

NO. CV 03 0566126S : SUPERIOR COURT
DOMINION NUCLEAR, ET AL. : JUDICIAL DISTRICT OF
: NEW LONDON
: AT NEW LONDON
v.
TOWN OF WATERFORD : MAY 27, 2005

MEMORANDUM OF DECISION ON ISSUE OF EXEMPTION

This case is a municipal tax appeal by the plaintiffs, Dominion Nuclear Connecticut, Inc. (Dominion Nuclear), Central Vermont Public Service Corp. (CVPS) and Massachusetts Municipal Wholesale Electric Co. (MMWE), challenging the valuation of their real estate and personal property located in the town of Waterford for tax purposes on the grand lists of October 1, 2002 and October 1, 2003. As part of this tax appeal, the plaintiffs claim certain exemptions from taxation, valued by the plaintiffs at over \$100 million. The town responds that the property located in portions of Unit 3 at the Millstone Nuclear Power Station (Millstone), previously exempt from taxation as air pollution control structures and equipment under General Statutes § 12-81 (52), are no longer exempt from taxation.

This memorandum deals only with the issue of whether the plaintiffs have lost the exemption from taxation as to those structures and equipment located at Unit 3 at Millstone.

The facts in this case are not in dispute.¹ The air pollution control exemption at issue here applies only to the Unit 3 reactor located at Millstone. The property containing the air pollution control equipment is owned by the plaintiffs in the following percentages: Dominion Nuclear, 93.47 percent; MMWE, 4.8 percent; and CVPS, 1.73 percent.

In 1993, Northeast Utilities Services Company (Northeast Utilities), on behalf of the then owners of Unit 3, applied to the department of environmental protection (DEP) to have certain structures and equipment certified as exempt from taxation pursuant to § 12-81 (52). On November 1, 1994, the DEP issued a certification stating that the structures and equipment located at Unit 3 had been purchased "for the primary purpose of reducing, controlling or eliminating air pollution," pursuant to the language set forth in § 12-81 (52).

Fifteen items of equipment and structures were certified by the 1994 DEP certification as being for the "primary purpose of reducing, controlling, or eliminating air pollution." (Joint Stipulation, dated November 17, 2004, ¶6.) Eleven of the fifteen items were found to be "solely for the abatement of air pollution," and four were found to be

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See Joint Stipulation of Facts, dated November 17, 2004.

"partially for the abatement of air pollution." (Joint Stipulation, dated November 17, 2004, ¶6.)²

On November 1, 1994, the then owners of Unit 3 Millstone filed the 1994 DEP certification with the assessor for the town of Waterford. The assessor exempted from taxation the air pollution control structures and equipment, as listed in the 1994 certification, on the town's grand lists of 1994, 1995, and 1996. The 1994 DEP certification was not re-filed with the assessor for the grand lists of 1997, 1998, 1999, 2000 and 2001.

On August 7, 2000, Dominion Nuclear entered into an agreement with Northeast Utilities to acquire Millstone Units 1 and 2 and 93.47 percent ownership of Unit 3. Subsequent to the execution of this agreement, Dominion Nuclear acquired title to Millstone Units 1 and 2 and a 93.47 percent interest in Unit 3. Up to the present time, MMWE and CVPS continue to own their respective 4.8 percent and 1.73 percent interests in Unit 3.

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Items certified solely for the abatement of air pollution were as follows: (1) the Supplemental Leak Collection System; (2) the Self Contained Air Conditioning for MCC and Rod Control to support Supplemental Leak Collection System Design; (3) the Hydrogen Recomber Building Structures and Equipment; (4) the Auxiliary and Fuel Building Filtration; (5) the ESF Building Self Contained Air Conditioning Units to support the Supplemental Leak Collection System Design; (6) the Reactor Containment Liner; (7) the Reactor Containment Secondary Enclosure; (8) the Reactor Plant - Containment Vacuum System; (9) the Reactor Plant - Quench and Recirculation Spray Systems; (10) the Radioactive Gaseous Waste System; and (11) the Radiation Monitoring Equipment (only for those radiation monitors specifically listed in Northeast Utilities' August 18, 1994 revision to the tax abatement filing.) The following four items of equipment and structures were certified as being partially for the abatement of air pollution: (1) the Auxiliary Building Structure; (2) the ESF Building Structure; (3) the Reactor Containment Superstructure; and (4) the Reactor Containment Substructure. (Joint Stipulation, dated November 17, 2004, ¶6.)

