State of New Hampshire

5/15/09

Board of Tax and Land Appeals

Governor Hugh J. Gallen
State Office Park
Johnson Hall
107 Pleasant Street
Concord, New Hampshire
03301-3834

Maryanne and Walter Zielinski

v.

Department of Revenue Administration

Docket No.: 23944-07LM

DECISION

The "Taxpayers" appeal, pursuant to RSA 198:56, the department of revenue administration's ("DRA") denial of their tax year 2007 application for Low and Moderate Income Homeowner's Property Tax Relief (hereinafter "Tax relief," see RSA 198:56, IV). For the reasons stated below, the appeal is granted.

The Taxpayers argued they were entitled to the Tax relief because:

(1) they purchased the "Property," located at 180 Watts Street in Manchester, in 1956 and have lived on the Property and paid the taxes on it ever since that time;

(2) the document transferring ownership to an irrevocable trust was prepared by others and presented to them for signature at a "seminar" they attended in 1996;

(3) they "did not know what they were doing" when they signed the trust document and it may be "no good"; and

(4) the trust has not precluded them from being recognized as the actual owners and residents of the Property for any other purpose, including borrowing money using the Property as collateral.

The DRA argued the denial of the Taxpayers' application was proper because: (1) RSA 198:56, II(c) provides that the term "owned" in that paragraph of the Tax relief statute includes "[a] person who has equitable title, or the beneficial interest for life in the homestead" and the Taxpayers' trust document does not state they have equitable title or the beneficial interest for life in the Property;

(2) other provisions in the trust document, including Clauses 1.2 and 3, also do not support such a conclusion;

(3) the trust document was drafted by a law firm that aggressively marketed this form of irrevocable trust to the public for the purpose of achieving another goal (to isolate assets in order to preserve Medicaid eligibility for future nursing home and other expenses); and

(4) all taxpayers must adhere to the requirements of the statute in order to be eligible for Tax relief.

Board's Rulings

Based on the evidence, the board finds the Taxpayers met their burden of proving they are entitled to the Tax relief and the appeal is therefore granted.[1]

The DRA based its denial of the Taxpayers' application on the wording of RSA 198:56, II(c) and some boilerplate provisions in the Taxpayers' trust document prepared for them at a seminar they attended and signed three years before enactment of

[1] The board's authority in this appeal is governed by RSA 198:60, II, which provides the board "may reverse or affirm, in whole or in part, or modify the decision appealed from when there is an error of law or when the board finds the [DRA] commissioner's action to be arbitrary or unreasonable."

the Tax relief program in 1999.[2] RSA 198:57, VII requires "[a] claimant who asserts ownership in a homestead because he or she holds equitable title, or the beneficial interest for life, in the homestead shall also submit a copy of the document creating such interest" to the DRA.

In June, 2008, the Taxpayers submitted to the DRA, with their tax year 2007 application for Tax relief, their trust document (signed on December 20, 1996 and titled "The Walter Zielinski and Maryanne Zielinski Irrevocable Trust"). This trust document was followed by a Quitclaim Deed, recorded on December 26, 1996 at the Registry of Deeds (in Book 5778, Page 1447) transferring the Property to the trust. Clause 3 of the trust document prohibits the Taxpayers from revoking or amending any provision of the trust document.

The DRA's attorney acknowledged at the hearing there is no further statutory definition or administrative regulation to help in the interpretation of the RSA 198:56, II provision regarding what is meant by "owned." He stated the DRA was looking for the board's guidance since it must process and decide other applications for Tax relief involving similarly worded trust documents.

Although this appeal raises a question of first impression regarding the interpretation of this statutory provision, the same phrasing regarding non-exclusive

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[2] The original legislation establishing "Education Property Tax Hardship Relief," former RSA 198:50, et seq., was enacted effective November 3, 1999. 1999 N.H. Laws ch. 338 (HB 999). This statute was later amended and then repealed and replaced by the "Low and Moderate Income Homeowners Property Tax Relief" statute now codified in RSA 198:56 et seq., effective July 1, 2002. The wording of the statute of interest in this appeal, RSA 198:56, II, has not been altered.

examples of what is meant by "owned" is contained in RSA 72:29, VI,[3] which the board has recently interpreted in the context of a similarly worded trust agreement involving the RSA 72:28 veteran's tax credit. Stolte v. City of Concord, BTLA Docket No. 22569-07 (October 12, 2007) (copy enclosed with this Decision). The language in each is quite similar because they were both drafted by the same law firm to achieve the same estate planning goal mentioned above.

