THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2019-0061

APPEAL OF KEITH R. MADER 2000 REVOCABLE TRUST, ET AL.

APPEAL PURSUANT TO RULE 10 FROM AN ORDER OF THE NEW HAMPSHIRE BOARD OF TAX AND LAND APPEALS

BRIEF FOR THE TOWN OF BARTLETT

TOWN OF BARTLETT

Christopher T. Hilson, Esq.
NH Bar No. 17116
Brendan Avery O'Donnell, Esq.
NH Bar No. 268037
Donahue, Tucker & Ciandella, PLLC
16 Acadia Lane
Exeter, NH 03833
(603)778-0686
chilson@dtclawyers.com
bodonnell@dtclawyers.com

The Town waives oral argument.

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2. Whether the BTLA correctly interpreted RSA 76:16 and N.H. Admin. R., Tax 203.02 as proscribing an attorney from completing the taxpayer signature and certification requirement required by those laws on behalf of the Taxpayers.

3. Whether the taxpayer signature and certification requirement contained in RSA 76:16 and N.H. Admin. R., Tax 203.02 violates the Taxpayers right to equal protection, where those laws apply equally to all taxpayers.

Statement of the Case

RSA 76:16 and N.H. Admin. R., Tax 203.02 (hereinafter "Tax 203.02") require a taxpayer to sign their abatement application, certify that the facts in the application are true, and certify that the taxpayer has a good faith basis for seeking an abatement ("signature and certification requirement"). Tax 203.02 specifically bars an attorney from completing the signature and certification requirement on behalf of a taxpayer. The Taxpayers did not complete with the signature and certification requirement; the Taxpayers' attorney signed on their behalf. NOA at 63[1]. The BTLA denied the Taxpayers' motion to waive application of Tax 203.02 because the Taxpayers' attorney: (1) knew when he agreed to represent the Taxpayers that he was going on vacation and returning four days prior to the filing deadline; (2) failed to review the BTLA's rules prior to or during his vacation; and (3) did not attempt to obtain the Taxpayers' signatures and certifications after returning from vacation. NOA at 63-69.

This appeal followed.

[1] NOA refers to the Taxpayers' Notice of Appeal.

Statement of Facts[2]

A. Procedural Background

Taxpayers Keith R. Mader 2000 Revocable Trust; Bearfoot Creek, LLC; Robert & Marie McInnis; Slalom Realty Trust; JR Realty Trust; Carol McPhearson; Bryce & Kathi Blair; Eileen A. Figueroa Rev. Tr.; Joseph A. & Mary F. Carlucci Living Tr.; Mark J. and Paula J. Gallagher; TJF Trust; Christopher and Amy Redondi; and Engeocom Bartlett, LLC (collectively the "Taxpayers"), submitted individual abatement applications to the Town on February 28, 2018, requesting that the Town abate their taxes. NOA at 64, ¶2; see also NOA at 79, ¶9(b). The Town denied the Taxpayers' abatement applications, and the Taxpayers appealed the Town's denial to the Board of Tax and Land Appeals ("BTLA"). See RSA 76:16-a.

On October 20, 2018, the BTLA sent a letter to Randall Cooper, the Taxpayers' Attorney, inquiring as to whether the Taxpayers signed their abatement applications. BTLA Decision at 1. On October 25, 2018, the Taxpayers responded by filing a motion seeking an "exception" from the BTLA's taxpayer signature rules. BTLA Decision at 1; NOA at 16; see also N.H. Admin. R., Tax 203.02(b)(4). The BTLA denied the Taxpayers' motion by written decision on December 3, 2018, and the BTLA denied the Taxpayers' motion for rehearing on January 10, 2019.

B. The Taxpayers' failure to comply with Tax 203.02

On February 7, 2018, James Rader left a message for Attorney Randall Cooper of Cooper, Cargill and Chant, P.A. (hereinafter collectively

[2] The pertinent facts concerning the lack of necessary taxpayer signatures do not appear to be in dispute.

"Taxpayer Counsel"), requesting that Taxpayer Counsel assist the Taxpayers with abatement applications. BTLA Decision at 2. That same day, Taxpayer Counsel responded to the Taxpayers via e-mail, communicating his willingness to undertake that representation and stating that: "The only hiccup I have is that I am leaving this Friday [February 9, 2018] 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." BTLA Decision at 2; NOA at 36. That same day, Taxpayer Counsel additionally forwarded a "Representation Agreement" to the Taxpayers, and Taxpayer Counsel contacted an appraisal firm before leaving for vacation to confirm the firm's availability to perform an appraisal. NOA at 18, ¶9-10.

