State of New Hampshire

Board of Tax and Land Appeals

Robert T. Risk

v.

Department of Revenue Administration

Docket No.: 25407-09LM

DECISION

The "Taxpayer" appeals, pursuant to RSA 198:56, the department of revenue administration's (the "DRA") determination of the Taxpayer's 2009 low and moderate income homeowner property tax relief application. The DRA's February 10, 2011 Motion to Dismiss and the Taxpayer's February 11, 2011 objection were addressed by the parties at the February 23, 2011 hearing. For the reasons stated below, the Motion to Dismiss is granted and, thus, the appeal is denied.

While the Low and Moderate Income Homeowner's Property Tax Relief law, RSA 198:56, et seq. contains no specific provision regarding the burden of proof, in civil actions the burden is generally on the plaintiff to establish its case by a preponderance of the evidence. Dunlop v. Daigle, 122 N.H. 295 (1982); Jodoin v. Baroody, 95 N.H. 154 (1948); Tax 201.27(f).

The Taxpayer argued he was entitled to 100% of the relief, rather than the 25% relief granted by the DRA, because:

(1) the DRA improperly based its determination on IRS Form 8829, which the DRA requested that he submit, where the Taxpayer reported that 75% of his home located at 246 Bennington Road, Francestown (the "Property") was "Used for Business";

(2) he owns 100% of the Property, located in a residential zone where home occupations are permitted, lives there 100% of the time and pays 100% of the property taxes;

(3) he had been receiving the full (100%) "rebate" (tax relief) for a number of years;

(4) the Property is assessed both for land and buildings, which includes a small house and a shed on 3.5 acres;

(5) he followed and complied with all the instructions for filling out the DP-8 relief form;

(6) the "homestead" definition in RSA 198:56, II should not be applied;

(7) the relief is intended for homeowners who qualify for it, regardless of how they use their home; and

(8) the full relief claimed ($223.48) should have been granted, rather than the lesser amount ($105.39).

The DRA argued the denial was proper because:

(1) the Taxpayer conceded the information he provided on the IRS Form 8829 is accurate;

(2) the legislature has defined "homestead" in RSA 198:56, II and the DRA is required to follow this definition;

(3) the RSA 198:56, II definition of "homestead" excludes "the portion of land and buildings ... used for commercial or industrial purposes.";

(4) the Taxpayer's claim on his IRS Form 8829 that 75% of his home was used for business purposes was the basis for DRA adjusting the claim and applying the relief to only 25% of the assessed value of the Taxpayer's Property; and

(5) the DRA's Motion to Dismiss should be granted because the DRA committed no error of law and the DRA's determination was not arbitrary or unreasonable.

Board's Rulings

RSA 198:60, II provides that, on appeal, the standard of review by the board of DRA's determination is whether there was an error of law in DRA's determination or whether the commissioner's action was arbitrary or unreasonable.

The Low and Moderate Income Homeowners Property Tax Relief statute (RSA 198:56 through RSA 198:61) grants a rebate of all or a portion of the RSA 76:3 state education property tax for qualifying residential property occupied by an owner meeting certain income and other qualifications.

This statute contains at least two apportionment provisions that limit the amount of the rebate any taxpayer who may meet the income qualifications is entitled to receive. One apportionment provision relates to a homestead that is not solely owned or occupied as the principal residence by the eligible claimant. RSA 198:57, V specifically provides as follows:

> If a homestead is owned by 2 or more persons as joint tenants or tenants in common, and one or more of such joint owners do not principally reside at such homestead, tax relief applies to the proportionate share of the homestead value that reflects the ownership percentage of the claimant. Only one claim may be filed for a single homestead.

The board has denied prior appeals by taxpayers of DRA determinations applying this statute to limit the amount of the rebate where partial owners of homestead property have claimed entitlement to the full rebate. In this appeal, there is no dispute the Taxpayer is the sole owner

and occupant of the Property and, thus, no issue arises regarding limitation or apportionment pursuant to RSA 198:57, V.

