

OHIO BOARD OF TAX APPEALS

Realty Income Corporation, A Maryland)
Corporation and Rite Aid of Ohio, Inc.,)
)
)
Appellants,)
)
vs.)
)
Lake County Board of Revision, the)
Lake County Auditor and the)
Willoughby-Eastlake City School)
District Board of Education,)
)
Appellees.)

CASE NOS. 2006-V-788, 789

(REAL PROPERTY TAX)

DECISION AND ORDER

Remanded on Appeal Feb. 25, 2009
Ohio Supreme Court No. 2008-1563

APPEARANCES:

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Entered July 15, 2008

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

This cause and matter comes to be considered by the Board of Tax Appeals upon two notices of appeal filed by appellant, Realty Income Corporation (“RIC”) from a decision of the Lake County Board of Revision (“BOR”), appellee herein.

The subject property is located in the Willoughby-Eastlake taxing district of Lake County, Ohio, and is further identified as parcel no. 28-A-043-O-00-018-0. The Lake County Auditor found the true and taxable value of the subject property for tax year 2005 to be as follows:

Parcel No. 28-A-043-O-00-018-0

	True Value	Taxable Value
Land	\$ 259,930	\$ 90,980
Building	\$ 792,710	\$ 277,450
Total	\$ 1,052,640	\$ 368,430

Upon consideration of the complaint filed by the Willoughby-Eastlake City School District Board of Education (“BOE”) and the counter-complaint filed by RIC, the BOR determined the true and taxable value of the subject property for the 2005 tax year to be as follows:

Parcel No. 28-A-043-O-00-018-0

	True Value	Taxable Value
Land	\$ 500,000	\$ 175,000
Building	\$ 1,484,500	\$ 518,580
Total	\$ 1,984,500	\$ 693,580

In its notices of appeal, RIC claimed that the auditor’s values were

correct and the value of the subject property should return to the values as originally assessed. By testimony at hearing, however, RIC claims that, as of tax lien date, the property value was \$840,000.

The matter was submitted to the Board of Tax Appeals pursuant to R.C. 5717.01 upon the notices of appeal and the statutory transcript certified by the Lake County Auditor, as secretary of the BOR. The board also has the testimony and appraisal report presented by RIC at hearing. In addition, the parties submitted legal argument.

The subject property is a plat of land containing 1.1139 acres improved with an 11,108-square-foot retail building,¹ constructed in 1997 and in use as a national retail pharmacy location. In May 2005, the subject property was transferred from its prior owner to RIC. The subject was one of a portfolio of eleven properties sold in the single transaction. All eleven properties were improved with retail buildings and all eleven were leased to the same national retail pharmacy, Rite Aid. Only two of the eleven were located in Ohio. S.T., Ex. F-2 at Ex. A. The purchase contract provides a separate purchase price for each location. The prices range from a low of \$1,617,551 for a property located in Bowden, Georgia, to a high of \$2,263,280 for a property located in Woodstock, Georgia. Id. The subject transferred for \$1,984,500. S.T., Ex. E.

At the hearing before the BOR, the BOE presented a copy of a

¹ The appellant's appraiser has calculated the building to be 11,140 square feet after adding in the drive-through window under the canopy. H.R. at at 17, Ex. 1 at 10.

conveyance fee statement and deed evidencing the transfer and requested that the value of the subject property be increased to the sales price (rounded). RIC appeared through counsel who informed the board that the property was used as a drug store which was originally “built to suit with a lease back option.” S.T., Ex. I. Counsel argued that the original transaction was a financing tool, as it was for the remaining eleven properties transferring at the same time as the subject. Therefore, counsel argued, the total price paid was “not all [for] real estate” and the transaction was “not an arm’s length sale.” Id.

The BOR raised value to \$1,984,500, and this appeal ensued. At the hearing held before this board, RIC presented the appraisal testimony of Richard G. Racek, Jr., MAI. Mr. Racek testified that as a part of the preparation of his appraisal he contacted RIC and learned that the subject was a part of a lump sum transaction. Regarding the recent sale of the subject property, he testified as follows:

“[T]he main reason that this particular transaction is not indicative of fair market value is because of its portfolio nature of being one of 11 properties, only two of which are in Ohio.” H.R. at 42.

The appraiser also reviewed the purchase agreement and the actual lease. The lease is a twenty-year lease with six five-year renewal options. Rite Aid is required to pay 2.5 percent of gross sales, with some adjustments, and an annual minimum rent. H.R. at 39-40.

