

IN THE SUPREME COURT OF OHIO

16-0735

NOTICE OF APPEAL FROM THE BOARD OF TAX APPEALS

ARC CAFEUSA001, LLC,

Appellant,

v.

Greene County Board of Revision,  
Greene County Auditor, Fairborn City  
School District Board of Education and  
the Ohio Tax Commissioner,

Appellees.

Case No. \_\_\_\_\_

Appeal from the Ohio  
Board of Tax Appeals

BTA Case No. 2015-922

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NOTICE OF APPEAL OF ARC CAFEUSA001, LLC

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FILED  
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CLERK OF COURT  
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

NOTICE OF APPEAL FROM THE BOARD OF TAX APPEALS

ARC CAFEUSA001, LLC,	:	Case No. _____
	:	
Appellant,	:	
	:	Appeal from the Ohio
v.	:	Board of Tax Appeals
	:	
Greene County Board of Revision,	:	
Greene County Auditor, Fairborn City	:	BTA Case No. 2015-922
School District Board of Education and	:	
the Ohio Tax Commissioner,	:	
	:	
Appellees.	:	

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NOTICE OF APPEAL OF ARC CAFEUSA001, LLC

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Appellant, ARC CAFEUSA001, LLC, ("Taxpayer") hereby gives notice of its appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from a Decision and Order of the Board of Tax Appeals ("BTA"), journalized on April 12, 2016, in Case No. 2015-922. A true copy of the BTA's Decision and Order being appealed is attached hereto as "Exhibit A" and is incorporated herein by reference. The Appellant Taxpayer complains of the following errors in the BTA's Decision and Order:

1. The BTA's decision is unreasonable and unlawful because it failed to apply the proper version of R.C. 5713.03 in effect on tax lien date January 1, 2014.
2. The BTA's decision is unreasonable and unlawful because it failed to find the true value of the fee simple estate, as if unencumbered pursuant to R.C. 5713.03 as such statutory provision was applicable to the tax lien

date at issue in this case. The BTA erroneously held that the sale of the subject property, although encumbered by a lease at the time of sale, reflected the fee simple interest when the only evidence in the record clearly demonstrated it did not.

3. The BTA decision is unreasonable and unlawful because it failed to properly apply the changes to R.C. 5713.03 that a sale no longer “shall” be the true value for real estate tax purposes, but that it “may” be considered. While acknowledging that the change in law was applicable to the period at issue, the BTA, nevertheless, held that the change in law has no effect on how it views sales for purposes of determining real property tax value.
4. The BTA’s decision is unreasonable and unlawful because it failed to recognize the value of the underlying lease of the subject property, which affected the sale price and value. See *Rite Aid of Ohio, Inc. v. Washington Cty. Bd. of Revision*, Slip Opinion No. 2016-Ohio 371 and *Steak ‘n Shake, Inc. v. Warren Cty. Bd. of Revision*, Slip Opinion No. 2015-Ohio-4836. The BTA failed to recognize that an adjustment to the sale was necessary so that the sale would reflect “the fee simple estate, as if unencumbered” as required by recently amended R.C. 5713.03.
5. The BTA’s decision is unreasonable and unlawful because the BTA failed to properly adjust the leased fee value to its fee simple value for real estate taxation purposes consistent with Ohio law when such

uncontroverted evidence was provided by the Appellant's expert witness before the BTA.

6. The BTA's decision is unreasonable and unlawful because it failed to consider the uncontroverted appraisal evidence of the fee simple value of the subject property presented by Appellant that constituted sufficient, reliable and probative evidence of value consistent with Ohio law.
7. The BTA's decision and order is unreasonable and unlawful because it is arbitrary, an abuse of discretion, and lacks foundation in law and fact.

Appellant requests that the Court reverse the Decision and Order of the BTA and find that the Appellant has met its burden to establish the fee simple value of the subject property as of January 1, 2014 to be \$810,000, or alternatively \$802,000 based on the adjusted leased-fee sale.

Respectfully submitted,



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**PROOF OF SERVICE UPON OHIO BOARD OF TAX APPEALS**

This is to certify that the Notice of Appeal of ARC CAFEUSA001, LLC was filed with the Ohio Board of Tax Appeals, State Office Tower, 30 East Broad Street, 24th Floor, Columbus, Ohio as evidenced by its date stamp as set forth hereon.



