

GIANT OIL, INC., (et. al.),

CASE NO(S). 2015-930

Appellant(s),

(REAL PROPERTY TAX)

vs.

DECISION AND ORDER

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

Appellee(s).

APPEARANCES:

For the Appellant(s)

- GIANT OIL, INC.
Represented by:
DAVID P. SUICH
MCNAMEE & MCNAMEE, PLL
2625 COMMONS BOULEVARD
BEAVERCREEK, OH 45431

For the Appellee(s)

- ASHLAND COUNTY BOARD OF REVISION
Represented by:
JACKIE L. HAGER
CARLILE PATCHEN & MURPHY LLP
366 EAST BROAD STREET
COLUMBUS, OH 43215

ASHLAND CITY SCHOOL DISTRICT BOARD OF EDUCATION
Represented by:
CHRISTIAN M. WILLIAMS
PEPPLE & WAGGONER, LTD.
5005 ROCKSIDE ROAD, SUITE 260
CLEVELAND, OH 44131-6808



Entered Thursday, April 14, 2016

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

The property owner, Giant Oil, Inc. ("Giant Oil"), appeals a decision of the board of revision ("BOR"), which determined the value of the subject real property, parcel number I25-014-0-0010-00, 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, the record of the hearing before this board, and the written argument of the parties.

The subject's total true value was initially assessed at \$575,120. Giant Oil filed a decrease complaint with the BOR seeking a reduction in value to \$255,000. The appellee board of education ("BOE") filed a countercomplaint in support of maintaining the auditor's values. At the BOR hearing, Giant Oil presented evidence that it purchased the subject property in October 2014 for a total of \$520,000, including equipment and goodwill. Giant Oil asserted that \$255,000 of the sale price was allocated to the subject real property. Giant Oil also offered the testimony and written report of appraiser Dan Miller, MAI, SRA, CVA. Mr. Miller explained that the subject property consists of a gas station with a small convenience

store, and opined that the total true value for the subject real property was \$255,000 as of January 1, 2014. The county's appraiser was also present at the hearing, and indicated that he thought that the initially appraised value for the subject may be high, but that \$255,000 was too low. The BOE did not offer any independent evidence of value, but relied on legal argument and cross-examination of Mr. Miller. Following the BOR hearing, Giant Oil supplemented the record with several additional documents: "Exhibit G," which was an allocation of the purchase price among "Land/Building" and "Equipment/Goodwill" signed by both the buyer and seller during the closing process, two recorded land use restrictions encumbering the subject property, and an addendum to the appraisal. The BOR issued a decision reducing the initially assessed valuation to \$520,000, which led to the present appeal.

At the hearing before this board, Giant Oil again relied on the report and testimony from Mr. Miller, but also presented testimony from its CEO and President, Basem Ali. Mr. Ali discussed the sale and the basis for the allocation of the total purchase price, referring to Appellant's Exhibit 1, to which the appellee parties objected. The attorney examiner reserved ruling on the objection, and allowed Mr. Ali to testify about the document. Mr. Ali explained that Exhibit 1 was not in existence at either the time of the sale or the earlier BOR hearing, and consisted of a list of the values of personal property that transferred with the real property in the October 2014 transaction. Mr. Ali testified that he created the document just prior to the hearing based on his experience, utilizing a number of sources for the replacement costs of the assets, but that it represented the values that he accorded to the items when he negotiated the sale and purchase price allocation at the time of closing. Mr. Ali also said that "Exhibit G," which was provided to the BOR after the hearing, was an allocation of the total purchase price that was made and signed during the closing process. Mr. Ali further stated that he did not believe that the bill of sale included in the purchase contract as it existed at the time of closing allocated any value to specific items of personal property, but indicated that the inventory from the convenience store sold separately and was not included in the \$520,000. Mr. Ali testified that when he leased the operation of the convenience store business, he sold the goodwill associated with the convenience store to the operator. Neither the BOE nor the county appellees presented independent evidence of value, but instead relied on cross-examination of the witnesses and the record from the hearing below. Following the hearing, the parties submitted written argument in support of their respective positions.