After reviewing the totality of the circumstances surrounding the

original lease and the subsequent sale eight years later, the appraiser concluded that the sale of the property was the sale of a “leased fee” interest and that sale did not qualify as “arm’s length” for purposes of concluding to a value for ad valorem tax purposes. H.R. at 41.

The BOE argues that the board should disregard the appraisal and value the property in accordance with the 2005 sale. This board acknowledges that the sale generally appears to be a bulk sale of 11 properties.² Sale prices garnered through bulk purchase transactions have been accepted as indicators of fair market value, *Pingue v. Franklin Cty. Bd. of Revision* (1999), 87 Ohio St.3d 62, and rejected as indicators of fair market value. *Elsag-Bailey, Inc. v. Lake Cty. Bd. of Revision* (1996), 74 Ohio St. 3d 647.

In *St. Bernard Self-Storage, L.L.C. v. Hamilton Cty. Bd. of Revision*, 115 Ohio St.3d 365, 2007-Ohio-5249, the Supreme Court had before it a purchase contract which allocated the sale price among various components of the sale. In rejecting the amount allocated by the purchase contract for purposes of valuing the real property for ad valorem tax purposes, the court also reflected on the application of the case law surrounding arm’s-length sales:

“*** The starting point for our analysis is the settled proposition that ‘the best evidence of “true value in money” is the proper allocation of the lump-sum purchase price and not an appraisal ignoring the contemporaneous sale.’ *Conalco, Inc. v. Monroe Cty. Bd. of Revision* (1977), 50 Ohio St.2d 129, 4 O.O. 3d 309,

² Arguably, the 11 properties were sold “in bulk” utilizing a single purchase agreement; however, as discussed on pages 10-11, *infra*, the agreement contemplates the agreements for each of the 11 properties to be separate.

363 N.E.2d 722, paragraph two of the syllabus. We believe this principle fully comports with our more recent holding in *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005 Ohio 4979, 834 N.E.2d 782, ¶ 13, that ‘when the property has been the subject of a recent arm’s-length sale between a willing seller and a willing buyer, the sale price of the property shall be “the true value for taxation purposes.”’ *Id.*, quoting R.C. 5713.03. As a result, we view the *Conalco* syllabus as effectuating the *Berea* doctrine in the context of a bulk sale.

“Bulk sales do differ, however. Unlike a simpler transaction where a single parcel of real property is sold individually, a bulk sale may involve the sale of all the assets of a business, whereby a parcel of real property constitutes one of many business assets sold at the same time for an aggregate sale price. Alternatively, a bulk sale may consist of a sale of numerous real estate parcels at an aggregate price as part of a single deal. In all such cases, a question arises beyond the basic pronouncement of *Berea*: whether the proffered allocation of bulk sale price to the particular parcel of real property is ‘proper,’ which is the same as asking whether the amount allocated reflects the true value of the parcel for tax purposes.

“St. Bernard advocates the principle that an allocation presented on the face of a purchase contract, if that contract and that allocation have been negotiated between the parties, should automatically acquire the force of presumptive--if not conclusive--validity. We disagree. While St. Bernard’s suggested approach would be simple to apply, it is not appropriate, because there may be various purposes in allocating a purchase price. Even in cases where those purposes are fully legitimate, the amount allocated to a particular parcel does not necessarily reflect the true value in money of the parcel. See *Heimerl v. Lindley* (1980), 63 Ohio St.2d 309, 311, 17 O.O. 3d 200, 408 N.E.2d 685.

“In bulk sale cases, we typically look for corroborating indicia to ensure that the allocation reflects the true value of the property. Where attendant evidence shows reason to doubt such a correspondence, we decline to use the allocation to establish true value. In *Heimerl*, for example, the evidence showed that an allocation of the purchase price of a business to certain personal property on the company’s books was performed ‘for the sole purpose of reducing the parties’ federal income tax liabilities’ and accordingly was ‘not intended to reflect the true value of the equipment component of the business.’ *Id.* at 309-310, 17 O.O.3d 200, 63 Ohio St.2d 309, 408 N.E.2d 685. Instead of using the new allocated book value, the taxpayer continued using the previous cost-depreciation schedule in preparing its personal property tax returns.

“In *Heimerl*, we expressly distinguished the issue of allocation from the situation in which the personal property to be valued was the sole subject of the sale. *Heimerl*, 63 Ohio St.2d at 311, 17 O.O.3d 200, 408 N.E.2d 685, citing *Grabler Mfg. Co. v. Kosydar* (1975), 43 Ohio St.2d 75, 72 O.O.2d 42, 330 N.E.2d 924. In *Heimerl*, the value assigned to the property ‘was an arbitrary apportionment of the whole for federal tax purposes,’ whereas in *Grabler* the ‘valuations were direct buy and sell prices of the particular assets.’ *Heimerl* at 312.

