State of New Hampshire

Board of Tax and Land Appeals

International Leather Goods, LLC

v.

Department of Revenue Administration

Docket No. 24728-10BP

DECISION

On June 7, 2010, the board rescheduled this appeal for hearing on September 2, 2010.[1] On July 26, 2010, the department of revenue administration ("DRA") filed a "Motion for Summary Judgment" (the "Motion"). On August 18, 2010, within the thirty (30) days prescribed in the summary judgment statute, RSA 491:8-a, II, the "Taxpayer" filed its "Objection" to the Motion. Upon review of the pleadings, documents and affidavits presented, the board finds the DRA is entitled to summary judgment. The Motion is therefore granted and the appeal dismissed for the reasons discussed below.

The Motion asserts the appeal to the board should be dismissed because of the Taxpayer's failure to appear at a duly scheduled hearing on November 24, 2009 before the DRA in violation of the DRA's rule requiring such appearance. The board agrees.

Whenever a taxpayer petitions for redetermination or reconsideration of a tax assessment, the DRA is required by statute, specifically RSA 21-J:28-b, III, to hold a "hearing." The

[1] The Taxpayer filed this appeal with the board on December 31, 2009 and a hearing was originally scheduled for June 8, 2010, but the board granted the Taxpayer's June 4, 2010 assented-to motion to continue the hearing.

Legislature has given the DRA broad rulemaking authority in RSA 21-J:13 and the DRA has adopted a comprehensive set of rules, including specific rules pertaining to the scheduling, attendance at and conduct of the mandatory hearing prescribed in the statute, and these rules have the force of law. See Rev. ch. 100 et seq., including Rev. 204.09 ("Hearings: Methods of Proceeding"); see also the Administrative Procedure Act, RSA ch. 541-A; and RSA 541-A:22, II ("Rules shall be valid and binding on persons they affect, and shall have the force of law . . . (and) shall be prima facie evidence of the proper interpretation of the matter that they refer to.").

As set forth in the Motion, the DRA, in the December 1, 2009 "Final Order" (see Motion, Exhibit B) issued by a "Hearing Officer" in the DRA's "Hearings Bureau," dismissed the Taxpayer's "Petition for Redetermination" (Exhibit 2 in the Objection). Prior to this development, the DRA's Hearings Bureau had granted several hearing continuances and Mr. Krieger duly received notice of the November 24, 2009 rescheduled hearing date by certified mail. (Final Order, pp. 2-3.) In dismissing the appeal, the Final Order (at p. 3) cites Rev. 204.09(i), which provides: "A failure by a petitioner or petitioner's representative to appear at a scheduled hearing shall result in the dismissal of the petition or request for abatement."[2]

The petition, filed in August, 2008, challenged certain business enterprise and business profits tax assessments, with interest and penalties, for tax years 2004 through 2006, as those amounts were adjusted by the DRA's "Audit Division." The petition named Robert Krieger, CPA, of Krieger & Company, PLLC ("Krieger") and an attorney as its two representatives and

[2] There is no question the filing of the petition resulted in a contested case within the meaning of the Administrative Procedure Act, see RSA 541-A:1, IV ("'Contested case' means a proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after notice and an opportunity for a hearing"), and it was so treated by the DRA, as stated on p. 2 of the Final Order.

disputed the "Notices of Assessment" issued by the Audit Division on July 3, 2008. (See Final Order, p. 2; and Exhibit 2 to the Objection.)

Neither Mr. Krieger nor anyone else on behalf of the Taxpayer appeared at this scheduled hearing and neither he nor anyone else filed a timely motion for reconsideration responsive to the non-attendance issue.[3] Instead, his December 15, 2009 letter in response to the Final Order (labeled "Petition for Reconsideration," Exhibit 4 to the Objection) simply attempts to raise various substantive "errors of facts" regarding the assessments themselves rather than even mentioning, let alone trying to excuse, his non-attendance at the hearing, the sole basis for dismissal stated in the Final Order.

On December 31, 2009, Mr. Krieger sent two more letters on behalf of the Taxpayer. One was addressed to the DRA's Hearing Officer and one to the BTLA.

In the DRA letter, Mr. Krieger mentions, for the first time, why he did not attend the November 24, 2009 hearing (to the effect his "computer server crashed and [ ] appointment book went down and [he] lost some information"). In his earlier December letter responding to the Final Order, Mr. Krieger did not mention any such computer problems or any other excuse or reason for non-attendance.

In his concurrent December 31st letter to the board, he states the Taxpayer is appealing the DRA's decision (with a later submittal of the required filing fee to the board after the Taxpayer was placed in default for non-payment; see January 8, 2010 Order). This December 31 filing

[3] Nor did anyone on behalf of the Taxpayer submit any written materials prior to the hearing. Rev. 204.09 (c) and (f) allow for certain written submissions to the DRA "presiding officer" either thirty (30) days or three days before the hearing, depending on what is submitted.

with the board was apparently made in recognition of the thirty (30) day rule for filing an appeal of the DRA's decision contained in RSA 21-J:28-b, IV.

