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THE TAX COURT COMMITTEE ON OPINIONS

CHRISTOPHER MATTHEW JOHNSON, :
 : TAX COURT OF NEW JERSEY
 : DOCKET NO: 000249-2017
 Plaintiff, :
 :
 v. :
 :
 TOWNSHIP OF EGG HARBOR, :
 :
 Defendant. :
 :

Decided: November 16, 2017

Christopher Johnson, Plaintiff.

Thomas G. Smith, attorney for Defendant.

CIMINO, J.T.C.

Taxpayer, Christopher Matthew Johnson, entered the United States Marine Corps on active duty on September 8, 1997. His initial duty was stateside in South Carolina, North Carolina, and California. He was thereafter stationed in Okinawa, Japan, from 2001 to September, 2002. His primary specialty was ground radio intermediate repair, which required him to repair various types of communications equipment for military vehicles and fixed locations. For a time, he became a Sergeant of the Guard for Camp Courtney's Anti-Terrorism Response Force in Okinawa, Japan. As the Sergeant of the Guard, he had the responsibility of posting

sentries with live ammunition at strategic points on the base to ensure against any sort of terrorist attack. In addition, at one point he had to secure a mailroom due to a mail bomb threat. He completed his service on September 7, 2002 receiving an honorable discharge and completing exactly five years of active duty.

During his service, the taxpayer received a number of medals and commendations. The most relevant for the purposes of this decision are the Global War on Terrorism Service Medal and the commendation presented to the Third Marine Expeditionary Force and Marine Corps Bases, Japan.

Correspondence presented to this court from the Department of Veterans Affairs indicates that the taxpayer is "considered to be totally and permanently disabled due solely to service connected disabilities."

On July 15, 2016, the taxpayer made an application for a tax exemption on his dwelling house as a result of his disability status. By letter dated August 2, 2016, the exemption was denied since he did not serve 14 days in an actual combat zone. Thereafter, he appealed to the Atlantic County Board of Taxation which upheld the decision of the assessor. On January 20, 2017, the taxpayer filed a complaint with this court challenging the decision of the Board of Taxation. Taxpayer then filed a motion for summary judgment claiming he was entitled to the exemption.

The township cross-moved for summary judgment seeking a decision upholding the decision of the County Tax Board.

Summary judgment provides a prompt businesslike and appropriate method to dispose of litigation in which material facts are not in dispute. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 530 (1995). Additionally, cross-motions for summary judgment demonstrate to the court the ripeness of a matter for adjudication. Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 177 (App. Div. 2008); see also Fisher v. City of Millville, 29 N.J. Tax 91, 92 (Tax 2016), aff'd, 450 N.J. Super. 610 (App. Div. 2017).

In the recent past, this court has dealt with similar issues in Wellington v. Township of Hillsborough, 27 N.J. Tax 37 (Tax 2012); Fisher, supra; and Galloway Township v. Duncan, 29 N.J. Tax 520 (Tax 2016). This is the first decision since the Appellate Division's affirmance of the decision in Fisher in which the Court has had the opportunity to apply the Appellate Division's holding.

The State Constitution authorized the Legislature to grant veteran's property tax exemptions. See N.J. Const., art. VIII, § 1, ¶ 3. Fisher, supra, 450 N.J. Super. at 614. Resultantly, the Legislature provided a total exemption for veterans honorably discharged who served in active service at a time of war and have been declared disabled as a result of their service. Entitlement to the exemption from real property taxes requires a party to prove

(1) he or she is a citizen and resident of this State, (2) now or hereafter honorably discharged or released under honorable circumstances, (3) from active service in a time of war, (4) in any branch or unit of the armed forces of the United States, (5) who shall be declared by the United States Veterans Administration or its Successor to have a service connected disability declared by the United States Veterans Administration or its successor to be a total or 100% permanent disability sustained through enemy action, or accident, or resulting from disease contracted while in such service. Id. at 615, (citing Wellington, supra, 27 N.J. Tax at 48).

Like Wellington, Fisher and Duncan which previously came before this court, the only question is whether taxpayer satisfies the third element, which is whether his service was in active service in time of war. The court must "remain mindful taxation is the rule and a claimant bears the burden of proving an exemption." Fisher, supra, 29 N.J. Tax at 615, (citing New Jersey Carpenters Apprentice Training and Educ. Fund v. Borough of Kenilworth, 147 N.J. 171, 177 (1996), cert. den., 520 U.S. 1241 (1997)). The phrase "active service in time of war" as used, is a defined term, which means the "periods of time set forth in [N.J.S.A. 54:4-8.10]." N.J.S.A. 54:4-3.33a. Initially, many of the periods of war or conflict were defined temporally regardless of location or service. However, over time with successive

military actions, the Legislature chose to tighten the qualifying requirements for the exemption. The history of this narrowing by the Legislature is set forth in the Tax Court opinion in Fisher, supra. Id. at 95-96.

Applicable to the taxpayer's time in service is the following statutory enactment defining active service in time of war to include:

Operation "Enduring Freedom," on or after September 11, 2001, who served in a theater of operation and in direct support of that operation for a period, continuously or in the aggregate, of at least 14 days in such active service commencing on or before the date the President of the United States or the United States Secretary of Defense designates as the termination date of that operation; provided, that any person receiving an actual service-incurred injury or disability while engaged in such service shall be classed as a veteran whether or not that person has completed the 14 days' service as herein provided.

[N.J.S.A. 54:4-8.10a.]