A second, statutory apportionment requirement, however, is relevant to this appeal and pertains to circumstances where a portion of the homestead is used for non-residential ("commercial or industrial") purposes. RSA 198:56, II defines the eligible homestead as follows:

> "Homestead" means the dwelling owned by a claimant or, in the case of a multi-unit dwelling, the portion of the dwelling which is owned and used as the claimant's principal place of residence and the claimant's domicile for purposes of RSA 654:1. "Homestead" shall not include land and buildings taxed under RSA 79-A or land and buildings or the portion of land and buildings rented or used for commercial or industrial purposes.

In turn, RSA 198:57, IV contains the following specific instruction to limit the amount of the rebate:

> All or a portion of an eligible tax relief claimant's state education property taxes, RSA 76:3, shall be rebated as follows:
> (a) Multiply the total local assessed value of the claimant's property by the percentage of such property that qualifies as the claimant's homestead . . .

(Emphasis added.) In this appeal, the DRA determined the percentage to be 25% because it obtained confirming information, supplied by the Taxpayer, that 75% of the Property was "Used for Business."

The board finds both the documentary evidence of the IRS Form 8829[1] and the testimony of Mr. Risk support DRA's reduction for the portion of the land and building used for non-residential purposes. Mr. Risk testified that, during the year in question, he used a portion of his residence for a home occupation which entailed printing and storing of publications and

[1] IRS Form 8829 is part of the Taxpayer's federal income tax return that RSA 198:57, VII requires claimants to provide to DRA. Thus, it is proper for the DRA to consider and act on this information.

marketing of them (primarily via the internet). Reflecting this business, Mr. Risk indicated on IRS Form 8829 that 75% of the square footage of his home was "used regularly and exclusively for business ..." (IRS Form 8829 at part 1, line 1). Given the Taxpayer's testimony and his claim with the IRS that 75% of certain expenses of his home are for business use, the Taxpayer cannot have it both ways and now wish to have 100% tax relief under the Low and Moderate Income Homeowners Property Tax Relief statute. As cited above, the statute is quite clear that only residential use of the homestead qualifies for the rebate and not any portion used for commercial or industrial purposes.

The Taxpayer also argued that he uses his dwelling, but not his land, for his home occupation and thus, DRA's application of the 75% expense deduction on IRS Form 8829 is not appropriate. We disagree. First, RSA 198:56, II defines "homestead" as including "land and buildings." In this case, the Taxpayer's lot is 3.5 acres and no evidence was presented to show that the lot is not primarily for the support of the house and accessory shed. Second, the Taxpayer's deductions for expenses relative to his home on IRS Form 8829 applied the 75% factor to the total real estate taxes for the 3.5 acres of land, the house and accessory shed. Again, it would be inconsistent for the Taxpayer to receive the benefit of a 75% deduction of the real estate taxes for the land and buildings on his federal income tax and not have a parallel calculation for determining the state education property tax rebate. For the efficient and consistent administration of the tax relief program, the Legislature provided DRA access to information contained on the federal income tax return that pertain both to the income and other aspects of eligibility for the tax relief. To allow taxpayers to file different claims with different levels of government without a clearly enunciated and rational basis would result in illogical and inconsistent application of the law between similar taxpayers by DRA.

Last, the Taxpayer asserted he relied upon the instructions that accompanied the DRA DP-8 relief form and did not note any apportionment was required between residential and business use of the Property. To the extent the instructions for the DP-8 relief form and other documents utilized by DRA (such as its "notice of relief" form) need further refinement to reflect the eligibility criteria contained in the statute, the board would encourage DRA to make those revisions. However, the board finds the statute sections cited earlier are clear and unambiguous. Thus, the DRA's determination was not an error of law and the commissioner's action was not arbitrary or unreasonable. Consequently, the board grants DRA's Motion to Dismiss and denies the appeal.[2]

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(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 with a copy provided to the board in accordance with Supreme Court Rule 10(7).

[2] Nothing in this Decision, of course, precludes the Taxpayer from applying for the full (100%) rebate in a future tax year if circumstances change and he stops using part of the Property for a non-residential purpose.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

CERTIFICATION

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Robert T. Risk, 246 Bennington Road, Francestown, NH 03043, Taxpayer; and Kathryn E. Skouteris, Esq., 109 Pleasant Street, Concord, NH 03301, counsel for DRA.

Date: March 4, 2011

Anne M. Stelmach, Clerk