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Supreme Court of New Hampshire.

APPEAL OF KEITH R. MADER 2000 REVOCABLE TRUST & a. (New Hampshire Board of Tax and Land Appeals)

No. 2019-0061
|
Argued: November 19, 2019
|
Opinion Issued: June 5, 2020

Synopsis

Background: Taxpayers, who owned property at condominium development, appealed decision of the New Hampshire Board of Tax and Land Appeals (BTLA), which dismissed their appeals of town's denial of applications for abatements of real estate taxes.

Holdings: The Supreme Court, Marconi, J., held that:

[1] in a matter of first impression, regulation's reasonable cause and not willful neglect exception permits tax abatement appeals to the BTLA, despite the lack of a taxpayer's signature and certification on application for abatement, if taxpayer can show it was not reasonably possible to submit application with taxpayer's signature and certification, and he or she was not recklessly indifferent to signature and certification requirement in preparing the application, and

[2] it was appropriate to remand decision to BTLA in order to determine whether taxpayers' failure to sign and certify their applications was due to reasonable cause and not willful neglect.

Vacated and remanded.

West Headnotes (12)

[1] Administrative Law and Procedure Construction
Statutes Judicial construction; role, authority, and duty of courts

The interpretation of a statute or a regulation is to be decided ultimately by the Supreme Court.

[2] Taxation Questions of law

If the Supreme Court finds the New Hampshire Board of Tax and Land Appeals (BTLA) misapprehended or misapplied the law, its order will be set aside. N.H. Rev. Stat. Ann. § 541:13.

[3] Administrative Law and Procedure Construction, interpretation, or application of law in general

The interpretation of an administrative rule, like the interpretation of a statute, presents a question of law subject to de novo review by the Supreme Court.

[4] Administrative Law and Procedure Construction
Statutes Rules, principles, maxims, and canons of construction in general

The Supreme Court uses the same principles of construction when interpreting both statutes and administrative rules.

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[5] **Administrative Law and Procedure**🔑Plain language; plain, ordinary, or common meaning

Where possible, the Supreme Court ascribes the plain and ordinary meaning to the words used in administrative rules.

[6] **Administrative Law and Procedure**🔑Construction
Administrative Law and Procedure🔑Rule or regulation as a whole; relation of parts to whole and one another

The Supreme Court construes all parts of an administrative rule together to effectuate its overall purpose and to avoid an absurd or unjust result.

[7] **Taxation**🔑Rules and regulations in general

In construing the New Hampshire Board of Tax and Land Appeals' (BTLA) rules, the Supreme Court is mindful that the statutory tax abatement scheme is written to make the proceedings free from technical and formal obstructions.

[8] **Taxation**🔑Rules and regulations in general

Like the statutory scheme they are designed to implement, administrative rules governing tax abatement appeals should be construed liberally, in advancement of the rule of remedial justice which they implement.

[9] **Taxation**🔑Trial de novo
Taxation🔑Questions of fact

Although the question of whether reasonable cause or willful neglect exists for taxpayer's lack of signature on tax abatement application is one of fact for the New Hampshire Board of Tax and Land Appeals (BTLA), the question of what constitutes reasonable cause or willful neglect excusing lack of signature is one of law subject to de novo review by the Supreme Court. N.H. Rev. Stat. Ann. § 76:16-a; N.H. Code Admin. R., Tax 203.02(b)(4).

[10] **Internal Revenue**🔑Failure to make returns

To show that a failure to file tax returns or comply with certain information reporting requirements was not due to "willful neglect," as required to avoid imposition of penalties under Internal Revenue Code, taxpayer must show the failure was the result neither of carelessness, reckless indifference, nor intentional failure. 26 U.S.C.A. §§ 6651(a), 6724(a); 26 C.F.R. §§ 301.6651-1(c)(1), 301.6724-1(a)(2).

[11] **Taxation**🔑Actions to reduce assessment or abate tax

Tax regulation's reasonable cause and not willful neglect exception permits tax abatement appeals to the New Hampshire Board of Tax and Land Appeals (BTLA), despite the lack of a taxpayer's signature and certification on application for abatement, if taxpayer can show: (1) despite exercising ordinary business care and prudence, it was not reasonably possible to submit application with taxpayer's signature and certification; and (2) he or she was not recklessly indifferent to signature and certification requirement in preparing the application. N.H. Rev. Stat. Ann. § 76:16-a;

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N.H. Code Admin. R., Tax 203.02(b)(4).

[12] Taxation Determination and relief

It was appropriate to vacate decision of New Hampshire Board of Tax and Land Appeals (BTLA), which dismissed taxpayers' appeals of town's denial of applications for abatements of real estate taxes, and remand to BTLA in order to determine whether taxpayers' failure to sign and certify their applications was due to reasonable cause and not willful neglect, as was required to permit tax abatement appeals to BTLA under governing regulation. N.H. Rev. Stat. Ann. § 76:16-a; N.H. Code Admin. R., Tax 203.02(b)(4).

Board of Tax and Land Appeals

Attorneys and Law Firms

Cooper Cargill Chant, P.A., of North Conway (Randall F. Cooper on the brief and orally), for the petitioners.

Donahue, Tucker & Ciandella, PLLC, of Exeter (Christopher T. Hilson and Brendan A. O'Donnell on the brief, and Mr. Hilson orally), for the respondent.

Opinion

HANTZ MARCONI, J.

***1** The petitioners[1] appeal a decision of the New Hampshire Board of Tax and Land Appeals (BTLA) dismissing their appeals of the denials of applications for abatements of real estate taxes issued by the respondent, Town of Bartlett (Town). The BTLA dismissed the appeals because the petitioners' abatement applications failed to comply with the signature and certification requirement of New Hampshire Administrative Rules, Tax 203.02 (Tax 203.02), and because the BTLA found that the petitioners did not demonstrate that these failures were "due to reasonable cause and not willful neglect." See N.H. Admin. R., Tax 203.02(d). We vacate and remand.

The following facts were found by the BTLA or are otherwise undisputed for the purposes of this appeal. The petitioners own property at a condominium development in Bartlett, and, with one exception, they are located out of state. On February 7, 2018, Attorney Randall F. Cooper received a message left by James Rader, the principal of the condominium developer, requesting legal representation due to a substantial increase in real estate taxes facing property owners. Cooper responded by e-mail that same day, communicating that he was willing to represent the property owners, but that he was leaving in two days for a vacation out of the country and would not return until February 26. Cooper assured Rader that, even though abatement applications were due to the Town by March 1, he would be able to timely submit them.

Before leaving for vacation, Cooper contacted an appraisal firm to confirm the firm's availability to perform an appraisal and sent Rader a representation agreement. According to the petitioners, they did not agree to the terms of the representation agreement until February 20, while Cooper was away on vacation.

Cooper returned from vacation on February 26 and prepared the abatement applications, which were submitted to the Town on or about February 27. The petitioners did not personally sign or certify their respective applications. Rather, Cooper, as their attorney, signed on their behalf. As to each application, Cooper certified that there was a good faith basis for the application and that the facts as stated in the application were true to the best of his knowledge.

The Town denied the abatement applications,[2] and the petitioners appealed to the BTLA on August 27. By letter dated October 10, the BTLA requested "written proof" that the petitioners "signed the abatement applications filed with the Town in compliance with [Tax 203.02]." On October 24, the petitioners filed a motion seeking an exception from Tax 203.02's signature and certification requirement. The petitioners acknowledged that they had not personally signed or certified their respective abatement applications, but contended that the omissions were "due to reasonable cause and not willful neglect." See N.H. Admin. R., Tax 203.02(d). In addition to their motion, the petitioners submitted personally signed affidavits in which they certified that they had good faith bases to seek abatements at the time their respective applications were filed.

***2** The BTLA denied the motion and dismissed the

appeals. It found that the petitioners failed to comply with Tax 203.02's signature and certification requirement, and further found that the petitioners had failed to demonstrate that these failures were "due to reasonable cause and not willful neglect." As to the latter finding, the BTLA stated that "[t]he record presented indicates [that Cooper] made a conscious decision not to obtain the Taxpayers' signatures and certifications prior to filing," and that his "anticipated vacation plans do not constitute reasonable cause." The petitioners filed a motion for rehearing, which the BTLA denied. This appeal followed.

[1] [2]Our standard for reviewing BTLA decisions is set forth by statute. Appeal of N.H. Elec. Coop., 170 N.H. 66, 72, 164 A.3d 1013 (2017); see RSA 71-B:12 (2012); RSA 541:13 (2007). We will not set aside or vacate a BTLA decision except for errors of law, unless we are satisfied, by a clear preponderance of the evidence, that such order is unjust or unreasonable. Appeal of Town of Charlestown, 166 N.H. 498, 499-500, 98 A.3d 1129 (2014); see RSA 541:13. The appealing party has the burden of demonstrating that the BTLA's decision was clearly unreasonable or unlawful. See Town of Charlestown, 166 N.H. at 499, 98 A.3d 1129; RSA 541:13. The BTLA's findings of fact are deemed prima facie lawful and reasonable. Town of Charlestown, 166 N.H. at 499, 98 A.3d 1129; see RSA 541:13. However, the interpretation of a statute or a regulation is to be decided ultimately by this court. See Appeal of Cole, 171 N.H. 403, 412, 196 A.3d 950 (2018); Appeal of Wilson, 161 N.H. 659, 661, 20 A.3d 1006 (2011). If we find that the BTLA misapprehended or misapplied the law, its order will be set aside. See Wilson, 161 N.H. at 661, 20 A.3d 1006.

[3] [4] [5] [6] [7] [8]Resolution of this case requires us to interpret administrative rules. The interpretation of a rule, like the interpretation of a statute, presents a question of law subject to de novo review. See Appeal of Cook, 170 N.H. 746, 749, 186 A.3d 228 (2018). We use the same principles of construction when interpreting both statutes and administrative rules. Id. Where possible, we ascribe the plain and ordinary meaning to the words used in administrative rules. See Appeal of Silva, 172 N.H. 183, 186-87, 210 A.3d 887 (2019). We construe all parts of an administrative rule together to effectuate its overall purpose and to avoid an absurd or unjust result. See id. at 187, 210 A.3d 887. Moreover, in construing the BTLA's rules we are mindful that the statutory tax abatement scheme "is written to make the proceedings free from technical and formal obstructions." GGP Steeplegate v. City of Concord, 150 N.H. 683, 686, 845 A.2d 581 (2004); see also Arlington Mills v. Salem, 83 N.H. 148, 154, 140 A. 163 (1927). Like the statutory scheme they are designed to implement, administrative rules governing tax abatement appeals "should be construed liberally, in advancement of the rule of remedial justice which" they implement. GGP Steeplegate, 150 N.H. at 686, 845 A.2d 581 (quotation omitted).