Nicholas M.J. Ray (0068664) COUNSEL OF RECORD

COUNSEL FOR APPELLANT  
ARC CAFEUSA001, LLC

**CERTIFICATE OF SERVICE**

This is to certify that on this 11<sup>th</sup> day of May 2016, a copy of this Notice of Appeal and a copy of the Demand to Certify Transcript were sent via certified mail to:

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COUNSEL FOR APPELLANT  
ARC CAFEUSA001, LLC

**IN THE SUPREME COURT OF OHIO  
(Praecipe)**

ARC CAFEUSA001, LLC,	:	Case No. _____
	:	
Appellant,	:	
	:	
v.	:	Appeal from the Ohio Board of Tax Appeals
	:	
Greene County Board of Revision, Greene County Auditor, Fairborn City School District Board of Education and the Ohio Tax Commissioner,	:	BTA Case No. 2015-922
	:	
Appellees.	:	

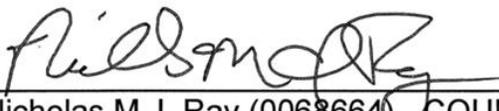
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**DEMAND TO CERTIFY TRANSCRIPT OF RECORD OF PROCEEDINGS**

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To: The Ohio Board of Tax Appeals:

Pursuant to R.C. 5717.04, the Appellant, who has filed a Notice of Appeal with the Supreme Court of Ohio, hereby makes this written demand upon the Ohio Board of Tax Appeals to certify the records of its proceedings, including any original papers and the statutory transcript of the Board of Revision, in *ARC CAFEUSA001, LLC v. Greene Cty. Bd. of Revision* (Apr. 12, 2016), BTA No. 2015-922.

  
\_\_\_\_\_  
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OHIO BOARD OF TAX APPEALS

ARC CAFEUSA001, LLC, (et. al.),

CASE NO(S). 2015-922

Appellant(s),

(REAL PROPERTY TAX)

vs.

DECISION AND ORDER

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

Appellee(s).

APPEARANCES:

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For the Appellee(s)

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Entered Tuesday, April 12, 2016

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

Appellant appeals a decision of the board of revision ("BOR") which determined the value of the subject real property, parcel numbers A02-0002-0040-0-0012-00 and A02-0002-0040-0-0012-01, for tax year 2014. This matter is now considered upon the notice of appeal, the transcript certified by the BOR pursuant to R.C. 5717.01, and any written argument submitted by the parties.

The subject property, a Wendy's fast-food restaurant, was initially assessed a collective true value of \$2,290,650. The appellant filed a complaint with the BOR, which requested a reduction to the subject property's collective value. The affected board of education ("BOE") filed a counter-complaint, which objected to the request.

At the hearing before the BOR, only the appellant appeared to submit argument and evidence into the record. The appellant submitted the report and testimony of appraiser Kelly M. Fried, who developed the sales comparison and income approaches to value, to conclude the value of the subject property to be \$810,000 as of January 1, 2014. Fried testified that she concluded that the transfer of the subject property to the appellant for \$2,290,650 in August 2013 reflected the value of the leased-fee interest because the lease payments were above the market norm. The BOR subsequently issued a decision, which retained the initially assessed value that was reflective of the \$2,290,650 purchase price, and this appeal ensued.

In lieu of attending a hearing before this board, the appellant submitted written argument to fully argue its positions. The appellant argued that Fried's appraisal report and testimony demonstrated that the August 2013 transaction was not an arm's-length transaction of the fee simple interest and, therefore, this board should not rely on such sale to determine value. Instead, the appellant argued, we should rely upon Fried's opinion of value to determine the subject property's value for tax year 2014. Alternatively, the appellant argued that, to the extent that we find the \$2,290,650 sale price to be competent and probative evidence of the subject property's value, this board should adjust the sale price to reflect the value of the fee simple interest.

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. It has long been held by the Supreme Court that "the best evidence of '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. Then, typically, "the only rebuttal lies in challenging whether the elements of recency and arm's-length character between a willing seller and a willing buyer are genuinely present for that particular sale." *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-1473, at ¶13. The court reaffirmed its position in *HIN, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 138 Ohio St.3d 223, 2014-Ohio-523, at ¶14, stating "[t]he only way a party can show that a sale price is not representative of value is to show that the sale was either not recent or not an arm's-length transaction." The opponent of relying upon a reported sale price has the affirmative burden to demonstrate why it does not reflect the property's value. *Cincinnati Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (1997), 78 Ohio St.3d 325, 327. However, when a property has not been the subject of a recent, arm's-length sale or when a sale of a property is not indicative of its value, "an appraisal becomes necessary." *State ex rel. Park Invest. Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410, 412.

