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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). 2016-138

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:
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RIVER VALLEY LOCAL SCHOOLS BOARD OF EDUCATION
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Entered Thursday, January 5, 2017

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

Appellant Kohl's Illinois, Inc. ("Kohl's") appeals a decision of the board of revision ("BOR"), which determined the value of the subject real property, parcel number 20-011000-5201, for tax year 2010. This matter is now considered upon the notice of appeal, the transcript certified by the BOR pursuant to R.C. 5717.01, the record of the hearing before this board, and the parties' written argument.

The subject's total true value was initially assessed at \$5,090,370. Kohl's filed a decrease complaint with the BOR seeking a reduction in value to \$3,500,000, though it amended its request at the BOR hearing consistent with its appraisal evidence. The appellee board of education ("BOE") filed a countercomplaint in support of maintaining the auditor's values. In earlier proceedings, this board and the Supreme Court issued decisions regarding the BOR's jurisdiction over the complaint. Ultimately, the matter was remanded

to the BOR with instructions to determine value. The BOE convened a hearing, at which Kohl's presented the testimony and written report of appraiser Kelly M. Fried, MAI, who opined that the subject's value was \$3,925,000 as of January 1, 2010, after she considered all three approaches to value. The cost approach yielded an indicated value of \$3,820,000 (rounded), with \$870,000 attributable to the land and \$2,947,935 attributable to the improvements, after she applied a 20% depreciation rate to the replacement cost to account for physical and external obsolescence. For her sales comparison approach, Fried utilized the sales of four properties, making transaction adjustments as well as adjustments based on differences in location, physical features, economic characteristics (such as occupancy or tenant mix), land-to-building ratio, size, and use. Fried concluded to a rounded value of \$3,945,000, based on this approach. Fried also performed the income approach, capitalizing a net operating income of \$394,434 at 9.96% (including a vacancy weighted tax additur) for an indicated value of \$3,960,000 (rounded). Finally, Fried reconciled these approaches, giving most weight (50%) to the sales comparison approach, but considering all three approaches in her final conclusion.

After Fried described her methodologies, she was subject to cross-examination, though it is unclear from the record as to the identity of the individual who performed such questioning. More notably, however, during this cross-examination, the recording becomes unintelligible and continues to be unintelligible for the remainder of the hearing. Accordingly, it is unclear whether and to what extent the BOE participated before the BOR. Following the hearing, the BOR issued a decision maintaining the initially assessed valuation, which led to the present appeal.

A hearing was held before this board, at which the parties were given an opportunity to supplement the record with additional evidence. Kohl's argued that the subject's value should be adjusted consistent with its appraisal evidence and again offered Fried's testimony. Notably, the BOE and county appellees had an opportunity to again cross-examine Fried regarding her appraisal. The BOE and county appellees challenged various aspects of Fried's analysis, such as her vacancy rate, choice of comparables, and role that the cost of the actual 2006 construction of the subject property played in her cost approach. The appellees, however, primarily relied on the assertion that Kohl's was barred from filing the underlying complaint in this matter due to a tax increment financing ("TIF") agreement. The BOE did not present any independent evidence of value. Kohl's argues that the issue of jurisdiction was already decided and the only issue on appeal is valuation. We agree, and for the reasons described below, find value consistent with Fried's appraisal.

Before we address the merits of this appeal, we must first address the deficiency in the record transmitted by the BOR. The BOR hearing record was unintelligible during a significant portion of the hearing, including cross-examination of Fried and during any argument that may have been presented by the county appellees or BOE. Parties and various tribunals rely upon boards of revision to fulfill their statutory duties to create and maintain a record capable of being reviewed on appeal. R.C. 5715.08; R.C. 5717.01. As the court has pointed out, "[b]y statute, the fiscal officer is the secretary of the BOR, specifically charged with 'keep[ing] an accurate record of the proceedings of the board' and with 'perform[ing] such other duties as are incidental to the position.'" *Cannata v. Cuyahoga Cty. Bd. of Revision*, 147 Ohio St.3d 129, 2016-Ohio-1094, ¶13. The court found that the BOR defaulted on its statutory obligation because it did not transmit the record in its entirety. The Supreme Court has further noted that "[f]ailure to certify the entire evidentiary record may prejudice the interest of the proponents of omitted items, and therefore, boards of revision should take care to comply with the statutory duty to certify the *entire* record." (Emphasis in original.) *Vandalia-Butler City Schools Bd. of Edn. v. Montgomery Cty. Bd. of Revision*, 130 Ohio St.3d 291, 2011-Ohio-5078, at ¶27, fn. 4. Therefore, the BOR should take care to ensure its evidentiary record is accurate and provide all evidence considered during its proceedings in the transcript provided to this board. In this appeal, however, any potential prejudice to the parties was mitigated by the availability of Fried for cross-examination at the hearing before this board, and the opportunity to present evidence and argument on appeal. Compare *Cannata*, supra, at ¶19 ("[W]e conclude that the BTA's reliance on the owner's appraisal, given the absence of potentially material portions of the record, constituted plain error that we may correct on appeal despite a waiver below.").