At this board's hearing, Giant Oil offered an exhibit, i.e., Exhibit 1, setting forth a value for the goodwill and tangible personal property transferred with the subject real property. The appellee parties objected to this evidence as a violation of R.C. 5715.19(G) and Ohio Admin. Code 5717-1-7(A)(2)(d), at which time, the attorney examiner reserved ruling. Mr. Ali testified that this document was newly-created and not in existence prior to the BOR hearing. Thus, it would not be barred by R.C. 5715.19(G). Although we impress upon the parties the importance of adherence to this board's rules to avoid surprise or ambush at a scheduled hearing, we overrule the appellees' objections in this case. Accordingly, we will consider Exhibit 1 in our analysis, giving it the appropriate weight based on its contents.

"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 ‘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. The existence of a facially qualifying sale may be confirmed through a variety of means, e.g., purchase agreement, deed, conveyance fee statement, property record card. See, e.g., *Worthington City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 124 Ohio St.3d 27, 2009-Ohio-5932; *Mason City School Dist. Bd. of Edn. v. Warren Cty. Bd. of Revision*, 138 Ohio St.3d 153, 2014-Ohio-104. Once the existence of a sale is established, “a sale price is deemed to be the value of the property, and 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, ¶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.” (Emphasis sic.) Accordingly, the affirmative burden clearly rests with the opponent of using a reported sale price 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.

In the present matter, it is undisputed that Giant Oil purchased the subject property from Route 250 Ashland LLC on October 27, 2014 for a total purchase price of \$520,000. There is also no dispute that the sale was a recent arm’s-length transaction. Giant Oil argues, however, that the total sale price does not accurately reflect the value of the subject real property because it included equipment and goodwill.

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. As the court further pointed out in *FirstCal*, supra, it is the purchaser of the property who performs the allocation provided to the auditor and possesses the information necessary to demonstrate the relationship of value to the real property. *Id.* at ¶25.

At the BOR, Giant Oil provided the purchase agreement, which indicates that the total purchase price of \$520,000 included real, personal, and intangible property, though the contract lacked an express allocation to each type of property. In support of its proposed allocation, Giant Oil submitted two allocations that were purportedly made contemporaneous with the closing of the sale: the conveyance fee statement and “exhibit G,” which was apparently an attachment to the purchase contract. The conveyance fee statement indicates that \$265,000 of the total purchase price was the portion paid for items “other than real property” and the total consideration for real property was \$255,000. Exhibit G more specifically indicates that those items other than “Land/Building” included both equipment and goodwill, but provides no further breakdown of those items or the specific items that transferred.

Because the allocation set forth on the conveyance fee statement and Exhibit G to the purchase agreement excluded the value for “goodwill” from the value of the real property, we find that the recorded sale price of \$255,000 is not a reliable indication of value for the subject. In *St. Bernard Self Storage*, supra, the court found that this board correctly found that there was “no evidence in the record to support the existence of a business value that could actually be severed from the real estate and be transferred or retained separately.” *Id.* at ¶24. In this case, Giant Oil has not provided any evidence that the goodwill can be transferred or retained separately from the real property. Although Mr. Ali stated that the operator of the convenience

store could arguably transfer the goodwill to a third party, we find it significant that Giant Oil required the lessee of the real property to purchase the goodwill associated with the subject. As additional support to show that the goodwill value of the business cannot be severed from the real property, we look to Mr. Miller's testimony. Mr. Miller explained that a significant factor in his analysis was not only the size and condition of the subject, but also its location and traffic count. Mr. Miller did not address any value associated with a particular flag at the subject property or any of the comparables. Ostensibly, this was an indication that as a gas station, the subject's value is in its ability to earn revenue through sales, and that ability is directly tied to its location and traffic count. Thus, the goodwill of the business and its ability to earn revenue is directly tied to the real property and cannot be severed, in this case. Accordingly, we cannot rely on the allocation set forth on the conveyance fee statement and Exhibit G because it excludes items that cannot be severed from the real property from its allocated value.