The DRA's Hearing Officer responded to Mr. Krieger on January 12, 2010, correctly citing the DRA's rule, Rev. 206.02, that rehearing or reconsideration motions must be filed within fifteen (15) days of the Final Order. See Objection, Exhibit 7. The Hearing Officer also ruled a timely filed motion must "identify each error" claimed in the Final Order and "state the correct factual finding, reasoning or conclusion urged by the moving party," noting Mr. Krieger's December 15, 2009 letter did not do this and his December 31, 2009 letter was untimely ("15 days beyond the deadline"). Id., citing Rev. 206.02.

The board finds there is no dispute regarding the above facts and the application of the DRA's rules to these facts support the granting of the Motion. As stated in the Motion (p. 4): "[t]he factual record before the [b]oard is clear and undisputed." While the Objection claims there remain "disputed issues" (pertaining to the underlying assessments and alleged errors in them), the Taxpayer does not dispute the above factual chronology at all or attempt to argue the DRA was without authority to adopt the rule (Rev. 204.09(i)) making non-attendance at the DRA hearing cause for dismissal.

Mr. Krieger clearly received notice of the November 24, 2009 hearing, the third date rescheduled by the DRA's Hearings Bureau largely to accommodate his own schedule. (See Motion, p. 4, and Affidavit of Lori E. Anderson, ¶¶ 5-9.) He did not, at any time, ask the DRA to decide the appeal on the documents submitted or to proceed without a hearing. See Rev. 204.06 (Waiver of Formal Adjudication).

The board finds the failure of a taxpayer or its representative to attend the DRA hearing prescribed by statute (RSA 21-J:28-b, III) is a sufficient ground for dismissing an appeal pursuant to Rev. 204.09(i). The board has a similar rule in effect for a taxpayer's failure to attend a duly scheduled hearing. See Tax 202.06(i); and e.g., Pagliarulo v. Town of Jackson, BTLA Docket No. 23037-06PT (May 15, 2009).[4] The board's statute (RSA 76:16-a), unlike the DRA statute at issue in this appeal, makes the holding of a hearing discretionary rather than mandatory, a distinction which makes application of the DRA dismissal rule even more compelling. Consequently, the DRA's decision to dismiss the Taxpayer's appeal for non-attendance at the hearing was not erroneous and there is no basis for the board to set it aside.

The Taxpayer makes two separate, unavailing arguments in the Objection for not granting summary judgment. The board will address each below.

First, the Taxpayer emphasizes that appeals to the board are "de novo," quoting from the language of RSA 21-J:28-b, IV. Although the hearing of an appeal of a DRA decision by either the superior court or the board is "de novo," this statute goes on to provide that, in most instances, "[l]egal issues shall be limited to those raised before the [DRA] . . . ." The Taxpayer

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[4] In Pagliarulo, the board held:

> "The board's rules are clear that if a taxpayer fails to make a timely motion in writing to reschedule the hearing date or appear within 30 minutes of the time scheduled (9:00 a.m.), the taxpayer will be defaulted and the appeal will be dismissed. See Tax 202.06(i). To be fair to all parties, the board consistently applies this rule since some time and effort by the other party is always involved in preparing for and attending a scheduled hearing."

In a similar vein, the law requires property owners to allow municipalities the right to inspect property to fulfill their assessment responsibilities and prescribes, upon refusal to allow such inspection, loss of the right of appeal. RSA 74:17 (Inspection of Property). This dismissal sanction is enforced even though the board has "de novo" jurisdiction to decide tax appeals. See, e.g., Appeal of Walsh, 156 N.H. 347, 351-52 (2007) (appeal dismissed on this procedural ground); and, generally, RSA 71-B:11.

did not raise, in a timely manner, the legal issue pertaining to non-attendance at the November 24, 2009 hearing or the dismissal outcome prescribed in Rev. 204.09(i) and did not make any cognizable argument to the DRA as to why this rule should not be applied.

The right to a "de novo" appeal of a DRA decision provided by the statute does not mean a taxpayer or its representative is free to decide whether or not to comply with the DRA's rules, including the specific rule requiring attendance at the scheduled hearing the DRA was statutorily obligated to hold. Such a reading would subvert the plain and ordinary meaning of the appeal statute and lead to an absurd result. See, e.g., Penelli v. Town of Pelham, 148 N.H. 365, 366 (2002); General Electric Co. v. Dole Co., 105 N.H. 477, 479 (1964); and Cagan's Inc. v. New Hampshire Department of Revenue Administration, 126 N.H. 239, 245 (1985). The result is absurd because it renders the hearing requirement meaningless and would mean any party could forego presenting any arguments to the agency and still maintain a "de novo" appeal to the superior court or the board.

