15-0888

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

IN RE TAX ASSESSMENT
OF CABELA'S RETAIL, INC.,

Petitioner,

Civil Action Nos: 09-CAP-6
10-CAP-8

ORDER

The County Commission of Ohio County, sitting as the Board of Equalization and Review (hereinafter "Board"), denied Cabela's Retail Inc.'s (hereinafter "Cabela's") challenge to the value of its real property established by the Ohio County Assessor for the 2009 tax year. Counsel have agreed that this Order shall also control the 2010 tax assessment for the same parcels and improvements.

On July 25, 2011, the Court remanded this matter to the Board because the Assessor failed to place any evidence on the record to show whether he considered the required appraisal factors set forth in W.Va. C.S.R. §§110-1P-2.1.1 to 2.1.4 (1991). On February 28, 2013 a new hearing was conducted before the Board of Equalization and Review. The parties have filed their supplemental briefs and the matter is now ripe for ruling.

The pertinent facts for the disputed appraised value of Cabela's property are:

1. 2009 tax year: $52,332,200 (land $14,736,800 for 33.52 acres and improvements $37,595,400, which primarily includes a building of 180,656 square feet and an extensive parking area).

2. 2010 tax year: $50,085,900 (land value $13,463,600 and improvements $36,622,300.

3. The parties do not dispute the valuation of the land.

In a previous order entered in this matter the Court held that the "cost approach was the most appropriate method for valuing the subject property was correct and neither arbitrary, capricious nor unreasonable," but remanded because the Assessor had not made a sufficient record as to whether she had considered all of the requisite factors of the cost-based method set forth in W. Va. C.S.R. 110-1P-2.1.4. For both 2009 and 2010, the Assessor followed the Courts holding and chose the cost-based or replacement-based methodology for the appraisal of the building.

The Assessor's argument:

Cabela's failed to overcome the presumption by clear and convening evidence that the 2009 and 2010 appraisals are erroneous. At the remand hearing, Jeff Prettyman, the Assessor's in-house[1] appraiser, testified that a cost-based or replacement-based methodology of appraisal was undertaken by a thorough inspection of the property, taking into consideration wall height, fit and finish and external improvements, among other things. Mr. Prettyman testified

[1] Jeff Prettyman is the commercial appraiser for the Ohio County Assessor's office. While he does not have the variety of certifications and trainings of private appraisers he is qualified under West Virginia law, by training and otherwise, to perform his job.

that he factored the square footage of the building, the type of building as well as the construction materials-- all undertaken through a state-mandated multiplier system. The physical depreciation of the building was factored in accord with a state-mandated software formula that depreciates the building annually. It is the Assessor's position that all of the required factors set forth in W.Va. C.S.R. 110-1P-2.1.1 to 2.1.4 have been considered.

Cabela's argument:

The cost-based appraisal technique was chosen by the appraiser- not because it was the most reliable- but because it was the only technique available with his limited resources. No evidence was proffered by the Assessor to show that she considered the required appraisal factors. The Appraiser cannot explain which factors her office utilized, or her findings with regard to the factors, and how the factors impacted the overall tax assessment.

FACTS IMPORTANT TO THE COURT'S DECISION

When Cabela's building was built in 2004, it was designed and constructed specifically for Cabela's retail purpose. All of Cabela's thirty eight stores in the continental United States are similarly constructed and are all distinctive to their brand. The Wheeling store is recognized as having a showroom that is an educational and entertainment attraction, featuring a décor of museum-quality, animal displays, huge aquariums, a mountain and trophy animals interacting in realistic re-creations of their natural habitats.