“In the area of real property valuation, we have not hesitated to authorize a departure from a recent sale price when a bulk sale price cannot properly be allocated. In all of those cases, value was determined without reference to a sale price because no convincing allocation of the sale price was offered. Cf. *Pingue v. Franklin Cty. Bd. of Revision* (1999), 87 Ohio St.3d 62, 1999 Ohio 252, 717 N.E.2d 293. Although the present case differs from those cases in that the allocation is presented in the purchase contract itself, we hold that in the context of valuing property for tax purposes, such an allocation is not to be taken as indicative of the value of the real property at issue unless other indicia on the face

of the contract, the circumstances attending the allocation, or some other independent evidence establishes the propriety of the allocation. It follows that neither the board of revision nor the Board of Tax Appeals was obligated to presume the validity of the allocation to goodwill.” Id. at ¶¶14-19. (Footnote omitted.)

Thus the price garnered through a bulk sale is evidence which *may* be used to value realty sold. RIC’s appraiser did not criticize the sale solely because the subject sold as part of a portfolio. The appraiser also discounted the sale because it is what he deemed to be a “leased fee” transaction. The appraiser argued that the income generated from the leases was the critical component of the sale, and not the real property itself.

Prior to the court’s determination in *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005-Ohio-4979, this board had rejected a sale price if the evidence revealed that the rental income of a subject property was either higher or lower than market rates. *Akron City School Dist. Bd. of Edn. v. Summit Cty. Bd. of Revision* (Aug. 29, 2003), BTA Nos. 2002-M-1669, 1671, unreported. However, the subject property considered in *Berea* was a rental property encumbered by a long-term lease nearing the end of the term. The rents received by the owners of the subject property were well below market rents. The court, however, concluded that the sale price controlled:

“While we recognize that several of our decisions have permitted the BTA to consider market rental value of commercial real property as an indicator of the true value of the property, none of those cases involved a recent

arm's-length sale of the property between a willing seller and a willing buyer. For instance, in *Wynwood Apts., Inc. v. Cuyahoga Cty. Bd. of Revision* (1979), 59 Ohio St. 2d 34, 35, 13 O.O.3d 19, 391 N.E.2d 346, this court noted that 'there was no recent arm's-length transfer of the property to serve as "best evidence" of the true value in money which the board must rely upon under R.C. 5717.03 and the case law of this court.' See, also, *Alliance Towers*, 37 Ohio St.3d 16, 523 N.E.2d 826; and *Canton Towers, Ltd. v. Stark Cty. Bd. of Revision* (1983), 3 Ohio St.3d 4, 3 OBR 302, 444 N.E.2d 1027, each approving the use of 'economic rental value of commercial real property as an indicium of value for *ad valorem* real property taxation purposes' where the property had not been sold in a recent arm's-length transaction between willing parties. *Alliance Towers*, 37 Ohio St.3d at 22, 523 N.E.2d 826.

"Consequently, *Wynwood Apts.* and similar cases addressing whether market rent or actual rent should be used in a property appraisal do not apply to situations in which the property has been recently sold in an arm's-length transaction. Indeed, as this court has often observed, 'appraisals based upon factors other than sales price are appropriate for use in determining value *only* when no arm's-length sale has taken place, or where it is shown that the sales price is not reflective of the true value.' (Emphasis added; citations omitted.) *Columbus Bd. of Edn. v. Fountain Square Assoc., Ltd.* (1984), 9 Ohio St.3d 218, 219, 9 OBR 528, 459 N.E.2d 894. See, also, *N. Olmsted Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1990), 54 Ohio St.3d 98, 561 N.E.2d 915, in which we held that 'in the absence of evidence of a recent arm's-length sale between a willing buyer under no compulsion to buy and a willing seller under no compulsion to sell, the testimony of expert witnesses becomes necessary'; and *Dublin Senior Community Ltd. Partnership v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 455, 459, 687 N.E.2d 426, in which we held that 'when an actual sale is not available, "an appraisal becomes necessary,"' quoting *Park Invest. Co.*, 175 Ohio

St. at 412, 25 O.O.2d 432, 195 N.E.2d 908.” Id. at ¶¶14-15.