The submission of an abatement application to a municipality is a prerequisite to the BTLA's review of an abatement request. See N.H. Admin. R., Tax 203.02(a). Tax 203.02 imposes several requirements on municipal abatement applications. As is relevant to this case, the application must include "[t]he taxpayer's signature ... certifying that the application has a good faith basis and the facts stated are true." N.H. Admin. R., Tax 203.02(b)(4). The rule further provides:

> The taxpayer shall sign the abatement application. An attorney or agent shall not sign the abatement application for the taxpayer. An attorney or agent may, however, sign the abatement application along with the taxpayer to indicate the attorney's or agent's representation. The lack of the taxpayer's signature and certification shall preclude an RSA 76:16-a appeal to the board unless it was due to reasonable cause and not willful neglect.

***3** N.H. Admin. R., Tax 203.02(d) (emphasis added). Thus, although the rule plainly states that an attorney may not substitute his or her signature for the taxpayer's, the lack of a taxpayer's personal signature and certification on a municipal abatement application does not preclude an appeal of the denial of that application to the BTLA if the omission is "due to reasonable cause and not willful neglect." Id.; see also Henderson Holdings at Sugar Hill v. Town of Sugar Hill, 164 N.H. 36, 40, 48 A.3d 892 (2012).

There is no dispute in this case that the petitioners did not personally sign or certify their abatement applications. Instead, the petitioners contest the BTLA's ruling that they did not demonstrate that the lack of signatures and certifications was due to reasonable cause and not willful neglect.

[9]We have not previously had occasion to construe the reasonable cause and not willful neglect exception in Tax 203.02. But cf. Appeal of Steele Hill Development, Inc., 121 N.H. 881, 884-85, 435 A.2d 1129 (1981) (construing agency order imposing additional taxes as an implicit finding that plaintiff had not demonstrated that his failure to timely file tax return was due to reasonable cause rather than willful neglect under a since-repealed taxation statute, see RSA ch. 71-A (repealed 1985)). Although the question of whether reasonable cause or willful neglect exists in a particular case is one of fact for the BTLA, the questions of what elements constitute reasonable cause or

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willful neglect under Tax 203.02 are ones of law. See United States v. Boyle, 469 U.S. 241, 249 n.8, 105 S.Ct. 687, 83 L.Ed.2d 622 (1985); Cook, 170 N.H. at 749, 186 A.3d 228. Thus, we analyze the reasonable cause and not willful neglect exception in Tax 203.02(d) de novo. See Cook, 170 N.H. at 749, 186 A.3d 228.

Neither "reasonable cause" nor "willful neglect" is defined in the BTLA's regulations. See N.H. Admin. R., Tax 102.01-.40 (defining certain terms used in BTLA regulations). But cf. N.H. Admin. R., Tax 102.02 (" 'Accident, mistake, or misfortune' means something outside the party's own control and not due to neglect, or something that a reasonably prudent person would not be expected to guard against or provide for." (emphasis added)). We have noted, however, that "[w]illful is a word of many meanings depending upon the context in which it is used." Appeal of Morgan, 144 N.H. 44, 52, 742 A.2d 101 (1999) (quotation omitted); accord Rood v. Moore, 148 N.H. 378, 379, 807 A.2d 1225 (2002). Furthermore, although we have often stated that actions are not willful when taken accidentally or on the basis of a mistake of fact, see, e.g., Miller v. Slania Enters., 150 N.H. 655, 662, 843 A.2d 939 (2004), our case law does not "indicate an intent to define 'willful' the same in every context," Morgan, 144 N.H. at 52, 742 A.2d 101. Nor does this oft-repeated construction mean that, in order for a given action to be nonwillful, it must have been taken accidentally or on the basis of a mistake of fact. In certain contexts, for example, we have analyzed whether noncompliance with a statute or regulation was willful based upon whether compliance was reasonably possible under the circumstances. See id. at 52-53, 742 A.2d 101; Ives v. Manchester Subaru, Inc., 126 N.H. 796, 801-02, 498 A.2d 297 (1985).

In Morgan, we upheld a finding of the New Hampshire Board of Pharmacy that the petitioner willfully violated specific recordkeeping and data entry statutes because he was not prevented from complying with those statutes by "circumstances beyond his reasonable control." Morgan, 144 N.H. at 45, 53, 742 A.2d 101. Morgan is consistent with the construction we gave RSA 275:44 (2010) in Ives. See Ives, 126 N.H. at 801-02, 498 A.2d 297. RSA 275:44, IV, which was at issue in Ives, provides that "[i]f an employer willfully and without good cause fails to pay an employee wages as required under" other paragraphs of the statute, the employer is liable for liquidated damages. RSA 275:44, IV; see Ives, 126 N.H. at 801, 498 A.2d 297. In Ives, we stated that an employer willfully and without good cause fails to pay an employee wages under RSA 275:44, IV when the employer withholds wages "voluntarily, with knowledge that the wages are owed and despite financial ability to pay them." Ives, 126 N.H. at 802, 498 A.2d 297 (emphasis added); see also Richmond v. Hutchinson, 149 N.H. 749, 751-52, 829 A.2d 1075 (2003) (applying construction of RSA 275:44, IV from Ives; rejecting argument that employer did not willfully withhold wages because the record showed the employer did not have a bona fide belief it was unable to pay said wages). Thus, Ives gave meaning to the "willfully and without good cause" standard in RSA 275:44, IV by focusing on whether the employer withheld wages even though the employer had the funds available to pay them. See Ives, 126 N.H. at 801-02, 498 A.2d 297.

***4** The construction we gave to RSA 275:44, IV in Ives, which uses language similar to Tax 203.02(d)'s "reasonable cause and not willful neglect" standard, tracks with federal laws that can excuse the failure to meet certain tax return filing requirements. See Steele Hill Development, 121 N.H. at 885, 435 A.2d 1129 (relying upon "[f]ederal courts that have dealt with ... language similar to that before us" to conclude that the taxpayer had the burden of proving that his failure to file a tax return was due to reasonable cause and not willful neglect under a since-repealed statute). The Internal Revenue Code "imposes mandatory penalties for the failure to file returns ... unless the taxpayer can show that such failure was due to 'reasonable cause' and not due to 'willful neglect.' " East Wind Industries, Inc. v. United States, 196 F.3d 499, 504 (3d Cir. 1999); see 26 U.S.C. § 6651(a) (2018). See generally Ann K. Wooster, Annotation, What, Other Than Reliance on Attorney, Accountant, or Other Expert, Constitutes "Reasonable Cause" Excusing Failure to File Tax Return or to Pay Tax, Under § 6651(a) of Internal Revenue Code of 1986 (26 U.S.C.A. § 6651(a)), 168 A.L.R. Fed. 461 (2001). Furthermore, taxpayers who fail to comply with certain information reporting requirements are not subject to penalties "if it is shown that such failure is due to reasonable cause and not to willful neglect." 26 U.S.C. § 6724(a) (2018); see In re Refco Public Commodity Pool, L.P., 554 B.R. 736, 742 (Bankr. D. Del. 2016).

Although neither "reasonable cause" nor "willful neglect" is defined in the Internal Revenue Code, see East Wind Industries, 196 F.3d at 504, the former is defined by Treasury Regulations, see 26 C.F.R. §§ 301.6651-1(c)(1) (2019), 301.6724-1(a)(2) (2019). The Treasury Regulation applicable to the failure to timely file a tax return states that a delay in filing is due to reasonable cause "[i]f the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time." 26 C.F.R. § 301.6651-1(c)(1). Similarly, the regulation applicable to the failure to comply with certain statutorily mandated information reporting requirements states that reasonable

cause will exist if "[t]he failure arose from events beyond the filer's control," 26 C.F.R. § 301.6724-1(a)(2)(ii), and the filer establishes that he or she "acted in a responsible manner ... both before and after the failure occurred," 26 C.F.R. § 301.6724-1(a). See In re Refco, 554 B.R. at 742. "[T]he threshold inquiry" under the federal reasonable cause standard "is whether, based on all the facts and circumstances, the taxpayer exercised ordinary business care and prudence." Id.

[10]As for "willful neglect," the United States Supreme Court construed that phrase in Boyle. See Boyle, 469 U.S. at 245, 105 S.Ct. 687. The Court stated that the meaning of "willful neglect" had "become clear over the near-70 years of [the phrase's] presence in the" Internal Revenue Code. Id. As used in the Code, "the term 'willful neglect' may be read as meaning a conscious, intentional failure or reckless indifference." Id. "Stated another way," to show that a failure was not due to willful neglect, "the taxpayer must show that the failure ... was the result 'neither of carelessness, reckless indifference, nor intentional failure.' " East Wind Industries, 196 F.3d at 504 (quoting Boyle, 469 U.S. at 246 n.4, 105 S.Ct. 687).

We find these federal authorities involving materially identical language to Tax 203.02(d)'s "reasonable cause and not willful neglect" standard highly persuasive. See Steele Hill Development, 121 N.H. at 885, 435 A.2d 1129. Like the Second Circuit Court of Appeals, "we believe that 'reasonable cause and not willful neglect' must refer not simply to whether the taxpayer acted voluntarily in the sense of acting consciously, but also to whether the filer's reason for so acting was objectively reasonable under the circumstances." Gerald B. Lefcourt, P.C. v. United States, 125 F.3d 79, 84 (2d Cir. 1997). In addition to the federal authorities discussed above, we draw support from our own case law construing similar standards, see Ives, 126 N.H. at 801-02, 498 A.2d 297, our longstanding interpretive rule that the tax abatement scheme "should be construed liberally," with the goal of making abatement proceedings "free from technical and formal obstructions," GGP Steeplegate, 150 N.H. at 686, 845 A.2d 581 (quotation omitted); accord Arlington Mills, 83 N.H. at 154, 140 A. 163, as well as the BTLA's own regulations, which appear to contemplate that a party's action is "not due to neglect" when it is attributable to "something outside the party's own control" or to "something that a reasonably prudent person would not be expected to guard against or provide for," N.H. Admin. R., Tax 102.02.

***5** [11]For all of these reasons, we construe Tax 203.02(d)'s reasonable cause and not willful neglect exception as permitting abatement appeals to the BTLA despite the lack of a taxpayer's signature and certification on the application at issue if the taxpayer can show that, despite exercising ordinary business care and prudence, it was not reasonably possible to submit the application with the taxpayer's signature and certification, and can further show that he or she was not recklessly indifferent to the signature and certification requirement in preparing the application.

