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Kohl's Illinois, Inc. v. Marion County Board of Revision

Ohio Board of Tax Appeals

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OHIO BOARD OF TAX APPEALS

KOHL'S ILLINOIS, INC. (KOHL'S DEPARTMENT STORES, INC.), (et. al.),

CASE NO(S). 2011-2747, 2014-3897

Appellant(s),

(REAL PROPERTY TAX)

vs.

DECISION AND ORDER

MARION COUNTY BOARD OF REVISION, (et. al.),

Appellee(s).

APPEARANCES:

For the Appellant(s) - KOHL'S ILLINOIS, INC. (KOHL'S DEPARTMENT STORES, INC.)
Represented by:
KAREN H. BAUERNSCHMIDT
KAREN H. BAUERNSCHMIDT CO., LPA
1370 WEST 6TH STREET, SUITE 200
CLEVELAND, OH 44113

For the Appellee(s) - MARION COUNTY BOARD OF REVISION AND RIVER VALLEY LOCAL SCHOOL DISTRICT BOARD OF EDUCATION
Represented by:
DOUGLAS EBERT
ASSISTANT PROSECUTING ATTORNEY
MARION COUNTY
134 EAST CENTER STREET
MARION, OH 43302

Entered Thursday, October 15, 2015

Mr. Williamson, Ms. Clements, and Mr. Harbarger concur.

Acting pursuant to pertinent provisions of R.C. 5717.04, the Board of Tax Appeals ("BTA") hereby gives effect to the Supreme Court of Ohio's decision and certifies BTA Case No. 2011-2747 is once again before this board, in accordance with the court's judgment entry in Kohl's Illinois, Inc. v. Marion Cty. Bd. of Revision, 140 Ohio St.3d 522, 2014-Ohio-4353, vacating this board's prior decision and remanding this matter with instructions "that the county commissioners and the BOE be afforded the opportunity to argue in support of the [no-contest] covenant" contained in a TIF agreement. Id. at ¶32. Upon vacating this board's decision, the court noted, "any bar to the complaint that arises from the TIF agreement is not a jurisdictional restriction and that, as a result, the beneficiaries of the covenant had the burden to come forward and prove their entitlement to a dismissal of the complaint." Id. at ¶1.

This matter (i.e., BTA Case No. 2011-2747) has been consolidated with BTA Case No. 2014-3897; both matters relate to the same subject parcel, i.e., 20-011000-5201, but contest different tax years, i.e., 2010 and 2013. Accordingly, these matters are now considered upon the notices of appeal, transcripts ("S.T.") certified by the Marion County Board of Revision ("BOR") pursuant to R.C. 5717.01, the record hearing before this board ("H.R.") on remand, and any written argument submitted by the parties. These matters

emanate from separate complaints filed with the BOR on behalf of "Kohl's Illinois, Inc. (Kohl's Department Stores, Inc.)" (hereinafter "Kohl's"), seeking a decrease in the value for subject property for tax years 2010 and 2013, respectively.

With regard to tax year 2010, the subject's total true value was initially assessed at \$5,090,370. A decrease complaint was filed with the BOR seeking a reduction in value to \$3,500,000. A counter complaint was filed on behalf of the River Valley Local Schools ("BOE") requesting to maintain the initially assessed valuation. Notably, line nine of the counter complaint indicated, the "[o]wner [was] prohibited from contesting value by TIF agreement." Thereafter, without a hearing, the BOR issued a decision dismissing the complaint "due to the fact that *** [the subject property] is part of the Legacy Crossing TIF with Marion County." Dissatisfied with the BOR's dismissal of the complaint, the property owner appealed to this board. On appeal, the property owner waived hearing, submitted written argument, and upon review, this board found the BOR's dismissal of the underlying complaint, based upon provisions of the TIF agreement and related documents, to be proper. Dissatisfied with the decision and order of this board, the owner appealed to the Supreme Court, where, ultimately, the court vacated this board's decision and order, and remanded the matter back to this board for further proceedings.