Not only is such a result absurd, but it flies in the face of the exhaustion of remedies doctrine, which is recognized in New Hampshire. See, e.g., Porter v. City of Manchester, 151 N.H. 30, 40 (2004) ("The rule requiring exhaustion of administrative remedies is designed to encourage the exercise of administrative expertise, preserve agency autonomy and promote judicial efficiency. (Citation omitted.)"). This doctrine requires a litigant to take all steps prescribed and reasonably necessary to allow the agency to rule correctly before an appeal can be considered.[5]

[5] Consistent with this doctrine are the statutes governing appeals of agency orders and decisions to the supreme court which require litigants to present disputed factual and legal issues first to the agency before an appeal of the

The Taxpayer, an LLC, can only act through its duly authorized representatives and is responsible for the acts and omissions of Mr. Krieger, who acted on its behalf before the DRA. The steps necessary to perfect a tax appeal by a party or its representative are fundamental to the point where even "[o]ne day's delay may be fatal to a party's appeal." Phetteplace v. Town of Lyme, 144 N.H. 621, 625 (2000), quoting from Dermody v. Town of Gilford, 137 N.H. 294, 296 (1993).

The failures and omissions of a tax representative in this regard are fatal and result in dismissal, regardless of a taxpayer's "intention" (to make a timely and complete filing, for example). See Arlington Book Sample Co. v. Board of Taxation, 116 N.H. 575, 576 (1976) ("Whether the late filing is due solely to oversight or omission by the taxpayer's counsel, and whether excusable or not, the relief sought is barred. (Citations omitted.)"). The Arlington case is of particular relevance because the inadvertence of a representative (an attorney) resulted in dismissal of the taxpayer's appeal. The law generally holds principals accountable for the actions or inactions of their agents. See, e.g., Holman-O.D. Baker Co. v. Pre-Design, Inc., 104 N.H. 116, 118-119 (1962), citing the Restatement, Second, Agency and other authorities.

Second, the Taxpayer claims in the Objection there are "disputed facts" that preclude the granting of summary judgment. The board disagrees. All of the disputed facts mentioned by the Taxpayer pertain to arguments regarding whether the DRA was correct in assessing and then adjusting (through the Audit Division) certain taxes, interest and penalties, not the threshold

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agency's decision can be maintained. Cf. RSA 541:3 and RSA 541:4; and Appeal of Walsh, 156 N.H. at 351 ("the reason for these requirements is obvious: administrative agencies should have a chance to correct their own alleged mistakes before time is spent appealing from them," quoting from Appeal of White Mtns. Educ. Assoc., 125 N.H. 771, 774 (1984)).

legal issue of non-attendance at the duly scheduled November 24, 2009 hearing where those arguments could have, and should have, been presented.

Summary judgment is appropriate where there is no genuine issue of a material fact relevant to the disposition of an appeal and the moving party is entitled to judgment as a matter of law. See, RSA 491:8-a, III; and, e.g., Vector Marketing Corp. v. New Hampshire Department of Revenue Administration, 156 N.H. 781, 782-83 (2008) (DRA entitled to summary judgment on business profits tax issue pertaining to status of individuals as employees or independent contractors; agency's interpretation of its own rules is entitled to deference, even if "deference is not total").

As noted in the Motion (p. 4), an issue of fact is "material," for purposes of summary judgment, if it "affects the outcome of the litigation." See N.E. Tel. & Tel. Co. v. City of Franklin, 141 N.H. 449, 452 (1996) (summary judgment granted in tax appeal), citing Horse Pond Fish & Game Club v. Cormier, 133 N.H. 648, 653 (1990) (also cited in the Motion). Parties may disagree about other facts, of course, but so long as there is no genuine issue of material fact regarding a dispositive issue, such as, for example, the application of a statute of limitations, summary judgment can and should be granted. See, e.g., Wood v. Greaves, 152 N.H. 228, 229 (2005). The board finds there is no genuine issue regarding the Taxpayer's failure to attend the November 24, 2009 DRA hearing and this material fact precludes the maintenance of this appeal.

For all of these reasons, the Motion is granted and the appeal is dismissed.

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. 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

Paul B. Franklin, Chairman

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

CERTIFICATION

I hereby certify that copies of the foregoing Decision have this date been mailed, postage prepaid, to: Neil B. Nicholson, Esq., McLane, Graf, Raulerson & Middleton, P.A., P.O. Box 326, Manchester, NH 03105-0326, counsel for International Leather Goods, LLC; and Kathryn E. Skouteris, Esq., State of New Hampshire, Department of Revenue, 109 Pleasant Street, Concord, NH 03302-0457, counsel for DRA.

Date: August 27, 2010

Anne M. Stelmach, Clerk