

11-1355

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

TARGET CORPORATION,
Petitioner,

v.

CIVIL ACTION NO. 11-CAP-3

THE HONORABLE KATHIE HOFFMAN
ASSESSOR, OHIO COUNTY, and

THE COUNTY COMMISSION OF
OHIO COUNTY, WEST VIRGINIA
Respondents.

CIRCUIT COURT
OF OHIO COUNTY
AUG 23 2011 10:00 AM

ORDER

On the 18th day of August, 2011, a hearing was held in the above captioned matter in order to hear oral arguments on Target Corporation's appeal to challenge the appraisal of the Target store located in the Highland's development in Ohio County, West Virginia. After considering all of the pleadings, oral arguments, and pertinent legal authority, the Court is prepared to issue a decision as set forth below.

FACTUAL AND PROCEDURAL HISTORY

Petitioner, Target Corporation ("Target"), is the owner of a store located in the Highland's development in Ohio County, West Virginia. The Petitioner is appealing the Ohio County Assessor's valuation of this property for *ad valorem* tax purposes for the 2011 tax year.

The Ohio County Assessor ("Assessor") valued the property at \$17,043,600 for the tax year 2011. To obtain this value, the Assessor considered the cost, income and market approaches and applied the cost approach based on the relatively new construction and lack of other relevant data that would involve either the income or market approach. The Assessor's appraised value of the property for the tax year 2010 was set at \$16,757,000. However, this appraised value was reduced for the 2010 tax year to \$12,975,300 through an exoneration by the Ohio County Commission ("Commission"). The record reflects that there was no agreement or understanding that the exoneration would apply to future tax years. On the other hand, Target

contends that the fair market value of the property is \$9,100,000 based upon Target's appraiser using the cost approach, sales comparison approach and income approach.

The Commission, sitting as the Board of Equalization and Review, adopted the Assessor's valuation of \$17,043,600 for the tax year 2011. Thereafter, Target timely filed its Petition for Appeal pursuant to W.Va. Code § 11-3-25.

STANDARD OF REVIEW

(A) "[J]udicial review of a decision of a board of equalization and review regarding a challenged tax-assessment valuation is limited to roughly the same scope permitted under the West Virginia Administrative Procedures Act, W. Va. Code Ch. 29A. *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W.Va. 250, 255, 539 S.E.2d 757, 762 (2000).

(B) The West Virginia State Administrative Procedures Act provides under W.Va. Code §29A-5-4(g) that: "The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

(C) An assessment made by a board of review and equalization and approved by the circuit court will not be reversed when supported by substantial evidence unless plainly wrong. Syl. Pt. 1, *Stone Brooke Ltd. Partnership v. Sisinni*, 224 W.Va. 691, 688 S.E.2d 300 (2009).

(D) When a circuit court reviews an appraisal of commercial real property made for *ad valorem* taxation purposes, the court shall, in its final order, make findings of fact and

conclusions of law addressing the assessing officer's consideration of the required appraisal factors set forth in W. Va. C.S.R. §§ 110-1P-2.1.1 to 2.1.4 (1991). Syl. Pt. 7, *Stone Brooke Ltd. Partnership v. Sisinni*, 224 W.Va. 691, 688 S.E.2d 300 (2009).

(E) A taxpayer challenging an assessor's tax assessment must prove by clear and convincing evidence that such tax assessment is erroneous. Syl. Pt. 6, *Stone Brooke Ltd. Partnership v. Sisinni*, 224 W.Va. 691, 688 S.E.2d 300 (2009).

DISCUSSION

Target contends that the valuation of the property for the 2011 tax year was excessive. In support of this contention, Target sets forth the following arguments:

- (1) That the Respondents' appraisal is excessive;
- (2) That the Respondents violated Target's right to equal and uniform taxation of its property throughout West Virginia;
- (3) That the Respondents increased the value of the target property without giving proper notice pursuant to W.Va. Code § 11-3-2a of a 10% increase from the previous year; and
- (4) That the designation of a County Commission as the Board of Equalization and Review inherently denies Target its right to due process.

The Court will address each of these arguments herein below.

(1) That the Respondents' appraisal is excessive.

Target claims that it cost \$6,200,000 to construct the building in 2006. The Assessor's appraised value of the property for the tax year 2010 was set at \$16,757,000. However, this appraised value was reduced for the 2010 tax year to \$12,975,300 through exoneration by the Commission. Thereafter, the Assessor valued the property at \$17,043,600 for the tax year 2011 without any remodeling or additions being made to the property. Target maintains that the Assessor's values for the property in question are incorrect and that an increase of approximately \$4 million in value from 2009 to 2011 is unexplained. Target is critical of the

methods used by the Assessor for determining the appraised value. The Respondents reply to this contention is that the methodology used by the Assessor is consistent with the methods proscribed in W. Va. C.S.R. §§ 110-1P-2.