Dominion Nuclear acknowledges that it had not asked the DEP to re-certify the air pollution control equipment at any time since it acquired the 93.47 percent interest in Unit 3.

On October 31, 2002, Dominion Nuclear filed the 1994 DEP certification with the assessor for the town of Waterford, on behalf of all three plaintiffs, and requested that the air pollution control structures and equipment be exempted from taxation on the October 1, 2002 grand list. In response to the filing of the certification, the assessor, in early January of 2003, requested that Dominion Nuclear submit evidence that the certified equipment had not been altered since 1996, the last year that the town exempted it from taxation.

By letter dated February 5, 2003, Paul P. Parlock, II, Supervisor, Tax, of Dominion Nuclear, responded to the assessor that there had been no material change to the structures and equipment, either in form or function, since the certification on November 1, 1994. (See Plaintiffs' Exhibit 2.) Also in response to the assessor's request, A.J. Jordan, Jr., of Dominion Nuclear's Engineering Department, submitted a letter dated February 12, 2003, affirming that no changes, other than routine maintenance, had occurred to the certified equipment. (See Plaintiffs' Exhibit 3.)³

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The letter from A.J. Jordan, Jr., of the Engineering Department of Dominion Nuclear, dated February 12, 2003, recites: "The Millstone Engineering Department has concluded that there have been no alterations to the systems and structures listed on the 'Application for Certification for Tax Relief for Air Pollution Control Equipment' which was approved on [November 1, 1994] that changes their functional capability. These systems and structures have been subject to maintenance since their original installation. Maintenance is routinely performed to ensure that equipment functional capability does not degrade. Maintaining these systems over time may have necessitated slight changes to address equipment

The assessor denied the plaintiffs' request for an exemption on the October 1, 2002 grand list. The plaintiffs subsequently appealed the assessor's denial of the exemption to Waterford's board of assessment appeals. The board upheld the assessor's determination.

On October 29, 2003, Dominion Nuclear again filed the 1994 DEP certification with the assessor for the town of Waterford, on behalf of all three plaintiffs, and requested the exemption of the air pollution control structures and equipment from the October 1, 2003 grand list. The assessor again denied the plaintiffs' exemption request. The plaintiffs appealed the assessor's decision to the board of assessment appeals, which subsequently declined to hear the appeal.

The assessor, who is not an engineer, is not qualified to determine whether the systems and structures described in the 1994 certification by the DEP meet the conditions recited in § 12-81 (52). The assessor denied the exemption because of his literal reading of § 12-81 (52) (b), which recites in part: "Such certification shall not be required for any assessment year following that for which initial certification is filed, provided if such structures and equipment are *altered in any manner*, such alteration shall be deemed a waiver of the right to such exemption until such certification, applicable with respect to the altered structures and equipment, is filed and the right to such exemption is established as required initially." (Emphasis added.)

obsolescence or overall reliability of the system. These changes are not considered to constitute 'alteration' to the systems or structures described in the referenced approved application." (Plaintiffs' Exhibit 3.)

The assessor relied on the statement from Dominion Nuclear's engineering department in order to conclude that the certified equipment had been "altered in any manner" under § 12-81 (52), thus requiring a new certification from the DEP. The defendant argues that this was a proper interpretation of the statute. The defendant also claims that the exemption granted to Northeast Utilities by the DEP's November 1, 1994 certification was personal to Northeast Utilities and could not be assigned to Dominion Nuclear upon its acquisition from Northeast Utilities of title to the systems and structures of Unit 3 on March 31, 2001.

Dominion Nuclear argues that the 1994 certification by DEP to Northeast Utilities could be and was assigned to it on its acquisition of Unit 3 from Northeast Utilities in 2001. Dominion Nuclear also argues that the assessor had no authority to deny the exemption from taxation on the grand lists of October 1, 2002, October 1, 2003, and October 1, 2004, as provided for in § 12-81 (52).