Giant Oil also provided an exhibit at this board's hearing, i.e., Exhibit 1, which purports to allocate the value of the tangible personal property and goodwill among each item transferred during the sale. While we will consider this document as a supplement to Mr. Ali's testimony because it is based on his recollection of the value attributable to each item, we do not find it sufficient to corroborate Giant Oil's allocation. First, we note that the total value set forth in the exhibit is \$255,440, almost \$10,000 less than the recorded amount. Second, it is apparent that Mr. Ali included items as tangible personal property that should be included in the value of the real property. For example, Mr. Ali separated the values he attributed to the HVAC system and septic tank from the real property, though they are clearly fixtures that should be included in the value of the subject. See R.C. 5701.02(A) (defining "real property" to include the "land itself, *** all growing crops, *** all buildings, structures, improvements, and fixtures of whatever kind on the land, and all rights and privileges belonging or appertaining thereto."); R.C. 5701.02(C) ("'Fixture' means an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the realty and not the business, if any, conducted by the occupant on the premises.").

We recognize that the list contains several items that would be considered equipment and properly valued separate from the realty. Exhibit 1, however, does not meet the standard of "corroborating indicia" of Giant Oil's allocation. Instead, Exhibit 1 is merely a written statement meant to supplement Mr. Ali's testimony and not a contemporaneous document from the time of the sale. Additionally, it is unclear whether the items in the list are even an accurate representation of the personal property that transferred at the time of the sale. The county appellees pointed to at least one potential discrepancy between the number of gasoline dispensers on the hearing exhibit and the number photographed in Mr. Miller's appraisal report. Moreover, even if we were to accept the list as an accurate representation of the personal property transferred, the basis for the values assigned to each value is unclear. Mr. Ali indicated that the values were based on his experience in the industry, but he was not introduced as an expert in valuing such property and stated that the replacement costs came from a variety of sources. None of these sources was provided, and the resulting numbers are unreliable hearsay. See Evid.R. 802. Furthermore, no explanation was presented for applying a 60% depreciation figure for each reported replacement value. Accordingly, we find that Giant Oil has failed to provide corroborating evidence of its requested allocation, or sufficient evidence to support any reduction of the full \$520,000 sale price to account for the items other than real property. As such, we find that the full sale price is properly attributable to the subject real property.

Giant Oil further relied on the appraisal analysis of Mr. Miller to provide an opinion of value for the subject property. Because the subject property was the subject of a qualifying sale, we need not address Mr. Miller's appraisal. Once evidence of a qualifying sale has been presented, "[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. ***" *Pingue v. Franklin Cty. Bd. of Revision* (1999), 87 Ohio St.3d 62, 64. (Citation omitted.) See, also, *Cummins*, supra, at ¶13 ("At the very heart of *Berea* 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.) The court recently reiterated the rule expressed in *Cummins*, stating that "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,” clarifying that the information in the report may be introduced to challenge recency, arm’s-length character, or voluntariness of the sale. *Columbus City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, Slip Opinion No. 2016- Ohio-757, ¶20. As Giant Oil has not challenged any of these aspects of the sale, Mr. Miller’s opinion of value is irrelevant to our analysis.

To the extent that Mr. Miller’s report was offered to show the proper allocation of the overall sale price to the subject real property by opining the value of the real property rather than reducing the sale price by the value of the items other than real property, we find that it is not a reliable indication of value. In *Cardinal Federal S. & L. Assn. v. Bd. of Revision* (1975), 44 Ohio St.2d 13, paragraphs two and three of the syllabus, the court held that “[t]he Board of Tax Appeals is not required to adopt the valuation fixed by any expert or witness” and that it “is vested with wide discretion in determining the weight to be given to evidence and the credibility of the witnesses which come before [it].” Indeed, this board may accept all, part, or none of an appraiser’s opinions. *Witt Co. v. Hamilton Cty. Bd. of Revision* (1991), 61 Ohio St.3d 155; *Fawn Lake Apts. v. Cuyahoga Cty. Bd. of Revision* (1999), 85 Ohio St.3d 609.