[12]In this case, the BTLA concluded that the administrative record was "bereft of supporting facts" that would warrant a finding that the lack of the taxpayers' signatures was due to reasonable cause and not willful neglect because, in part, "[t]he record presented indicate[d] [that Cooper] made a conscious decision not to obtain the Taxpayers' signatures and certifications" in preparing the abatement applications after returning from vacation. Although the BTLA did not explain how it construed Tax 203.02(d)'s reasonable cause and not willful neglect standard, that the BTLA offered Cooper's "conscious decision" to omit the petitioners' signatures as a justification for dismissing their appeals suggests that the BTLA construed the standard to focus, at least in part, on whether the omissions were intentional. Such a focus is perhaps understandable in light of Tax 203.02(d)'s use of the word "willful," but the proper interpretation of "willful" in a given statute or regulation depends upon the context in which it appears. Morgan, 144 N.H. at 52, 742 A.2d 101. In light of Tax 203.02's context, as discussed above, we do not construe the rule's reasonable cause and not willful neglect standard to focus on whether the taxpayers intended to submit applications without their signatures and certifications; rather, we construe the standard to permit abatement appeals to the BTLA despite noncompliance with the signature and certification requirement when the taxpayer can show that it was not reasonably possible to comply with that requirement despite exercising ordinary business care and prudence, and that the taxpayer was not recklessly indifferent to the signature and certification requirement. See, e.g., Gerald B. Lefcourt, P.C., 125 F.3d at 84; see also Ives, 126 N.H. at 801-02, 498 A.2d 297; GGP Steeplegate, 150 N.H. at 686, 845 A.2d 581; cf. N.H. Admin. R., Tax 102.02.

Because the BTLA did not have the benefit of the construction of Tax 203.02(d) that we announce today, however, and because the primary issue presented by the petitioners' motion was whether the lack of their signatures and certifications "was due to reasonable cause and not willful neglect" under Tax 203.02(d), we vacate the BTLA's decision and remand for further consideration in light of our construction. See Cook, 170 N.H. at 753, 186 A.3d 228. We trust that the BTLA will give appropriate weight to the circumstances in this case that

bear on the objective reasonableness for the omitted signatures and certifications. Those circumstances include, but are not necessarily limited to, the following: the petitioners sought representation; the representation agreement was not signed until Cooper was away on vacation; Cooper had approximately three days to complete and file the abatement applications after returning from vacation; all but one of the petitioners were located out of state; and the Town did not reject the applications for the lack of signatures. See In re Hudson Oil Co., Inc., 91 B.R. 932, 950-51 (Bankr. D. Kan. 1988) (finding reasonable cause where time constraints made timely filing impossible).

***6** In addition to arguing that the omissions of their signatures and certifications were due to reasonable cause and not willful neglect, the petitioners appear to suggest that Tax 203.02(d) may be ultra vires insofar as it prohibits attorneys from signing abatement applications for their clients. See Bach v. N.H. Dep't of Safety, 169 N.H. 87, 94, 143 A.3d 246 (2016) (concluding that administrative rules were ultra vires and thus unlawful because they changed the requirements of the statute they were intended to implement). In light of our decision reinstituting the petitioners' abatement appeals, we need not address, at this time, whether the BTLA may lawfully promulgate a rule permitting the dismissals of property tax abatement appeals on the sole basis that the taxpayer's attorney signed and certified the abatement application at issue. See Antosz v. Allain, 163 N.H. 298, 302, 40 A.3d 679 (2012). However, we take this opportunity to note that we do not view Wilson as necessarily determinative of that question. Wilson did not involve an attorney — with a special obligation of candor toward the tribunal, see N.H. R. Prof. Conduct 3.3 — who signed the necessary section of the abatement application certifying that the application has a good faith basis and that the facts stated in it are true. See Wilson, 161 N.H. at 660, 20 A.3d 1006 (the nonattorney representative merely wrote on the signature line for the abatement applicants "See agent form," but the accompanying agent authorization form signed by the applicants did not contain a certification that the facts stated in the abatement application were true). Nor do we view Henderson Holdings, the facts of which did not implicate Tax 203.02(d) because the petitioner appealed the denial of its abatement application to the superior court, not the BTLA, as controlling on that issue. See Henderson Holdings, 164 N.H. at 37-38, 40, 48 A.3d 892.

We have reviewed the remaining appellate arguments and conclude that under the circumstances of this case, they do not warrant further discussion. See Vogel v. Vogel, 137 N.H. 321, 322, 627 A.2d 595 (1993).

In summation, we vacate the BTLA's decision dismissing the petitioners' abatement appeals and remand for further consideration as to whether the omissions of the petitioners' personal signatures and certifications on their applications were "due to reasonable cause and not willful neglect" as we have construed that phrase.

Vacated and remanded.

HICKS, BASSETT, and DONOVAN, JJ., concurred.

All Citations

--- A.3d ----, 2020 WL 3009072

Footnotes

1 There are eighteen petitioners in this matter: Keith R. **Mader** 2000 Revocable Trust; Bearfoot Creek, LLC; Robert McInnis; Marie McInnis; Slalom Realty Trust; JR Realty Trust; Carol McPhearson; Bryce Blair; Kathi Blair; Eileen A. Figueroa Revocable Trust; Joseph A. Carlucci Living Trust; Mary F. Carlucci Living Trust; Mark J. Gallagher; Paula J. Gallagher; TJF Trust; Christopher Redondi; Amy Redondi; and Engeocom Bartlett, LLC.

2 Although the Town denied the abatement applications, the lack of the petitioners' signatures and certifications was not the reason for the denials. See RSA 76:16, III(g) (Supp. 2019); Henderson Holdings at Sugar Hill v. Town of Sugar Hill, 164 N.H. 36, 40, 48 A.3d 892 (2012).

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In re: 13 Town of Bartlett Appeals

(see attached docket list)

DECISION

The board has carefully reviewed the facts and arguments presented by the "Taxpayers'" attorney (Randall F. Cooper, Esq. of Cooper Cargill Chant) in an October 25, 2018 "Motion to Allow Exception . . ." ("Motion") in each of these 13 tax abatement appeals filed against the Town of Bartlett ("Town"). The Motion was filed in response to an October 20, 2018 letter from the board's Clerk to Attorney Cooper inquiring whether the Taxpayers "signed the abatement applications filed with the Town in compliance with Tax 203.02(b)(4)."[1]

The Motion acknowledges the Taxpayers did not sign their respective abatement applications and seeks an 'exception' from the taxpayer certification and signature requirements. These requirements are clearly stated in Tax 203.02(b)(4) and (d), were enacted pursuant to RSA 76:16, III (g) and have been validated in several recent supreme court decisions.[2] In the alternative, the Motion seeks a ruling that this taxpayer signature requirement 'does not apply to an appeal [sic] signed by a New Hampshire attorney at law.' (See Motion, pp. 1-7.) The Town has objected to the Motion (in a November 14, 2018 filing signed by its selectmen) and urges the board not to "accept the appeals." The Motion is denied and each of the appeals is dismissed for the following reasons.

The salient facts pertinent to the Motion can be summarized as follows:

1. On February 7, 2018, Attorney Cooper was notified (via a phone message) that one "principal of the developer of Bearfoot Creek Condominium [sic; see fn. 1]" (James Rader) requested legal representation due to a "substantial increase in taxes on their [sic] property." On that same day, Attorney Cooper, in an email to Mr. Rader, communicated his "willing[ness] to undertake that representation," stating:

   > The only hiccup I have is that I am leaving this Friday for Morocco, and returning on Monday, February 26th. Abatement applications are due to the Board of Selectmen by Thursday, March 1st. That shouldn't be a problem.

   [Motion, Exhibit 2.] There is nothing in this email or elsewhere in the record to support the assertion (in the Motion, p. 3) that Attorney Cooper, at that time, intended "to prepare and complete the applications . . . (with an attorney's signature)," rather than with each Taxpayer's signature.

2. On or about "February 27, 2017 [sic 2018]" (the day after his return to the office from his vacation), Attorney Cooper completed abatement applications for each Taxpayer and "signed on their behalf [sic] as their attorney certifying that there was a good faith basis for the

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[1] All of these applications to the Town (and the resulting appeals filed with the board) pertain to assessments in a development known as "Bearfoot Creek."

[2] See Appeal of Wilson, 161 N.H. 659 (2011); accord, Henderson Holdings of Sugar Hill, LLC v. Town of Sugar Hill, 164 N.H. 36 (2012).

application, and that the facts, as stated, were true." (Motion, p. 3.) The Motion is silent on whether Attorney Cooper sent drafts of these applications to his clients for review and approval prior to filing them with the Town or indeed made any attempt to obtain their signatures; instead, he apparently concluded his own preparation of the abatement applications and signatures as their "attorney at law" was sufficient.

3. The Town denied the abatement applications on June 18, 2018[3] and Attorney Cooper filed these appeals with the board on August 27, 2018. Like the abatement applications, the appeal documents are signed only by Attorney Cooper, not the individual Taxpayers.

Upon review of these facts, the relevant statutes, board rules and case law, the board finds the Motion's assertion that enforcement of the Taxpayer certification and signature requirement in Tax 203.02(b)(4) and (d) is "unreasonable and unlawful" is without merit. It is not "unreasonable" for the board to expect attorneys, no less than other representatives and self-represented parties, to comply with the taxpayer certification and signature requirement rule; nor is it "unlawful" for the board to apply this duly enacted rule found to be consistent with the board's responsibilities under the tax abatement statutes. These findings are especially clear from the passages from Wilson and Henderson Holdings quoted below construing RSA 76:16, I, RSA 76:16, III and the board's authority to enact and apply this rule.

In Wilson, 161 N.H. at 663-65, the supreme court ruled as follows:

> The form to which RSA 76:16, I, refers "shall be prescribed by the [BTLA]" and "shall include" certain statutorily delineated information as well as "such other information deemed necessary by the [board]." By statute, the form must include: . . . (2) sections for information about the person applying, the property for which the abatement is sought, and other properties the person owns in the municipality; . . . (6) a place for the applicant's signature "with a certification by the person applying that the application has a good faith basis and the facts in the application are true" . . . Contrary to the petitioners' assertions, we view Rule 203.02(d) as consistent with this statutory scheme. . . .
>
> Rule 203.02(d) is also consistent with RSA 76:16, III, and constitutes a reasonable rule for carrying out the [board's] functions. See RSA 71-B:8. . . . [T]he information required by RSA 76:16, III, including the taxpayer's signature and certification that the information submitted is true, affects the right to seek tax relief. To construe the statutory scheme otherwise would . . . render the statute a virtual nullity, which we will not do. *Appeal of Johnson*, 161 N.H. ___, ___ (decided January 26, 2011); *see also Weare Land Use Assoc. v. Town of Weare*, 153 N.H. 510, 511-12 (2006) ("The legislature will not be presumed to pass an act leading to an absurd result and nullifying, to an appreciable extent, the purpose of the statute."); *Appeal of Barry*, 142 N.H. 284, 287 (1997) (we will not interpret a statute so as to render it meaningless).

[3] The Town denied the abatement applications because the Taxpayers did not provide the Town with any supporting documentation (such as the "Yankee Appraisal" mentioned in the Motion, p. 3) until well after the July 1 deadline in RSA 76:16 for the Town to act.

