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CALIFORNIA APPELLATE COURT AFFIRMS REASSESSMENT OF PROPERTY THAT WAS SUBJECT TO A TRANSFER BETWEEN A CORPORATION AND A FAMILY TRUST

Jeffrey Prang, Los Angeles County Assessor v. Luis A. Amen et al, as Trustees, etc., Cal. App. 2nd Case No. B298794 (December 7th, 2020).

A California appellate court has affirmed a trial court decision that upheld the Los Angeles County Assessor's reassessment of a property, which was subject to a transfer between a corporation and a Trust that owned all of the voting stock in the corporation. Under California's Proposition 13, a change in ownership of real property will trigger a reassessment of a property's value for taxation purposes. However, an exception to this rule applies when the proportional ownership interests, including stock, of the seller and buyer in the real property remain the same after the transfer.

Here, the County Assessor had reassessed the property after the Trust received it from a corporation that the Trust had partially owned. As a result of the reassessment, the property's value doubled for taxation purposes. Although there were at least five owners (including the Trust) of the stock of the corporation that transferred the property and the buyer was solely the Trust, the Trust contended that the proportional ownership interest exception applied because it had owned all of the voting stock in the corporation.

The Trust believed that ownership interests in real property held by a corporation should be measured by solely voting stock rather than both voting stock and non-voting stock. However, the County Assessor measured ownership in the real property held by the corporation that transferred the property by all stock whether it was voting or non-voting stock. In upholding the trial court's decision and the County Assessor's interpretation of the term "stock" under Revenue and Taxation Code §62(a)(2), the appellate court concluded that a change in ownership did occur for reassessment purposes when the corporation transferred the property to the Trust.

INDIANA TAX COURT UPHOLDS BOARD OF REVIEW'S DECISION FINDING THAT LOWE'S APPRAISAL EVIDENCE LACKED PROBATIVE VALUE

Lowe's Home Centers Inc., v. Monroe Cty. Assessor, Ind. Tax Ct., Cause No. 19T-TA-00017, Nov. 19, 2020.

The Indiana Tax Court affirmed that Indiana Board of Tax Review's decision finding that Lowe's appraisal failed to warrant a reduction in value. On appeal Lowe's contended that the Board erred in rejecting its sales and income approaches, and erred in excluding the obsolescence adjustments from its cost approach. Before the Board, both Lowe's and the assessor presented appraisal evidence. The assessor also presented an appraisal review that critiqued the Lowe's appraisal. In rejecting Lowe's sales comparison approach, the Board found that the adjustments made to the comparables failed to reflect the property's location, condition and use. In rejecting the income approach to value, the Board found that the market rent estimates lacked probative value primarily because it relied upon questionable data and unsupported location adjustments. Finally, the Board found that the Lowe's cost approach including an obsolescence depreciation adjustment was not supported. In affirming the findings of the Board, the Tax Court reiterated that the Indiana Board is the finder of fact and the Board must weigh the evidence and judge the credibility of witnesses. Ultimately, the Court found that substantial and reliable evidence supported the Board's findings and that the arguments advanced by Lowe's were unpersuasive.

INDIANA TAX COURT UPHOLDS BOARD OF REVIEW'S DECISION FINDING THE COST APPROACH TO BE THE BEST INDICATION OF THE PROPERTY'S MARKET VALUE-IN-USE.

Meijer Stores LP v. Boone County Assessor, Ind. Tax Ct., Cause No. 19T-TA-00030, 12/31/2020.

This case involved the 2014-2017 valuation of a 194,860 square foot "big box" retail store built in 2014. The 2016 assessment was $11,878,900. Both the property owner and the Assessor presented appraisal evidence. Both of the appraisers used all three approaches to value. The property owner's appraiser relied mainly on the sales approach, but he offered a range of value between $7,190,000 using sale comparables and $8,240,000 using the cost approach, including an obsolesce factor.

The Assessor presented two appraisals. The Assessor's appraiser relied mainly on the cost approach, given the age of the improvements. For the first appraisal, the appraiser used reproduction costs from the Marshall Valuation Service. For the second, he used actual construction costs. For both, the appraiser concluded that there was no obsolescence and made only an age-life adjustment, which resulted in a value of $14,450,000 using reproduction cost and $16,550,000 using actual cost.

Below, the Indiana Board of Tax Review rejected both appraisers' sales and income approaches as unreliable. The IBTR found the cost approach to be best since it "avoids the controversies over the definition of fee simple ownership" and is useful in valuing new properties. The cost figures before obsolescence were "very similar." The Tax Court concurred in these conclusions.

Although the IBTR and the Tax Court agreed that the store suffered from obsolescence, both found the property owner's obsolescence deduction to be unreliable because the adjustment was not supported by specific identified inadequacies and it was tied to the rejected income approach.