Mr. Prettyman obtained an appraised value for the building by using a cost-based or replacement-based methodology. He conducted a thorough inspection of the building, took into consideration wall height, fit and finish and external improvements and he then yearly deprecated the appraised value of the building to find the value for the tax years in issue. Such factors as square footage, condition of the building, the type of building, and materials used in the building are used in this process through the use of the state mandated computer program that allows multiplication factors to be assigned to compute the value of the property. This same computer program factors in the state mandated depreciation and the county modifier that adjusts construction costs by county. Mr. Prettyman also considered functional[2] and economic[3] obsolescence but rejected any depreciation based upon functional or economic obsolescence because the subject building was only five years old and there did not appear to be any external factors affecting the value of the business. Mr. Prettyman also rejected the concept of "super-adequacy" (a building larger than needed) in evaluating the depreciation of the building. Mr. Prettyman's reasoning was that because the building was only five years old that they wouldn't have built it way too large and therefore, he did not make any adjustments.

Cabela's expert, Jay Goldman is well qualified. He holds an undergraduate degree in real estate; an undergraduate degree in business; a juris doctor degree;

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[2] Functional obsolescence was defined by Mr. Prettyman as a building whose use and style has become outmoded.

[3] Economic obsolescence was defined by Mr. Prettyman as a building whose use has become substantially impaired by external factors such as legislation or environmental concerns.

is a member of the Society of Industrial and Office Realtors (SIOR); CCIM Institute (CCIM) as a General Certified Appraiser in West Virginia; is a member of The Appraisal Institute (MAI); and The Counselors of Real Estate (CRE).

Mr. Goldman criticized as inadequate the use of a static percentage reduction as utilized by the county for depreciation because it fails to recognize that some items depreciate faster than others and it makes no adjustment for functional[4] and economic obsolescence. He agreed with Mr. Prettyman that there is no external obsolescence, but the Assessor's valuation did not factor in short term depreciation items or functional obsolescence, and to that extent it was inadequate.

Mr. Goldman discussed several areas of functional obsolescence including 1) market for big box stores declining because of increased internet sales; 2) Cabela's construction of the building, including the large square footage, high grade material, unusual amenities. Mr. Goldman acknowledged that appraisers have to exercise their own subjective judgment, based upon the best information available, when making adjustments like depreciation.

WEST VIRGINIA LAW

West Virginia recognizes a presumption that valuations for taxation purposes fixed by an assessor are correct. The taxpayer has the burden of challenging the assessment and has to demonstrate by clear and convincing evidence that the tax assessment is erroneous. See, Syllabus Point 2, in part,

[4] Mr. Goldman referred to functional obsolescence as "something that could be considered a super-adequacy or something that somebody wanted in particular that the market will not reimburse them for."

Western Pocahontas Properties, Ltd. v. County Commission of Wetzel County, 189 W.Va. 322, 431 S.E.2d 661 (1993).

This Court is confined to determining whether the challenged property valuation is supported by substantial evidence or is otherwise in contravention of any regulation, statute, or constitutional provision. County tax assessors are fundamentally bound by statute to ascertain the "true and actual value" of all property. See, W. Va. Code § 11-3-1 (1977). Such value is defined as "the price for which such property would sell if voluntarily offered for sale by the owner thereof...." Id. The regulations adopted by the Tax Commissioner respecting the valuation of commercial and industrial property reflect this mandate:

> "The appraised value (market value) of commercial and industrial real property is the price at or for which the property would sell if it was sold to a willing buyer by a willing seller in an arms-length transaction without either the buyer or the seller being under any compulsion to buy or sell." 110 W. Va.C.S.R. § 1P-2.1.1.

The "cost approach" to appraising property is defined as the appraisal process in which replacement cost of improvements, less all types of depreciation, is added to a land value in determining an estimate of the fair market value for improved real property. *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 539 S.E.2d 757, 208 W.Va. 250 (2000). In applying the cost approach the Tax Commissioner will consider three (3) types of depreciation: physical deterioration, functional obsolescence and economic obsolescence.

Additionally, 110 W. Va. C.S.R. §1P-2.1.3[5] recognizes other important considerations affecting the value of land including: location, size, shape, topography, accessibility, present use, highest and best use, easements, zoning, availability of utility, income imputed to land and supply and demand for land of a particular type. Each of these factors should be considered, although some may be given more weight than others. It is recognized that the assessor necessarily has some discretion to decide what weight will be given to all the given factors. The appraisal criteria can also take into account, "[t]he value of such property to its owner," W. Va.C.S.R. § 110-1P-2.1.1.7, suggesting that a particular parcel of property may be valued at one amount by its owner while it may be valued differently by persons other than its owner.

