

ORIGINAL

THE SUPREME COURT OF OHIO

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Arbors East RE, LLC, *et al.*,

CASE NO. 15-1410

Appellants,

Appeal from the Ohio Board Tax
Appeals, Case Nos. 2014-
4527 & 2014-4607

vs.

Franklin County Board of

Revision, *et al.*,

Appellees.

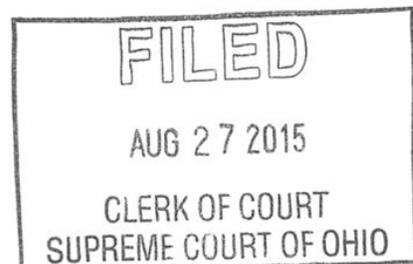
NOTICE OF APPEAL OF ARBORS EAST RE, LLC., *et al.*

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Appellants, Arbors East RE, LLC *et al*, hereby give notice of their appeal, pursuant to the pertinent provisions of R.C 5717.04, from a Decision and Order of the Ohio Board of Tax Appeals in the matter of **Arbors East Re, LLC., et al. v. Franklin County Board of Revision, et al.**, being Case Numbers 2014-4527 and 2014-4607. The final order of the Board of Tax Appeals (hereinafter "BTA") was journalized by the BTA on July 30, 2015 and a copy of said final order is appended hereto and fully incorporated herein.

Appellant states that the Decision and Order of the BTA is unlawful and erroneous in the following respects:

1. The BTA decision and order ignores the appraisal and other evidence of the fair market value of the subject real property and ignores the determinations of the Franklin County Auditor which valued only the real estate.
2. The BTA Decision and Order is unlawful and erroneous in that it adopts a transfer of assets comprised of land, buildings, licenses and other personal and intangible property as solely the value of the real estate.
3. The BTA decision is contrary to the Supreme Court determination in *Dublin Senior Community , L.P. v. Franklin Cty. Bd. of Revision (1997), 80 Ohio St. 3d 455* in that the determination of the BTA does not separate real estate values from business, personalty and intangible values.
4. The BTA failed to recognize that the property was never on the open market and it was necessary for the Appellant to purchase the property or discontinue business.

5. The BTA unlawfully and erroneously determined that an arms-length sale existed, when in fact the transaction was between a landlord and tenant and the latter was mandated to buy the property, including realty, personalty and intangibles.
6. The BTA decision fails to recognize that the licenses to operate a nursing home on the subject property are site specific and it was a business imperative for Appellant to purchase the property.
7. The BTA decision is unlawful and erroneous in that the BTA did not determine a proper valuation of the real estate when it had appraisal evidence and other evidence of the separate categories of items involved in the transfer of the property and unlawfully and erroneously determined that there was an arms length transfer of only the real estate contrary to the Supreme Court holding in *St. Bernard Self-Storage, LLC. V. Hamilton Cty. Bd. of Revision*, 115 Ohio St. 3d 365, 2007-Ohio-5249 and in *Sapina v. Cuyahoga Cty. Bd. of Revision*, 136 Ohio St. 3d 188, 2013-3028.
8. The BTA unlawfully and erroneously rejected reliable, probative appraisal evidence in lieu of the non arms-length transfer price and erroneously determined that such transfer mandated such determination and ignored the purchase contract which refuted the BTA assumptions.
9. The BTA erroneously shifted the burden of proof to Appellant with regard to the assertion of the board of education of an arms length sale when the burden of proof in that regard was upon the party (board of education) to prove the existence of an arms-length sale and the evidence clearly refuted such contention.
10. The BTA erroneously determined that the Appellant was a "willing" buyer when the record clearly established that it was necessary for the Appellant to acquire the property or discontinue business.