In looking at the Assessor's two appraisals, both the IBTR and the Tax Court compared the actual costs of construction in the second cost approach with the Marshal Valuation Service costs in the first cost approach analysis, finding the difference "roughly reflects obsolescence of 18%." Thus, "it was reasonable for the Indiana Board to conclude that Koon's first cost approach inherently accounted for "substantial immediate obsolescence for features unique to the Meijer [s]tore." The Court further accepted the IBTR's decision to remove from the cost approach an adjustment for entrepreneurial profit, which was the most credible and the best indication of the property's market value-in-use. Thus, the Court affirmed the IBTR's value of $12,798,600 for the 2016 tax year.

MASSACHUSETTS APPEALS COURT AFFIRMS TAX BOARD'S VALUATION OF COOPERATIVE SENIOR HOUSING COMPLEX

The Village at Duxbury Homeowners Cooperative Corporation v. Board of Assessors of Duxbury, Mass. App. Ct., 19-P-1225 (Oct. 16, 2020).

The Massachusetts Appeals Court recently affirmed the state Appellate Tax Board (the "Tax Board")'s valuation of a senior housing cooperative, confirming a reduction of approximately $10MM for each of the two fiscal years at issue in the case.

The subject property, a senior housing complex organized as a cooperative cooperation, consisted of independent living (IL) and assisted living (AL) units. Each IL unit was represented by one share of stock, while the AL units were represented collectively by one share of stock held by a partnership.

Claiming that the facility was overvalued, the owner filed abatement applications with the Town of Duxbury for fiscal years 2015 and 2016. After the town's board of assessors (the "assessors") denied both applications, the taxpayer appealed to the Tax Board. Both the owner and the assessors submitted appraisal reports. The owner's appraisal relied upon an income capitalization method that the Tax Board had historically accepted to value similar non-cooperative senior housing communities, while the assessors relied upon a hybrid sales/income capitalization approach that comported with how traditional cooperative units may be valued. The Tax Board found the owner's methodology to be the most appropriate and granted the owner's requested reduction. The assessors appealed the decision to the Appeals Court.

The parties' dispute hinged on the underlying question of how to value the real estate associated with a senior housing complex that is organized as a cooperative cooperation, which was one of first impression in Massachusetts. The owner asserted that, regardless of the form of ownership, the accepted methodology for other senior living facilities should be applied. The assessors argued that the sum of the value of the shares of the stock in the cooperative corporation was the appropriate methodology to apply.

On appeal, the Court accepted the owner's methodology, agreeing with the Tax Board that a senior housing cooperative is very different from and cannot be equated to a traditional apartment cooperative. Specifically, while an apartment complex is composed almost entirely of the realty, a senior housing complex is comprised of many non-realty assets and liabilities. The Court further agreed with the Tax Board that the value of a share of a stock in the subject facility includes not just the value of the realty but also the going concern of the cooperative. As a result, the Court affirmed that the taxpayer's income capitalization was the appropriate method to apply to the facility because it best distinguished the value of

the real estate from the cooperative's non-realty assets.

OHIO COURT AND BOARD OF TAX APPEALS DETERMINE EVIDENCE NOT SUFFICIENT TO ADJUST VALUE BASED UPON PURPORTED MEMBERSHIP TRANSFERS

Cleveland Municipal School Dist. Bd. of Edn. v Cuyahoga Cty. Bd. of Revision., Ohio Ct. App. (8th App. Dist.) Docket No. 109028, 2020-Ohio-5427, Nov. 25, 2020.

Cleveland Metropolitan Schools Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision, BTA No. 2019-497, June 29, 2020.

In two unrelated cases, the Cleveland Municipal School District Board of Education "BOE" filed increase cases alleging that an increase was warranted based upon an entity transfer. When each case went to hearing before the Board of Revision, the BOE submitted documents including limited warranty deeds showing transfers to new entities, Costar information supporting a transfer of each property and mortgage documentation. After presentation of this information, along with legal argument the Board of Revision retained the original valuation in both cases. The BOE then appealed to the Board of Tax Appeals ("BTA"). The BOE waived the hearings and did not present additional evidence at the BTA and instead relied upon argument and the evidence it submitted before the Board of Revision.

In both cases the BTA began its analysis based upon the finding in *Orange City Schools Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision, 8th Dist.,* 2019-Ohio-634 (affirmed on appeal to the Ohio Supreme Court at 2020-Ohio-710), finding "a transfer of the membership interest in a limited liability company may be the best evidence of value when "the purchase and sale agreement indicates that the transfer of membership interest was done solely to transfer title to the subject property." The BTA went on to state where the purchase agreements or other contracts make it clear that no other going concern value or assets are owned by the newly formed entity, the transfer is a valid sale for real property valuation purposes. In both of these cases the BTA found that the BOE failed to meet its burden to adjust the valuation because the BOE failed to provide any evidence that the entity transfer was done for the purpose of transferring the real estate.