The resolution of the issue in this case lies with the proper construction of § 12-81 (52) and its application to the facts in this case. Section 12-81 provides that the "following - described property shall be exempt from taxation:

"(52) (a) Structures and equipment acquired by purchase or lease after July 1, 1967, for the primary purpose of reducing, controlling or eliminating air pollution, certified as approved for such purpose by the Commissioner of Environmental Protection. Said commissioner may certify to a portion of structures and equipment so acquired to the extent that such portion shall have as its primary purpose the reduction, control or elimination of air pollution;

"(b) Any person claiming the exemption provided under this subdivision for any assessment year shall, on or before the first day of November in such assessment year, file such certification by the Commissioner of Environmental Protection, as required under subparagraph (a) of this subdivision, with the assessor or board of assessors in the town in which such structures and equipment are located. Failure to file such certification within the time limitation prescribed herein shall constitute a waiver of the right to such exemption for such assessment year. Such certification shall not be required for any assessment year following that for which initial certification is filed, provided if such structures and equipment are altered in any manner, such alteration shall be deemed a waiver of the right to such exemption until such certification, applicable with respect to the altered structures and equipment, is filed and the right to such exemption is established as required initially."

Section 12-81 (52) has as its goal the promotion of the prevention of air pollution. To that end, this statute grants a tax benefit by way of an exemption from taxation, to any person⁴ who acquires "by purchase or lease" structures and equipment whose "primary purpose" is the reduction, control or the elimination of air pollution.

The legislature has determined that it shall be the policy of this state to protect its natural resources and "to control air, land and water pollution in order to enhance the health, safety and welfare of the people of the state. . . ." General Statutes § 22a-1. The

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See General Statutes § 22a-170 which recites in part, "'person' includes any individual, firm, partnership, association, syndicate, company, trust, corporation, limited liability company, municipality, agency or political or administrative subdivision of the state, and any other legal entity"

commissioner of environmental protection has been given the authority to control and protect the environment. See General Statutes § 22a-2 (b). Consistent with this legislative policy, a property tax exemption is granted pursuant to § 12-81 (52) to any person who acquires, by purchase or lease, structures and equipment whose primary purpose is the reduction, control or the elimination of air pollution.

Section 12-81 (52) requires three conditions to be fulfilled before a person can be granted an exemption from taxation: (1) the person must purchase or lease air pollution control structures or equipment for the primary purpose of reducing, controlling or eliminating air pollution; (2) the person purchasing or leasing such structures or equipment must obtain a certification from the commissioner of environmental protection that the primary purpose of the structures or equipment is for the reduction, control or elimination of air pollution; and (3) the certification must be filed with the assessor on or before the first day of November in such assessment year. "Such certification shall not be required for any assessment year following that for which initial certification is filed" provided that the structures or equipment have not been "altered in any manner." General Statutes § 12-81 (52) (b).

The plaintiffs contend that they have complied with all of the requirements of § 12-81 (52) and are therefore entitled to the exemption. The issue here is whether the certification, as re-filed by the plaintiffs on October 31, 2002, entitles the plaintiffs to the same exemption previously granted under the original certification. This issue raises three sub-issues: (1) is Dominion Nuclear entitled to claim the property tax exemption originally granted to Northeast Utilities; (2) have the air pollution control structures and

equipment described in the DEP's 1994 certification been "altered in any manner" as recited in § 12-81 (52) (b); and (3) what authority is charged with the responsibility for making this determination.

The defendant concedes that the 1994 certification has been properly filed with the assessor. However, the defendant argues that it was not Dominion Nuclear that obtained the 1994 certification from the DEP and, therefore, Dominion Nuclear was not entitled to obtain the benefits from the certification. The defendant further argues that the plaintiffs' air pollution control equipment has been altered in "any manner" so as to cause the plaintiffs to lose the exemption.

Turning to the issue of whether the exemption granted to Northeast Utilities under the DEP's 1994 certification can be assigned to Dominion Nuclear, a recitation of applicable tax principles is necessary.