Beside the temporal requirement of service after September 11, 2001, the Legislature also required service in a theater of operation and in direct support of the operation. The decision here turns on whether the taxpayer's military service constituted direct support of Operation Enduring Freedom. The taxpayer, like the veteran in Duncan, supra, asserts that a certain definition used by the Joint Chiefs of Staff which defines "direct support" is determinative. Joint Chiefs of Staff, Joint Pub. 1-02,

Dictionary of Military and Associated Terms, 69 (Nov. 8, 2010, amended Jun. 15, 2015). Id. at 533. Conversely, the award and decoration regulations adopted by each military branch require that "direct support" take place in certain areas of eligibility. See U.S. Dep't of Army, Reg. 600-8-22, Military Awards 35-37, 185-186 (Jun. 25, 2015); U.S. Dep't of Air Force, Instr. 36-2803, The Air Force Awards and Decorations Program 186-89, 234, 237 (Dec. 18, 2013); Dep't of U.S. Navy, Sec'y of the Navy Instr. 1650.1H, Navy and Marine Corps. Award Manual, 4-28, 4-69 (August 22, 2006). As explained in greater detail in Duncan, supra, "there simply is no indication that the Legislature understood either of the seemingly conflicting definitions of 'direct support' set forth in the military regulations to be applicable in interpreting the eligibility criteria for the exemption". Id. at 534-535.

The taxpayer also argues that his Third Marine Expeditionary Force received a commendation from the Secretary of the Navy which specifically indicated that the Force was engaged in direct support. Just like the conflicting regulations already discussed, the commendation does not add any clarity as to what constitutes direct support, or more importantly, that the Legislature relied upon or sought to incorporate this definition of direct support.

"[U]nlike the definition of what constitutes a disability (i.e., per Veterans Administration determination), the Legislature did not define 'direct support' or any other term. The Legislature

did not defer to a technical definition or term of art prescribed by military regulation or otherwise." Id. at 534. The Legislature specifically utilized the word direct to note a closer relationship to the event being defined. "[T]he word 'direct' connotes relative freedom from remoteness whether in terms of time, intervention or other contributive causes or the like". Id. at 535, (citing Gerba v. Bd. of Trustees, 83 N.J. 174, 186 (1980)). Direct support must be something more than remote support without the experience of war. See Fisher, supra, 29 N.J. Tax at 99-100. The Appellate Division has now confirmed that "the determination turns on the exposure of the service member to the harms of war..." Id. at 619.

In the case at hand, the taxpayer served approximately four years in the United States and one year in Japan. While in Japan, his duties included repairing radios and then, for a three month stint, supervising guard duty. Unlike the veteran in Wellington, supra, who was exposed to enemy chemical agents, or the veteran in Duncan, supra, in which her experiences of war contributed to her disability rating and was no less deserving of benefits than a veteran who treated war mangled soldiers closer to the battlefield, the taxpayer here was not exposed to the harms of war by being in charge of guard duty or having to deal with a bomb scare.

While the taxpayer's service to this country is commendable like that of all of our veterans, his service was more akin to

that of the veteran in Fisher, supra, who also performed military police duties at her base. Id. at 101-02. However, this court is required to interpret the law in accordance with legislative intent as well as the prior decisions of the Appellate Division and the Tax Court effectuating the intent of the Legislature. To reiterate, the Legislature made a decision to narrow the eligibility for more recent conflicts with the theater of operation and direct support requirement. The decision of this court implements that legislative pronouncement. As such, this court is constrained to deny taxpayer's application.

The taxpayer here relies upon a proposed regulation of the Director defining the term direct support as applied to the veteran's property tax exemption. See 49 N.J.R. 1668(a) (Jun. 19, 2017). The summary indicates the proposed regulation defines the term "direct support" as set forth by the case law, in particular, Galloway, Fisher and Wellington. Id. at 1669. In any event, the proposed regulation is not helpful because it has never been adopted.

The taxpayer further argues that pending legislation eliminating the theater of operations requirement supports his argument that his service was in direct support. Senate Bill No. 1622 (introduced Feb. 16, 2016); Assembly Bill No. 3150 (introduced Feb. 22, 2016). The court cannot now decide whether eliminating the theater of operations requirement eviscerates the direct

support requirement since the legislation has not been adopted.¹ Prospective legislative action, while at times instructive, cannot impart substance to the current law. Columbia Broadcasting System, Inc. v. Melody Recordings, Inc., 134 N.J. Super. 368, 382 (App. Div. 1975). Simply put, the court cannot apply legislation which has not become law.

In any event, the aforesaid legislation has cleared committee in the Assembly and passed the full Assembly on June 22, 2017. The legislation has been favorably reported from one of two committees of the Senate. The current legislative term expires January 9, 2018. N.J. Const., art. IV, §1, ¶3. In the event the bill is enacted into law in the current term, the court upon application of the taxpayer will certainly consider whether this constitutes a basis for relief under R. 4:50-1(f). See Castiglioni v. Castiglioni, 192 N.J. Super. 594 (Ch. Div. 1984) (change in federal law respecting military pension distributability undoing prior Supreme Court decision held to constitute a basis for subparagraph (f) relief.); See also Edgerton v. Edgerton, 203 N.J. Super. 160, 170 (App. Div. 1985). Of course, the court would then consider applicability as well as retroactivity.

¹ For early conflicts, the only requirement for service was temporal. Beginning with conflicts in the 1980s, the Legislature added a geographic requirement. Then, beginning with conflicts in the early 1990s, the Legislation added both a geographic and a direct support requirement. Fisher, supra, 29 N.J. Tax at 95-96.

For the foregoing reasons, taxpayer's motion is denied and the township's cross-motion is granted.