11. The BTA decision is unlawful and erroneous in that it ignored the Supreme Court decision in *N. Royalton City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 129 Ohio St 3d 172, 2011-Ohio-3092.
12. The BTA ignored the Court's direction : " if the record clearly establishes that a portion of a sale price pertains to personal property, the BTA should subtract that portion from the stated sale price to arrive at the amount of consideration paid for the realty" as mandated in *Olentangy Local Schools Bd. of Edn.v.Delaware Cty Bd. of Revision*, 125 Ohio St. 3d 103, 2010-Ohio-1040, Paragraph 22.
13. The BTA ignored the "best evidence" of value for the subject real property and erroneously and unlawfully determined that it was constrained to find the transfer price of all of the assets as the sole value of the realty contrary to the evidence of record.

The Appellant herein respectfully requests the Supreme Court of Ohio reverse the decision and order of the Ohio Board of Tax Appeals.

Respectfully submitted,



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Attorney for Appellants

CERTIFICATE OF SERVICE

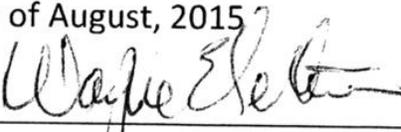
A copy of the foregoing Notice of Appeal was served upon all counsel by certified mail:

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This 27th day of August, 2015



Wayne E. Petkovic (0027086)

OHIO BOARD OF TAX APPEALS

ARBORS EAST RE, LLC., (et. al.),

CASE NO(S). 2014-4527, 2014-4607

Appellant(s),

(REAL PROPERTY TAX)

vs.

DECISION AND ORDER

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

Appellee(s).

APPEARANCES:

For the Appellant(s)

- ARBORS EAST RE, LLC.
Represented by:
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For the Appellee(s)

- FRANKLIN COUNTY BOARD OF REVISION
Represented by:
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BOARD OF EDUCATION OF THE COLUMBUS CITY SCHOOLS
Represented by:
KAROL C. FOX
RICH & GILLIS LAW GROUP, LLC
6400 RIVERSIDE DRIVE, SUITE D
DUBLIN, OH 43017

Entered Thursday, July 30, 2015

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

Appellant appeals decisions of the board of revision ("BOR"), which determined the value of the subject real property, parcel numbers 010-196382-00 and 010-198395-00, for tax years 2011-2013. This matter is now considered upon the notices of appeal, the transcripts 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 \$4,000,000. Appellant filed a decrease complaint with the BOR seeking a reduction in value to \$3,500,000. The appellee board of education ("BOE") filed an original complaint seeking an increase to \$7,490,000, and also a countercomplaint in support of maintaining the auditor's values. At the BOR hearing, the BOE provided evidence of an April 2011 sale of the subject property. Appellant did not dispute the recency or arm's-length nature of

the sale, but asserted that the total purchase was for the business's going concern and included items other than real property. Appellant presented the testimony and written report of appraiser Samuel D. Koon, MAI, who described the subject property as a 100-bed skilled nursing and rehabilitation facility, opining a total true value of \$4,640,000 as of January 1, 2011 for the subject real property. Although he also performed the sales comparison and income capitalization approaches to value to determine the going concern value of subject property, Mr. Koon testified that he relied on the subject sale price, considering it to encompass the purchase price for the entire going concern. Mr. Koon then reduced the \$7,490,000 purchase price to account for the \$1,800,000 value of the certificates of need, \$300,000 value for the furniture, fixtures, and equipment, and the \$750,000 value of the business, including goodwill. Appellant also presented the testimony of Bill McVeigh, property tax manager for the operator, who explained that company who had operated the subject property for roughly 20 years made a business decision to purchase the property rather than continue operation under a lease. The BOR issued a decision increasing the initially assessed valuation to \$7,202,900, reducing the total purchase price by the value of the personal property reported on appellant's tax filings, noting that the property owner had not provided sufficient evidence to deduct any other items from the sale price. From this decision, appellant filed the instant appeal.