The petitioners assert that our interpretation is inconsistent with *GGP Steeplegate v. City of Concord*, 150 N.H. 683, 685-86 (2004). . . . We held that a brief explanation of the reasons for seeking an abatement is sufficient and that a town or city may not deny an abatement application solely because the taxpayer failed to provide a more detailed explanation. *Id*.

The petitioners mistakenly contend that their case is on all fours with *GGP Steeplegate*. To the contrary, we held that the taxpayer in *GGP Steeplegate* complied with RSA 76:16, III(e), which requires an "applicant to state with specificity the reasons supporting the abatement request." . . .While in *GGP Steeplegate*, we held that demanding that a taxpayer provide more information than is statutorily required conflicted with ensuring "that tax abatement proceedings remain free from technical and formal obstructions," mandating that a taxpayer provide exactly what is statutorily required is not inconsistent with this goal. *Id*.

The petitioners argue that, consistent with the goal of keeping tax abatement proceedings free from technical and formal obstructions and the requirement that the statutory scheme be construed liberally, Lutter's signature on their tax abatement application should have been deemed sufficient to comply with RSA 76:16, III(g). We disagree. RSA 76:16, III(g) requires the taxpayer to certify that he or she has a good faith basis for applying for an abatement and that the facts in the application are true. Neither Lutter's signature nor the signed agent authorization form complied with this requirement.

While the petitioners assert that requiring the taxpayer's signature and certification is inconsistent with allowing the taxpayer to have a representative in the first place, see RSA 71-B:7-a, we fail to see the inconsistency. Had the legislature intended a representative's signature to suffice, it could have so stated. *See*, *e.g.*, RSA 77-A:6, I (2003) (permitting tax returns to be signed by a "taxpayer or by its authorized representative"); RSA 78-C:3 (2003) (tax returns shall be signed by "taxpayer or by his authorized representative"). We 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. [Citation omitted.]

In Henderson Holdings, 164 N.H. at 39-40, the supreme court further held:

RSA 76:16, I (2003) permits those aggrieved by the assessment of a tax to "apply in writing on the form set out in paragraph III to the selectmen or assessors for an abatement of the tax." Paragraph III states:

The abatement application form shall be prescribed by the [board]. The form shall include the following and such other information deemed necessary by the board: . . .

(g) A place for the applicant's signature with a certification by the person applying

> that the application has a good faith basis and the facts in the application are true. . . .
>
> In *Wilson,* we addressed a factual scenario identical to this case in virtually every respect. *See Wilson,* 161 N.H. at 660–61, 20 A.3d 1006.. . .
>
> The only notable distinction between the facts of this case and those in *Wilson* is that, unlike in *Wilson,* where the petitioners appealed to the BTLA, here the petitioner appealed to the superior court. As noted in *Wilson,* the BTLA's administrative rules contain a provision stating that "[t]he lack of the taxpayer's signature and certification shall preclude" an appeal to the BTLA "unless it was due to reasonable cause and not willful neglect." *Id.* at 662, 20 A.3d 1006 (quoting *N.H. Admin. Rules,* Tax 203.02(d)). The petitioners in *Wilson* argued that the BTLA rule conflicted with RSA 76:16, IV, which, as noted above, provides that an applicant's failure to use the abatement application form set forth in RSA 76:16, III "shall not affect the right to seek tax relief." We disagreed, holding that, while failure to use the form itself does not affect the right to seek tax relief, the statute "is silent as to whether the right to seek tax relief from a town or the BTLA may be lost because an applicant has failed to sign an abatement request, or otherwise has failed to provide the information *required* by RSA 76:16, III." *Id.* at 663, 20 A.3d 1006. We further held that "the information required by RSA 76:16, III, including the taxpayer's signature and certification that the information submitted is true, affects the right to seek tax relief." *Id.* As such, the administrative rule is consistent with RSA 76:16, III and constitutes a reasonable rule for carrying out the BTLA's functions. *Id.*
>
> We now reiterate what we said in *Wilson*: "RSA 76:16, III(g) requires the taxpayer to certify that he or she has a good faith basis for applying for an abatement and that the facts in the application are true." *Id.* at 665, 20 A.3d 1006. . . . The mere fact that the petitioner in this case appealed to the superior court instead of the BTLA does not alter the analysis of that which the statute requires in the first instance. As we concluded in *Wilson,* construing the statutory scheme to allow a taxpayer to apply for an abatement without providing a town with the "*necessary information* to process such a request and without certifying that the information provided is true ... would render the statute a virtual nullity." *Id.* at 663–64, 20 A.3d 1006 (emphasis added). This, as we stated in *Wilson,* "we will not do." *Id.*

The Motion (p. 3) nonetheless asks the board to make an "exception," based on a contention Wilson and Henderson Holdings "are not determinative." The board does not agree and finds these decisions apply with equal force to the present appeals. In brief: (1) if the legislature had intended an attorney's "signature to suffice [in place of a taxpayer signature], it could have so stated"; (2) the property tax abatement statutes, RSA 76:16, III (g) in particular, "requires the taxpayer" to certify and sign the abatement application, unlike other statutory frameworks which permit an attorney or other representative to sign documents on behalf of clients; and (3) non-enforcement of this certification and signature requirement "would render the statute a virtual nullity." (See Wilson and Henderson Holdings, quoted above.)

The taxpayer certification and signature requirement applies without exception to all taxpayers, whether they represent themselves or are represented by an attorney at law or a non-attorney acting as their "agent." As noted above (in Wilson), non-attorneys are permitted to represent taxpayers before the board because of special legislation: see RSA71-B:7-a. While attorneys are clearly subject to other standards and responsibilities (most notably the Rules of Professional Conduct), this fact does not exempt the Taxpayers from compliance with the specific certification and signature requirement embodied in the statutes, RSA 76:16, I and RSA 76;16, III (g), and the board's rules, Tax 203.02(b)(4) and Tax 203.02(d). To argue otherwise obfuscates the important distinction between an "attorney at law" (who serves as an advocate for a client's interests) and a witness, which can result in prejudice and a conflict of interest.[4]

The references in the Motion (pp. 5-6) to the New Hampshire Rules of Professional Conduct and case authorities regulating attorney conduct are therefore not persuasive; neither are its references to the rules of the superior court. In this respect, Superior Court Rule 7(e) neither authorizes nor permits the signature of an attorney to take the place of a party; instead, the rule simply provides that each pleading filed with the superior court must be signed by someone (or it may be stricken) and that the signature of that someone ("an attorney, a non-attorney representative, or self-represented party") embodies certain obligations ("that he or she has read the filing; that to the best of his or her knowledge, information and belief there is good ground to support it; and that it is not interposed for delay"). This broad rule applies to pleadings of every sort filed in the superior court and does not obviate the distinct obligation of a taxpayer ("the person aggrieved by the assessment") to "apply in writing" ("by March 1 . . . and not afterwards"), including "the applicant's signature [and] certification . . ." on the abatement application, as required by the specific statutes and board rules discussed above.

The board further finds the Motion is bereft of supporting facts that would warrant a finding, pursuant to Tax 203.02(d), that "[t]he lack of the taxpayer's signature and certification . . . was due to reasonable cause and not willful neglect. Appeal of Wilson,161 NH 659 (2011)." The Motion's conclusory statements (see pp. 2-4 and 7) are not persuasive on this issue and do not satisfy the requisite burden of proof.[5] The record presented indicates one attorney made a conscious decision not to obtain the Taxpayers' signatures and certifications prior to filing abatement applications on their behalves. In any event, his anticipated vacation plans do not

[4] Cf. N.H. Rule of Professional Conduct 3.7 (Lawyer as Witness); and ABA Model Rule Comment [1]: "Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client."

[5] For example, no specific reasons are stated in the Motion as to why the signatures and certifications could not have been obtained by the March 1 filing deadline (four business days after Attorney Cooper's return to a law office having other attorneys and support staff).
Exhibit 9 attached to the Motion contains "executed Property Owner Certifications from each Taxpayer under the penalties of RSA Chapter 641 obtained for this motion." [See Motion, p. 4, emphasis added.] These undated documents, presumably prepared more than eight months after the March 1 statutory deadline, do not mention any review of the abatement applications filed on the Taxpayers' behalves and do not satisfy the signature and certification requirements discussed above.

constitute reasonable cause for making an "exception" to this requirement in the statute and the board's rules.

For all of these reasons, the Motion is denied and each of the appeals is dismissed.

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

/s/_____
Michele E. LeBrun, Chair

/s/_____
Albert F. Shamash, Member

/s/_____
Theresa M. Walker, Member

CERTIFICATION

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Randall F. Cooper, Esq., Cooper Cargill & Chant, P.A., 2935 White Mountain Highway, North Conway, NH 03860, Taxpayers' attorney; Town of Bartlett, Selectmen's Office, 56 Town Hall Road, Intervale, NH 03845; and Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, NH 03258, Contracted Assessing Firm.

Dated: December 3, 2018

/s/_____
Anne M. Stelmach, Clerk

In re: 13 Town of Bartlett Appeals
(see attached docket list)

ORDER

The "Taxpayers'" attorney filed a 14-page Motion For Rehearing ("Motion"), along with a 5-page Affidavit (Exhibit A to the Motion), on December 17, 2018 with respect to the December 3, 2018 Decision dismissing each of these 13 tax year 2017 appeals;[1] the Motion (p. 1) contends the "[D]ecision was unlawful and/or unreasonable." The "Town" filed an objection to the Motion on December 21, 2018 stating there are no "grounds for a rehearing." The suspension Order issued on December 24, 2018 is hereby dissolved and the Motion is denied.

The board finds the Motion fails to satisfy the "good reason" requirement for granting such a motion and therefore finds the Motion has no merit. (See RSA 541:3 and Tax 201.37, both cited in the Motion). Nothing in the Motion or the Affidavit[2] warrants either a "rehearing" or a reconsideration of the Decision.

As further discussed in the Decision (see pp. 2-7), the Motion errs in its repeated assertions that signature and certification by an "attorney at law" on an RSA 76:16 tax abatement application can substitute for the taxpayer signature and certification requirements plainly stated in this statute. These requirements were confirmed in two recent supreme court decisions: Appeal of Wilson, 161 N.H. 659 (2011); and Henderson Holdings of Sugar Hill, LLC v. Town of Sugar Hill, 164 N.H. 36 (2012). The plain meaning of the statute and the board's rules [see Tax 203.02(b)(4) and (d)], combined with the extensive analysis in those decisions, belie the argument in the Motion (p. 7) that these specific signature and certification requirements "plac[e] form over substance."

Moreover, an attorney's failure to review, understand and/or comply with these requirements does not constitute "reasonable cause and not willful neglect," as plainly held in

[1] The Decision was issued in response to an October 25, 2018 Taxpayer motion entitled: "Motion to Allow Exception for Taxpayer Signature Pursuant [to] Tax 203.02(d) or in the Alternative Rule That Tax 203.02(d) Does Not Apply to an Appeal Signed by a New Hampshire Attorney at Law." While that pleading is certainly "part of the record," the board does not agree with various characterizations of the Decision in the Motion (see, e.g., pp. 2-3). Shortly after issuance of the Decision, the board granted a request from the Taxpayers to consolidate these 13 appeals for purposes of any possible rehearing motion or appeal. (See December 13, 2018 Order.)