First, "[t]he general rule of construction in taxation cases is that [statutes] granting a tax exemption are to be construed strictly against the party claiming the exemption. . . . Exemptions, no matter how meritorious, are of grace, and must be strictly construed. They embrace only what is strictly within their terms. . . . [Moreover] [w]e strictly construe such statutory exemptions because [e]xemption from taxation is the equivalent of an appropriation of public funds, because the burden of the tax is lifted from the back of the potential taxpayer who is exempted and shifted to the backs of [other taxpayers]" (Citations omitted; internal quotation marks omitted.) Fanny J. Crosby Memorial, Inc. v. Bridgeport, 262 Conn. 213, 220, 811 A.2d 1277 (2002).

Second, Where the issue is the right of the taxpayer to claim an exemption from taxation, the burden of proving the applicability of the statute governing tax exemptions is upon the taxpayer. See Bell Atlantic Nynex Mobile v. Commissioner of Revenue Services, 273 Conn. 240, 252, 869 A.2d 611 (2005).

Section 12-81 (52) is based on the premise that if a taxpayer, after July 1, 1967, purchases "structures and equipment for the primary purpose of reducing, controlling or eliminating air pollution," that taxpayer will be granted an exemption from taxation upon a certification by the DEP and the filing of the certification with the assessor of the town wherein the property lies. Reading this statute strictly, according to its terms, and in accordance with the above recited general tax principles, it only applies to the taxpayer who purchases or leases the structures or equipment for the stated purpose of reducing, controlling or eliminating air pollution. To read this statute to include assignees of the original purchaser would require this court to add language allowing an assignment as a statutory right. This the court cannot do. "Since tax credits are a matter of legislative grace, we cannot infer that tax credits . . . can be assigned to a third party ." Daimler Chrysler Services North America, LLC v. Commissioner of Revenue Services, Superior Court, judicial district of New Britain, Docket No. CV 02 0514699 (December 31, 2003, Aronson, JTR) (36 Conn. L. Rptr 345), citing Oxford Tire Supply, Inc. v. Commissioner of Revenue Services, 253 Conn. 683, 690, 755 A.2d 850 (2000). See also Daimler Chrysler v. State Tax Assessor, 817 A.2d 862, 866 (Me. 2003) ("Tax credits are conferred by legislative grace and are not assignable as a contractual right in the absence of either explicit contractual or statutory language.")

Dominion Nuclear's argument is simple. Dominion Nuclear owns the air pollution control structures and equipment, the structures and equipment were granted an exemption from property taxes, the exemption follows the property regardless of who the owner is and the structures and equipment remain exempt so long as the property is being used to control air pollution as certified by the DEP. The theme of this argument is that an exemption from the payment of property taxes granted by the legislature may be treated as a property right and assigned from party to party so long as the purpose of the exemption is maintained.

The obvious purpose of § 12-81 (52), limiting the exemption to a purchaser or lessee of air pollution control equipment, was to create an incentive to abate air pollution. There is nothing in the language of this statute that creates a separate property right that can be bought and sold as a commercial item. The logical extension of the Dominion Nuclear's argument is that once air pollution control structures and equipment have been purchased and certified by the DEP in compliance with the statute creating the exemption, the structures and equipment become a marketable commodity. It would be a long stretch for this court to infer from the language in § 12-81 (52) that an exemption, created to benefit a purchaser or lessor of air pollution control structures and equipment, was indeed a valuable commodity that could be bought and sold on the market.

It is well recognized that the court cannot expand upon the language of a § 12-81 (52) in order to accomplish the wishes of Dominion Nuclear as an assignee of the original purchaser. Commissioner of Public Safety v. Freedom of Information Commission, 204 Conn. 609, 620, 529 A.2d 692 (1987). Section 12-81 (52) was created by the legislature

solely to encourage a person, whose activities could affect the pollution of the air, to purchase or lease air pollution control structures and equipment. For these reasons, Dominion Nuclear, as a second hand rose,⁵ cannot be considered as the assignee of an exemption from property taxes pursuant to § 12-81 (52).