Although a hearing was convened before this board, neither party presented any additional evidence, instead requesting the opportunity to rely on written argument. Appellant argues that because the subject property is a nursing home facility, the property involves a combination of real estate and business activities, both of which must be kept separate in order to value the real property. Appellant further argued that the proper method to value this type of property is to separate the value of the business operations and other non-realty from the real property. Appellant further argues that because a prior landlord-tenant relationship existed between the buyer and seller and it was not listed on the open market, the sale was not arm's-length. Because the reported purchase price cannot be relied upon to establish value, appellant argues, the only evidence as to the subject's true value is Mr. Koon's report, opining a value of \$4,450,000. The BOE argued that the sale was the best evidence of value and that the property owner had failed to show that listed purchase price should be reduced to account for items other than real property.

It appears from the BOR's decision recording that appellant provided additional documents after the BOR hearing, including amendments to the original lease and a federal tax filing. Although the BOR expressly relied on at least one of these documents, they were not included in the transcript certified to this board. As previously noted, appellant had the opportunity to supplement the record at this board's hearing, but did not present these or any other documents. Accordingly, we are unable to consider such evidence in our decision. We remind the BOR of its statutory duty to create and maintain a record capable of being reviewed on appeal, including the evidence relied upon to reach its decision. R.C. 5715.08; R.C. 5717.01; *Sapina v. Cuyahoga Cty. Bd. of Revision*, 136 Ohio St.3d 188, 2013-Ohio-3028, ¶35. It is important to note that parties and various tribunals rely upon boards of revision to fulfill their statutory duties. The Supreme Court has 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." *Vandalia-Butler City Schools Bd. of Edn. v. Montgomery Cty. Bd. of Revision*, 130 Ohio St.3d 291, 2011-Ohio-5078, fn. 4. (Emphasis in original.)

"When cases are appealed from a board of revision to the BTA, the burden of proof is on the appellant, whether it be a taxpayer or a board of education, to prove its right to an increase [in] or decrease from the value determined by the board of revision." *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (2001), 90 Ohio St.3d 564, 566. See, also, *Shinkle v. Ashtabula Cty. Bd. of Revision*, 135 Ohio St.3d 227, 2013-Ohio-379. In *EOP-BP Tower, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 1, 2005-Ohio-3096, ¶6, the court elaborated: "In order to meet that burden,

the appellant must come forward and demonstrate that the value it advocates is a correct value. Once competent and probative evidence of value is presented by the appellant, the appellee who opposes that valuation has the opportunity to challenge it through cross-examination or by evidence of another value. *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493, ***. The appellee also has a choice to do nothing. However, the appellant is not entitled to the valuation claimed merely because no evidence is adduced opposing that claim. *W. Industries, Inc. v. Hamilton Cty. Bd. of Revision* (1960), 170 Ohio St. 340, 342, ***.” Id. at ¶5-6. (Parallel citations omitted.)

It has long been held by the Supreme Court that “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.” *Conalco v. Bd. of Revision* (1977), 50 Ohio St.2d 129, paragraph one of the syllabus. In the absence of a qualifying sale, we are mindful of the Supreme Court’s longstanding pronouncement holding that while a qualifying sale typically provides “[t]he best method of determining value[,] *** 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, 412. See, also, *LTC Properties, Inc. v. Licking Cty. Bd. of Revision*, 133 Ohio St.3d 111, 2012-Ohio-3930 (Pfeifer, J., concurring).

In order for a recent sale to qualify as the best evidence of a property’s value, “a key consideration *** is whether the seller and buyer were both willing.” *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 134 Ohio St.3d 529, 2012-Ohio-5680, ¶28. In *Walters v. Knox Cty. Bd. of Revision* (1989), 47 Ohio St.3d 23, 25, the court held that “an 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.”

In the present matter, it is undisputed that the subject property transferred from Nationwide Health Properties, Inc. to Arbors East RE, LLC on April 5, 2011 for \$7,490,000. Absent an affirmative demonstration such sale is not a qualifying sale for tax valuation purposes, we find the existing record demonstrates that the transaction was recent, arm’s-length, and constitutes the best indication of the subject’s value as of tax lien date. We note that sales between landlord and tenant have previously been found to be arm’s-length. See, e.g., *N. Royalton City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 129 Ohio St.3d 172, 2011-Ohio-3092, ¶¶32-34. The Supreme Court further held that “[t]he case law does not condition character of a sale as an arm’s-length transaction on whether the property was advertised for sale or was exposed to a broad range of potential buyers.” Id. at ¶29.

