

## OHIO BOARD OF TAX APPEALS

Board of Education of the	)	CASE NO. 2006-H-1740
Kettering City Schools,	)	
	)	(REAL PROPERTY TAX)
Appellant,	)	
	)	DECISION AND ORDER
vs.	)	
	)	
Montgomery County Board of Revision,	)	Remanded upon Settlement of Appeal
Montgomery County Auditor, and GE	)	June 4, 2009
Capital Franchise Finance Corporation,	)	Ohio Supreme Court No. 2008-2058
	)	
Appellees.	)	

### APPEARANCES:

For the Appellant Board of Education	-	Rich, Crites & Dittmer, LLC Mark H. Gillis 300 East Broad Street, Suite 300 Columbus, Ohio 43215
For the County Appellees	-	Mathias H. Heck, Jr. Montgomery County Prosecuting Attorney Nolan Thomas Assistant Prosecuting Attorney P.O. Box 972 301 W. Third Street Dayton, Ohio 45422
For the Appellee Property Owner	-	Siegel Siegel Johnson & Jennings Co., LPA Nicholas Ray 3001 Bethel Road, Suite 208 Columbus, Ohio 43220

Entered September 23, 2008

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

The Board of Education of the Kettering City Schools (“BOE”) appeals from a decision of the Montgomery County Board of Revision (“BOR”), in which the BOR determined the true value of permanent parcel number J44-041-03-0017 to be \$369,940 for tax year 2005. The BOE argues that the correct true value should be \$870,680.

The contested parcel is improved with a building being used as a Taco Bell restaurant. Statutory transcript (“S.T.”) at Exs. C-D. For tax year 2005, the auditor valued the subject property at \$369,940. The BOE subsequently filed a complaint with the BOR, seeking an increase in the subject property’s value to \$870,680. Appellee GE Capital Franchise Finance Corporation (“property owner”) filed a counter-complaint to maintain the auditor’s value.

At the BOR hearing, the BOE presented a copy of a real property conveyance fee statement and a limited warranty deed, which show that the subject sold on May 27, 2005 for a total purchase price of \$870,680. S.T. at Ex. A. The BOE argued that the sale price should be adopted as the true value of the subject. S.T. at Ex. D, audiotape recording of BOR hearing. In response, the property owner’s counsel argued that the sale price does not represent the subject’s true value since the transfer was structured as a sale-leaseback transaction. Id. On review, the BOR decided to retain the auditor’s value of \$369,940. The BOE now argues on appeal that the BOR erred in not accepting the sale price.

This matter is submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to this board by the BOR, and the briefs submitted by the parties. Although accorded an opportunity to present additional evidence at a hearing before this board, the parties waived their appearance. This board will, therefore, conduct a de novo review of the record established before the board of revision, consistent with the Supreme Court’s standard enunciated in *Black v.*

*Cuyahoga Cty. Bd. of Revision* (1985), 16 Ohio St.3d 11, 13-14, and *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1996), 76 Ohio St.3d 13, 15.

We begin our review of this matter by noting that a party who asserts a right to an increase or decrease in the value of real property has the burden to prove the right to the value asserted. *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1994), 68 Ohio St.3d 336; *Crow v. Cuyahoga Cty. Bd. of Revision* (1990), 50 Ohio St.3d 55; *Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision* (1988), 37 Ohio St.3d 318. Consequently, it is incumbent upon an appellant challenging the decision of a board of revision to come forward and offer evidence that demonstrates its right to the value sought. *Cleveland Bd. of Edn.*, supra; *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493. Once an appellant has presented competent and probative evidence of true value, other parties asserting a different value then have a corresponding burden of providing sufficient evidence to rebut the appellant's evidence. *Springfield Local Bd. of Edn.*, supra; *Mentor Exempted Village Bd. of Edn.*, supra. Accordingly, this board must proceed to examine the available record and to determine value based on the evidence before it. *Coventry Towers, Inc. v. Strongsville* (1985), 18 Ohio St.3d 120; *Clark v. Glander* (1949), 151 Ohio St. 229. In doing so, we will determine the weight and credibility to be accorded to the evidence presented. *Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision* (1975), 44 Ohio St.2d 13.

The BOE presented copies of a real property conveyance fee statement and limited warranty deed evidencing the transfer of the subject property on May 27,

2005 for a total purchase price of \$870,680. S.T. at Ex. A. The BOE contends that this sale constitutes a valid, recent, arm's-length sale, and, as such, the transfer price remains the best evidence of the value of the subject property as of January 1, 2005.

We agree.

R.C. 5713.03 provides, in pertinent part, that:

“In determining the true value of any tract, lot, or parcel of real estate under this section, if such tract, lot, or parcel has been the subject of an arm's length sale between a willing seller and a willing buyer within a reasonable length of time, either before or after the tax lien date, the auditor shall consider the sale price \*\*\* to be the true value for taxation purposes.”

As the party asserting that the valuation determined by the BOR should be increased, the BOE bears the burden of proving that the value it alleges should be the true value. The BOE met that burden by introducing documents establishing that the property sold on May 27, 2005 for the amount of \$870,680. *Cleveland Municipal School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 107 Ohio St.3d 250, 252, 2005-Ohio-6434. It is well established that when property has been the subject of a recent arm's-length sale between a willing buyer and a willing seller, the sale price of the property shall be the true value for taxation purposes.<sup>1</sup> *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 118 Ohio St.3d 45, 2008-Ohio-1588; *Rhodes v.*

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<sup>1</sup> We find the evidence of the sale of the subject five months after the tax lien date is sufficiently recent for tax valuation purposes. See R.C. 5713.03; *New Winchester Gardens, Ltd. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 36; *Hilliard City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1990), 53 Ohio St.3d 57; *Bd. of Edn. for Orange City School Dist. v. Cuyahoga Cty. Bd. of Revision* (May 17, 2002), BTA Nos. 2000-R-880, et seq., unreported; *Equity Strongsville II. v. Cuyahoga Cty. Bd. of Revision* (Feb. 2, 1996), BTA Nos. 1994-M-163, et seq., unreported.