Cabela's poses unique valuation problems: It is unquestioned that there is nothing like a Cabela's in Ohio County. It is more than a retail store, it is a

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[5] W. Va. C.S.R. § 110-1P-2 (1991)

In determining appraised value, primary consideration shall be given to the trends of price paid for like or similar property in the area or locality wherein such property is situated. Additionally, for purposes of appraisal of any tract or parcel of real property used for commercial or industrial purposes, including chattels real, *the appraisal shall consider the following factors:*

The location of such property;

Its site characteristics;

The ease of alienation thereof, considering the state of its title, the number of owners thereof, and the extent to which the same may be the subject of either dominant or servient easements;

The quantity of size of the property and the impact which its sale may have upon the surrounding properties;

If purchased within the previous eight years, the purchase price thereof and the date of each such purchase;

Recent sale of, or other transactions involving, comparable property;

The value of such property to its owner;

The condition of such property;

The income, if any, which the property actually produces and has produced within the next preceding three (3) years; and

Any commonly accepted method of ascertaining the market value of any such property, including techniques and method peculiar to any particular species of property if such technique or method is used uniformly and applied to all property of like species.

distinctive tourist destination. The amenities are super-adequate for a purpose other than Cabela's. Other "warehouse" type stores such as Lowe's, and Home Depot have none of the niceties of the Cabela building. Other soft good retailers such as Kohl's and Steve and Barry's also lack the opulence of the retail space and the massive square footage that Cabela's commands. All of the amenities possessed only by the Cabela's store were not used by Mr. Prettyman when he refused to utilize the market approach appraisal method for the Cabela's property.

Mr. Prettyman testified, although without much elaboration, that he considered the factors in W. Va. C.S.R. § 110-1P-2 (1991). Specifically, he testified that he considered, but rejected any functional obsolescence. However, it appears that his only consideration on functional obsolescence was that the store was not "too big" for what is was originally built but, functional obsolescence clearly entails far more than just size. However, the Court is bound by the law and cannot substitute its own judgement when such a heavy burden is born by the taxpayer. "Arbitrary or unjust action by an assessor in fixing the value of land must be shown by *clear and cogent proof* in order that the complaining taxpayer may be given relief from allegedly excessive valuation." Syl Pt. 2, *Bankers Pocahontas Coal Co. v. Cnty. Court of McDowell Cnty.*, 135 W. Va. 174, 174, 62 S.E.2d 801, 802 (1950) (emphasis added).

Even Cabela's expert recognizes that depreciation and its application is subjective. There is no bright line rule as to how to apply depreciation, only that

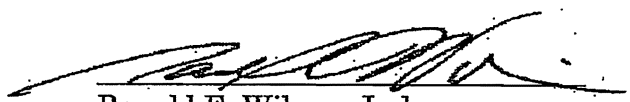
it is required to be considered. It is clear from the testimony that the Assessor did, in fact, consider depreciation as required, but then rejected it. Therefore, it is the finding of the Court that the Cabela's has failed to show by clear and convincing evidence that the Assessors valuation of the Cabela's property for the years 2009 and 2010 was arbitrary or unjust and therefore the valuations are hereby AFFIRMED.

IT IS SO ORDERED.

This matter shall be stricken from the active docket of the Court.

Copies of this Order have been transmitted by this Court to: Marc E. Williams, Esq., 949 Third Avenue, Suite 200, Huntington, WV 25701; Don Tennant, Esq., 38 Fifteenth Street, Suite 100, Wheeling, WV 26003; Pat Casey, Esq., 1140 Chapline Street, Wheeling, WV 26003.

ENTER this 17th day of August, 2015.



Ronald E. Wilson, Judge