With regard to tax year 2013, the subject's total true value was initially assessed at \$5,043,650. A decrease complaint was filed with the BOR seeking a reduction in value to \$3,500,000. No counter complaint was filed. At the hearing before the BOR, counsel for the property owner appeared and submitted an owner's pro forma of value, however, no corroborating witness testimony was provided in conjunction with such submission. Thereafter, upon consideration of the information presented, the BOR found "the Applicant [had] not met the burden of proof necessary to reduce the Auditor's values" and it issued a decision maintaining the subject's initially assessed valuation, which led to the present appeal.

On remand of the tax year 2010 matter, initially, we note the Supreme Court concluded that "the TIF agreement is not a jurisdictional restriction" to the filing of a valuation complaint. *Kohl's*, supra, at ¶1. The court explained, a "TIF is a method of promoting and financing the development of real property by directing "all or a portion of the increased property tax revenue that may result" from the development to defraying the cost of improvements that are part of the development. *Princeton City School Dist. Bd. of Edn. v. Zaino*, 94 Ohio ST.3d 66, 68, 760 N.E.2d 375 (2002), quoting Meck & Pearlman, *Ohio Planning and Zoning Law* 704, Section T 15.29 (2000); ***." Id. at ¶3. In addition, the Supreme Court determined the "[t]he no-contest covenant *** [contained in the TIF agreement at issue in this matter] expressly intended to run with the land and bind those, such as Kohl's, who purchased from the original owners who signed the TIF agreement." Id. at ¶9. Moreover, the Supreme Court also found the county commissioners and the BOE to be the beneficiaries of the TIF agreement's no-contest covenant and on remand, has instructed this board to afford such beneficiaries the opportunity to show that they are entitled to relief based upon the covenant. Id. at ¶29-30.

At the hearing before this board, on remand, counsel for the county appellees provided the testimony of Mr. Kenneth H. Stiverson, a county commissioner and former BOE member. H.R. at 58. Subject to objections levied by owner's counsel, the county appellees also submitted three exhibits: a copy of the TIF agreement, marked as Exhibit A; certified copies of a Declaration of Covenants and Deeds, marked as Exhibit B; and a copy of the county commissioners' approval resolution of the TIF agreement, marked as Exhibit C. At that time, counsel for the property owner offered the appraisal and testimony of Ms. Kelly M. Fried, a state certified general real estate appraiser in Ohio. In her report, Ms. Fried employed the cost, income capitalization, and sales comparison approaches to value and determined an overall final value of \$3,925,000, as of January 1, 2010, and an overall final value of \$4,225,000, as of January 1, 2013, for the subject property. H.R., Ex. 1.

At the outset, we address Kohl's objection to the county appellees' request for leave to file its witness and evidence disclosures seventeen days prior to this board's hearing, after the disclosure deadline. In its request, the county appellees admit that they failed to "timely file its witness list and list of exhibits,"

however, they also claim no prejudice will result if leave is granted, and further, aver "[t]he documents submitted *** are crucial to permitting the Board to make a decision in this case on the merits, rather than on the admitted procedural failure of Appellee." Memorandum in Response to Brief in Opposition to Motion for Leave to File Witness List and Exhibits Instantly at 1. In response to the county's request, the property owner filed a brief in opposition and later, levied continuing objections at this board's hearing. Upon consideration of the arguments advanced, the county appellees' request for leave is well taken and is hereby granted and the property owner's objections are hereby overruled.