Taxpayer Counsel stated in an affidavit that he reviewed RSA 76:16 "to determine the last possible filing date" prior to determining if he could represent the Taxpayers in light of Taxpayer Counsel's upcoming vacation. NOA at 88, ¶4. Notably, RSA 76:16 contains the same signature requirement contained in the BTLA's rules. See RSA 76:16, III(g).

Taxpayer Counsel claimed that, at this time, he had "no recollection or knowledge of the tax payer signature requirement in Section H of the Abatement Application or Tax 203.02." NOA at 89, ¶6. Taxpayer Counsel made no effort to review the BTLA rules or the abatement application form from February 7 to February 9, 2018, when he left for vacation. App. Br. at 11; NOA at 89, ¶6. Nor is there any indication in the record that Taxpayer Counsel asked any other attorney or staff at his firm to review the BTLA rules for filing abatement applications or the abatement application form.

There is no evidence that, during his vacation, Taxpayer Counsel reviewed the BTLA rules, contacted the Taxpayers, or asked any person in his law firm to review the BTLA rules. See NOA at 63-70; NOA at 93-96.

Taxpayer Counsel returned on February 26, 2018, but he did not start working on the abatement applications until February 27, 2018. NOA at 64, ¶2. Taxpayer Counsel claims that he learned of the signature requirement on February 27, 2018 when he downloaded the abatement application form from the BTLA's website. NOA at 94; NOA at 89, ¶ 8. Neither Taxpayer Counsel nor anyone at Taxpayer Counsel's firm attempted to obtain the Taxpayers' signatures or sent drafts of the applications to the Taxpayers for review and approval from the date of Taxpayers' Counsel's formal retention on February 20, 2018 to the applicable filing deadline. See NOA at 64, ¶2; NOA at 95. Similarly, no attempt was made to obtain the Taxpayers' signatures electronically, via fax, or other medium. NOA at 64, ¶2; NOA at 95. Rather, Taxpayer Counsel decided that it was "impossible" for him to obtain the Taxpayers' signatures and complete and file the applications on time. NOA at 89. Taxpayer Counsel "concluded his own preparation of the abatement applications and signatures as their 'attorney at law' was sufficient," and he completed the abatement applications and signed on behalf of the Taxpayers on February 27—two full days prior to the filing deadline. NOA at 64, ¶2; see also NOA at 79, ¶9(b) (Taxpayers stating that "Attorney Cooper on February 27 made a conscious decision to sign and file the applications on behalf of his clients"). Taxpayer Counsel submitted the Taxpayers' abatement applications by letter dated February 28—one full

day prior to the filing deadline. See NOA at 64, ¶2; see also, NOA at 79, ¶9(b).

Summary of the Argument

1. The BTLA properly dismissed the Taxpayers' abatement appeals because the Taxpayers' did not complete the signature and certification requirement set forth in RSA 76:16 and Tax 203.02. The BTLA properly denied the Taxpayers' motion to waive application of Tax 203.02 because the Taxpayers' failure was not due to reasonable cause and not willful neglect. The BTLA's decision was supported by the evidence that Taxpayer Counsel: (1) knew when he agreed to represent the Taxpayers that he was going on vacation and returning four days prior to the filing deadline; (2) failed to review the BTLA's rules prior to or during his vacation; and (3) did not attempt to obtain either original or facsimile signatures and certifications from the Taxpayers after returning from vacation.

2. Tax 203.02 unambiguously provides that an attorney cannot complete the signature and certification requirement on behalf of a taxpayer. Because the regulation is unambiguous, the Taxpayers' arguments regarding whether an attorney should be able to complete the signature and certification requirement on behalf of a taxpayer are irrelevant.

3. RSA 76:16 and Tax 203.02 do not violate the Taxpayers' rights to equal protection because they apply equally to all taxpayers. The statutory and regulatory scheme authorizing an attorney-in-fact, but not an attorney-at-law, to complete the signature and certification requirement does not constitute an equal protection violation because all taxpayers have an equal right to use an attorney-in-fact, and no taxpayers are authorized to use an attorney-at-law.

Argument

1. Standard of Review

Appeals from BTLA decisions are governed by RSA chapter 541. See RSA 71-B:12; 76:16-a, V. The BTLA's factual findings are deemed prima facie lawful and reasonable. Appeal of Wilson, 161 N.H. 659, 661 (2011). The Taxpayers can only overcome that presumption by "showing that there was no evidence from which the BTLA could conclude as it did." Id. (quotation omitted). The Board's decision shall not be set aside or vacated except for error of law, unless the appellant demonstrates by a clear preponderance of the evidence that the Board's decision was unjust or unreasonable. Id.