Despite this court's determination that Dominion Nuclear is not an assignee of a property tax exemption, it is nonetheless appropriate to resolve the pending issue of whether the plaintiffs' property retains the tax exemption in the face of the assessor's claim that the property has been altered, thereby causing it to lose its exemption. The reason for this is that the assessor has put into question the validity of the property tax exemption as it applies to all of the plaintiffs, not just Dominion Nuclear.

Returning to the issue of whether there was an alteration of the tax exempt property in this case, causing a loss of the exemption, it is necessary to determine who is qualified to make such a determination. The town's position is that the assessor, having a watchtower role in town assessments, is the proper person to raise the claim of the tax exempt property being altered. The plaintiffs, however, argue that the assessor, having no expertise as to whether the air pollution control equipment has been altered, has no authority to deny the property tax exemption.

The assessor, by statute, has been given extensive powers to exercise in the role as guardian of the public's interest in the fair valuation of taxable property in the assessor's town. In this regard, our courts have held that the assessor has a "watchtower"

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Reference is to the song "Second Hand Rose" sung by Barbara Streisand whose father was a second hand dealer and she the recipient of second hand clothes.

responsibility. See Matzul v. Montville, 70 Conn. App. 442, 446-47, 798 A.2d 1002, cert. denied, 261 Conn. 923, 806 A.2d 1060 (2002). Assuming that the assessor has no role to play in granting or denying the tax exemption at issue, as argued by the plaintiffs, it would be contrary to legislative intent to prohibit an assessor from challenging the validity of an exemption where the assessor, in good faith, believes that, for whatever reason, a taxpayer is no longer entitled to an exemption. Under these circumstances, the plaintiffs' argument that the assessor has no authority to question the status of the plaintiffs' exemption is without merit.

Accepting the proposition that the assessor does have the authority to question the validity of the exemption granted by the DEP in 1994, it must next be determined whether the assessor has the authority to withhold or deny the plaintiffs' exemption on the lists of October 1, 2002, and subsequent years.

In the present case, the assessor denied the plaintiffs a tax exemption for October 1, 2002, because he believes that the air pollution control structures and equipment, originally exempted from taxation by the 1994 DEP certification, were altered in accordance with the terms of the statute granting the exemption. In other words, the assessor took it upon himself to make the determination as to whether the structures and equipment were altered.

Section 12-81 (52) grants to the DEP, not the assessor, the role of determining whether property purchased or leased for the purpose of abating air pollution is exempt from property taxation. The reason for this role is that the determination of whether property so purchased meets the conditions as stated in the exemption statute requires a

certain knowledge and expertise that one dealing with the control of air pollution must have. Certainly, an assessor, whose expertise and knowledge lies within the field of valuation of real and personal property, is not qualified to make the determination required in § 12-81 (52). Support for this position comes from the language in § 12-81 (52) (b) that requires a re-certification by the DEP if the structures and equipment have been altered in any manner following the original certification. In other words, the legislature has placed the burden of granting or denying a property tax exemption for structures and equipment purchased for air pollution control with the DEP, not the assessor. This leads the court to the question that is germane to the central issue here: what action may an assessor take when he or she believes that a taxpayer has lost an exemption granted under § 12-81 (52)? For guidance, it is appropriate to look at Carmel Hollow Associates Ltd. Partnership v. Bethlehem, 269 Conn. 120, 848 A.2d 451 (2004).

Carmel Hollow, supra, 269 Conn. 122-23, deals with the principle issue of whether an assessor may deny "an application to classify as forest land subdivided land that the state forester has designated as forest land pursuant to General Statutes § 12-107d solely on the basis of the assessor's determination that the use of the land has changed." Similar to the statute at issue in Carmel Hollow, dealing with the classification of forest land, § 12-81 (52) is silent regarding the role of the assessor in determining the status of the structures and equipment described in that statute. *Id.*, 133. The procedure here, as in Carmel Hollow, leaves the determination of the exemption in the hands of the person with the expertise to make the determination, not the assessor. As in Carmel Hollow, unless the DEP determines that the structures and equipment have been altered from the

original application for exemption, there is no reason for the assessor to cancel that exemption. *Id.*, 133.

