

ORIGINAL

IN THE SUPREME COURT
STATE OF OHIO
APPEAL FROM THE BOARD OF TAX APPEALS

RODGER L. BARKOFF AND
SHARON L. BARKOFF

Appellant,

v.

SUMMIT COUNTY BOARD OF
REVISION, ET AL.

Appellees.

) SUPREME COURT CASE NUMBER:
) 2012-1542
)
) BOARD OF TAX APPEALS
) CASE NO. 2009-K-3018
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APPELLEE, AKRON BOARD OF EDUCATION'S BRIEF

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I. APPELLANT'S ASSIGNMENT OF ERRORS PRESENTED FOR REVIEW

Appellant, Rodger L. Barkoff and Sharon L. Barkoff, Trustees ("Barkoff"), appealed the August 14, 2012, Decision and Order of the Board of Tax Appeals ("BTA") as to the tax year 2008 tax valuation of an Arby's restaurant in Akron purchased on August 11, 2005, for \$1,407,000. Barkoff contends the BTA erred in accepting a sale 28 months from the January 1, 2008, tax lien date when no evidence was presented to show the sale was recent. In the Notice of Appeal, Barkoff set forth the following errors:

ASSIGNMENT OF ERROR NO. 1:

The Board of Tax Appeals decision and order using a sale that occurred 28 months prior to the tax lien date to determine value when no evidence was submitted to show that the sale was recent is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 2:

The Board of Tax Appeals decision and order adopting the use of a sale rejected by the local fiscal offer and board of revision when no evidence is introduced to show that their decisions were wrong is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 3:

The Board of Tax Appeals decision and order shifting the burden of proof on the issue of recentness to non-appealing parties is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 4:

The Board of Tax Appeals decision and order to reject Appellant's evidence on the issue of value is unreasonable and unlawful.

II. ISSUE PRESENTED FOR REVIEW

At issue is whether a Decision and Order of the BTA unreasonable or unlawful which recognized an arm's-length sale 28 months prior to the tax lien date when no evidence other than the sale was submitted to show that the sale was recent and the sale was not adopted by the Fiscal Officer and Board of Revision.

III. STATEMENT OF THE CASE

Barkoff requests this Court to change precedent and rule that the Board of Tax Appeals' Decision and Order is lawful and reasonable in recognizing an unrefuted arm's-length sale 28 months prior to the tax lien date when no additional evidence other than the sale was submitted by the School Board to show that the sale was recent or by Barkoff to be too remote.

IV. STATEMENT OF THE FACTS

Appellee, Board of Education of the Akron City School District ("School Board") requests the Court to affirm the Decision and Order of the BTA in regard to the tax year 2008 complaint filed by the School Board. Barkoff purchased the subject property on August 11, 2005, for \$1,407,000. The sale comprised cash of \$537,000 and a mortgage for \$870,000 with North American Savings Bank. The School Board filed a complaint with the BOR on March 30, 2009, as to the sale and attached the deed and conveyance fee statement for the transfer of the property.

On August 14, 2012, the BTA issued a Decision and Order to order the Summit County BOR and Fiscal Officer to set the value of the property at the sale price.

V. LAW AND ARGUMENT

A. Standard of Review

In an appeal from the BTA, the Court does not reevaluate the facts, but looks merely to the issue of whether the BTA's decision was unreasonable or unlawful. "This court does not sit either as a super BTA or as a trier of fact de novo." *DAK, PLL v. Franklin Cty. Bd. of Revision* (2005); 105 Ohio St.3d 84. This Court restated the standard for review of BTA decisions in *Banbury Village, Inc. v. Cuyahoga Cty. Bd. of*

Revision (1990), 53 Ohio St. 3d 251, "[w]e will not substitute our judgment for that of the BTA on factual issues, and we will not overrule its findings of fact if based upon sufficient probative evidence." citing *Buckeye Power, Inc. v. Kosydar* (1973), 35 Ohio St. 2d 137, and *Hawthorn Melody, Inc. v. Lindley* (1981), 65 Ohio St. 2d 47.

B. There is a Rebuttable Presumption That a Sale of Real Property Which is Actual, Recent and the Result of an Arm's-Length Transaction is the Best Evidence of a Property's Value.

It is unrefuted that the subject property was purchased in an arm's-length sale on August 11, 2005, for \$1,407,000.