2. The BTLA properly determined that the Taxpayers failed to comply with the signature and certification requirement.

A taxpayer's right to apply for a tax abatement is governed by statute. See RSA 76:16, I(b). The BTLA prescribes a standard form for taxpayers to use when applying for an abatement. See RSA 76:16, II. The BTLA is required by statute to include certain information in that standard abatement application form, and the BTLA can include "such other information deemed necessary by the board." RSA 76:16, III. The form must include sections for "information concerning the person applying, the property for which the abatement is sought and other properties in the municipality owned by the person applying." RSA 76:16, III(b). The form must include "[a] section requiring the applicant to state with specificity the reasons supporting the abatement request." RSA 76:16, III(e). In addition to requiring this information, the form must include "[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." RSA 76:16, III(g).

The BTLA's rules specifically provide that "[t]he taxpayer shall sign the abatement application" and "[a]n attorney or agent shall not sign the abatement application for the taxpayer." Tax 203.02(b), (d). The rule goes on to expressly state that 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." Tax 203.02(d); see also Appeal of Wilson, 161 N.H. 663 (concluding that Tax 203.02(d) is lawful and consistent with the Legislature's statutorily prescribed tax abatement process). This Court has previously ruled that the BTLA could properly dismiss taxpayer abatement appeals on the basis that a non-attorney representative signed the abatement applications, in contravention of Tax 203.02(d). Appeal of Wilson, 161 N.H. at 662-65; see also Henderson Holdings at Sugar Hill v. Town of Sugar Hill, 164 N.H. 36, 40-41 (2012) (a municipality may deny a taxpayer's request for an abatement for failure to comply with the signature and certification requirement set forth in Tax 203.02).

The BTLA found, and the Taxpayers do not dispute, that the Taxpayers did not sign their respective tax abatement applications. NOA at 63-64. Nor did the Taxpayers certify that the facts in the application were true and that the person applying had a good faith basis for seeking a tax abatement. NOA at 63-64. Instead, Taxpayer Counsel signed the abatement applications for the Taxpayers, in direct contravention of Tax 203.02(d). NOA at 64.

Therefore, the Taxpayers did not comply with Tax 203.02(d), and the BTLA could properly dismiss their appeal unless the Taxpayers demonstrated that their failure was "due to reasonable cause and not willful neglect." See Tax 203.02(d).

3. The BTLA properly determined that the Taxpayers' failure was not due to reasonable cause and not willful neglect.

The BTLA determined that the Taxpayers' failure was not due to reasonable cause. The BTLA's finding is supported by the evidence that: (1) Taxpayer Counsel willfully accepted the Taxpayers' case knowing he would only have four days to complete the abatement applications; (2) Taxpayer Counsel did not take steps prior to or during his vacation to obtain the statutorily required signatures and certifications, either personally or through other firm attorneys or support staff; and (3) Taxpayer Counsel "discovered" the signature and certification requirement at least three days prior to the deadline, but he made no attempt to contact the Taxpayers to obtain their signatures and certifications.

A. Prior to agreeing to take the Taxpayers' case, Taxpayer Counsel knew that he was scheduled to go on vacation and that he would only have four days after returning from vacation to complete the Taxpayers' abatement applications. Thus, Taxpayer Counsel willfully accepted the Taxpayers' case knowing he would only have four days to review the applicable law, to complete the abatement applications, and to file the abatement applications by the March 1 deadline.

B. Despite knowing that he would only have four days after returning from vacation to complete the abatement applications, Taxpayer Counsel made only cursory efforts prior to leaving for vacation to review

the applicable law and procedural rules.[3] Nor did Taxpayer Counsel take any steps to have another attorney or support staff in his office review the applicable law and procedural requirements during Taxpayer Counsel's vacation. NOA at 69 n.5. Thus, Taxpayer Counsel consciously placed himself in the position of having only four days to review the applicable law and complete the abatement applications.

C. The BTLA found that Taxpayer Counsel had four days after returning from vacation to obtain the Taxpayers' signatures and certifications. NOA at 69 n.5. Taxpayer Counsel acknowledges that he was aware of the signature and certification requirement at least as of February 27. NOA at 94. Taxpayer Counsel also worked in an office with other attorneys and support staff. BTLA Order at 7 n.5. Nevertheless, Taxpayer Counsel made no effort to obtain the signatures and certifications; he unilaterally concluded three days prior to the March 1 deadline that it was "impossible" to obtain the signatures and certifications. NOA at 64; NOA at 95; see also NOA at 79, ¶9(b). Similarly, although Tax 203.02 does not require that signatures be original, no evidence was submitted regarding the impossibility of gathering photocopy, electronic, facsimile, or similar non-original signatures prior to the deadline. See generally NOA at 95. No attempt was apparently made to gather such non-original signatures. NOA at 95. The BTLA did not need to accept Taxpayer Counsel's

