine whether shares are transferable. DRA administrative rules supply the relevant guidelines and definitions.[2]

Under DRA Rule 901.02(a), a beneficial interest is not represented by transferable shares under RSA 77:3, I(b) if "the shares, equity interests and all ownership rights are not transferable without obtaining prior member approval or causing a dissolution of the organization." Under DRA Rule 901.03(c), a beneficial interest is represented by transferable shares under RSA 77:4, III if "the shares, equity interests and all ownership rights are freely transferable without the necessity of securing prior member approval or causing dissolution of the organization." DRA Rule 901.17 defines transferable, as used in RSA 77:3, I(b) and RSA 77:4, III, as "the ability of a shareholder or interest holder in an organization to dispose of, by any means, all rights incidental to his interest without a required approval of the disposition by another member, and without dissolution of the organization, itself."

Having reviewed the pleadings, statutes, and rules in careful detail, the Court agrees with the petitioners that ambiguities exist. There is initial confusion because Rule 901.02(a) uses the word "transferable" while Rule 901.03(c) uses the phrase "freely transferable." There is no explanation of why the word "freely" is used in one rule and not

[1] Various parts of RSA chapter 77 have been amended at different times during the course of this litigation and after DRA rendered decisions regarding the petitioners' tax liabilities. References in this order are to the statute as it existed at the times relevant to this suit. The parties agree about which version of the statute applies.

[2] Changes to DRA rules have also taken effect. References in this order are to the rules as they existed at the times relevant to this suit, and prior to some of the rule changes. The parties agree about which rules apply.

the other. The rules do not define "freely" or "freely transferable." This difference in terminology creates ambiguity. By using the word "freely," the drafters may have intended to say that the shares must be disposable, without any rules or restraints, by any method of the limited partner's choosing. Common meanings of "freely" include "without restraint or reserve," "without hindrance," and "with freedom from strict observance of any model, pattern, convention, or rule." Webster's Third New International Dictionary 906 (unabridged ed. 1993). Conversely, the drafters may have understood "freely transferable" as a term of art that has a particular meaning under the law and does not turn on common dictionary definitions. Or, the drafters may have used "freely transferable" intending to reference "free transferability," as that term is used in federal tax law. Finally, the drafters may not have intended the word "freely" to give any different or added meaning to Section 901.03(c). The drafters could have intended "transferable" and "freely transferable" to be synonymous.

The drafters of the rules likely intended "freely transferable" to have a particular meaning. The Court is disinclined to assume that the drafters included the word "freely" unnecessarily. The Court is likewise disinclined to simply ignore the word. Cf. In re Guardianship of Williams, 159 N.H. 318, 323 (2009) ("the legislature is not presumed to waste words . . . and whenever possible, every word of a statue should be given effect" (quotation and brackets omitted)). The drafters failed, however, to define the phrase. The Court believes that, at the very least, by using the term "freely transferable," without defining it, the drafters created an ambiguity that must be construed in favor of the petitioners. Construing Rule 901.03(c) in conjunction with Rule 901.17 and the common

understandings of "freely" in the petitioners' favor, the Court finds that a reasonable meaning of "freely transferable" is that the limited partner must be able, without any restriction, to dispose if his or her rights and interests by any means of his or her choosing without first obtaining approval. Under this interpretation, the units at issue in this case are not "freely transferable" because transfers are subject to the restrictions and conditions set forth in paragraph 11 of the Partnership Agreement.

Even if the Court were to find that "freely" has no meaning or that "freely transferable" simply means "transferable," as defined in Rule 901.17, it would still find that ambiguity exists because the definition provided in Rule 901.17 is ambiguous. The petitioners argue that the words "by any means" and "approval" are ambiguous.

The Court agrees that the phrase "by any means" makes the definition ambiguous. The phrase could mean that, if there is any single means by which a limited partner can dispose of his or her shares without approval, then the shares are transferable. In other words, if there is one means, however limited or narrow, by which the limited partner can dispose of his or her shares without approval, then the shares are transferable. Alternatively, "by any means" could mean that the shares are transferable only if the limited partner has the ability to dispose of the shares by all means without approval. Otherwise stated, for the shares to be transferable, the limited partner must be able to choose any means of disposal. "Any" as it is used in "by any means" could reasonably mean "one" or "all." The petitioners argue that the word "freely" in Rule 901.03(c) indicates that "by any means" in Rule 901.17 should be read to mean "all" because collectively the rules appear to imply that limited partners should only be taxed individually if they have

broad authority to dispose of their interests without seeking approval. Irrespective of whether the Court agrees with this particular argument, the Court agrees generally that, in this context, "by any means" is ambiguous.