Next, we recognize the appellees' jurisdictional argument, as the jurisdiction of a tribunal cannot be waived and may be raised at any stage of the proceedings. *Buckeye Foods v. Cuyahoga Cty. Bd. of Revision*, 78 Ohio St.3d 459 (1997); *Shawnee Twp. v. Allen Cty. Budget Comm.*, 58 Ohio St.3d 14 (1991). This is not the first time, however, that this board has considered Kohl's authority to file the underlying complaint. In previously considering the subject complaint, the Supreme Court held that the TIF agreement itself was not a jurisdictional restriction, and remanded the matter to this board to afford the BOE and county commissioners the opportunity to argue in support of the TIF agreement's no-contest covenant. *Kohl's Illinois, Inc. v. Marion Cty. Bd. of Revision*, 140 Ohio St.3d 522, 2014-Ohio-4353. On remand, this board gave the appellee parties the opportunity to provide evidence and testimony consistent with the court's decision. Following the hearing, we found that the appellees failed to satisfy their burden on remand and vacated the BOR's earlier dismissal, remanding the matter to the BOR with instructions to conduct further proceedings to determine the value of the subject property for tax year 2010. *Kohl's Illinois, Inc. v. Marion Cty. Bd. of Revision* (Oct. 15, 2015), BTA Nos. 2011-2747, 2014-3897, unreported. Neither the BOE nor the county appellees appealed that decision.

This board's October 2015 decision was clearly a final appealable order, as it affected a substantial right of the parties, i.e., Kohl's right to file a complaint against the value of the subject property. See *MB West Chester, L.L.C. v. Butler Cty. Bd. of Revision*, 126 Ohio St.3d 430, 2010-Ohio-3781. When none of the affected parties chose to appeal that decision, it became binding on the issue of jurisdiction with respect to this complaint pursuant to the doctrine of res judicata. In *Superior's Brand Meats, Inc. v. Lindley*, 62 Ohio St.2d 133 (1980), the court discussed the applicability of the concepts of res judicata and collateral estoppel to proceedings conducted before administrative bodies:

"The doctrine of collateral estoppel is an important element of our legal system. It provides a necessary degree of finality to decisions rendered by our courts. Finality is a desirable objective in administrative proceedings as well.

"We recognize the need for flexibility in applying the doctrine of collateral estoppel to the administrative decision-making process; however, because of the need for finality, we hold that ordinarily where an administrative proceeding is of a judicial nature and where the parties have had an adequate opportunity to litigate the issues involved in the proceeding, the doctrine of collateral estoppel may be used to bar litigation of issues in a second administrative proceeding." *Id.* at 135.

We therefore find any arguments raised regarding the TIF agreement and its effect on the BOR's jurisdiction over the underlying complaint to be barred.

We now turn to the issue of valuation. When cases are appealed from a board of revision to this board, an appellant must prove the adjustment in value requested. *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 90 Ohio St.3d 564, 566 (2001). 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*, 175 Ohio St. 410 (1964).

In the present appeal, there is no evidence of a recent arm's-length sale of the subject property. Instead, Kohl's relies on Fried's appraisal to support its requested reduction. As we have noted on previous occasions, the appraisal of real property is not an exact science, but is, instead, an opinion, the reliability of which depends upon basic competence, skill, and ability demonstrated by the appraiser. See, e.g., *Cyclops Corp. v. Richland Cty. Bd. of Revision* (May 30, 1985), BTA No. 1982-A-566, et seq., unreported. Furthermore, the Supreme Court has held that this board exercises its discretion as the finder of fact in evaluating the credibility of witnesses. See *Shinkle v. Ashtabula Cty. Bd. of Revision*, 135 Ohio St.3d 227,

2013-Ohio-397, ¶25. Here, we find that Fried's appraisal constituted competent evidence of the value of the subject property and has provided a reliable indication of the subject's value as of the tax lien date.

While we acknowledge the criticisms set forth by the appellees, we find that Fried adequately supported her conclusions. Fried explained that she utilized all retail vacancies rather than narrowing her search solely to "big box" properties because she believed it would lead to a more reliable result. Fried likewise described why she chose the comparable properties she utilized in her analysis, along with the basis for her adjustments. Furthermore, Fried testified that although the property was constructed in 2006, the replacement cost yielded a more reliable result than utilizing the property's actual reconstruction cost due to a lack of sufficient evidence regarding the subject's original construction. Additionally, Fried testified that she utilized her judgment when she placed most weight on the sales comparison approach in her final reconciliation. Finally, we reject the BOE's contention that the auditor's value is entitled a presumption of probative and reliable force that would prohibit this board from accepting a competent and probative appraisal performed by an MAI appraiser opining value as of the tax lien date. Accordingly, upon review of the record before us, we find Fried's appraisal to be the most probative evidence of the value of the subject property.

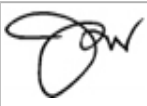


It is therefore the order of this board that the true and taxable values of the subject property, as of January 1, 2010, were as follows:

TRUE VALUE

\$3,925,000

TAXABLE VALUE

\$1,373,750

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