The General Assembly, through its enactment of R.C. 5713.03, has recognized the utility of a sale in establishing the value of real property for purposes of ad valorem taxation. This statute provides in part:

"The county auditor, from the best sources of information available, shall determine, as nearly as practicable, the true value of each separate tract, lot, or parcel of real property and of buildings, structures, and improvements located thereon ***. In determining the true value of any tract, lot, or parcel of real estate under this section, if such tract, lot or parcel has been the subject of an arm's length sale between a willing seller and a willing buyer within a reasonable length of time, either before or after the tax lien date, the auditor shall consider the sale price of such tract, lot, or parcel to be the true value for taxation purposes. ****"

This statute is a codification of *State ex rel. Park Invest. Co. v. Bd of Tax Appeals* (1964), 175 Ohio St. 410, 412, where the Supreme Court held that "[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. This, without question, will usually determine the monetary value of the property." *See, also, Conalco Inc. v. Monroe Cty. Bd. of Revision*

(1977), 50 Ohio St.2d 129, paragraph one of the syllabus ("The best evidence of the 'true value in money' of real property is an actual, recent sale of the property in an arm's-length transaction."); *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (2005), 106 Ohio St.3d 269 ("Pursuant to R.C. 5713.03, the sale price in a recent arm's-length transaction between a willing seller and a willing buyer shall be considered the true value of the property for taxation purposes."). In *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision* (2008), 117 Ohio St.3d 516, the court noted that the "initial burden on a party presenting evidence of a sale is not a heavy one, where the sale on its face appears to be recent and at arm's length." Upon the presentation of such evidence, "a rebuttable presumption exists that the sale has met all the requirements that characterize true value." *Cincinnati Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (1997), 78 Ohio St.3d 325, 327. The Ohio Supreme Court has stated that the sale price is the best indication of value in *Reynoldsburg Bd. of Edn. v. Licking Cty. Bd. of Revision, et al.* (1997), 78 Ohio St.3d 543, 545, wherein the Court provided that "[n]evertheless, we have always insisted that the sale price of an arm's-length transaction occurring within a reasonable time of the tax lien date was the value of the property as of the tax lien date." The syllabus of *Walters v. Knox Cty. Bd. of Revision, et al.* (1989), 47 Ohio St.3d 23, states "[a]n arm's-length sale is characterized by these elements: it is voluntary, i.e., without compulsion or duress; it generally takes place in an open market; and the parties act in their own self interest."

The production of a conveyance fee statement or deed requires the party disagreeing with the sale price to rebut such evidence with other evidence indicating that the consideration paid is not reflective of the property's true value. *Zazworsky v.*

Licking Cty. Bd. of Revision, et al. (1991), 61 Ohio St.3d 604. Barkoff failed to produce competent, credible and probative evidence to support any contention that the August 11, 2005, sale price is not indicative of the value of the subject property for tax year 2008. Barkoff presented no evidence to challenge the arm's-length nature of the sale. Barkoff failed to rebut the presumption that the indicated consideration on the deed and conveyance fee statement is correct.

C. Recent Sales of Property

The subject property was sold 28 months prior to the tax lien date of January 1, 2008. The Supreme Court has addressed and approved sales 16 months and 28 months from the lien date as recent sales. See, e.g., *Cincinnati Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (1997), 78 Ohio St.3d 325. As provided from numerous Supreme Court decisions, the mere passage of some months between sale and tax lien dates is not sufficient cause to disregard a sale. See, e.g., *HK New Plan Exchange Property Owner II, L.L.C. v. Hamilton Cty. Bd. of Revision* (2009), 122 Ohio St.3d 438 (value based upon sale occurring twenty-four months prior to tax lien date); *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision* (2006), 108 Ohio St.3d 310 (reversing this board's decision and ordering that the property's taxable value as of January 1, 2002 be based upon its sale which occurred in October 2003, twenty-two months after tax lien date); *Cleveland Mun. School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (2005), 107 Ohio St.3d 250 (valued based on sale occurring twelve months after tax lien date); *Reynoldsburg Bd. of Edn. v. Licking Cty. Bd. of Revision* (1997), 78 Ohio St.3d 543, 1997 Ohio 185 (value based upon sale occurring five months after tax lien date); *Zazworsky, supra* (value based upon sale occurring fifteen

months after tax lien date); *W.S. Tyler Co. v. Lake Cty. Bd. of Revision* (1990), 57 Ohio St.3d 47 (value based upon sale occurring eleven months after tax lien date); *Hilliard City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1990), 53 Ohio St.3d 57 (value based upon sale occurring twelve months after tax lien date); *Dublin-Sawmill Properties v. Franklin Cty. Bd. of Revision* (1993), 67 Ohio St.3d 575 (holding that sales of portions of a property occurring between November 1984 and September 1985 were entitled to consideration in determining value as of January 1, 1987); *U.S. Postal Serv. v. Logan Cty. Bd. of Revision* (Sept. 16, 1987), Logan App. No. 8-85-14, unreported (holding that a sale of property approximately forty months prior to tax lien date still constituted the best evidence of the property's value).