Mr. Miller testified that he relied on the sales comparison approach to determine the value of the subject real property. Mr. Miller explained that although he performed the income approach, he did not rely on it and instead used it to test the reasonableness of his conclusion utilizing the sales comparison approach. As such, we will not review Mr. Miller’s income analysis. With respect to his sales comparison approach, Mr. Miller considered the sales of five properties that he chose based on their size and location, but also their daily traffic count. Without making any adjustments to the sales, which occurred from February 2008 through May 2013, Mr. Miller calculated the price per square foot for each. Mr. Miller then reconciled the sales data, indicating that he gave the 2008 sale the least weight because it occurred during superior market conditions and that he gave most weight to his second sale comparable, which transferred at \$192.90 per square foot, based on its traffic count, location, and physical features. Mr. Miller then concluded to an indicated value of \$198.60 per square foot, or a total of \$255,000, as of January 1, 2014, perhaps coincidentally the same value as the recorded sale price from the October 2014 transaction.

On cross-examination, Mr. Miller acknowledged that the first sale took place almost six years before the tax lien date, but stated that the market is not appreciating or depreciating. Mr. Miller also agreed that his second sale, which was located in Lorain County, was finalized in 2012, but that was upon the completion of a land installment contract signed in 2005. Mr. Miller did not dispute that the third sale involved seller financing and was located in Cuyahoga County. Mr. Miller likewise acknowledged that the fourth and fifth sales, located in Stark County and Ashland County, respectively, were foreclosure sales. Troublingly, when first confronted with these challenges at the BOR, Mr. Miller was seemingly unaware of some of these facts despite his claim to have spoken with parties involved in each transaction. Mr. Miller stated that when he looked at each sale, even knowing that there may have been a distressed aspect to it, he considered it based on its individual circumstances and considered the price per square foot when compared to the remaining data set. In this case, however, it appears that each sale involved some element that calls into question the utility of its reported price.

This board recognizes that inherent in the appraisal process is the fact that an appraiser must necessarily make a wide variety of subjective judgments in selecting the data to rely upon, effect adjustments deemed necessary to render such data usable, and interpret and evaluate the information gathered in forming an opinion. See, e.g., *Developers Diversified Realty Corp. v. Ashland Cty. Bd. of Revision* (Mar. 17, 2000), BTA Nos. 1998-A-500, et seq., unreported; *Armco Inc. v. Richland Cty. Bd. of Revision* (Nov. 19, 2004), BTA No. 2003-A-1058, unreported. In this instance, however, we are unable to review those adjustments and fully consider the subjective judgments Mr. Miller made with respect to his data because he did not provide any explanation. When he was asked by the attorney examiner about his adjustments, Mr. Miller merely clarified that he did a qualitative relative comparison and that a demonstration of his adjustments was not located in his report. We find this especially problematic in this case where each of the comparable sales had some question about its reliability because they were located in different geographic areas, with varying degrees of uncertainty as to their arm’s-length nature, and took place over a significant time span.

It appears that Mr. Miller did not determine the reliability of each sale on its own merits. Rather, he used the group of unadjusted questionable sales as a whole to support his inclusion of each one. We find this analysis does not meet the standard necessary for this board to consider Mr. Miller's conclusion a reliable indication of value. Accordingly, even if this board were to consider Mr. Miller's opinion, we would find that it does not support the value requested by Giant Oil.

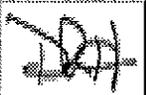
It is therefore the order of this board that the true and taxable values of the subject property, as of January 1, 2014, were as follows:

TRUE VALUE

\$520,000

TAXABLE VALUE

\$182,000

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