Disagreeing with the BTA's analysis, the BOE appealed the BTA's decision to the 8th District Court of appeals in *Cleveland Municipal School Dist. Bd. of Edn. v Cuyahoga Cty. Bd. of Revision.,* Ohio Ct. App. (8th App. Dist.) Docket No. 109028, 2020-Ohio-5427, Nov. 25, 2020. The Appeals Court affirmed the BTA's decision, finding that it was reasonable and lawful for the BTA to retain the original valuation when no sufficient and probative evidence, such as a purchase agreement, was presented to determine the relationship between the buyer and seller, and when the record lacked specific evidence of the transaction which would determine if the newly formed entity was done to facilitate the transfer of real property only.

TENNESSEE STATE BOARD OF EQUALIZATION GRANTS A $9 MILLION VALUE REDUCTION FOR A REGIONAL MALL

In Re: G&I VII Retail Carriage, LLC (Dec. 3, 2020), Tennessee State Board of Equalization Case No. 117263.

The property in issue is a 62.35 acre site improved with a 378,752 regional retail center. The unenclosed "lifestyle center" was built in 2005. The 2017 market value on the property was set at $50,640,900. The owner sought a value of $41,600,000 based upon appraisal evidence.

The appraisal relied upon sales comparison and income approaches to value. As part of his appraisal theory, the appraiser testified that, while the economy generally improved between 2012 and 2017, the improvement did not apply to in-person retail and regional malls. "Buyers and investors were not buying these types of properties, and the actual per square foot sales of the stores in these properties continued to decline. This was due, in part, to the growth in e-commerce and expanding competition for retail dollars as well as the over-abundance of retail space." Id., at 2-3. For his sales comparison approach, the appraiser relied on five recent sales of regional malls the he considered similar to the subject, making adjustments to account for differences. The income approach relied on i-line and anchor sales per square foot, taking into account the property's 21% vacancy rate. The appraiser utilized a capitalization rate of 12%, plus tax additur.

In addition to the appraiser's evidence, the owners offered the testimony of a broker who sells multi-tenant shopping centers nationally and another analyst of mall properties in the Memphis market. Both testified that the 12% vacancy rate was conservative given the market and opined that the appraiser's value was most likely high given the current state of the regional retail market. The owner's presented this testimony because the assessor challenged the 12% vacancy rate as too high.

Upon review, the Board concluded that the owners had established a prima facie case that the property's value was less than that of the local board based appraiser's valuation of the property was reasonable and supported by the evidence, as was his selection of a cap rate. Because the power had met its burden, "it is incumbent on the Assessor to offer rebuttal evidence to refute that proof." Id. at 10. Here, the Board found that the Assessor, despite contesting the capitalization rate used, offered no affirmative evidence of a proper capitalization rate for the subject. Thus, the reduction in value was granted.

WISCONSIN COURT OF APPEALS DENIED A BIG-BOX RETRAILER'S REQUEST FOR A LOWER PROPERTY VALUE

Lowe's Home Centers, LLC v. Village of Plover (Oct. 20, 2020), Wisconsin Court of Appeals, 4th District, Case No. 20149AP974.

The subject poetry, a Lowe's Home Center built in 2005, was assessed a value of $7,356,000 for tax years 2016 and 2017. Lowe's sought a value of $4,500,000 for both years based upon appraisal evidence. The circuit court rejected Lowe's complaint. On appeal, the Court of Appeals also affirmed the $7,356,000 valuation for several reasons:

1. The Court rejected Lowe' argument that the county's value was not entitled to a presumption of correctness. Lowes argued that the assessments violated the directives in the *Wisconsin Property Assessment Manual* by carrying over the exact same market value from the 2005 appraisal for 12 years. In short, Lowes argued that the county failed to carry out the required mass appraisals for 2016 and 2017. The Court rejected this contention, finding that a mass appraisal was performed, as required, for both 2016 and 2017.