We begin our analysis with the transfer of the subject property to the appellant for \$2,290,650 in August 2013. Fried's appraisal report identified the seller as G E Capital Franchise Fin. No one disputed the details of the transaction. However, as previously noted, the appellant argued that that price at which the subject property transferred reflected the leased fee interest, not the fee simple interest.

We first consider whether the August 2013 transaction was conducted at arm's-length. In *Walters v. Knox Cty. Bd. of Revision* (1988), 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." The record is void of any competent and probative evidence that demonstrates that the August 2013 transaction was not an arm's-length transaction. No one with firsthand knowledge of the transaction testified before the BOR or this board. Although the appellant submitted the testimony of Fried in an attempt to rebut the presumptions accorded to the transaction, none of the testimony indicated that either party to the transaction was compelled or under duress to sell or to purchase the subject property, or that the parties to the transaction were related or failed to act in their own self-interest. Furthermore, in *N. Royalton City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 129 Ohio St.3d 172, 2011-Ohio-3092, at ¶29, the Ohio Supreme Court held that "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. See *Walters* at 26 (Douglas, J., concurring in judgment only) (distinguishing 'private sale' transaction from open-market sales and asserting

that '[p]rivate sale transactions which are at arm's-length occur every day')." We conclude, therefore, that the transaction in August 2013 was an arm's-length transaction upon which we may rely to determine the subject property's value for tax year 2014.

The appellant argued that the price reflected on the conveyance fee statement reflected the leased fee interest of the subject property and that the current version of R.C. 5713.03 requires that we value the fee simple interest. We disagree and conclude that the price reflected on the conveyance fee statement reflected the fee simple interest. "The total range of private ownership interests in real property is called the *bundle of rights*," which includes "the right to sell an interest[;] the right to lease an interest[;] the right to occupy the property[;] the right to mortgage an interest[; and] the right to give an interest away[.]" (Emphasis in original.) The Appraisal of Real Estate, 14th Ed., at 5. The record is void of any evidence that the August 2013 transferred anything less than fee simple ownership to the appellant or that the seller, G E Capital Franchise Fin, retained a reversionary interest in the subject property. Although we acknowledge that the appellant has given up "the right to occupy the property," i.e., the subject property is encumbered by a lease, in exchange for rental payments, such right is only one of the bundle of rights of fee simple ownership. The court has recognized "'[a] fee simple' may be absolute, conditional, or subject to defeasance, but the mere existence of encumbrances does not affect its status as fee simple. Black's Law Dictionary (8th Ed.2004) 648-649." *Meijer Stores Ltd. Partnership v. Franklin County Bd. of Revision*, 122 Ohio St.3d 447, 2009-Ohio-3479, at fn. 4. In so doing, in *Meijer*, the court held:

"[T]he possibility of encumbering a property like the one at issue here constitutes -- as a purely factual matter -- one method of realizing the value of legal ownership of the property. See *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-1473, \*\*\*, ¶27 (encumbering property typically represents an owner's attempt to realize the full value of the property'); *AEI Net Lease Income & Growth Fund*, 119 Ohio St.3d 563, 2008-Ohio-5203, \*\*\*, ¶ 21 (sale-leaseback, in its totality, constituted an arm's-length transaction in which seller/lessee and buyer/lessor each pursued the objective to realize value of the realty)." (Internal citations omitted.) *Id.* at ¶23.

Moreover, in *HIN*, supra, the court held:

"Additionally, *HIN* relies on *Alliance Towers, Ltd. v. Stark Cty. Bd. of Revision*, 37 Ohio St.3d 16 \*\*\*, (1988), in support of its position that we must value the property as if unencumbered by the U.S. Bank lease. In *Alliance Towers*, we stated that '[f]or real property tax purposes, the fee simple estate is to be valued as if it were unencumbered.' *Id.* at paragraph one of the syllabus. In *Cummins*, however, we distinguished *Alliance Towers* because it involved a valuation by appraisal, not the validity of a sale price. *Cummins*, 117 Ohio St.3d 516, 2008-Ohio-1473, \*\*\*, at ¶ 15. We found *Alliance Towers* to be inapposite and affirmed that it would never be proper to adjust a recent arm's-length sale price because of an encumbrance." (Internal citations omitted.) *Id.* at ¶ 24.

Likewise, we find that it would be improper to adjust the \$2,290,650 sale price because of the lease.