[3] Taxpayer Counsel claims that he reviewed RSA 76:16 prior to leaving for vacation, but only discovered the signature and certification requirement upon reviewing the BTLA's rules on February 27. Both RSA 76:16 and the BTLA's rules contain the signature and certification requirement. Thus, Taxpayer Counsel, who reviewed RSA 76:16 and has experience handling tax abatements, should have been aware of the signature and certification requirement prior to leaving for vacation.

conclusory claim that it was impossible to comply with the law, particularly because the Taxpayers provided no specific reasons to support Taxpayer Counsel's claim that it was impossible to obtain the signatures and certifications by the March 1 filing deadline, and provided no explanation why electronic, facsimile, or similar signatures could not be collected. NOA at 69 n.5; NOA at 95. The BTLA concluded that Taxpayer Counsel "made a conscious decision not to obtain the Taxpayers' signatures and certifications prior to filing abatement application on their behalves." NOA at 69.

In sum, the BTLA reasonably determined, and the record amply supports, that the Taxpayers failed to demonstrate that their failure to comply with the signature and certification requirement was due to reasonable cause and not willful neglect, and the BTLA's determination is supported by the evidence. See Appeal of Wilson, 161 N.H. 661 (the BTLA's factual findings will be upheld if there is any evidence in the record to support them).

D. The Taxpayers argue that their failure to comply with the signature and certification requirement was reasonable and not the result of willful neglect. The Taxpayers argue that their failure was reasonably caused by the delay in Taxpayer Counsel returning from vacation, and that Taxpayer Counsel's "failure . . . to become aware of the taxpayer signature requirement prior to his [return from vacation] was not willful neglect." Taxpayer Br. at 22-25.

As the BTLA correctly noted, Taxpayer Counsel's failure to "review, understand and/or comply with these requirements does not constitute 'reasonable cause and not willful neglect." See Arlington

American Sample Book Company v. Board of Taxation, 116 N.H. 575, 576 (1976) (affirming dismissal of taxpayer's untimely appeal where taxpayer instructed attorney to file an appeal but the attorney failed to timely file the appeal, reasoning that dismissal was proper even if delay was "due solely to oversight or omission by the taxpayer's counsel"). Taxpayer Counsel told the Taxpayers that he could represent them, fully aware of his impending vacation and the deadline for filing tax abatements. Taxpayer Counsel's failure to review and understand RSA 76:16, Tax 203.02, and the BTLA's standard tax abatement form prior to agreeing to accept the Taxpayers' time-sensitive abatement appeal is fully imputable to the Taxpayers.[4]

Furthermore, the Taxpayers ignore the fact that Taxpayer Counsel had four days upon returning from vacation, and three days upon discovering the signature and certification requirement, to attempt to obtain the original or facsimile signatures and certifications of the Taxpayers. See Taxpayer Br. at 22-27 (discussing whether it was willful neglect for Taxpayer Counsel to fail to discover the signature and certification

[4] The United States Supreme Court similarly analyzed "reasonable cause and not due to willful neglect" in the context of a client relying on an attorney, who failed to comply with procedural requirements. United States v. Boyle, 469 U.S. 241 (1985); see also Appeal of Steele Hill Dev., 121 N.H. 881, 885 (1981) (relying upon federal case law when analyzing whether a taxpayer's failure to timely file with the Board of Taxation was due to reasonable cause and not willful neglect). The United States Supreme Court reasoned that, while it is reasonable for a taxpayer to rely upon the substantive advice of an accountant or attorney, that reliance cannot function as a substitute for compliance with unambiguous procedural requirements. Boyle, 469 U.S. at 251. Because it "requires no special training or effort to ascertain a deadline and make sure that it is met," the "failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent, and such reliance is not 'reasonable cause' for a late filing." Id. at 252. Here, RSA 76:16, Tax 203.02(d), and construing case law all unambiguously require the Taxpayer to personally sign their abatement application, and the BTLA provides a standard abatement application form that includes the signature and certification requirement and clearly states that the applicant must sign the application even if a representative, attorney, or other advocate completes the application. Thus, the Taxpayers' reliance on Taxpayer Counsel does not excuse their failure to comply with an unambiguous procedural requirement.

requirement prior to returning from his vacation, but ignoring Taxpayer Counsel's failure to comply with the requirement following his return and discovery of the requirement). The Taxpayers, argued before the BTLA that complying with the requirement during this time frame was "impossible," relying upon Taxpayer Counsel's unsupported claim of impossibility. NOA at 89.