2. The Court affirmed the lower court's rejection of Lowe's appraisal evidence using the sales comparison approach. The sales in the approach were found to not be "reasonably comparable" because the sales "were either vacant stores or stores in transition/distressed, whereas Lowe's had been continually operating since its construction in 2005, with no indication that it would become vacant prior to the dates of vale." *Supra*, at ¶35. The Court of Appeal found the rejection proper under the *Wisconsin Property Assessment Manual,* which directs an "assessor should avoid using sales of improved properties that are vacant ("dark") or distressed as comparable sales unless the subject property is similarly dark or distressed." Id at ¶40. Here, the record showed that the sales used in the appraisal "were all distressed in one way or the other" while the subject property was thriving.
3. The Court also affirmed the lower tribunal's rejection of Lowe's sales comparison approach because it agreed that the sales used were not from comparable locations. While the Lowe's was located in a "thriving low vacancy retail setting," the sales used in the approach were "vacant or transition properties located in other areas of the state." at ¶47.
4. The Court of Appeals affirmed the lower court's rejection of Lowe's cost approach to value. Specifically, the Court found that the 50% functional obsolescence adjustment made by the appraiser was inappropriate. The appraiser had determined a reproduction cost as a single-tenant big-box property. However, the he then deducted function obsolesce because it was not functional as a multi-tenant building. In other words, the appraiser inappropriately "switched highest and best use midstream."

PENNSYLVANIA SUPREME COURT GRANTS AUTOZONE'S REQUEST TO REVIEW WHETHER SCHOOL DISTRICT'S MONETARY THRESHOLD FOR ASSESSMENT APPEALS VIOLATES CONSTITUTION'S UNIFORMITY CLAUSE

Kennett Consolidated School District v. Chester County Bd. of Assessment Appeals, 150 MAL 2020, Supreme Court PA, Middle District

The Pennsylvania Supreme Court accepted Autozone's request to review a lower court ruling that a School District's system for determining whether to appeal an assessment did not violate the state constitution's uniformity clause. A Philadelphia area school district utilized a monetary threshold to determine whether to challenge an assessment for a property. Specifically, the School District asked its appraiser to review and identify any property that appeared to be underassesed by one million dollars or more. The School District presented emails showing that it instructed it appraiser to review and consider all property types—commercial, residential and otherwise.

Autozone argued that the School District's monetary threshold was impermissible based on the Pennsylvania Supreme Court's 2017 landmark decision in *Valley Forge v. Upper Merion Area School District*. In *Valley Forge*, the Court held that a school district's selective targeting of commercial properties for assessment appeals while ignoring other sub-classifications of properties was prohibited by the constitution's uniformity clause. Despite the emails to the appraiser, Autozone argued that the operation and effect of the School District's monetary threshold resulted in disparate treatment to commercial properties, which is prohibited by the state constitution.

In ruling that the School District's monetary threshold did not violate the uniformity clause, the lower court noted that the threshold did not discriminate based on property type because the only criteria utilized to challenge the assessment was whether or not the property was underassessed by more than one million

dollars. Because the appraiser did not purposefully ignore non-commercial properties, there was no violation of the uniformity clause. The lower court also made clear that the School District could design a policy that simultaneously conformed to the constitution and allowed it to pursue only those appeals where the increase in assessment would justify the cost of the appeal.

WASHINGTON COURT OF APPEALS UPHOLDS CLASSIFICATION OF MACHINERY AND EQUIPMENT AS REAL PROPERTY FIXTURES IN AFFIRMING VALUATION OF MANUFACTURING FACILITY

REC Solar Grade Silicon, LLC v. McKnight, Wash. Ct. App. Dkt. No. 52975-1-II (Oct. 13, 2020).

The Washington Court of Appeals upheld a superior court's decision affirming the state Board of Tax Appeals (the "BTA")'s valuation of a manufacturing facility, concluding that the BTA had correctly rejected the property owner's appraisal and correctly classified the facility's 18,000 items of machinery and equipment ("M&E") as fixtures instead of personal property.

The owner of the subject facility, which makes and sells solar-grade polysilicon, appealed the facility's valuation for tax 2011. While both the owner and the County Assessor submitted appraisal reports to the BTA, the BTA rejected both reports and performed its own valuation. The BTA also concluded that the facility's M&E were classified as fixtures, a type of real property subject to tax, rather than personal property that should be excluded from the valuation. On remand following a judicial review by the superior court, the BTA again used its own appraisal and again concluded that the M&E items were real property. On review, the superior court affirmed the BTA's decision and the owner appealed to the Court of Appeals.

The Court concluded that the BTA did not err in rejecting the property owner's appraisal, as it was riddled with deficiencies and based on controversial valuation methods. In addition, the Court deemed correct the BTA's classification of the M&E as fixtures because the M&E met the requisite three-part legal test. Specifically, the M&E were securely attached to the real property, were used for the purpose for which the property was designed and were intended by the owner to be permanently used on the property. Though the owner attempted to argue that the M&E items could be moved or replaced, the Court noted that because the manufacturing process halts when any of the M&E is moved, the M&E were "constructively" attached to the real property.