Because of these similarities, the board finds the following reasoning contained in the Stolte decision also applies to this appeal:

> The board has closely reviewed the provisions of the Trust Agreement and carefully considered the City's reasonable arguments as to why the Taxpayer is not eligible for the tax credit. On balance, however, and acknowledging it is a close question of law, the board finds the Trust Agreement does provide a basis to conclude the Taxpayer does not have a beneficial interest for life in the eligible Property. ...
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> [A] reading of several provisions of the Trust Agreement together causes the board to conclude the Taxpayer indeed does have a beneficial interest for her life in the Property. First, "Clause 3" is entitled "Reserved Powers and Rights of Grantor." Clause 3 includes three paragraphs, the last two being stated in the negative as to what the grantor does not retain interest in and in particular paragraph 3.2 being the one the City relied upon in denying the tax credit. However, paragraph 3.1 sets up the provisions for how the Trust shall be distributed "[u]pon the death of the Grantor." Because paragraph 3.1 is part of the clause reserving powers and rights to the grantor, this paragraph can infer that during the life of the grantor no distribution of the Trust shall occur and thus the assets of the Trust, primarily the Property, exist for the benefit of the Taxpayer during her remaining life.
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> Further, "Clause 4" is entitled "Disposition During Lifetime of Grantor." Clause 4 states in part "[d]uring the lifetime of the Grantor, the Trustee shall distribute the net income of this Trust to the Grantor, no less often than quarterly...." Again, this

[3] This statute provides:
> For purposes of RSA 72:28, 29-a, 30, 31, 32, 33, 35, 36-a, 37, 37-a, 37-b, 38-a, 39-a, 62, 66 and 70, the ownership of real estate, as expressed by such words as "owner", "owned" or "own", shall include those who have equitable title or the beneficial interest for life in the subject property.

> clause provides for any income from the Property, potentially any rental income or in-kind residence value, to accrue to the benefit of the Taxpayer. ...
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> Considering the benefits that accrue to the Taxpayer of income or in kind income in Clause 4 and that Clause 3 states no distribution of the assets of the Trust can occur until after her death, the board concludes these provisions give rise to a beneficial interest for life in the Property as provide by statute.
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> The board reviewed Black's Law Dictionary, 6th ed. (1997), which defines in part, beneficial interest as "[i]n trust law, [it] refers to interest of the beneficiary in right to income or principal of trust funds, in contrast to trustee who holds legal title." The board clearly understands the Trust Agreement does not define the Taxpayer as one of the beneficiaries. However, during her life, we conclude the joint, consistent reading of Clauses 3 and 4 create a beneficial interest for the Taxpayer. ...
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> [R]eading the various provisions of the Trust Agreement in concert with each other, the board concludes the Taxpayer has a beneficial interest in the Property and is in keeping with the statutory intent of providing a veteran's tax credit for the surviving spouse of a veteran.

As in Stolte, the board finds the trust document that is central to this appeal is not a model of clarity or consistency and therefore is not susceptible to an entirely literal reading or application. For example, Schedule A to the trust document appears to limit the trust principal to "All of the Donors' tangible personal property," not any real property such as their residence (the Property) which they almost immediately transferred by Quitclaim Deed to the trust.

Leaving this drafting error aside, the DRA places emphasis on the fact the trust document does not specifically state the Taxpayers have "equitable title, or a beneficial interest for life" in the Property in so many words. This appears to be the sole reason the DRA denied the Tax relief application. Based on a fair reading of the trust document as a whole, however, and its understanding of the legislative intent of the statute, the board concludes the Taxpayers have established by a preponderance of the evidence that they

have, at the very least, a beneficial interest for life in the Property sufficient to make them eligible for the Tax relief.

This reading is supported by Clause 4 of the trust document, which requires the "Trustee" (a term referring to the two Taxpayers and their daughter, Anne M. Edmonds, a third trustee) to distribute the "income of the Trust" exclusively to the Taxpayers or add any undistributed income at the end of each calendar year to the "principal" of the trust, and this presumptively includes any "income in kind" from occupying the Property as their residence. Clause 4 can be read to prohibit the Trustee from disposing of the Property at any time "during the lifetime of the Donors [the Taxpayers]." There is no question the trust document was prepared to enable the Taxpayers to continue to live on the Property and benefit exclusively from its use for the rest of their lives and that no one has the power or the discretion to prevent them from doing so (including the third trustee, their daughter, who is one of three children named as "Legatees" in Clause 1.2).