The appellant relied on recent cases from the court to alternatively argue that the \$2,290,650 sale price should be adjusted downward. See *Steak 'n Shake, Inc. v. Warren Cty. Bd. of Revision*, Slip Opinion 2015-Ohio-4836; *Rite Aid of Ohio, Inc. v. Washington Cty. Bd. of Revision*, Slip Opinion 2016-Ohio-371. However, in those cases, the court specifically discussed the appropriateness of adjusting *comparable* sales of the leased fee interest to reflect the market in which a property unencumbered by a lease would compete. See also *Lowe's Home Ctrs., Inc. v. Washington Cty. Bd. of Revision*, Slip Opinion No. 2016-Ohio-372. That is not the case in this matter and we see no reason to stray from the court's previous holdings in this matter. We conclude, therefore, that the value provided on the conveyance-fee statement, memorializing the August 2013 transaction, reflected the value of the fee simple interest.

Furthermore, we also reject the appellant's argument that changes to the language of R.C. 5713.03 grants discretion to this board and to boards of revision to determine whether to adopt sales to determine the value of real property. As noted above, it is well-established case law that the "best evidence" of a property's value is the amount for which it transfers between two unrelated parties "recent" to tax lien date. See, e.g., *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005-Ohio-4979. Although it referred to the former version, the court has acknowledged that R.C. 5713.03 addresses a county auditor's valuation of real property for tax purposes. *Olentangy Local Schools Bd. of Edn. v. Delaware Cty. Bd. of Revision*, 141 Ohio St.3d 243, 2014-Ohio-4723, ¶24. The court noted that in order "[t]o implement former R.C. 5713.03, this court established "a rebuttable presumption \*\*\* that [a] sale has met all the requirements that characterize true value." Id. at ¶41, quoting *Cincinnati School Dist. Bd. of Edn.*, supra, at 327. Since the statute was amended, however, the court has not specifically addressed the effect of this amendment, though it has commented that the change to the statute could have constituted a clarification of prior law but "may have substantively changed the law." *Sapina v. Cuyahoga Cty. Bd. of Revision*, 136 Ohio St.3d 188, 2013-Ohio-3028, ¶20, fn. 1. See, also, *Akron City School Dist. Bd. of Edn. v. Summit Cty. Bd. of Revision*, 139 Ohio St.3d 92, 2014-Ohio-1588, ¶12, fn. 2. We must find that the changes made to R.C. 5713.03 directing the auditor's valuation process do not overrule the directive consistently set forth by the Supreme Court that this board rely on a recent arm's-length sale of the property if evidence of such a sale is properly before us.

In reviewing this matter, we are mindful of our duty to independently determine the subject property's value. *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1996), 76 Ohio St.3d 13, 15 (BTA must reach its "own independent judgment based on its weighing of the evidence contained in [the BOR] transcript"). In so doing, we find that the appellant failed to rebut the presumptions accorded to the transaction of August 2013. Absent an affirmative demonstration that the August 2013 sale was not a qualifying sale for tax valuation purposes, we find that it was a recent, arm's-length sale upon which we rely to determine the subject property's value for tax year 2013. Furthermore, we will not consider Fried's appraisal report because "[i]t is only when the purchase price does not reflect the true value that a review of independent appraisals based upon other factors is appropriate. *Ratner v. Stark Cty. Bd. of Revision* (1986), 23 Ohio St.3d 59 \*\*\*." *Pingue v. Franklin Cty. Bd. of Revision* (1999), 87 Ohio St.3d 62, 64. See, also, *Cummins*, supra, at ¶23 ("[W]e erred \*\*\*when we authorized the use of appraisals to adjust the price set in a recent, arm's-length transaction. To do so places the cart (appraisal) before the horse (an actual arm's-length sale)."). Additionally, "the mere fact that an expert has opined a different value should not be deemed sufficient to undermine the validity of the sale price as the property value." *Columbus City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, Slip Opinion No. 2016-Ohio-757, ¶20.

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

PARCEL NUMBER A02-0002-0040-0-0012-00

TRUE VALUE

\$1,860

TAXABLE VALUE

\$650

PARCEL NUMBER A02-0002-0040-0-0012-01

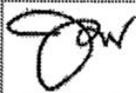
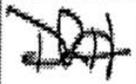
TRUE VALUE

\$2,288,790

TAXABLE VALUE

\$801,080

It is the order of the Board of Tax Appeals that the subject property be assessed in conformity with this decision and order.

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