After review of the record before the Board of Equalization and Review, the Court FINDS that the Assessor properly considered the required appraisal factors set forth in W. Va. C.S.R. §§ 110-1P-2. In support of its finding, the Court turns to the testimony of Deputy Assessor Jeff Prettyman. Deputy Assessor Prettyman acknowledged that he considered the three methods suggested by the state rules, those being the cost approach, income approach and market (data) approach. He selected the cost approach as the method of appraisal for this particular property because it was a very new building. He opined that the cost approach was chosen because there were "no like sales" and income figures were not provided by Target. Deputy Assessor Prettyman testified that he considered all of the items in W. Va. C.S.R. §§ 110-1P-2 promulgated in 2010. In addition, he testified that he considered the economic obsolescence and functional obsolescence in determining the appraised value.

(2) That the Respondents violated Target's right to equal and uniform taxation of its property throughout West Virginia

Target asserts that the Ohio County appraisal is in excess and unequal as compared to the appraisals of Target stores in other counties at a value in excess of what other county assessors have determined. Respondents counter this assertion by stating that assessments in other counties are irrelevant in determining the valuation of property in Ohio County.

The equal and uniform clause of *Section 1 of Article X of the West Virginia Constitution* requires a taxpayer whose property is assessed at true and actual value to show more than the fact that other property is valued at less than true and actual value. To obtain relief, he must prove that the undervaluation was intentional and systematic. *Syl. Pt. 1, Kline v. McCloud* 174 W.Va. 369, 326 S.E.2d 715 (1984). Target's argument is that the Assessor knew the valuations of Target stores in other counties and regardless of that

knowledge imposed a higher assessment on the Ohio County store. This argument must fail because Target must show more than the fact that the other Target stores throughout the state were assessed a lower figure. In addition, the record reflects that the Assessor proscribed to the appropriate methods, by considering the required appraisal factors outlined in W. Va. C.S.R. §§ 110-1P-2. to determine the valuation of Target's property in order to obtain a just valuation of the property. Thus, the Court FINDS that Target's right to equal and uniform taxation of its property in Ohio County was not violated.

(3) That the Respondents increased the value of the target property without giving proper notice pursuant to W.Va. Code § 11-3-2a of a 10% increase from the previous year.

West Virginia Code §11-3-2a provides in part that: "If the assessor determines the assessed valuation of any item of real property appraised by him or her is more than ten percent greater than the valuation assessed for that item in the last tax year, the increase is \$1,000 or more and the increase is entered in the property books as provided in section nineteen of this article, the assessor shall give notice of the increase to the person assessed or the person controlling the property as provided in section two of this article..."

Target complains that the Assessor failed to give proper notice of a 10% increase from the previous year. Target contends that the appraised value for the 2011 tax year was \$17,043,600, which was more than a 10% increase of the 2010 tax year appraisal in the amount of \$12,975,300. Respondents maintain that the appraised value for the 2010 tax year was actually \$16,757,000 in that a settlement agreement was reached between the parties to lower the appraised value to \$12,975,300, which was accomplished through an exoneration by the Commission.

As set forth above, the record reflects that there was no agreement or understanding that the exoneration would apply to future tax years. Consequently, the logical conclusion is that the primary basis for the exoneration was to provide Target a reduction in the amount of property tax to be paid for that year (i.e., tax year 2010). Regardless, Target was on notice of both

appraised values for tax year 2010 as well as the 2011 appraised value prior to the hearing before the Board of Equalization and Review. Target had prior notice of all appraised values prior to the hearing and was provided a hearing to contest the increase in the appraised value for the tax year 2011. *Assuming arguendo* that a technical error of the statute did occur, it would be considered as harmless error since Target's substantial rights were not affected by the error. Therefore, Target's was provided adequate notice to prepare an appeal and was not prejudiced.

(4) That the designation of a County Commission as the Board of Equalization and Review inherently denies Target its right to due process.

Target urges the Court to recognize that a conflict of interest exists by the designation of the County Commission as the Board of Equalization and Review.

W. Va. Code § 11-3-24 (1979) (Repl. Vol. 2008), which establishes the procedure by which a county commission sits as a board of equalization and review and decides taxpayers' challenges to their property tax assessments, is facially constitutional." Syl. Pt. 4, *In re: Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W.Va. 14, 672 S.E.2d 150 (2008). In its Memorandum of Law, Target candidly states the record of the proceedings in this case before the Ohio County Commission sitting as a Board of Equalization and Review did not disclose any demonstrated bias on the part of the commissioners. Therefore, because Target has failed to demonstrate actual bias on the part of the Board of Equalization and Review, Target was not denied due process of the law in this matter.

CONCLUSIONS OF LAW

1. The assessment made by the Ohio County Board of Review and Equalization for the tax year 2011 is supported by substantial evidence.
2. The methods utilized by the Assessor in valuing the Target property is consistent with the required appraisal factors set forth in W. Va. C.S.R. §§ 110-1P-2, et. seq.

3. Target failed to prove by clear and convincing evidence that such tax assessment is erroneous.

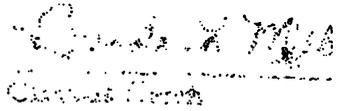
WHEREFORE, it is **ORDERED, ADJUDGED, and DECREED** that Target's Petition For Appeal is hereby **DENIED** for the reasons set forth above. The Petitioner's exception and objection to this ruling is noted.

The Clerk of the Circuit Court shall forward an attested copy of this Order to all counsel of record.

ENTERED this 6th day of September, 2011.


MARTIN J. GAUGHAN, JUDGE

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Circuit Clerk