However, the Taxpayers bore the burden of proving that their failure was due to reasonable cause and not willful neglect, and the BTLA did not credit Taxpayer Counsel's unsupported statement. NOA at 94-95; see also Appeal of N.H. Elec. Coop., 170 N.H. 66, 74 (BTLA is not required to credit a witness's testimony). For example, the BTLA noted that all the Taxpayers[5] "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."[6] NOA at 95.

Taxpayer Counsel acknowledged that he discovered the signature and certification requirement on February 27, giving him three days to comply with the requirement. NOA at 64; NOA at 89, ¶8. Nevertheless, there is no evidence that Taxpayer Counsel made any attempt to comply with the signature and certification requirement between then and the

[5] Furthermore, the fact that Taxpayer Counsel needed to obtain the signatures and certifications of thirteen taxpayers, as opposed to just one taxpayer, is immaterial. Each of the Taxpayers filed an individual abatement application, and the signature and certification requirement applied to each Taxpayer individually.

[6] Similarly, the Taxpayers did not establish that it was impossible for them to have signed and certified their abatement applications and sent them by overnight mail to Taxpayer Counsel, or to scan or fax their signatures and certifications to Taxpayer Counsel.

deadline. NOA at 95. This evidence alone is sufficient for the BTLA to conclude that the Taxpayers failed to demonstrate that their failure was due to reasonable cause and not willful neglect. See Appeal of Wilson, 161 N.H. at 661 (BTLA's decision will be upheld if there is any evidence from which the BTLA could conclude as it did).

4. Tax 203.02 unambiguously prohibits an attorney from completing the signature and certification requirement on behalf of a taxpayer.

The Taxpayers make numerous arguments regarding why an attorney's signature should be sufficient to meet the signature and certification requirement. See Taxpayers' Br. at 27-38. According to the Taxpayers, an attorney should be able to sign and certify on behalf of the taxpayer based on the scope of an attorney-client relationship because, unlike with non-attorney representatives, the attorney is subject to the rules of professional conduct, which make their certification more reliable. See Taxpayers' Br. at 27-38.

However, the issue is not whether an attorney *should* be able to complete the signature and certification requirement. The issue is whether an attorney *is authorized* by the statutory and regulatory scheme to complete the signature and certification requirement. Thus, this is an issue of statutory interpretation.

In engaging in statutory interpretation, this Court first examines the language of the statute or regulation and ascribes the plain and ordinary meanings to the words used. See Appeal of Wilson, 161 N.H. at 662 (engaging in statutory interpretation of RSA 76:16 and Tax 203.02). Legislative intent is interpreted from the statute as written, and this Court

will not consider what the legislature might have said or add language that the legislature did not see fit to include. Id.

RSA 76:16 plainly requires the BTLA to prescribe a form for applying for tax abatements, which must include "[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." RSA 76:16, III(g). RSA 76:16 also authorizes the BTLA to require "such other information deemed necessary by the board." RSA 76:16, III. Consistent with this statutory requirement, the BTLA promulgated Tax 203.02, which 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.

N.H. Admin. R., Tax 203.02(d) (emphases added). This Court has previously concluded that Tax 203.02(d) is consistent with the statutory scheme for tax abatements. See Appeal of Wilson, 161 N.H. at 663.

RSA 76:16 and Tax 203.02(d) clearly provide that an attorney cannot sign the abatement application for a taxpayer.[7] The Taxpayers'

[7] Other than an offhand reference to an *ultra vires* exercise of regulatory authority on page 16 of their Brief, the Taxpayers' have not argued that Tax 203.02 was improperly enacted or that the regulation exceeded the BTLA's authority. Therefore, the only preserved issue before this Court regarding the meaning of RSA 76:16 and Tax 203.02 is whether those laws by their terms prohibit an attorney from signing an abatement application on behalf of a taxpayer. See, e.g., State v. Blackmer, 149 N.H. 47, 49 (2003) ("we confine our review to only those issues that the defendant has fully briefed").

arguments regarding whether an attorney *should* be able to sign the abatement application on behalf of a taxpayer are in direct conflict with the plain language of these laws. An attorney completing the signature and certification requirement cannot comply with the law when the law explicitly proscribes the attorney from taking that action on behalf of the taxpayer. Accordingly, the Taxpayers' interpretation of the laws must fail because it would require this Court to ignore the plain language of the statutes and regulations and to read additional language into the statutes and regulations that the legislature and the BTLA did not see fit to include. See Appeal of Wilson, 161 N.H. at 662; see also Appeal of Public Serv. Co. of N.H., 171 N.H. 87, 105 (2017) (decisions regarding the wisdom of particular laws properly belong to the legislature, not the court).