The defendant's position is that it is the taxpayer's obligation to determine whether the exempt structures and equipment have been altered because "[t]he taxpayer is the most expert on whether the physical change has occurred" (Defendant's Reply Brief, dated January 27, 2005, p. 8.) Yet, when Dominion Nuclear takes the position that the structures and equipment have not been altered, the assessor disagrees with this conclusion.⁶

In the present case, the assessor, after disagreeing with Dominion Nuclear, did notify the DEP that he believed the structures and equipment in issue had been altered, but the DEP refused to issue a declaratory ruling on whether the equipment at issue had in

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"The only reason the [a]ssessor became involved in the alteration process in this case was plaintiffs' failure to forthrightly report whether the equipment and systems had been 'altered in any manner'. Since the [a]ssessor was generally aware of the many alterations which occurred at Millstone since 1994, he inquired as to whether any alterations had occurred in the pollution control equipment. . . . Plaintiffs did not assure him that the air pollution equipment and systems had not been 'altered in any manner.'" (Defendant's Reply Brief, dated January 27, 2005, p. 8, n. 3.)

fact been altered.⁷ After the DEP declined to review the certification previously granted in 1994, the assessor denied the exemption at issue.

As discussed above, § 12-81 (52) sets forth a statutory scheme whereby certain air pollution control structures and equipment are exempt from taxation. As one can see, this statutory scheme involves the taxpayer and the commissioner of environmental protection. The only involvement by the assessor in this process is to accept the certification from the taxpayer and file it with his or her records.

The court in Carmel Hollow Associates Ltd. Partnership v. Bethlehem, supra, 269 Conn. 133-35, conducted an exhaustive analysis and discussion on the statutory scheme of the legislature in granting deductions and exemptions. Using this analysis, it becomes clear that the assessor, in the instant case, and the state forester in Carmel Hollow, were given similar responsibilities for the approval or denial of tax benefits to a taxpayer. Of particular note, is the court's comment that "in light of the fact that General Statutes § 12-107d (c) provides that an assessor 'shall' approve an application for the classification of property as forest land if the property has been so designated, and because there is no other provision that gives an assessor discretionary authority to deny such an application,

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"DEP Commissioner Arthur Rocque rejected the Town's petition for declaratory ruling (See Defendant's Exhibit D) in a letter dated August 16, 2004, in which he stated that "virtually all of the equipment at issue in the Petition is either required by local, state or federal law or will not be removed regardless of its tax status under section 12-81 (52). This equipment is now in use and either must or will remain in use in the future. As such, resolution of the tax issues raised in the Petition will do little to either promote or discourage the use of air pollution control equipment or structures. Indeed, while resolution of the issues in the Petition would require a substantial expenditure of agency resources, any such resolution is not likely to have an appreciable effect upon the environment." (Defendant's Exhibit E.)

the only reasonable construction of the statutory scheme is that an assessor who believes that the use of the land has changed must request a reexamination of the forest land designation pursuant to § 12-107d (b)." (Emphasis in original.) Id., 134. As in Carmel Hollow, the statutory scheme here affirmatively provides that the commissioner of environmental protection is the only government official authorized to certify that the structures and equipment purchased or leased for the purpose of controlling air pollution meet the conditions set forth in § 12-81 (52). To permit the assessor, who acknowledged that he has no expertise when it comes to air pollution control structures and equipment, to withdraw the exemption previously granted, would be in direct conflict with § 12-81 (52) (b). In a similar vein, the Carmel Hollow court noted that "it would defy common sense to grant discretionary authority to assessors to deny such applications because assessors may be motivated by local financial considerations that are at odds with the underlying purpose of the statutory scheme to conserve the state's natural resources." Id., 134-35.

In summary, for the October 1, 2002 grand list, Dominion Nuclear cannot be considered the beneficiary of the property tax exemption originally granted to Northeast Utilities as a result of the 1994 DEP certification. Furthermore, as to the plaintiffs who have owned the property at issue since the time of the 1994 DEP certification, the assessor has no authority to withhold the exemption granted under that certification until such time as the DEP decertifies the property as provided for in § 12-81 (52).

Accordingly, on the issue of exemption, judgment may enter in accordance with this decision without costs to either party.

Arnold W. Aronson
Judge Trial Referee