Appellant further asserts that the recorded purchase price encompassed consideration for the entire going concern, including not only the real property, but also personal property and certificates of need. An owner who seeks to reduce the valuation of real property below the full sale price bears the burden of showing the propriety of allocating some portion of that reported price to other assets. *FirstCal Indus. 2 Acquisitions, L.L.C. v. Franklin Cty. Bd. of Revision*, 125 Ohio St.3d 485, 2010-Ohio-1921; see, also, *St. Bernard Self-Storage, L.L.C. v. Hamilton Cty. Bd. of Revision*, 115 Ohio St.3d 365, 2007-Ohio-5249. The Supreme Court has instructed this board that “if the record clearly establishes that a portion of a sale price pertains to personal property, the BTA should subtract that portion from the stated sale price to arrive at the amount of consideration paid for the realty.” *Olentangy Local Schools Bd. of Edn. v. Delaware Cty. Bd. of Revision*, 125 Ohio St.3d 103, 2010-Ohio-1040, ¶22. Further, the court has found “the applicable standard is whether the record contains ‘corroborating indicia’ or ‘best available evidence’ that supports an allocation of the aggregate purchase price.” *Sapina v. Cuyahoga Cty. Bd. of Revision*, 136 Ohio St.3d 188, 2013-Ohio-3028, ¶18, quoting *St. Bernard*, *supra*, at ¶17.

In the instant appeal, we find that appellant did not unequivocally establish a basis for allocating a portion of the sale price to the personal property that was transferred. Cf. *St. Bernard Self-Storage LLC*,

supra. Although appellant is correct in its assertion that the valuation of a nursing home facility may be done by extracting the value of the real property after determining the value of the going concern through appraisal analysis, this does not apply to the instant appeal because there is a recent arm's-length sale of the property, which is presumed to establish its true value. See, *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-1473, ¶13 (“At the very heart of *Berea [City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision]*, 106 Ohio St.3d 269, 2005-Ohio-4979] lies the rejection of appraisal evidence of the value of the property whenever a recent, arm's-length sale price has been offered as evidence of value.”). (Footnote omitted.) While the appellant alleges through testimony of Mr. Koon and arguments of counsel that the purchase price was for going concern value, all documentation submitted to the county auditor reflects a value for realty only. See *HIN, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 124 Ohio St.3d 481, 2010 Ohio 687.

Appellant did not provide any allocation of the purchase price that was performed contemporaneous with the sale or testimony from someone who was involved with the sale. In fact, both of appellant's witnesses testified that to their knowledge, no breakdown of the total sale price was available. It was only after the sale, in order to challenge the property's value for real property taxation purposes, did the appellant claim that the price allocated to the subject was for a going concern value, a value above the value of the real estate itself. The purchase agreement provides that among other items, the seller was required to deliver a deed, the lease termination agreement, and a bill of sale and assignment “conveying the applicable Landlord Personal Property to Buyer.” Although the record contains a duly executed deed and a copy of the lease termination agreement, no bill of sale was provided or alleged to exist. As such, we are unable to verify which items other than the real property described in the sale documents in fact transferred or the portion of the overall purchase price attributable to those items. We further note that in addition to deductions for personal property and certificates of need, Mr. Koon's valuation includes a deduction for goodwill, which the Supreme Court has found is not an asset separable from the realty. See *Hilliard City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 128 Ohio St.3d 565, 2011-Ohio-2258, ¶ 33.

It is therefore the order of this board that the subject property's true and taxable values, as of January 1, 2011, 2012, and 2013, were as follows:

PARCEL NUMBER

010-196382-00

TRUE VALUE

\$366,640

TAXABLE VALUE

\$128,320

PARCEL NUMBER

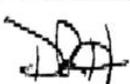
010-198395-00

TRUE VALUE

\$7,123,360

TAXABLE VALUE

\$2,493,180

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