5. RSA 76:16 and Tax 203.02 do not violate equal protection because they apply equally to all taxpayers.

"The Federal and State Equal Protection Clauses do not 'demand that a statute necessarily apply equally to all persons or require things which are different in fact to be treated in law as though they were the same.'" In re Sandra H., 150 N.H. 634, 638 (2004); N.H. CONST. Pt. I, Art. 2. "Where a classification realistically reflects the fact that the two groups are not similarly situated in certain circumstances, and the legislation's differing treatment of the groups is sufficiently related to a government interest, it will survive an equal protection challenge." In re Sandra H., 150 N.H. at 638 (quotations, citation, and brackets omitted). Where a classification does not involve a suspect class, a fundamental right, or an important substantive right, this Court applies the rational basis test. Id.

The Taxpayers argue that the procedural taxpayer signature and certification requirement of RSA 76:16 and Tax 203.02(d) violates their right to equal protection. The Taxpayers argue that a taxpayer represented by an attorney-at-law is treated differently than a taxpayer's attorney-in-fact.

Although the Taxpayers try to frame their argument as whether two classes of *taxpayers* are treated differently, it is clear from their arguments that the classification they challenge is the unequal treatment of two types of agents *(*attorneys-at-law and attorneys-in-fact). This distinction is important because RSA 76:16 and Tax 203.02(d) apply equally to all taxpayers. If all taxpayers are treated equally under the law, there can be no equal protection violation.

RSA 76:16 and Tax 203.02(d) do not create a classification among taxpayers, and the laws do not treat *taxpayers* differently. Rather, these laws prescribe whether a taxpayer may use an agent to fulfil the signature and certification requirement, and the laws apply equally to all taxpayers. Every taxpayer can personally complete the signature and certification requirement. See RSA 76:16, Tax 203.02(d). Every taxpayer can grant a power of attorney which authorizes the agent to file a tax abatement complaint, including completing the signature and certification requirement. See RSA 564-E:204; RSA 564-E:212, (6) (authorizing an attorney-in-fact to verify pleadings). No taxpayer is allowed to have a non-attorney representative or an attorney-at-law complete the signature and certification requirement. See RSA 76:16; Tax 203.02(d). In other words, every taxpayer is subject to the same procedural requirements for filing a tax abatement and has the same tools available for completing those

procedural requirements. Therefore, RSA 76:16 and Tax 203.02(b), (d) apply equally to all taxpayers, and there is no equal protection violation because all taxpayers are treated equally. See N. Country Envtl. Servs. v. State, 15 N.H. 15, 26 (2008).

Viewed in this light, it is apparent that the Taxpayers' real complaint is that Taxpayer Counsel (an attorney-at-law) does not have the same rights under the law as an agent acting pursuant to a power of attorney (an attorney-in-fact). However, that equal protection complaint belongs to an attorney-at-law, such as Taxpayer Counsel, not to the Taxpayers, who would lack standing to raise such a claim. Regardless, the Taxpayers only raised an equal protection challenge alleging that certain taxpayers are treated unequally; the Taxpayers did not preserve an equal protection challenge on the grounds that attorneys-at-law are treated unequally to attorneys-in-fact. See State v. Blackmer, 149 N.H. 47, 49 (2003) (issues not raised in a notice of appeal are not preserved for appellate review).

Therefore, because RSA 76:16 and Tax 203.02(b), (d) require all taxpayers to complete the signature and certification requirement, and because all taxpayers have the same right to alternatively grant a power of attorney for an agent to complete the signature and certification requirement, all taxpayers are treated equally and there can be no equal protection violation.

6. Rational basis review is the correct level of scrutiny when analyzing a classification between attorneys-at-law and attorneys-in-fact in laws involving taxation.

Even if this Court agrees with the Taxpayers that they are treated unequally compared to another class of taxpayers, RSA 76:16 and Tax

203.02 do not violate the Taxpayers' equal protection rights because the classification between attorneys-at-law and attorneys-in-fact is rationally related to a legitimate government interest.

This Court has repeatedly held that the proper standard of review for an equal protection challenge to a law involving classifications of taxpayers is the rational basis test. See, e.g., N. Country Envtl Servs., 157 N.H. at 25-26 (applying rational basis test to taxpayer's equal protection challenge of a classification contained in a tax exemption statute); Verizon New Eng., Inc. v. City of Rochester, 151 N.H. 263, 271 (2004) (applying rational basis test to taxpayer's equal protection challenge of a municipality's assessment of taxes on some, but not all similarly situated taxpayers); Estate of Robitaille v. N.H. Dep't of Revenue Admin., 149 N.H. 595, 596-97 (2003) (applying rational basis test to taxpayer's equal protection challenge of a classification contained in New Hampshire's legacy and succession tax statute); see also Estate of Cargill v. City of Rochester, 119 N.H. 661, 665-67 (1979) (under Part I, Article 14 of the State Constitution, limits on access to courts are permissible so long as they are not arbitrary or discriminatory). This Court applied the rational basis test in those cases because the classifications did not involve a suspect class or affect a fundamental right. See, e.g., Estate of Robitaille, 149 N.H. at 596. Moreover, this Court has applied the rational basis test in cases where the taxpayer was seeking an abatement of taxes. See Verizon New Eng., 151 N.H. at 270. Therefore, this Court should follow its precedent and apply the rational basis test to the Taxpayers' equal protection challenge.