*Hamilton Cty. Bd. of Revision*, 117 Ohio St.3d 532, 2008-Ohio-1595; *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-1473; *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 271-272, 2005-Ohio-4979; *Zazworsky v. Licking Cty. Bd. of Revision* (1991), 61 Ohio St.3d 604; *Conalco v. Bd. of Revision* (1977), 50 Ohio St.2d 129, at the syllabus.

Although the presumption exists that the sale price is the best evidence of true value, that presumption may be rebutted where the sale is not an arm's-length sale. *Bd. of Edn. of the Cleveland Municipal School Dist.*, supra, citing *Lakeside Ave. Ltd. Partnership v. Cuyahoga Cty. Bd. of Revision* (1996), 75 Ohio St.3d 540, 544. However, the property owner presented no competent or probative evidence challenging the arm's-length nature of the sale before either the BOR or this board to rebut the presumption that the sale price is the best evidence of value. Before the BOR, the property owner's counsel presented an unexecuted copy of a sale-leaseback agreement between the buyer and seller of the subject property, the related lease, and the sworn affidavit of John Kallergis, the chief executive officer of both the seller and the lessee of the subject property.<sup>2</sup> S.T. at Ex. D. The affidavit states, inter alia, that the property was not offered for sale on the open market and the transfer price was based solely on the value of the rent payments under the lease. This board will not

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<sup>2</sup> As the BOE argues, page six of the lease states that the lease is a "true lease" and not a financing instrument and that the parties agreed that the rent is "the fair market value for the use of the premises." Brief at 3-4.

accord any weight to the property owner's affidavit. *Am. District Telegraph Co. v. Porterfield* (1968), 15 Ohio St.2d 92 (holding the Board of Tax Appeals did not unreasonably or unlawfully exclude evidence in the form of affidavits because there was no opportunity for cross-examination); *Raskin v. Limbach* (Feb. 2, 1988), BTA No. 1986-F-28, unreported, at 11, fn. 1, ("We generally regard affidavits of the type herein submitted, as simply voluntary, *ex parte* declarations, primarily self-serving in nature, and while submitted under oath, made without notice to the adverse party, and, since the affiant never appears, there is no opportunity for cross-examination. Naturally, these characteristics substantially reduce the weight accorded thereto, rendering such material of little probative value."); *Southeastern Hunting and Fishing Club v. Tracy* (Feb. 24, 1995), BTA No. 1994-X-252, unreported (denying admission of affidavits into evidence); *Hanley v. Tracy* (Interim Order, May 12, 1995), BTA No. 1994-K-1413, unreported; *Genlyte Group, Inc. v. Tracy* (Sept. 25, 1998), BTA No. 1996-K-532, unreported (discussing evidentiary value of affidavits submitted to the Tax Commissioner); *Dave Dennis Dodge, Inc. v. Wilkins* (Oct. 27, 2006), BTA Nos. 2005-K-857, et seq., unreported.

Regardless of whether we accept the statements made in the affidavit, the property owner's evidence demonstrates that the transfer was structured as a sale-leaseback transaction. Citing *Cummins*, supra, the property owner argues that, as a

sale-leaseback transaction, this sale is an unreliable indicator of value.<sup>3</sup> While we do not agree that the sale-leaseback nature of the subject sale necessarily causes it to lose its arm's-length nature, "certain types of transactions, albeit arm's-length transactions, call into question whether the sale price reflects the true value of the property. Among the types \* \* \* prompting an investigation of the sale, is a sale-lease arrangement." *S. Euclid/Lyndhurst Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1996), 74 Ohio St.3d 314, 317. See, also, *Kroger Co. v. Hamilton Cty. Bd. of Revision* (1993), 67 Ohio St.3d 145; *Cleveland Hts./Univ. Hts. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1995), 72 Ohio St.3d 189. The details of the sale-lease arrangement must be reflective of market rates and terms for the sale price to be equally reflective of market value. *Id.* We find the property owner has presented no probative evidence to indicate the lease entered into by the parties was not at arm's-length and in good faith or that the parties were not acting in their own self-interest. *Id.*; *Cummins*, supra. Further, we find no evidence of compulsion or duress that would cast doubt on the reliability of the value established by the transaction. *Strongsville Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 112 Ohio St.3d 309, 2007-Ohio-6. Consequently, without evidence to controvert the validity of the arm's-length nature of the May 2005 sale, we must conclude that the best evidence of the property's true value for taxation purposes is the

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<sup>3</sup> The presence of a sale-leaseback transaction does not automatically foreclose the use of the sale to determine value. Instead, "Ultimately, such a [sale-leaseback] situation presents an issue of the arm's-length character of the transaction, and *Berea* does not stand in the way of such an inquiry." *Cummins*, supra, ¶30.

sale price. *Rhodes, supra; Dublin City Schools Bd. of Edn., supra; Cummins, supra; Berea, supra.*

Accordingly, based upon the preponderance of competent and probative evidence before this board, the value of the subject parcel as of January 1, 2005 shall be as follows:

	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$204,200	\$ 71,470
BUILDING	<u>666,480</u>	<u>233,270</u>
TOTAL	\$870,680	\$304,740

The Auditor of Montgomery County is hereby ordered to cause his records to reflect the value determined herein for the subject real property and to assess the same in accordance therewith as provided by law.

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