[2] See Affidavit, pp. 1 and 2, where the attorney recites his "retired from the full time practice of law" status as well as his "past experience with tax abatements . . . and procedural issues of filing an abatement application in a timely manner." His professional status and experience, however, have no bearing on the issues resolved in the Decision. In other words, the taxpayer signature and certification requirements are the same whether an abatement application is filed by a taxpayer, a non-attorney representative under RSA 71-B:7-a (see Decision, p. 6) or an experienced or inexperienced attorney.

prior decisions.[3] The Motion (p. 6) quotes from the Affidavit to the effect that the attorney, in the relevant time period, "had no recollection or knowledge" of the taxpayer signature and certification requirements (stated in the statute and the board's rules) basically because, by his own admission, he had made no effort to ascertain or "investigate" them until "February 27th [when] he realized the need for the signatures of each of the Taxpayers." Such 'arguable' negligence (id.) by an attorney does not excuse non-compliance or satisfy the relevant standards cited in the Decision. In this respect, the Motion (p. 11), citing Paras, 115 N.H. at 67, acknowledges that "[i]n tax abatement proceedings," a taxpayer "is bound by the acts of his attorney, including acts of omission or neglect." (See Paras and the further authorities cited therein.) Further, the burden of proof on factual questions regarding 'reasonable cause/not willful neglect' "lies with" the Taxpayers, cf. Appeal of Steele Hill Development, 121 N.H. 881, 885 (1981), a burden they have not satisfied.

The additional facts presented in the Motion, such as the statement that 12 of the 13 Taxpayers "were out of state" (see Affidavit, p. 3), do not satisfy this burden or otherwise excuse non-compliance. All are property owners in New Hampshire and nothing in the record reflects any attempt by the Taxpayers' attorney to contact any of them regarding the signature and certification requirements or to satisfy these requirements via alternative means (such as through an electronic submittal) prior to the March 1 statutory deadline for the abatement application. Again, RSA 76:16, III(g) is clear on its face that what is required is "the applicant's signature [and] certification," not the signature and certification of the representative who may have filed the abatement application on his or her behalf, whether or not the representative is an attorney at law. (See Decision, pp. 5-6.)

Nor is there merit in the reference in the Motion (p. 12) to one provision ["RSA 564-E:204(5)(c)"] of the Uniform Power of Attorney Act (codified in RSA ch. 564-E). There is no basis to conclude any of the Taxpayers retained anyone to act as their "attorney in fact": the record simply demonstrates the attorney was hired to "render professional services" (as set forth in the "scope of representation" provisions in the "Representation Agreement" signed well before the March 1, 2018 filing deadline for the abatement application[4]). The Representation Agreement does not satisfy the specific requirements for a valid power of attorney under the Uniform Power of Attorney Act and the Motion does not contend otherwise. (See RSA 564-E:105, RSA 564-E:106 and RSA 564-E:113.)

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[3] See, e.g., Arlington American Sample Book Company v. Board of Taxation, 116 N.H. 575, 576 (1976) (affirming dismissal of appeal where taxpayer instructed attorney to file an appeal and "appeal was prepared in proper form. . . with the intention that it be filed" in a timely manner, but attorney delayed in filing the appeal; dismissal proper even if delay "is due solely to oversight or omission by the taxpayer's counsel [citing Paras v. City of Portsmouth, 115 N.H, 63, 66-67 (1975)]"; cf. Appeal of City of Concord, 161 N.H. 169, 172 (2010) (citing Arlington and further noting "the plain language" of the tax abatement statutes "admits of no exceptions").

[4] See Motion, p. 5; it is by no means clear why the attorney had no apparent difficulty getting the Representation Agreement signed and "accepted" by "February 20, 2018," in advance of the March 1 filing deadline, but not the abatement applications he intended to file on behalf of each Taxpayer. His prior motion to excuse non-compliance with the taxpayer signature and certification requirements (see fn. 1) does not mention his clients' unavailability to sign the abatement application for any reason, including the alleged out-of-state location of all but one of them.

In summary, and for all of these reasons, the Motion is denied.

Pursuant to RSA 541:6, any appeal of the Decision must be by petition to the supreme court filed within thirty (30) days of the date on this Order, with a copy provided to the board in accordance with Supreme Court Rule 10(7).

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

/s/
Michele E. LeBrun, Chair

/s/
Albert F. Shamash, Member

/s/
Theresa M. Walker, Member

CERTIFICATION

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Randall F. Cooper, Esq., Cooper Cargill & Chant, P.A., 2935 White Mountain Highway, North Conway, NH 03860, Taxpayers' attorney; Town of Bartlett, Selectmen's Office, 56 Town Hall Road, Intervale, NH 03845; and Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, NH 03258, Contracted Assessing Firm.

Dated: January 10, 2019

/s/
Anne M. Stelmach, Clerk

In re: 13 Town of Bartlett Appeals

(See attached docket list)

DECISION ON REMAND

In this ruling, the board will: first summarize the proceedings to date in these 13 tax year 2017 abatement appeals; and then discuss and apply the "reasonable cause and not willful neglect" standard (when a taxpayer does not comply with the statutory signature and certification requirements for a timely filed abatement application stated in RSA 76:16 and Tax 203). This standard, plain on its face, but also elucidated by the common law, became a threshold issue governing the resolution of these appeals.

In brief, the board finds, based on the facts presented, the Taxpayers have not met their burden of proving the omission of their signatures and certifications was due to reasonable cause and not willful neglect. Consequently, and for the reasons detailed below, each of the 13 appeals is dismissed.

A. Proceedings to Date

In its December 3, 2018 Decision, the board dismissed these property tax abatement appeals filed by the "Taxpayers'" common attorney (Randall F. Cooper, Esq. of Cooper Cargill Chant). The dismissals occurred after the board made further inquiry as to the reasons taxpayer signatures and certifications were not included on the abatement applications filed with the "Town," as required by the statutes governing tax abatement appeals. [See RSA 76:16 and RSA 76:16-a, in particular RSA 76:16, III[1]; see also Tax 203.02(b)(4) and Tax 203.02(d) promulgated in response to this statutory provision and the case law discussed below; cf. RSA 76:17.]

The Taxpayers filed a Motion for Rehearing on December 17, 2018. The board denied this motion on January 10, 2019. The Taxpayers then filed a timely appeal of the Decision to the supreme court.

Following oral arguments on November 19, 2019, the supreme court issued a June 5, 2020 opinion ('mandated' on June 19, 2020). This "Supreme Court Opinion" (see p. 9) vacated the Decision dismissing the appeals and remanded them to the board for "further consideration as

[1] This statute provides in relevant part:

> III. The abatement application form shall be prescribed by the board of tax and land appeals. The form shall include the following and such other information deemed necessary by the board:
>
> (a) Instructions on completing and filing the form . . .
>
> (e) A section requiring the applicant to state with specificity the reasons supporting the abatement request with an explanation of what specificity means . . .
>
> (g) A place for the applicant's signature with a certification by the person applying that the application has a good faith basis and the facts in the application are true.

to whether the omissions of the petitioners' personal signatures and certifications on their [abatement] applications were 'due to reasonable cause and not willful neglect' . . . ." (Cf. July 10, 2020 Order on Remand, p. 1.)

In response to the Supreme Court Opinion, the board invited the parties to propose how best to complete the ordered remand proceedings (in light of the largely undisputed facts presented and the present Covid-19 pandemic). (Id.) Attorney Cooper responded to the Order on Remand in a pleading filed on July 21, 2020 (the "Taxpayers' Response").

The Taxpayers' Response contends: "no further hearing or factual submissions are required" in order for the board to decide the reasonable cause and not willful neglect issue; and a ruling in favor of the Taxpayers is 'compelled' by the Supreme Court Opinion, citing only two paragraphs from that opinion and presenting no additional arguments or authorities. (Id.) The board does not agree for the reasons discussed below.

The Town, for its part, responded to the Order of Remand in a July 27, 2020 letter signed by all three selectmen (filed on July 31, 2020). This letter states:

> The Board of Selectmen feel that the taxpayer representative failed to properly represent [sic] and his error was willful neglect and not reasonable cause, although we do acknowledge that he did admit to his mistake. The attorney is not your average taxpayer, [sic] he is a lawyer and he knows the law better than a taxpayer and he did not follow the rules set forth and probably should be held to a higher standard than the average taxpayer. The Town has no way of knowing if all of those taxpayers had even hired him at that point, which is why their signature is important. We feel that the BTLA was correct in their dismissal of the appeal[s] and support their decision. There were issues previously with other matters from other towns before the BTLA regarding acceptance without signature, which is why the rule was enacted, and failure to abide by this rule will affect the entire State and should not be allowed.

The board agrees with the Town that the appeals should be dismissed.

While arguably Attorney Cooper should not be held "to a higher standard" than a taxpayer (or a tax representative, for that matter) in any property tax proceeding, neither he nor his clients should benefit from a lower standard either. Other points of agreement with the Town's arguments for dismissal are stated below.

The signature and certification requirements at issue in these appeals are not simply a matter of board rule; more importantly, they are requirements plainly stated in the statute enacted by the Legislature. RSA 76:16, III(g), quoted in footnote 1, provides in essence that the completed abatement application must include: "A place for the applicant's signature" and a certification "that the application has a good faith basis and the facts in the application are true."[2] [Cf. Tax 203.02(b)(4) and (d).] The board's rules address municipal abatement applications and appeal documents and are in accord with these statutory requirements and several recent supreme

[2] The "person applying" for an abatement is the taxpayer, not the taxpayer's attorney or other representative. Cf. RSA 71-B:7-b (Representation by Nonattorneys).

court decisions.[3] These statutory requirements are also plainly stated in Section H of the abatement application form (attached) which Attorney Cooper completed and filed with the Town for each of the 13 properties under appeal.

B. Application of the Reasonable Cause and Not Willful Neglect Standard

As noted above, Attorney Cooper, the Taxpayers' representative, chose not to submit any additional facts or legal arguments to satisfy their individual burdens of proving the omission of their signatures and certifications from the abatement applications was due to reasonable cause and not willful neglect. [Cf. Appeal of Steele Hill Development, Inc., 121 NH. 881, 884-85 (1981), cited in the Supreme Court Opinion, pp. 4-6.] Although not further defined in any New Hampshire statute or rule, the reasonable cause and not willful neglect standard has a plain meaning that is consistent with the board's understanding of the Supreme Court Opinion and the New Hampshire and other authorities cited in that ruling.[4]

Keeping this burden and the standard in focus, the board carefully reviewed both the largely undisputed facts presented in the record[5] and finds no factual basis exists for excusing the omission of taxpayer signatures and certifications on the abatement applications.