Next, we address Kohl's continuing objections, levied at this board's hearing, and its subsequent written motion, "to strike [the] appearance of county commissioner and school board." H.R. and Appellant Kohl's Motion to Strike Appearance of County Commissioner and School Board ("Kohl's Motion to Strike"), at 1. The owner argues that "the Board of Commissioners and the School Board are not property parties to" the within appeals because "[t]he commissioners did not file an original or counter complaint for either the 2010 or 2013 tax years with the Board of Revision either before or after the BOR's dismissal" and "[t]he BOE had no standing in the 2013 tax case." Kohl's Motion to Strike, at 1, 3, 4. Furthermore, the owner contends "both parties waived their right to assert the no-contest covenant as a defense against Kohl's tax-year 2010 and 2013 complaints." *Id.*, at 4. However, the county appellees point out, "[i]n this case, the Ohio Supreme Court has found that the Board of Marion County Commissioners and the River Valley Local School District are the beneficiaries of the covenant" contained in a TIF agreement. Response of Appellees at 1.

Upon consideration, we note, the Supreme Court expressly found "the county commissioners and the BOE" to be "the beneficiaries of the [TIF agreement's no-contest] covenant" and further, we are mindful that the court remanded the tax year 2010 matter with specific instructions "that the county commissioners and the BOE be afforded the opportunity to argue in support of the covenant." *Kohl's*, supra, at ¶29, 32. Moreover, the court also specifically stated that "under these circumstances, Kohl's itself cannot claim the waiver, because it failed to assert the need for the proponents of the no-contest covenant to appear. Kohl's thereby waived any reliance on the claim that its opponents had waived their opportunity to be heard." *Id.* at ¶31. Accordingly, we find the owner's written argument and continuing oral objections to the appearance of the county commissioners and BOE to be without merit; accordingly, we deny the owner's motion and overrule its objections.

Finally, the property owner also "objects to, and moves to strike, certain written statements by counsel related to the claimed intentions and desires of Max A. Findlay, Inc. as set forth in the County's Post Hearing Brief." Kohl's Post Merit Hearing Reply Brief at 1. Upon consideration, we find the owner's general objection, and motion to strike "certain [unidentified] written statements" to be without merit. *Id.* Accordingly, the owner's objection is overruled and the motion to strike is denied; this board will accord statements contained in the parties' written arguments their appropriate weight.

We now turn to the merits of BTA Case No. 2011-2747. Initially, we acknowledge the Supreme Court's finding that "Kohl's attempt to find an ambiguity in [the TIF] terms fail[ed]" and "the county commissioners and the BOE are the beneficiaries of the covenant and should bear the burden of proving that it was enforceable against Kohl's." *Kohl's*, supra, at ¶30, 33.

Upon review, we recognize that it is of particular importance for the county appellees to present a developed argument to effectively shoulder their burden and demonstrate that the no-contest covenant of the TIF agreement is binding and enforceable against Kohl's. However, based upon the record before this board, it appears that the county appellees have misconstrued its burden on remand, as set forth by the Supreme Court. Initially, while we acknowledge that the county appellees provided testimony of a county commissioner (and former BOE member) at this board's hearing, such testimony merely relates to that commissioners' understanding of the approval process for, and some terms contained in, the subject TIF agreement; consequently, such testimony does little, if anything, to shoulder the burden assigned to the county appellees.

Turning to the county appellees' written legal argument, we observe, despite the Supreme Court's finding that the terms of the TIF agreement "expressly intended to run with the land and bind" successive purchasers, the county appellees continue to argue the circumstances surrounding, and terms contained in, the TIF agreement and its no-contest covenant. The county appellees do not advance any arguments to satisfy their burden and establish that such terms are binding and enforceable upon Kohl's. Ultimately, the county appellees advance the argument that Kohl's was on notice of the no-contest covenant when it purchased the subject property; Kohl's violated the covenant by filing a complaint and seeks to "renege on paying for the roadway"; and as a result of Kohl's violation of the terms of the TIF agreement, this board should deny the owner's appeal. Brief of Appellees at 6. Conversely, Kohl's argues that the county appellees have "failed to meet their burden of proof, [and] the no-contest covenant in the TIF Agreement cannot be enforced or bar Kohl's tax complaints. Alternatively, Kohl's concludes the no-contest covenant violates Ohio law regarding such covenants, has no statutory basis or foundation, violates public policy, unconstitutionally takes Kohl's property, denies Kohl's due process, and violates Kohl's constitutional right to have its real property uniformly taxed at true value." Kohl's Post Merit Hearing Brief at 12.