The Court must construe the ambiguity in the taxpayers' favor. Doing so, the Court finds that "transferable" can reasonably be understood to mean that a partner must have the ability to dispose of, without approval, all of his or her rights and interests by all means, in other words, by any means he or she chooses. Under the Partnership Agreement, a limited partner cannot dispose of his or her interest by any means of his or her choosing because the partnership may instead choose to exercise its option to buy the units. Lyme Timber can, in effect, veto a limited partner's choice of transferee.

The Court also agrees that "approval" is ambiguous. There is no definition of "approval." Under Lyme Timber's Partnership Agreement, unless the limited partner is transferring the units to a family member, there must be a bona fide written offer and the transfer cannot go forward if Lyme Timber decides to buy the units at the same price. Thus, Lyme Timber may decline to sanction the proposed transfer by buying the units, giving Lyme Timber the ability to decide to whom transfers can be made. The only restriction is that Lyme Timber cannot stop a limited partner from transferring his or her units to a family member. DRA describes paragraph 11(c) as merely a right of first refusal and not approval. There is no definition of "approval," making it difficult to plainly distinguish under the rules approval from right of first refusal. The rules also do not state whether the partnership agreement or the practice of the partnership guides whether "approval" is required. Absent any textual support, the Court is reluctant to find that

"approval" can only mean that the partnership agreement must state explicitly that the partnership has the ability to refuse to allow the transfer even if it does not make an equal offer on the units. Approval could reasonably refer to whether the limited partnership can block the transfer the limited partner desires to make (by, for example, buying the shares). Under this interpretation, paragraph 11 of the Partnership Agreement establishes an approval requirement.

Because the regulations fail to define approval, they are ambiguous. In light of this ambiguity and the ambiguity regarding the phrase "by any means," the Court finds that the regulations can reasonably be construed in a manner that results in a finding that the petitioners' beneficial interests are not represented by transferable shares. Thus, even if the Court disregards the ambiguity created by the phrase "freely transferable," other ambiguities result in a ruling in the petitioners' favor.

Throughout their pleadings, the parties disagree about what weight should be given to DRA's interpretation of the relevant rules and what weight should be given to deposition testimony of Audit Director John Mintken regarding his understanding of the rules. The petitioners believe that many of Mintken's statements show that the rules are ambiguous and that DRA lacks set criteria for determining whether shares are transferable. Even if the Court takes DRA's understanding of the rules into account, it still finds that the rules are ambiguous. The ambiguities must be construed in the petitioners favor, and doing so requires that the Court grant the petitioners' motion. Thus, the parties' disagreement about what deference should be given to which statements or decisions of DRA personnel is not a significant factor in the Court's decision.

The parties have requested a hearing on the pending motions. After reviewing the record and the issues presented, the Court found that a hearing would not be helpful. A party to an equitable action requesting oral argument or an evidentiary hearing on a motion must "set[ ] forth by memorandum, brief statement or written offer of proof the reasons why the oral argument or evidentiary hearing will further assist the court in determining the pending issues(s)." Super. Ct. R. 58. "Rule 58 clearly implies that the superior court has discretion to deny a requested oral argument or evidentiary hearing if the proffered reasons for holding such a hearing are insufficient." Provencher v. Buzzell-Plourde Assoc., 142 N.H. 848, 852 (1998) (quotation and ellipsis omitted). Even where a matter is "hotly contested," the superior court may deny a party's request for a hearing if there are not adequate reasons that a hearing would assist the court. See In re Erik M., 146 N.H. 508, 511 (2001). The motions ask the Court to interpret statutes and rules. The parties have thoroughly briefed their arguments. A hearing would not assist the Court in interpreting the rules. There is also no need to have a hearing to reiterate arguments that are already carefully outlined in the pleadings. Accordingly, the Court has not held a hearing on the motions and denies the request for a hearing.

For the foregoing reasons, DRA's motion for partial summary judgment is DENIED. The petitioners' cross-motion for partial summary judgment is GRANTED.

SO ORDERED.

Dated: May 13, 2010

Timothy J. Vaughan
Presiding Justice