As noted above, the Taxpayers' Response quotes and places misplaced reliance on two paragraphs in the Supreme Court Opinion.[6] The board finds this reliance is misplaced because

[3] See Appeal of Wilson, 161 N.H. 659 (2011); accord, Henderson Holdings of Sugar Hill, LLC v. Town of Sugar Hill, 164 N.H. 36 (2012).

[4] See, e.g., the A.L.R. Fed annotation and the federal tax and bankruptcy cases cited in the Supreme Court Opinion, pp. 5-8. Given the wide range of possible fact patterns, the board doubts whether a statutory definition or further rulemaking with respect to the "reasonable cause and not willful neglect" phrase is warranted.

[5] See pages 2-3 of the Decision and pages 1-2 and fn. 1 of the January 10, 2019 Order denying Attorney Cooper's rehearing motion, which reference his pleadings and Affidavit.

[6] The two paragraphs are in quotes below:

> "If the taxpayer can show that, despite exercising ordinary business care and prudence, it was not reasonably possible to submit the application with the taxpayer's signature and certification, and can further show that he or she was not recklessly indifferent to the signature and certification requirement in preparing the application."
>
> "We trust that the BTLA will give appropriate weight to the circumstances in this case that bear on the objective reasonableness for the omitted signatures and certifications. Those circumstances included, but are not necessarily limited to, the following: the petitioners sought representation; the representation agreement was not signed until [Attorney Cooper] was away on vacation; Cooper had approximately three days to complete and file the abatement applications after returning from vacation; all but one of the petitioners were located out of state; and the Town did not reject the applications for lack of signatures."

neither the record presented nor the relevant timeline of events[7] supports the Taxpayers' arguments.

To begin with, the Taxpayers did not exercise ordinary business care and prudence in multiple respects (aside from the separate issue of whether they were "recklessly indifferent" to the statutory requirements "in preparing the [abatement] application[s]"). They were notified of the assessments on each property no later than December 1, 2017 (the Town's notice of tax date), approximately three months before the March 1, 2018 abatement application filing deadline for tax year 2017.

At some point, the Taxpayers either individually or collectively decided to challenge the assessments, but took no discernible steps to do so until Mr. Rader, presumably on their behalves, reached out to Attorney Cooper on February 7, 2018.[8] Attorney Cooper then "contacted an appraisal firm" to "confirm[] her availability to undertake Fair Market Value appraisals of the Taxpayers' properties… with an anticipated completion date in May of 2018." (See paragraphs 10 and 11 of Attorney Cooper's October 25, 2018 "Motion To Allow Exception….")

He then sent his firm's standard "Representation Agreement" (signed by Attorney Cooper on February 7, 2018) to the Taxpayers, who then waited "until February 20" (almost two weeks) to sign and return it. (Supreme Court Opinion, p. 2.) There is no indication Attorney Cooper consulted further with anyone, including the Taxpayers or the appraisal firm, before completing and signing each abatement application on their behalves within one day of his return

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[7] The relevant dates and gaps in time are as follows:

> 12/1/17 -- Notice of Tax date;
> 2/7/18 (Wednesday) -- James Rader, the "principal of the condominium developer," contacts Attorney Cooper regarding representation of the 13 individual Taxpayers;
> 2/7/18 or 2/8/18 (Wednesday or Thursday) -- Attorney Cooper contacts appraiser;
> 2/9/18 (Friday) -- Attorney Cooper departs on two-week vacation;
> 2/20/18 (Tuesday) -- Taxpayers agree to the terms of the Representation Agreement and return signed agreement to Attorney Cooper;
> 2/26/18 (Monday) -- Attorney Cooper returns from vacation and prepares abatement applications;
> 2/27/18 (Tuesday) -- Attorney Cooper files abatement applications to the Town; and
> 3/1/18 (Thursday) -- Statutory Deadline for Filing Abatement Application.

[8] See Supreme Court Opinion, p. 2:

> On February 7, 2018, Attorney [] Cooper received a message left by James Rader, the principal of the condominium developer requesting legal representation. . . . Cooper responded by e-mail that same day, communicating that he was willing to represent the property owners, but that he was leaving in two days for a vacation out of the country and would not return until February 26. Cooper assured Rader that, even though abatement applications were due to the Town by March 1, he would be able to timely submit them. . . .
>
> Cooper returned from vacation on February 26 and prepared the abatement applications, which were submitted to the Town on February 27. . . . As to each application, Cooper certified that there was a good faith basis for the application and that the facts as stated in the application were true to the best of his knowledge.

to the office (on February 26, days before the March 1 statutory filing deadline). (Id.) In other words, Attorney Cooper determined entirely on his own that "good faith grounds" existed for filing abatement applications and he did so simply by comparing the 2017 assessments with those of the prior tax year. (See paragraph 11 of Attorney Cooper's October 25, 2018 motion.)

These and other facts belie a factual finding that it was 'not reasonably possible' for the Taxpayers (with or without competent and diligent legal representation) to comply with the signature and certification requirements in a timely manner. There is no evidence the Taxpayers took (or were given, by Attorney Cooper) the opportunity to review the abatement applications before they were filed with the Town. The application, with the accompanying instructions, is straightforward and simple (see attachment) and emphasizes the importance of complying with signature and certification requirements (in Section H). The Taxpayers could have signed and certified each abatement application using various modalities, including faxed or e-mailed signatures or even the U.S. mail (since timely filing only requires a postmark by March 1, not actual delivery to the Town), but did not do so.

It is beyond dispute that an attorney acts as an agent for his client and the client is responsible under the law for the acts and omissions of each agent. (See, e.g., Paras v. Portsmouth, 115 N.H. at 66-67, cited in fns. 11 and 14 to this Decision on Remand.)

The board is persuaded by a review of the entire record and the relevant timeline that neither the Taxpayers nor their agent (Attorney Cooper) made any attempt to comply with the taxpayer signature and certification requirements at all, in a timely manner.[9] The Taxpayers' collective decision to seek representation from Attorney Cooper (despite his vacation plans and their delay in signing the Representation Agreement) does not excuse his or their noncompliance. Giving due weight to all the applicable facts and circumstances, the board finds it was not "objectively reasonable" for Taxpayer signatures and certifications to be omitted from their abatement applications. In their individual appeals for the subsequent tax year (2018), the Taxpayers did sign and certify each abatement application. (See, e.g., BTLA Docket No. 29293-18PT.)

As noted above, the board reviewed prior supreme court and board decisions before making its own factual findings and deciding dismissals were proper. Arlington American Sample Book Company v. Board of Taxation, 116 N.H. 575 (1976), is especially instructive and on point. In that case, the supreme court upheld the dismissal of the plaintiff's tax abatement appeal based on the following facts:

> The plaintiff acquired certain commercial property in Newport in 1970 for a price of $100,000. In 1971, the property was assessed by the town at that value. In 1972, it was assessed at $337,500, whereupon the plaintiff appealed to the selectmen and then the board of taxation for an abatement. The latter granted an abatement to $100,000. In 1973, the property was again assessed at $337,500, and, upon appeal, the board abated the assessment to $160,950. In 1974, the tax year now in dispute, the town again assessed the property at

[9] See the undated "Property Owner Certifications" attached as Exhibit 9 to Attorney Cooper's October 25, 2018 motion. As emphasized in the Supreme Court Opinion, p. 6, a taxpayer must "establish[] that he or she 'acted in a responsible manner… both before and after the failure occurred.'" The board finds, based on the facts and chronology presented, that the Taxpayers and their representative did not act in a "responsible manner…."

> $337,500. When an appeal to the selectmen brought no action, the plaintiff instructed its attorney to file an appeal with the board of taxation. The appeal was prepared in proper form on May 23, 1975, with the intention that it be filed. However, it then remained in the attorney's office and was not filed until June 10, 1975.
>
> The parties agree that the time for perfecting an appeal to the State board of taxation expired on June 4, 1975. RSA 76:16-a (Supp.1975). The plaintiff argues that the act of preparing the necessary papers with the intention that they be filed tolled the limitation found in RSA 76:16-a (Supp. 1975). . . .
>
> The operative language of RSA 76:16-a I requires an application to the board to be made in writing 'within six months after notice of such tax, and not afterwards . . . .' '(T)he intent of the statute to cut off the statutory right at once upon termination of the stated period seems tolerably clear.' [Citation omitted.] 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. Paras v. Portsmouth, 115 N.H. 63, 66-67, 335 A.2d 304, 307 (1975); Missionaries of La Salette Corp. v. Town of Enfield, 116 N.H. 274, 356 A.2d 667 (1976).

Id. at 575-76.

Arlington has been cited and followed both by the supreme court and the board. See, e.g., Appeal of City of Concord, 161 N.H. 169, 171-72 (2010)[10]; and Boissennault v. Town of

[10] This decision states as follows:

> The City argues that the BTLA was without jurisdiction to hear the taxpayer's appeal. Specifically, it argues that RSA 79–A:10 (2003) and RSA 76:16–a, I (2003) require that a taxpayer file a timely abatement petition with the City before taking an appeal to the BTLA. In addressing this argument, we examine the controlling statutes. . . .
>
> "When the language of a statute is clear on its face, its meaning is not subject to modification." *Dalton Hydro v. Town of Dalton,* 153 N.H. 75, 78, 889 A.2d 24 (2005). "We will neither consider what the legislature might have said nor add words that it did not see fit to include." *Id.* . . .
>
> We agree with the City that the plain language of these statutes [including RSA 76:16 and RSA 76:16-a] admits of no exceptions. Taken together, the statutes require a taxpayer to first file an abatement petition with the taxing authority "within 2 months of the notice of tax date and not afterwards." RSA 79–A: 10. Under RSA 76:16–a, I, an appeal to the BTLA is permitted only "[i]f the selectmen neglect or refuse to abate." Thus, failure to file an abatement petition within two months after the notice of tax date bars BTLA review.
>
> In Appeal of Estate of Van Lunen, 145 N.H. 82, 86, 750 A.2d 737 (2000), we stated: "The statutory deadlines for requesting a tax abatement under RSA chapter 76 and its predecessor have historically been strictly enforced, and failure to timely submit an appeal is fatal regardless of accident, mistake, or misfortune." (Citations omitted.) See also Arlington Am. Sample Book Co. v. Board of Taxation, … (affirming State Board of Taxation's dismissal of appeal where petition for abatement was untimely). In Appeal of Town of Sunapee, 126 N.H. 214, 489 A.2d 153 (1985), we reversed the BTLA's order reducing the town's assessment where the property owner failed to file for an abatement. We held:
>
> > Under RSA 76:16–a, I (Supp.1983) a taxpayer is authorized to seek relief from the board [of tax and land appeals] only "if the selectmen neglect or refuse to abate." The subject matter jurisdiction of the board is thus limited to the subject of the selectmen's refusal or

Allenstown, BTLA Docket No. 28875-17PT.[11]

In prior appeals, the board analyzed the statutory signature and certification requirements in some depth before concluding dismissals of appeals were appropriate, notwithstanding the availability of other, lesser sanctions. See, e.g., Belmar PAG Limited Partnership v. City of Nashua, BTLA Docket No. 21029-04PT, et al. (March 8, 2006 Consolidated Order). Addendum A contains the extended discussion of this issue in "Belmar," where the board dismissed tax appeals lacking taxpayer signatures and certifications on the abatement applications.