The Taxpayers do not address the cases in which this Court has applied the rational basis test in analyzing taxpayer classification equal

protection challenges. Instead, the Taxpayers argue that this Court should review their equal protection challenge under intermediate scrutiny because the "right to apply for an abatement" is an "important substantive right." However, the Taxpayers have not cited a single case where this Court applied intermediate scrutiny when considering an equal protection challenge to a taxation law. Nor have the Taxpayers cited any cases in which this Court has held that the "right to apply for an abatement" is an "important substantive right." The cases that the Taxpayers cite challenge the proportionality of particular assessments, but those cases do not involve equal protection challenges and do not rule that taxation implicates a "substantive right." See LSP Ass'n v. Town of Gilford, 142 N.H. 369 (1997) (taxpayer did not raise an equal protection challenge); Rollins v. City of Dover, 93 N.H. 448 (1945) (taxpayer did not raise an equal protection challenge). The one case that the Taxpayers cite in which this Court applied intermediate scrutiny when analyzing an equal protection challenge did not involve taxation—it involved whether a zoning ordinance infringed upon the right to use and enjoy property. See Community Resources for Justice, Inc. v. City of Manchester, 154 N.H. 748, 762 (2007) (equal protection challenge of zoning ordinance for infringing upon the right to use and enjoy property). In sum, the cases that the Taxpayers cite provide no basis for deviating from this Court's established precedent of applying the rational basis test to equal protection challenges based on taxpayer classification.

7. The differing treatment of attorneys-at-law and attorneys-in-fact is constitutional under rational basis review.

Under the rational basis test, laws are presumed to be valid and will be upheld if the classification is rationally related to a legitimate state interest. Estate of Robitaille, 149 N.H. at 596-97. The party challenging the law has the burden of proving that the classification is arbitrary or without some reasonable justification. Id. at 597.

The BTLA has a legitimate interest in requiring a taxpayer to comply with the signature and certification requirement. "[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." Appeal of Wilson, 161 N.H. at 663. Thus, the signature and certification requirement are both an evidentiary and procedural safeguard designed to ensure that the BTLA has the necessary information to process an abatement request. Id. at 663-64. Additionally, the signature and certification requirement ensures that taxpayers believe they have a good faith basis for seeking an abatement, thereby reducing the strain on municipal and state resources that would otherwise be caused by taxpayers bringing abatement applications without a good faith basis for doing so.

The signature and certification requirement is rationally related to these government interests because a taxpayer represented by an attorney-at-law is not similarly situated to a taxpayer's attorney-in-fact. There are two key distinctions between the authority of an attorney-at-law and an attorney-in-fact: (1) they do not have an equal right to make decisions on behalf of a taxpayer; and (2) they do not have an equal right to give evidence on behalf of the taxpayer's interests.

A. An attorney-in-fact can make decisions on behalf of the taxpayer; an attorney-at-law cannot.

First, an attorney-at-law is a counselor, an advisor. The existence of an attorney-client relationship does not grant the attorney authority to make decisions on behalf of a client. For example, an attorney-at-law can properly advise or advocate for a client, but that attorney cannot make decisions for the client such as whether to initiate a lawsuit. See N.H. Rules of Professional Conduct, R. 2.1 to 2.4 (lawyer acting as an advisor); N.H. Rules of Professional Conduct, R. 3.1 to 3.9 (lawyer acting as an advocate); see, e.g., O'Meara's Case, 164 N.H. 170, 177 (2012) (affirming the sanction of an attorney-at-law for making a settlement offer without the client's authorization, i.e., sanctioning the attorney for making the decision to make a settlement offer). Thus, an attorney-at-law can advise a client to file for an abatement, and the attorney-at-law can file for an abatement at the direction of the taxpayer. However, the attorney-at-law cannot *make the decision* to file for an abatement on behalf of the taxpayer.

Conversely, if a person holds a taxpayer's power of attorney, and that power of attorney grants "general authority with respect to real property," the agent is authorized by statute to manage or conserve an interest in property by contesting taxes or applying for refunds of taxes. See RSA 564-E:204. Thus, the existence of such a power of attorney grants the holder the power to initiate a lawsuit on behalf of the taxpayer. However, unlike with an attorney-at-law, the holder of such a power of attorney also has statutory authority to *make the decision* to file for an abatement of taxes. See RSA 564-E:204; see also RSA 564-E:212, (6) (a

power of attorney granting an agent authority with respect to claims and litigation authorizes the agent to "verify pleadings").