After *Berea*, this board has concluded on a number of occasions that the sale price garnered for a national pharmacy retail location is competent and probative evidence of that store’s value, despite the claim that the rental income was higher than market rent. *Bd. of Edn. of the Columbus City Schools v. Franklin Cty. Bd. of Revision* (May 18, 2007), BTA Nos. 2005-R-329, et seq., unreported, affirmed, 118 Ohio St.3d 262, 2008-Ohio-2449; *Hon. Dusty Rhodes v. Hamilton County Bd. of Revision* (Mar. 9, 2007), BTA No. 2005-M-1098, unreported, affirmed, 117 Ohio St.3d 532, 2008-Ohio-1595; *Bd. of Edn. of the Columbus City Schools v. Franklin Cty. Bd. of Revision* (June 30, 2006), BTA No. 2005-A-381, unreported; *Dayton School Dist. Bd. of Edn. v. Montgomery Cty. Bd. of Revision* (Jan. 6, 2006), BTA No. 2004-V-73, unreported. But, see, *RX Bedford Investors, LLC v. Cuyahoga Cty. Bd. of Revision* (Feb. 3, 2006), BTA Nos. 2002-R-2509, 2564, unreported, appeal remanded upon settlement, (Sept. 21, 2006), Sup. Ct. Nos. 2006-445, 448.

Thus, if the subject would have not been sold as a part of a portfolio, the sale price garnered would have been considered evidence of its value. The question then becomes, is there evidence within the record which corroborates the use of the sale as indicia of value? No person related to the sale testified, either before this board or before the BOR. Thus, we have only the purchase contract to review.

Unlike a so-called “bulk sale,” that contract does not provide a total sale price and allocation of that sale price among the various components of the sale, but

instead provides a sale price for each component. Article 1 of the contract provides, “Seller shall sell and Buyer shall purchase all of Seller’s right, title and interest in and to the Property for the purchase price set forth in column ‘3’ of Exhibit ‘A.’” In addition, Exhibit A provides a separate purchase price for each separately listed property and provides in the first paragraph:

“An individual Seller’s duties, obligations and liabilities hereunder are neither ‘joint’ or ‘joint and several’ with any other individual Seller. This Agreement is executed as a single document for the convenience of the parties, but constitutes a separate agreement between each individual Seller and Buyer. It is the parties’ intention that each individual Seller is severally obligated hereunder.” S.T., Ex. F-2. at 2 of 59.

Given this evidence, and given the law regarding the application of *Berea* to “bulk sales,” this board concludes that the sale price is competent and probative evidence of value.

We acknowledge that RIC’s appraiser performed an appraisal disregarding the sale price and valuing the property in accordance with generally accepted appraisal principles. However, valuing the subject property without regard to the sale price is inconsistent with the manner in which other drugstore properties have been valued throughout the state after *Berea*. In many, if not all, of the similarly situated appeals, appraisal evidence disregarding the sale price was present. However, this board concluded that *Berea*’s holding regarding the efficacy of the sale price controlled. Thus, in the present matter, the board concludes that the property owner did not provide sufficient evidence to rebut the presumption that the sale price was the

best evidence of value, just as we did for the other Ohio property that was part of the May 2005 sales. *Realty Income Corp. v. Lake Cty. Bd. of Revision* (Mar. 18, 2008), BTA Nos. 2006-M-786, 787, unreported, appeal pending Sup. Ct. No. 2008-709.

Upon consideration of the existing record and the applicable law, the Board of Tax Appeals finds and determines upon a preponderance of probative and competent evidence that the value of the subject property as of January 1, 2005 was:

Parcel No. 28-A-043-O-00-018-0

	True Value	Taxable Value
Land	\$ 500,000	\$ 175,000
Building	\$ 1,484,500	\$ 518,580
Total	\$ 1,984,500	\$ 693,580

It is the order of the Board of Tax Appeals that the Auditor of Lake County list and assess the subject real property in conformity with this decision and order. It is further ordered that this value be carried forward in accordance with the law.³

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³ At hearing, counsel for RIC stated that because 2005 was the last year of the triennial cycle in Lake County, the “carry forward” language of this board was not necessary. H.R. at 7. However, neither party was aware of any complaint filed against the subject’s 2006 valuation or any subsequent year. Id. at 9, 10. The carry-forward provisions of R.C. 5715.19(D) can be severed by the filing of a complaint for a subsequent tax year. *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1999), 87 Ohio St.3d 305. This board has no knowledge of the actions taken subsequent to the filing of this appeal. If a new complaint was not filed for tax year 2006 (or subsequent years), the determination made by this board will carry forward to each year until this complaint is finally determined. *Cleveland Mun. School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 105 Ohio St.3d 404, 2005-Ohio-2285.