

Northshire Bookstore Properties, LLC v. Vermont Department of Taxes, No. 10-24-07 Bncv
(Howard, J., Mar. 27, 2008)

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**STATE OF VERMONT
BENNINGTON COUNTY, SS.**

**NORTHSHIRE BOOKSTORE PROPERTIES, LLC,
Plaintiff**

v.

**BENNINGTON SUPERIOR COURT
DOCKET NO. 10-24-07 Bncv**

**VERMONT DEPARTMENT OF TAXES,
Defendant**

DECISION AND ORDER

Introduction

Appellant-Taxpayer Northshire Bookstore Properties, LLC (Northshire) appealed from a Determination of the Commissioner of the Department of Taxes (Determination) upholding the Department’s assessments of property transfer tax on the transfer of two parcels of real property. Northshire objects arguing that the property transfers at issue were exempt from tax under 32 V.S.A. § 9603(24) which holds that transfers made to a limited liability company (LLC) “at the time of formation” are exempt from taxation. The Department, and the Commissioner on appeal, concluded that since the two parcels of property were not transferred until the Operating Agreement was finalized approximately six months after a Certificate of Organization was issued by the Secretary of State, the property was not transferred at the time the LLC was formed, and thus, the property tax exemption in § 9603(24) did not apply. As such, the primary issue on appeal is whether a transfer of property subsequent to the issuance of a Certificate of

Organization but contemporaneous with the finalization of an Operating Agreement satisfies § 9603(24)'s requirement that such transfer occur "at the time of formation." Since the Court concludes that an LL is formed at the time articles of organization are filed, the claimed tax exemption does not apply, and the Determination is **AFFIRMED**.

Standard of Review

The court reviews this case "on the basis of the record established before the Commissioner." *State Dep't of Taxes v. Tri-State Indus. Laundries, Inc.*, 138 Vt. 292, 294 (1980). "[J]udicial review of agency findings is ordinarily limited to whether. . . there is any reasonable basis for the finding." *Tri-State Industrial Laundries*, 138 Vt. at 294; accord *Bigelow v. Dep't of Taxes*, 163 Vt. 33, 35 (1994) (findings not set aside unless "clearly erroneous"). "[W]e must afford deference to the Commissioner's determination. . . ." *Morton Buildings, Inc. v. Dep't of Taxes*, 167 Vt. 371, 374 (1998); accord *Tri-State Industrial Laundries*, 138 Vt. at 294 (Commissioner's determination presumed "correct, valid and reasonable, absent a clear and convincing showing to the contrary").

Background

The dispositive facts are undisputed. Edward and Barbara Morrow are the majority owners of the Northshire Bookstore, located in Manchester Center, Vermont. In an effort to keep the bookstore economically viable, Mr. and Mrs. Morrow sought investors and funding to expand the bookstore. Part of the expansion included acquiring two adjacent parcels of real property. It was decided that this newly acquired real estate would be transferred to and held by a limited liability company called Northshire Bookstore Properties, LLC. Articles of Organization for such LLC were filed with the Secretary of State's Office on November 6, 2002 but the LLC's Operating Agreement was not finalized until six months later in May 2003. At

that time the two parcels of real estate were transferred to the LLC and on May 23, 2003, the LLC filed a Vermont Property Transfer Tax Return declaring the transfer exempt from tax pursuant to 32 V.S.A. § 9603(24).

The Department denied Plaintiff the exemption on the grounds that the property transfer did not occur at the time the LLC was formed. Recognizing that there is no statute or regulation defining that which is considered to be “at the time of formation”, the Department maintains an unwritten practice that it will treat transfers made within ninety days from the issuance of the LLC’s Certificate of Organization by the Secretary of State to still be considered done “at the time of formation.” Since Plaintiff’s property transfer did not occur until approximately six months after the Certificate was issued, the Department billed Plaintiff a total of \$15,120 in tax plus interest and penalty for the transfer of both parcels of real estate.

On appeal to the Commissioner, the designated hearing officer affirmed, concluding that the date of formation of an LLC is measured by the date upon which the articles of organization are filed with the Secretary of State, and not by the date the written operating agreement is finalized or signed, on the rationale that if “the date of formation was to be measured by the signing of a written operating agreement, the tax exemption would be inconsistently applied and virtually unenforceable.” Taxpayer appealed to this Court pursuant to 32 V.S.A. §§ 5885(b) and 6072.

Analysis

Vermont law imposes a tax on the transfer of property located within the state subject to specific exemptions. 32 V.S.A. §§ 9602, 9603. Section 9603(24) of Title 32 provides a tax exemption for property transfers “made to a limited liability company at the time of its formation.” A literal interpretation of this statute would require property transfers be made

simultaneously with formation of the LLC or risk losing the benefit of the tax exemption. § 9603(24); see *Mathieu Properties, LLC v. Vermont Dep't of Taxes*, No. 188-06 CnCv (Katz, J., October 10, 2006) (concluding that a literal interpretation of § 9603(24) would require a property transfer to occur simultaneously with the formation of the LLC to qualify for the tax exemption). Recognizing that such a result was likely unintended by the legislature and potentially could lead to absurd results, the Department has adopted an unwritten practice in which it permits taxpayers transferring property to an LLC within ninety days of such LLC's formation to still receive the benefit of this tax exemption. See *id.* (literal interpretation of § 9603(24) to require property transfer simultaneous with LLC formation could lead to absurd results and thus Court approved the Departments practice of providing taxpayers with a ninety day grace period to transfer property and still receive the tax exemption).

