THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2007-0708, In the Matter of Robert A. Sawyer and Linda L. Sawyer, the court on October 17, 2008, issued the following order:

The respondent, Linda L. Sawyer, appeals two orders of the Laconia Family Division (Sadler, J.) in these post-divorce proceedings. The first order interpreted the parties' divorce decree as requiring the petitioner, Robert A. Sawyer, to pay the respondent fifty percent of the federal capital gains tax she incurred as a result of the sale of two of the parties' properties. The second enforced paragraph 19H of the parties' permanent stipulation, which their divorce decree incorporated by reference. We affirm in part, reverse in part and remand.

The respondent first argues that the trial court erred to the extent that it required the petitioner to pay fifty percent of only the federal capital gains tax she incurred at a fifteen percent tax rate. She asserts that in addition to paying a fifteen percent federal capital gains tax, she also paid a twenty-five percent federal capital gains tax on "unrecaptured Section 1250 gains." (Quotation omitted). The petitioner appears to agree that the respondent paid a twenty-five percent federal tax, and that this tax related to the sale of Section 1250 property. He argues, however, that this twenty-five percent tax is a tax on "recaptured depreciation," and that because this "tax is treated as ordinary income to the tax payer," it "is not [a] capital gains tax." The petitioner is mistaken.

Section 1250 property is real property that is subject to an allowance for depreciation. Internal Revenue Serv., Dep't of Treasury, Publication 544, Sales and Other Dispositions of Assets 28 (2007); see 26 U.S.C.A. § 1250(c) (2002). Unrecaptured Section 1250 gain is the part of the gain realized from the sale of Section 1250 property held for more than one year that is due to the depreciation deductions allowed on the property. 4 Mertens Law of Federal Income Taxation § 22.67, at 22-227 (2007); see Internal Revenue Serv., supra at 28, 35. The petitioner refers to the depreciation that a taxpayer is allowed to take over the useful life of an asset as "recaptured depreciation." The Internal Revenue Code refers to it as unrecaptured Section 1250 gain. See 26 U.S.C.A. § 1(h)(6) (Supp. 2008). Unrecaptured Section 1250 gain is taxed at a special capital gains tax rate of a maximum of twenty-five percent. Mertens, supra at 22-221 to 22-222; see 26 U.S.C.A. § 1(h)(1)(D) (Supp. 2008).

Unrecaptured Section 1250 gain is to be distinguished from additional depreciation, which is the depreciation in excess of that calculated according to the straight-line method. Internal Revenue Serv., supra at 28; see 26 U.S.C.A. § 1250(b)(1) (2002). Additional depreciation is taxed as ordinary income. Internal Revenue Serv., supra at 28; see 26 U.S.C.A. § 1250(a)(1)(A) (2002). Any depreciation taken for Section 1250 property held for one year or less is deemed additional depreciation and is taxed as ordinary income. Internal Revenue Serv., supra at 28; see 26 U.S.C.A. § 1250(b)(1).

There is no allegation here that the respondent had any "additional depreciation" as that term is defined by the Internal Revenue Code (depreciation in excess of that allowed by the straight-line method). Accordingly, the tax on the depreciation that the respondent took on the subject properties was a tax on unrecaptured Section 1250 gain, which is a capital gains tax. To the extent that the trial court ruled that the petitioner was required to pay fifty percent of only the federal capital gains tax that the respondent paid at a fifteen percent rate, it erred. The twenty-five percent tax that she paid on unrecaptured Section 1250 gain was also a capital gains tax.

The respondent next asserts that the trial court erred to the extent that it ruled that the New Hampshire Business Profits Tax was not a "capital gain tax" within the meaning of the parties' divorce decree. The interpretation of a divorce decree is a question of law, which we review de novo. Estate of Tremaine v. Tremaine, 146 N.H. 674, 675 (2001). In construing a divorce decree, we look to the plain meaning of the words used in the document. Id. at 676. We interpret a divorce decree and incorporated stipulations in light of the facts and circumstances known to the parties and the court at the time the court issued the decree, along with future facts or circumstances known or reasonably anticipated to occur in the future. In the Matter of Arvenitis & Arvenitis, 152 N.H. 653, 655 (2005).

Paragraphs 18 and 19A of the parties' permanent stipulation awarded the respondent the marital homestead located at 59 Dartmouth Street/35 Oak Street and the property located at 522-532 Main Street in Laconia. The decree ordered that both properties be sold and awarded the net proceeds from the sales to the respondent. Both paragraphs provided, in pertinent part, that upon the sale of the property, "Robert A. Sawyer shall pay to Linda L. Sawyer 50 percent of any capital gain tax incurred by Linda L. Sawyer as a result of this sale."

In context, we agree with the trial court that the plain meaning of the phrase "capital gain tax" as used in the parties' divorce decree does not refer to the New Hampshire Business Profits Tax. A capital gain tax is a "tax on income derived from the sale of a capital asset." Black's Law Dictionary 1496 (8th ed. 2004). The New Hampshire Business Profits Tax does not meet this

definition. It is a tax on "precisely defined business profits." Jacobs v. Price, 125 N.H. 196, 198 (1984). While the income derived from the sale of a capital asset may be included in gross business profits, see RSA 77-A:1, III(d) (2003), the business profits tax is not levied upon gross business profits. It is levied only upon taxable business profits, which are defined by statute as gross business profits adjusted by certain additions and deductions and then adjusted by a statutorily-prescribed method of apportionment. RSA 77-A:1, IV (2003). The business profits tax does not operate as a capital gain tax and in common parlance is not referred to as such. Accordingly, we conclude that the trial court did not err when it ruled that the phrase "capital gain tax" as used in the parties' decree did not include the New Hampshire Business Profits Tax.

The respondent's final argument is that the trial court erred when it declined to reform the parties' property settlement because of an alleged mutual mistake of fact. She contends that the parties made a mutual mistake when they failed to list a certain property in Appendix B to their permanent stipulation. Because she concedes that this issue is not reviewable in this forum, we decline to consider it. The parties may address the issue on remand.

Affirmed in part; reversed in part; remanded.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

Eileen Fox,
Clerk