In this respect, the board does not read other provisions cited by the DRA at the hearing[4] to mean the Taxpayers do not have a beneficial interest for life in the Property. In addition, because of the prohibition on revocation or amendment contained in Clause 3 noted above and the fact the trust document was signed three years before the Tax relief program was even enacted, it would be unreasonable to assume the Taxpayers have it within their power at this point to correct any drafting deficiencies in the trust document.

The Taxpayers have paid the taxes on the Property continuously from the time they purchased the Property in 1956 through the present, including the period after

[4] Clause 3 of the trust agreement states: "The Donors do not retain any interest in the principal of this Agreement of Trust by express reservation or by agreement between or among, or assumption of, the Donors, the Trustee and the Legatees [identified in Clause 1.2]."

formation of the trust and the transfer of legal title to it in 1996. They were able to borrow funds from a financial institution (Fleet Bank) after formation of the trust, using the Property as collateral, most recently in 2005, as reflected in an "Open End Mortgage" recorded at the Registry of Deeds (Book 7499, Page 0897), which is a matter of public record.

These additional facts are consistent with the conclusion the operative effects of the trust document should not deprive the Taxpayers of eligibility for the Tax relief they applied for in tax year 2007, especially when the clear intent of this remedial tax abatement program (tax relief for low and moderate income homeowners) is also kept in mind. When construing a statute, its basic purpose – the problem the statute was intended to remedy – must be considered and this can be done by making inquiry into the statute's declared objective and the "mischief" it was intended to remedy or relieve. See e.g., Appeal of Town of Newmarket, 140 N.H,. 279, 283 (1995) (citation omitted).

When this Tax relief program was first enacted in 1999, the legislature explicitly stated its purpose and intent. See 1999 N.H. Laws ch. 338:1.[5] This intent has not

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[5] This section includes the following pronouncements:

> II. The general court recognizes that over the years it has enacted numerous property tax exemptions providing relief to taxpayers who meet identified criteria, and that when the means employed to effect tax relief comport with the articulated justifications, that tax relief is constitutional and constitutes a valid purpose.
>
> III. The general court has determined that the implementation of a uniform education property tax will have serious adverse economic consequences on certain taxpayers. The economic burden on these at-risk taxpayers should be mitigated, at least in part. It is reasonable and fair to award education property tax hardship relief to taxpayers who meet defined criteria. The hardship relief provisions of this act contain criteria that limit its assistance to those low and moderate income taxpayers who may face the risk of bankruptcy, foreclosure, or the loss of their primary residence due to the immediate implementation of a uniform education property tax. The taxpayers that will benefit from the property tax hardship relief will face the harms that the hardship relief is intended to prevent. Therefore, the general court finds that its remedy satisfies the underlying rationale and assists a class of taxpayer for whom disparate tax treatment is justified.

Zielinski # fall into this category

changed and reflects a desire to allow those who have legal ownership, equitable title or a beneficial interest for life in homestead property, and who also meet very specific and stringent income requirements (now stated in RSA 198:57, IV), to reduce their overall property tax burden so that they are not jeopardized by the loss of their homes ("at risk of bankruptcy, foreclosure, or the loss of their primary residence"). See also RSA 198:57, III(a), which states an eligible tax relief claimant is a person who "[o]wns a homestead or interest in a homestead subject to the statewide enhanced education tax." In light of this intent and the statutory framework, the board finds it would be unreasonable to affirm the denial of the Taxpayers' application for Tax relief on the facts presented.

For all of these reasons, the appeal is granted.

A motion for rehearing, reconsideration or clarification (collectively "rehearing motion") of this decision must be filed within thirty (30) days of the clerk's date below, not the date this decision is received. RSA 541:3; Tax 201.37(a). 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 541:3

and 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.

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: Maryanne and Walter Zielinski, 180 Watts Street, Manchester, NH 03104, Taxpayers; and Michael R. Williams, Esq., State of New Hampshire, Department of Revenue Administration, 109 Pleasant Street, Concord, NH 03301, counsel for DRA.

Dated: May 13, 2009

Anne M. Stelmach, Clerk