Consequently, in a situation where an attorney-at-law and an attorney-in-fact each believes that filing for an abatement is in the taxpayer's best interests and would conserve the taxpayer's property interest, only the attorney-in-fact has the authority to make the decision to actually file for an abatement. This distinction is readily apparent considering that an attorney-in-fact can hire an attorney-at-law for advice and advocacy, and a client can grant an attorney-at-law a power of attorney, which conveys different authority than the attorney client relationship. See Int'l Strategies Group, Ltd. v. Greenberg Traurig, LLP, 482 F.3d 1, 8 (1st Cir. 2007) (noting that "[a] power of attorney establishes the relationship of attorney-in-fact, which is an agency relationship different from the relationship of an attorney-at-law" (quotation omitted)).

B. An attorney-in-fact can testify and give evidence on behalf of a taxpayer; an attorney-at-law cannot.

Second, an attorney-at-law cannot both represent a client and testify on their behalf. See N.H. Rules of Professional Conduct, R. 3.7. Conversely, an agent holding a power of attorney is not limited in this regard. See RSA chapter 564-E. This is particularly relevant in the context of actions for abatement of taxes because the taxpayer in an abatement action may testify as to the value of their property. See Simpson v. Calivas, 139 N.H. 1, 14 (1994) (A taxpayer's personal opinion as to the value of his or her property can be admissible evidence of the property's value).

The signature and certification requirement is necessary information for the BTLA to process an abatement request. Appeal of Wilson, 161

N.H. at 663-64. The signature and certification requirement ensures that a person with the right to make a claim personally believes that the other evidence in the application is true and that the person has a good faith basis for applying for the abatement. Thus, when a taxpayer, or a person holding a power of attorney to manage the taxpayer's real estate, completes the signature and certification requirement, the person with the right to maintain an abatement action is attesting to what he or she personally believes, which is relevant evidence in the abatement action.[8] Conversely, when an attorney-at-law completes the signature and certification requirement on behalf of the taxpayer, the attorney-at-law is only attesting to what the attorney-at-law believes, or what the attorney-at-law *thinks* the taxpayer believes.

Therefore, for the purposes of the signature and certification requirement, attorneys-at-law and attorneys-in-fact are not similarly situated, and those differences are rationally reflected in the law's differing treatment of those types of agency relationships. Thus, RSA 76:16 and Tax 203.02(d) do not violate the Taxpayers' right to equal protection because

[8] This is consistent with the common usage of powers of attorney. When a person is empowered pursuant to a power of attorney, he or she is often in place to generally manage the affairs, assets and properties of the principal, especially where necessary due to incapacity of the principal. A person in such a role will often possess first-hand knowledge concerning the property of the principal, such that the abatement application may be executed and certified with first-hand knowledge. In contrast, the engagement of an attorney-at-law is normally on a transactional basis, where all information concerning the property of the client originates with the client, and the attorney typically does not have first-hand knowledge of the information recited in the abatement application. Because Taxpayer Counsel lacked personal knowledge of the properties, he relied solely upon public information. Due to this lack of personal knowledge, Taxpayer Counsel's signature and certification lacked the scope and force that the signature and certification of the Taxpayers, or any duly authorized attorney-in-fact, would have carried.

the differing treatment of attorneys-in-fact and attorneys-at-law does is rationally related to the state's legitimate interests.

Conclusion

For the foregoing reasons, the Town respectfully requests that this Honorable Court affirm the BTLA's judgment.

Respectfully submitted,

TOWN OF BARTLETT
By its attorneys,

DONAHUE, TUCKER & CIANDELLA, PLLC

Date: July 17, 2019

By: /s/ Christopher T. Hilson
Christopher T. Hilson, Esquire
N.H. Bar No. 17116

By:/s/ Brendan A. O'Donnell
Brendan Avery O'Donnell, Esquire
N.H. Bar No. 268037
16 Acadia Lane
Exeter, NH 03833
(603)778-0686
chilson@dtclawyers.com
bodonnell@dtclawyers.com

Certification of Compliance

This brief complies with the word limit set forth in Supreme Court Rule 16(11), containing 6561 words (exclusive of the cover page and all tables).

Certificate of Service

I hereby certify that on July 17, 2019 that a copy of the foregoing was forwarded to opposing counsel via the Supreme Court's electronic filing system.

/s/ Christopher T. Hilson
Christopher T. Hilson, Esquire