The policy reasons for the Legislature to require taxpayer signatures and certifications on all abatement applications are self-evident in many respects. Some of them are stated by the Town selectmen in their response letter response (see p. 3, supra). Other municipalities appearing before the board have expressed substantially similar concerns regarding why the taxpayer signature and certification requirements are important. (See Belmar, quoted in the Addendum, p. 17.) Clearly, the Legislature chose to draft the statute so that each taxpayer is required to understand and warrant the good faith basis when the taxpayer decides to challenge a property tax assessment with an abatement application. This requirement prevents attorneys and/or tax representatives from possibly filing random and insubstantial appeals without the knowledge and consent of each taxpayer (in the hope of a contingency fee or other remuneration resulting if an abatement is eventually granted). In other words, a legislative concern for taxpayer accountability and closer regulation of the abatement process is evident in the statutory signature and certification requirement.

> neglect. Selectmen can be said to neglect or refuse only what a taxpayer has first requested. Hence, the jurisdiction of the board is limited to the subject of a taxpayer's original request to the selectmen. It is a truly appellate jurisdiction. Since the taxpayers did not ask the selectmen to abate taxes on the ... lot [in question], the board can order no abatement as to that lot.

Id. at 216, 489 A.2d 153 (citation, brackets and ellipses omitted).

[11] See October 23, 2018 Order in Boissenault at pp.3-4:

> In Arlington Book Sample Co. v. Board of Taxation, 116 N.H. 575, 576 (1976), the supreme court affirmed the dismissal of a tax appeal due to untimely filing. In Arlington, the sole cause of the untimely filing was an attorney's inadvertent delay in filing, after having already "prepared in proper form" the required document, and the taxpayer had the "intention" to make a timely and complete filing. As the supreme court noted,
>
> > 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. Paras v. Portsmouth, 115 N.H. 63, 66-67, 335 A.2d 304, 307 (1975); Missionaries of La Salette Corp. v. Town of Enfield, 116 N.H. 274, 356 A.2d 667 (1976).
>
> Arlington, 116 N.H. at 576. . . .
>
> In other words, as the Town notes, "The Taxpayer representative [in this appeal] is seeking reconsideration as a remedy to an error [he] created." (Objection, p. 2.) While the Town finds the Taxpayer's arguments "unconscionable" (id.), the board will simply note they defy logic and are not supported by the abundant case law cited above.

The board further finds Attorney Cooper's arguments place undue emphasis on his professional status.[12] Both attorneys at law and non-attorney tax representatives are authorized by the Legislature to represent taxpayers before the board and both are held to the same standards and responsibilities to know the statutory requirements for filing abatement applications and tax appeals.[13] To the extent Attorney Cooper has admitted to some "negligence" in this regard,[14] the Taxpayers conceivably have a remedy for any provable damages suffered upon the dismissal of these appeals because of any actionable act or omission of their agent.

For all of these reasons, the board finds the Taxpayers have not met their burden of proof on the issue discussed above and finds merit in the Town's arguments that the appeals should be dismissed. Consequently, each appeal is denied.

Any party seeking a rehearing, reconsideration or clarification of this Decision on Remand 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).

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[12] In his Affidavit, Attorney Cooper states he has "retired from the full time practice of law." (See January 10, 2019 Order, fn. 1.) He remains the principal named partner in a law firm (Cooper Cargill Chant) employing a number of attorneys, paralegals and other staff.

[13] Cf. Wilson and Henderson Holding, cited above in fn. 3. See also the Town's arguments (quoted above on p. 3) that all taxpayers should be held to the same standards, whether self-represented or represented by an attorney or tax representative.

[14] See January 10, 2019 Order at pp. 2-3:

> [A]n attorney's failure to review, understand and/or comply with these requirements does not constitute "reasonable cause and not willful neglect," as plainly held in prior decisions. [Fn. omitted.] The Motion (p. 6) quotes from the Affidavit to the effect that [Attorney Cooper], in the relevant time period, "had no recollection or knowledge" of the taxpayer signature and certification requirements (stated in the statute and the board's rules) basically because, by his own admission, he had made no effort to ascertain or "investigate" them until "February 27th [when] he realized the need for the signatures of each of the Taxpayers." Such 'arguable' negligence (id.) by an attorney does not excuse noncompliance or satisfy the relevant standards cited in the Decision. In this respect, the Motion [for Rehearing] (p. 11), citing Paras, 115 N.H. at 67, acknowledges that "[i]n tax abatement proceedings," a taxpayer "is bound by the acts of his attorney, including acts of omission or neglect." (See Paras and the further authorities cited therein.) Further, the burden of proof on factual questions regarding 'reasonable cause/not willful neglect' "lies with" the Taxpayers, cf. Appeal of Steele Hill Development, 121 N.H. 881, 885 (1981), a burden they have not satisfied.

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

/s/
Michele E. LeBrun, Chair

/s/
Albert F. Shamash, Member

/s/
Theresa M. Walker, Member

ADDENDUM TO DECISION ON REMAND

The following passages are excerpted from the board's rulings in Belmar, at pp. 6-12:

> Nashua and the other municipalities base their argument for dismissal of these appeals on a somewhat different proposition: not on specificity in the abatement application of the reasons for an abatement, but rather on whether the taxpayer is required to sign the abatement application, which Nashua calls a "fundamental element" and "a jurisdictional prerequisite for an appeal." See Nashua's Memorandum, pp. 3 and 4, citing Tyler Road Development Corp. v. Town of Londonderry, 145 N.H. 615, 617 (2000) and Appeal of Sunapee, 126 N.H. 214, 216 (1985); and Nashua's Supplemental Memorandum at p. 3 ("based on the purpose and practical importance of the requirement . . . justice requires that the signature requirement not be waived retroactively").
>
> In essence, the issue boils down to the question of whether the taxpayer signature requirement in the abatement application, a requirement stated both in the statute and the board's rules, as well as on the abatement form itself, is most properly viewed more like: (i) the absolute deadline for filing the abatement application (by March 1, prescribed in RSA 76:16, I); or (ii) an incidental matter simply affecting its 'completeness' (akin to the degree of specificity issue discussed in the Steeplegate case).
>
> In Tyler Road, the supreme court held that if a party fails to request an abatement from the municipality on a part of its property (several lots), then "the court has no jurisdiction to abate them," even if the taxpayer later desires an abatement on those lots and had filed for an abatement on other similar lots that it owned; the court noted the superior court (and, by implication, the board's) statutory "jurisdiction to abate taxes is appellate only. See LSP Assoc. [v. Town of Gilford], 142 N.H. at 374, 704 A.2d at 798. It has no jurisdiction to abate taxes absent a prior request for an abatement filed with the town's assessors." Tyler Road, 145 N.H. at 619.
>
> In Appeal of Sunapee, the supreme court found a taxpayer could not be awarded an abatement on appeal (with respect to a second lot on which he had not requested an abatement from the municipality), because: "Selectmen can be said to neglect or refuse only what a taxpayer has first requested. Hence, the jurisdiction of the board is limited to the subject of a taxpayer's original request to the selectmen." 126 N.H. at 216.
>
> The board has thoroughly reviewed the evidence, arguments and authorities presented by each side on the issue of whether the absence of the taxpayer's signature on each abatement application means the applications were not timely filed and therefore that the appeals should be dismissed (as the municipalities argue) or, alternatively, whether each municipality was required to give further opportunities to cure the omission, rendering dismissals unwarranted. While none of the authorities reviewed by the board are squarely on point and dispositive on this issue, the board, on balance and after additional research, concludes the omission is much more like the failure to meet the time deadline of March 1 (which results in loss of appeal rights, regardless of accident, mistake or misfortune or some other exculpatory reason) rather than being a relatively minor technical defect that can be cured after notice is given to the taxpayer or its

representative. The board therefore disagrees with the arguments advanced by the taxpayers' attorney on at least two fundamental counts.

First, the board does not find the taxpayer signature requirement is a mere "technical" formality or an unnecessary "obstruction" to the abatement process that can be ignored by a taxpayer's representative at his or her discretion and without sanctions. To adopt such a view would mean a representative could file virtually any document by the March 1 deadline (including a blank form with just the taxpayer's name perhaps) and then wait for the municipality to request more information or fuller compliance with the statute. This approach would render the filing deadline meaningless in practical terms and increase the burdens on assessors who must handle large numbers of abatements filed around the March 1 deadline. [Fn. omitted.] The board reads the statutory framework to place respective obligations and burdens both on taxpayers (or their representatives, if they choose to use them) and on the municipalities; bending the rules for one in this area (such as by not applying the statute and rule requiring a taxpayer signature) increases the burden on the other.

Consistent with this approach, the courts and the board have uniformly enforced municipal filing deadlines relative to the tax process -- time deadlines that cannot be waived or relaxed even due to "accident, mistake or misfortune." See, e.g., Appeal of Brady, 145 N.H. 308, 309-10 (2000) (failure to file inventory form required by municipality results in loss of the right to appeal, regardless of whether it was due to accident, mistake or misfortune and regardless of whether it was due to fault of the taxpayer); and Appeal of Estate of Van Lunen, 145 N.H. 82, 86 (2000) (board "properly refused to consider requests for tax abatements that were not timely filed with the town. (Citation omitted.)"

The requirement of timely filing is so strong that 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 hard and fast rule applied in these decisions relative to untimely filings makes it clear that the outcome is not dependent on whether the municipality suffers harm or prejudice by reason of the late filing. For example, it is not likely that a delay of one day in filing an abatement application would harm or prejudice a municipality, but even such a minimal delay would result in a dismissal of the appeal.

There is even case authority to the effect that an attorney's inadvertence in not filing a tax appeal by the statutory deadline (even when the paperwork for a filing "was prepared in proper form" (emphasis added), regardless of the taxpayer's "intention" (to make a timely and complete filing, for example), is fatal to the appeal and results in dismissal. Arlington Book Sample Co. v. Board of Taxation, 116 N.H. 575, 576 (1976). As the court noted, "'[T]he intent of the statute to cut off the statutory right at once upon termination of the stated period seems tolerably clear.' (Citation omitted.) 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. Paras v. Portsmouth, 115 N.H. 63, 66-67, 335 A.2d 304, 307 (1975); Missionaries of LaSalette Corp. v. Town of Enfield, 116 N.H. 274, 356 A.2d 667 (1976)." Arlington, 116 N.H. at 576.