Barkoff presented no evidence as to any change of market conditions between August 11, 2005, and January 1, 2008, to refute that the August, 2005, sale is indicative of market conditions as of January 1, 2008. The "Great Recession" began in 2008 and, in particular, the fourth quarter of 2008.

D. Board of Tax Appeals Decision and Order

As pointed out by the BTA, "no one has suggested that the August 2005 sale was not an arm's-length transaction and instead the point of contention lies in the element of recency." As to the burden to prove or contest whether an arm's-length sale is recent to the tax lien date, the BTA in citing decisions of this Court provides that "it remains the burden of a party contesting the utility of a sale to rebut the presumptions to be accorded it. See, e.g., *Worthington City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 129 Ohio St.3d 3, 2011-Ohio-2316, 949 N.E.2d 986. *Cincinnati Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (1997), 78 Ohio St.3d 325, 1997 Ohio 212, 677 N.E.2d

1197; *South Euclid-Lyndhurst City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (May 13, 2005), BTA No. 2003-G-1041, 2005 Ohio Tax LEXIS 626 at *12.”

The mere passage of some months between sale and tax lien dates is not sufficient cause to disregard a sale. See, e.g., *HK New Plan Exchange Property Owner II, L.L.C. v. Hamilton Cty. Bd. of Revision*, (2009), 122 Ohio St.3d 438 (value based upon sale occurring twenty-four months prior to tax lien date); *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision* (2006), 108 Ohio St.3d 310 (reversing this board's decision and order that the property's taxable value as of January 1, 2002 be based upon its sale which occurred in October 2003, twenty-two months after tax lien date.)

This Court recently set forth that the burden is on the party challenging the recency of the sale to do so. *N. Royalton City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (2011), 129 Ohio St.3d 172 (“As the opponent of using the sale price as the criterion of value, Riser had the initial burden to show that the 2005 sale was either not recent or not at arm's length.”)

In submitting evidence as to the sale of the property the School Board met its burden of proof as to the evidence necessary in regard to the sale of the property. As Barkoff provided no evidence or any credible, competent and probative evidence as to a change in market conditions, it was not incumbent on the School Board to provide evidence that there was no change in market conditions between the sale and tax lien dates.

Further, Barkoff presented no expert evidence as to any changes in market conditions. As noted by the BTA, “statements made by counsel on his clients' behalf

do not constitute evidence upon which our decision may be based. See, e.g., *Corporate Exchange Bldgs. IV & V, L.P. v. Franklin Cty. Bd. of Revision* (1998), 82 Ohio St.3d 297, 299, 695 N.E.2d 743.” Further, no evidence was provided that the market of the subject property had undergone a sudden or significant change between the sale and tax lien dates.

Barkoff contends that on account of the Fiscal Officer having a record of the sale and not adopting the sale to set the value of the property for tax year 2008 that the School Board had a burden to show that the Fiscal Officer erred for not using the sale. Taxpayers and School Boards regularly file complaints as to a sale within a recent amount of time from the tax lien date because the county auditor failed to adopt the sale price as the value of the property. A sale within 28 months of the tax lien date is not remote, especially when there is no evidence of any change of market conditions. Barkoff proposes a deference to the county auditor when in fact there is a regular practice for a taxpayer to contest the determination of an auditor for failing to recognize a sale, even if the sale date is within a few years or relatively recent to the lien date without the taxpayer providing additional evidence.

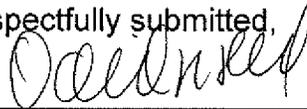
Finally, Barkoff provides no authority as to the argument involving the use of the sale in BOR proceedings and the statutory duty of the auditor for a reappraisal shifting the burden to the School Board. This Court affirmed the valuing of a property for tax purposes at its sale price despite the fact that the values of other, neighboring properties are valued as of the last reappraisal date does not violate Ohio Const. art. XII, § 2, when the valuation of the individual parcel is based on its most recent sale

price. *Reynoldsburg Bd. of Edn. v. Licking Cty. Bd. of Revision* (1997), 78 Ohio St.3d 543.

VI. CONCLUSION

For the preceding reasons, the School Board respectfully requests the Court to affirm the Decision and Order of the BTA.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Appellee's Brief was served by overnight mail on this 22 day of April, 2013 upon Todd W. Sleggs, Esq., Sleggs, Danzinger & Gill LPA. 820 West Superior Avenue, Seventh Floor, Cleveland, Ohio 44113, Regina M. VanVorous, Assistant Prosecuting Attorney, Summit County Prosecutor's Office, 220 S. Balch Street, suite 118, Akron, Ohio, and Christine Mesirow, Section Chief, Taxation Section, Ohio Attorney General, 30 East Broad Street, 17th floor, Columbus, OH 43215-3428.



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