The statutory language on the formation of an LLC is clear and unambiguous, and undoubtedly holds that an LLC is formed on the date upon which articles of organization are delivered to the secretary of state for filing. 11 V.S.A. § 3022(a); see also 11 V.S.A. 3022(b) (“...the existence of a limited liability company begins when the articles of organization are filed”). Indeed, 11 V.S.A. § 3022(c) states that “[t]he filing of the articles of organization...is *conclusive proof that the organizers satisfied all conditions precedent to the creation of the organization.*” 11 V.S.A. § 3022(c) (emphasis supplied). Northshire does not allege, nor can it be demonstrated, that the articles of organization were not delivered and in fact, the secretary of state issued a certificate of organization evidencing the formation of the LLC on November 6, 2002. Northshire then proceeded to utilize this date on its property tax transfers as the date upon which the LLC was formed, indicating that Northshire was fully aware that November 6, 2002 was indeed the date their LLC was formed.

Despite this admission, throughout this litigation Northshire has suggested that an ambiguity exists regarding the formation date of an LLC because 32 V.S.A. § 9603(24) utilizes the phrase “at the time of formation” while 11 V.S.A. § 3022 refers only to the “organization” of an LLC. However, a review of the common definitions of both “organization” and “formation” establish that both words have a similar meaning relating to the formation or organization of an entity, thus establishing that the legislature’s usage of these different words does not create an ambiguity in applying both statutes in the instant case. Compare *Webster’s New World Dictionary* 549 (2d ed. 1986) (definition for formation includes “a thing formed” and “the way in which something is formed or arranged; structure” with *Webster’s New World Dictionary* 1002 (2d ed. 1986) (definition of organization includes “an organizing or being organized” and “the manner of being organized; organic structure”); see also *Wesco Inc. v. Sorrell*, 2004 VT 102, ¶ 14 (primary objective in construing statute is to effectuate legislatures intent, and where statute is unambiguous, Court will apply the plain, ordinary meaning of the statutory language); *Mathieu Properties, LLC v. Vermont Dep’t of Taxes*, No. 188-06 CnCv (Katz, J., October 10, 2006) (holding that the words “at the time of formation” as used in 32 V.S.A. § 9603(24) are “subtle and recondite” and therefore “enjoy a plain meaning”). The Court concludes that the plain meaning of these statutes establishes that an LLC is deemed to be formed on the date upon which articles of organization are filed with the Secretary of State.

Northshire’s claimed tax exemption was properly denied below because the real estate was not transferred until May 2003, six months after the articles of organization were filed with the Secretary of State. Such a transfer occurring a significant period of time after the filing of the articles cannot be treated as a contemporaneous transfer as required under the statute. Moreover, even under the Department’s ninety day grace period, Northshire’s claimed

exemption must fail because the property transfer in May 2003 did not occur within ninety days of the LLC's formation on November 6, 2002.¹ The Court therefore concludes that the Department properly disallowed the tax exemption because Northshire did not comply with the statutory requirements for tax exemption in 32 V.S.A. § 9603(24) nor did it transfer the property within the ninety day grace period allowed by the Department.

Northshire's final argument appears to be that since it was unaware of the requirement that in order to qualify for the tax exemption in 32 V.S.A. § 9603(24) the real estate must be transferred within ninety days of filing articles of organization, Northshire's due process rights must have been violated. While it is certainly true that vague laws which fail to provide adequate notice of conduct that is proscribed violate due process and are unconstitutional, an individual's ignorance of the provisions of a law does not in and of itself establish that said law violates due process, as is suggested by Northshire. See *State v. Harris*, 152 Vt. 507, 509 (1989) ("If a statute is so vague that persons of ordinary intelligence do not know what conduct violates its terms, it does not comport with due process."); *State v. Woods*, 107 Vt. 354 (1935) ("The maxim, "Ignorantia legis non excusat," and the corresponding presumption that every one is conclusively presumed to know the law, are of unquestioned application in Vermont as elsewhere, both in civil and in criminal cases.").

In the Court's view, the statutes at issue are not vague, but instead are quite specific and provide taxpayers with sufficient notice as to the requirements that must be met to take

¹ Northshire also alleges that the Department's grace period practice should be invalidated because the practice was not implemented by formal regulation. Without passing on the validity of this practice, the Court notes that declaring the practice invalid provides Northshire no aid in the instant appeal because if the Department's grace period were held inapplicable Northshire, and other taxpayers, could only claim the tax exemption under 32 V.S.A. § 9603(24) if the property transfer occurred simultaneously with the delivery of articles of organization to the secretary of state. See *Mathieu Properties, LLC v. Vermont Dep't of Taxes*, No. 188-06 CnCv (Katz, J., October 10, 2006). Since Northshire clearly did not transfer the real estate simultaneously with its filing of articles of organization, or within ninety days of the LLC's formation, it is largely irrelevant for purposes of this case whether the Department's grace period is valid.

advantage of this tax exemption. Indeed, as discussed *supra*, 32 V.S.A. § 9603(24) explicitly states that the tax exemption is available only for a property transfer occurring at the time the LLC is formed, and 11 V.S.A. § 3022 specifically establishes the requirements for forming an LLC indicating exactly when an LLC comes into existence. See 32 V.S.A. § 9603(24); 11 V.S.A. § 3022. The Court can only conclude that Northshire's failure to inform itself of all the requirements of receiving the claimed tax exemption and its decision to take six months to transfer the property after the date of the LLC formation without such effort does not work to transform these otherwise clear and unambiguous statutes into vague and unconstitutional laws, and thus, holds that no due process violation occurred.

For the foregoing reasons Northshire's appeal is hereby denied and the Determination is **AFFIRMED**.

ORDER

Dated at Bennington, VT, this _____ day of March 2008.

David Howard
Presiding Judge