The Arlington case is of particular relevance because the inadvertence of a representative (an attorney) resulted in dismissal of the taxpayer's appeal. While such an outcome might seem harsh, 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.

In Paras v. Portsmouth, 115 N.H. 63, 67 (1975), a taxpayer contended "he should not be bound by his lawyer's actions or inactions. . . ." In this tax appeal, the supreme court stated: "We cannot agree. An attorney is an agent of the client, provided his acts are within the scope of his authority. (Citation omitted.) Plaintiff is, therefore, bound by the acts of his attorney, including acts of omission or neglect. (Citations omitted.)" Id.

Because of legislation enacted in 1995 (RSA 71-B:7-a), "non-attorneys" (like Mr. Lutter and other tax representatives) may represent taxpayers in appeals before municipalities and the board. But such representation imposes corresponding responsibilities and obligations. As with attorney representation of a taxpayer, Mr. Lutter's "acts of omission or neglect" are binding on the taxpayers who give him the authority to represent them. Further, Mr. Lutter's authorization documents, (various examples of the "Agent Authorization" forms were received as evidence in these appeals) where the client/taxpayers granted Mr. Lutter authority to represent them, contains the following statement accepting full responsibility for his actions. "While we have delegated the above authority to this agent, we accept full responsibility for any and all actions he makes in our behalf." (See, e.g., Taxpayer Exhibit 2 in Docket No. 21036-04PT.)

Second, the board finds the taxpayers' statutory arguments regarding interpretation of RSA 76:16, III and IV to be without merit. Paragraph IV, added in 1991, clarifies that a taxpayer can provide the information required in paragraph III without necessarily using the abatement application form "prescribed by the board," but the option granted by the legislature of not using the prescribed form does not mean the substantive requirements of paragraph III, including the "applicant's signature" and a certification ("that the application has a good faith basis and the facts in the application are true") can be omitted at the discretion of the tax representative. . . .

[Contrary to the arguments presented], no court has required a municipality to 'help' a taxpayer representative, or a taxpayer for that matter, to fulfill his obligation to complete the required abatement application and file it by the March 1 deadline. The board finds no basis to do so here.

Similarly, the board does not agree that questioning the "good faith" of each municipality or whether each can show "prejudice, surprise or undue advantage" is necessary to decide the motions to dismiss. See Taxpayer's Memorandum at pp. 4 and 6. The interests of the tax representative and the assessor are, by their very nature, at odds with each other. Insisting on compliance with statutory and regulatory requirements, even if some laxity may have been tolerated in the past, does not mean the municipalities' motions to dismiss are without merit. [Fn. omitted.]

A practical concern expressed by the municipalities should also be mentioned. Their assessors expressed a frustration when abatement applications are not signed by the taxpayers. In those situations, the municipalities may be uncertain exactly whom they were dealing with and whether or not there is a legitimate basis (or "good cause" under RSA 76:16) for challenging the assessment. This uncertainty can delay and degrade the assessment review and abatement process and is a further policy consideration supporting enforcement of the signature requirement stated in the statute, the rule and the abatement form itself.

ATTACHMENT TO DECISION ON REMAND

TAXPAYER'S RSA 76:16 ABATEMENT APPLICATION TO MUNICIPALITY

TAX YEAR APPEALED _____

INSTRUCTIONS

1. Complete the application by typing or printing legibly in ink. **This application does not stay the collection of taxes; taxes should be paid as assessed. If an abatement is granted, a refund with interest will be made.**

2. File this application with the municipality by the deadline (see below). Date of filing is the date this form is either hand delivered to the municipality, postmarked by the post office, or receipted by an overnight delivery service.

DEADLINES: The "notice of tax" means the date the board of tax and land appeals (BTLA) determines the last tax bill was sent by the municipality. (If your municipality bills twice annually, you must apply after the bill that establishes your final tax liability and not before.)

Step One: Taxpayer must file the abatement application with the municipality by March 1 following the notice of tax.
Step Two: Municipality has until July 1 following the notice of tax to grant or deny the abatement application.
Step Three: Taxpayer may file an appeal either at the BTLA (RSA 76:16-a) or in the superior court (RSA 76:17), but not both. An appeal must be filed:

1) no earlier than: a) after receiving the municipality's decision on the abatement application; or b) July 1 following the notice of tax if the municipality has not responded to the abatement application; and

2) no later than September 1 following the notice of tax.

EXCEPTION: If your municipality's final tax bill was sent out after December 31 (as determined by the BTLA), the above deadlines are modified as follows (RSA 76:1-a; RSA 76:16-d, II):

Step One: 2 months after notice of tax;
Step Two: 6 months after notice of tax; and
Step Three: 8 months after notice of tax.

FORM COMPLETION GUIDELINES:

1. **SECTION E**. Municipalities may abate taxes "for good cause shown." RSA 76:16. Good cause is generally established by showing an error in the assessment calculation or a disproportionate assessment. Good cause can also be established by showing poverty and inability to pay the tax.

2. SECTION G. If the abatement application is based on disproportionate assessment, the taxpayer has the burden to show how the assessment was disproportionate. To carry this burden the taxpayer must show: a) what the property was worth (market value) on the assessment date; and b) the property's "equalized assessment" exceeded the property's market value. To calculate the equalized assessment, simply divide the assessment by the municipality's equalization ratio (assessment ÷ ratio). Because a property's market value is a crucial issue, taxpayers must have an opinion of the market value estimate. This value estimate can be shown by obtaining an appraisal or presenting sales of comparable properties.

3. **SECTION H**. The applicant(s) must sign the application even if a representative (e.g. Tax Representative, Attorney, or other Advocate) completes Section I.

4. Make a copy of this document for your own records.

FOR MUNICIPALITY USE ONLY:
Town File No.: _____
Taxpayer Name: _____

RSA 76:16 ABATEMENT APPLICATION TO MUNICIPALITY

SECTION A. Party(ies) Applying (Owner(s)/Taxpayer(s))

Name(s):

Mailing Address:

Telephone Nos.: (Home) _____ (Cell) _____ (Work) _____ (Email) _____

Note: If an abatement is granted and taxes have been paid, interest on the abatement shall be paid in accordance with RSA 76:17-a. Any interest paid to the applicant must be reported by the municipality to the United States Internal Revenue Service, in accordance with federal law. Prior to the payment of an abatement with interest, the taxpayer shall provide the municipality with the applicant's social security number or federal tax identification number. Municipalities shall treat the social security or federal tax identification information as confidential and exempt from a public information request under RSA 91-A.

SECTION B. Party's(ies') Representative if other than Person(s) Applying (Also Complete Section A)

Name(s):

Mailing Address:

Telephone Nos.: (Home) _____ (Cell) _____ (Work) _____ (Email) _____

SECTION C. Property(ies) for which Abatement is Sought

List the tax map and lot number, the actual street address and town of each property for which abatement is sought, a brief description of the parcel, and the assessment.

Town Parcel ID#	Street Address/Town	Description	Assessment

SECTION D. Other Property(ies)

List other property(ies) in the municipality owned in the same name(s), even if abatements for the other property(ies) have not been sought. The taxpayer's entire real property estate must be considered in determining whether the appealed property(ies) is (are) disproportionately assessed.

Town Parcel ID#	Street Address/Town	Description	Assessment

SECTION E. Reasons for Abatement Application

RSA 76:16 provides that an abatement may be granted for "good cause shown." "Good cause" generally means:
1) establishing an assessment is disproportionate to market value and the municipality's level of assessment; or
2) establishing poverty and inability to pay the tax. This form can be utilized for either basis of requesting an abatement. The taxpayer has the burden to prove good cause for an abatement.

1) If claiming disproportionality, state with specificity all the reasons supporting your application. Statements such as "taxes too high," "disproportionately assessed" or "assessment exceeds market value" are insufficient. Generally, specificity requires the taxpayer to present material on the following (all may not apply):

    1. physical data – incorrect description or measurement of property;
    2 market data – the property's market value on the April 1 assessment date, supported by comparable sales or a professional opinion of value; and/or
    3. level of assessment – the property's assessment is disproportionate by comparing the property's market value and the town-wide level of assessment.

Note: If you have an appraisal or other documentation, please submit it with this application.

2) If claiming poverty or inability to pay, state in detail why abatement of taxes is appropriate as opposed to some other relief such as relocating, refinancing or obtaining some alternative public assistance. Ansara v. City of Nashua, 118 N.H. 879 (1978).

    (Attach additional sheets if needed.)

SECTION F. Taxpayer's(s') Opinion of Market Value

State your opinion of the market value of the property(ies) appealed as of April 1 of the year under appeal.

Town Parcel ID# _____ Appeal Year Market Value $_____

Town Parcel ID# _____ Appeal Year Market Value $_____

Explain the basis for your value opinion(s). (Attach additional sheets if necessary.)

SECTION G. Sales, Rental and/or Assessment Comparisons

List the properties you are relying upon to show overassessment of your property(ies). If you are appealing an income producing property, list the comparable rental properties and their rents. (Attach additional sheets if needed.)

Town Parcel ID#	Street Address	Sale Price/Date of Sale	Rents	Assessment

SECTION H. Certification by Party(ies) Applying

Pursuant to BTLA Tax 203.02(d), the applicant(s) **MUST** sign the application. By signing below, the Party(ies) applying certifies (certify) and swear(s) under the penalties of RSA ch. 641 the application has a good faith basis, and the facts stated are true to the best of my/our knowledge.

Dated: _____

_____
(Signature)

_____
(Signature)

SECTION I. Certification and Appearance by Representative (If Other Than Party(ies) Applying

By signing below, the representative of the Party(ies) applying certifies and swears under penalties of RSA ch. 641.

1. all certifications in Section H are true;

2. the Party(ies) applying has (have) authorized this representation and has (have) signed this application; and

3. a copy of this form was sent to the Party(ies) applying.

Date: _____ _____
(Representative's Signature)

SECTION J Disposition of Application* (For Use by Selectmen/Assessor)

* RSA 76:16, III states: the municipality "shall review the application and shall grant or deny the application in writing by July 1 after the notice of tax date…."

Abatement Request: GRANTED _____ Revised Assessment $_____ DENIED _____

Remarks:

Date: _____

_____ _____
(Selectmen/Assessor Signature) (Selectmen/Assessor Signature)

_____ _____
(Selectmen/Assessor Signature) (Selectmen/Assessor Signature)

CERTIFICATION

I hereby certify a copy of the foregoing Decision on Remand has this date been mailed, postage prepaid, to: Randall F. Cooper, Esq., Cooper Cargill & Chant, P.A., 2935 White Mountain Highway, North Conway, NH 03860, Taxpayers' counsel; Town of Bartlett, Selectmen's Office, 56 Town Hall Road, Intervale, NH 03845; and Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, NH 03258, Contracted Assessing Firm.

Dated: 10/8/2020

/s/
Anne M. Stelmach, Clerk