Upon careful examination of the record before this board, the county appellees have failed to satisfy their burden on remand as set forth by the Supreme Court to show that the "no-contest covenant is valid and binding under contract law or real-covenant law." *Kohl's* at ¶29. Indeed, the county appellees failed to provide any statutory basis for applying the covenant to Kohl's and failed to demonstrate that the no-contest covenant qualifies as a covenant that runs with the land under pertinent case law. In fact, it bears noting that the county appellees do not cite to any legal authority for applying the no-contest covenant to Kohl's or to prove the covenant qualifies as one that runs with the land. Since the county appellees have failed to provide this board with any pertinent legal authority, we are unable to make a determination as to whether the no-contest covenant is binding and enforceable upon Kohl's. Because the Supreme Court's found that "the TIF agreement is not a jurisdictional restriction," and based upon the record before this board, we hereby vacate the BOR's dismissal of the underlying tax year 2010 complaint and remand this matter to the BOR with instructions to conduct further proceedings to determine the value of the subject property for tax year 2010.

Next we turn to tax year 2013 and address the merits of BTA Case No. 2014-3897. When cases are appealed from a board of revision to this board, an appellant must prove the adjustment in value requested. See, e.g., *Shinkle v. Ashtabula Cty. Bd. of Revision*, 135 Ohio St.3d 227, 2013-Ohio-397. As the Supreme Court of Ohio has consistently held, "[t]he best method of determining value, when such information is available, is an actual sale of such property between one who is willing to sell but not compelled to do so and one who is willing to buy but not compelled to do so. *** However, such information is not usually available, and thus an appraisal becomes necessary." *State ex rel. Park Invest. Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410. See, also, Justice Pfeifer's concurrence in *LTC Properties, Inc. v. Licking Cty. Bd. of Revision*, 133 Ohio St.3d 111, 2012-Ohio-3930. This board is charged with the responsibility of determining value based upon evidence properly contained within the record which must be found to be both competent and probative. *Strongsville Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1997), 77 Ohio St.3d 402, 405; *Cardinal Fed. S. & L. Assn. v. Bd. of Revision* (1975), 44 Ohio St.2d 13, paragraph two of the syllabus.




As previously stated, at the hearing before this board, counsel for the property owner offered the appraisal and testimony of Ms. Kelly M. Fried. Ms. Fried testified that she employed the cost, income capitalization, and sales comparison approaches to value. She then assigned twenty percent weight to the cost approach, fifty percent weight to the sales comparison approach, and thirty percent weight to the income capitalization approach, and reconciled an overall final value of \$4,225,000, as of January 1, 2013, for the subject property. H.R., Ex. 1. At that time, counsel for the county appellees chose not to cross examine the appraiser, nor did the county submit any written argument opposing the appraisal report. As such, upon our review of owner's appraisal evidence, which provides an opinion of value as of tax lien date, was prepared for tax valuation purposes, and attested to by a qualified expert, we find the appraisal to be competent and probative and the value conclusion reasonable and supported.

To the extent Kohl's made any constitutional claims, we note that the Ohio Supreme Court has authorized this board to accept evidence on constitutional points; however, it has also clearly stated that we have no jurisdiction to decide constitutional claims. *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229; *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 198.

It is therefore the order of this board that the BOR's dismissal of the underlying tax year 2010 complaint is vacated and BTA Case No. 2011-2747 is remanded to the BOR with instructions to conduct any proceedings necessary to determine the value of the subject property for tax year 2010.

Further, it is the order of this board that the true and taxable values of the subject property, as of January 1, 2013, were as follows:

PARCEL NUMBER
20-011000-5201
TRUE VALUE
\$4,225,000
TAXABLE VALUE
\$1,478,750

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Ms. Clements		
Mr. Harbarger		

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



Kathleen M. Crowley, Board Secretary