

## OHIO BOARD OF TAX APPEALS

Board of Education of the Kettering	)	CASE NO. 2007-A-1124
City Schools,	)	
	)	(REAL PROPERTY TAX)
Appellant,	)	
	)	DECISION AND ORDER
vs.	)	
	)	
Montgomery County Board of	)	
Revision, Montgomery County	)	
Auditor, and Lamden Food Mart, Inc.,	)	
	)	
Appellees.	)	

APPEARANCES:

For the Appellant - Rich, Crites & Dittmer, LLC  
Allison J. Crites  
300 East Broad Street, Suite 300  
Columbus, Ohio 43215

For the County  
Appellees - Mathias H. Heck, Jr.  
Montgomery County Prosecuting Attorney  
Laura G. Mariani  
Assistant Prosecuting Attorney  
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P.O. Box 972  
Dayton, Ohio 45422

For the Appellee  
Property Owner - Hisham A. Shtayyeh, pro se  
42 Woodcroft Trail, Suite B  
Beavercreek, Ohio 45430

Entered March 10, 2009

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

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein by the above-named appellant from a decision of the Montgomery County Board of Revision. In said decision, the board of revision determined the taxable value of the subject property for tax year 2006.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to this board by the county board of revision, the record of the testimony and evidence presented at a hearing before this board, and the briefs filed by counsel to the appellant and by the property owner.<sup>1</sup>

The subject real property, a gas station/mini mart, is located in the city of Kettering corporation taxing district, Montgomery County, Ohio. The value of the parcel, #N64-006-04-0001, as determined by the auditor and by the board of revision, is as follows:

	AUDITOR	
	TRUE VALUE	TAXABLE VALUE
Land	\$ 305,640	\$ 106,970
Bldg	165,020	57,760
Total	\$ 470,660	\$ 164,730

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<sup>1</sup> We note that in its brief, the property owner makes argument relative to a gas purchase agreement and its value in relation to the subject sale and included a copy of such agreement with the brief. The agreement shall be stricken from the record, as it was never authenticated at hearing, nor was it offered/received into evidence. As this attachment was submitted outside the record, we have concluded that it does not rise to the level of evidence upon which we can rely in making our determination herein. See *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1996), 76 Ohio St.3d 13; *Executive Express, Inc. v. Tracy* (Nov. 5, 1993), BTA No. 1992-P-880, unreported; *Cunagin v. Tracy* (Mar. 31, 1995), BTA No. 1994-P-1083, unreported; *Kemen v. Hamilton Cty. Bd. of Revision* (Jan. 2, 1998), BTA No. 1997-M-433, unreported; *Montgomery v. Cuyahoga Cty. Bd. of Revision* (Aug. 14, 1998), BTA No. 1997-T-897, unreported; *Triple V's Holding v. Cuyahoga Cty. Bd. of Revision* (Apr. 24, 2000), BTA No. 1997-K-1701, unreported. See, also, *Soc. Natl. Bank v. Allen Cty. Bd. of Revision* (Mar. 15, 1996), BTA No. 1995-T-561, unreported (disregarding attachments, which included affidavits, to a brief); *ARV Assisted Living, Inc. v. Hamilton Cty. Bd. of Revision* (Interim Order, July 30, 1999), BTA No. 1998-N-168, unreported (striking from consideration information attached to a post-hearing brief which reflected a sale of the property had occurred after the BTA hearing but before the issuance of a decision); *Bd. of Edn. of the Hilliard City School Dist. v. Franklin Cty. Bd. of Revision* (July 15, 2005), BTA No. 2003-R-1430, unreported (striking from consideration certified copies of documents attached to a post-hearing brief); *Lancaster City Schools Bd. of Edn. v. Fairfield Cty. Bd. of Revision* (Apr. 30, 2004), BTA No. 2002-B-1743, unreported (striking from consideration affidavit attached to a post-hearing brief); *Brookins v. Ottawa Cty. Bd. of Revision* (Oct. 5, 2007), BTA No. 2005-R-1065, unreported (striking from consideration affidavit attached to a post-hearing brief).

BOARD OF REVISION			
	TRUE VALUE		TAXABLE VALUE
Land	\$	305,640	\$ 106,970
Bldg		278,880	97,610
Total	\$	584,520	\$ 204,580

The appellant board of education contends that the board of revision has undervalued the parcel in question by not relying upon the sale of the subject on January 27, 2006 from True North Energy, LLC to appellee Landen Food Mart, Inc. (hereinafter “Landen”) for \$1,007,500, as an indicator of its value.

Before turning to the merits herein, we will review how this matter came to this board on appeal. Specifically, the Board of Education of the Kettering City Schools filed an original complaint against the valuation of the subject property with the Montgomery County Board of Revision seeking to increase the subject’s value to reflect its sale price obtained in January 2006. No counter-complaint was filed, although the property owner did appear at the BOR proceedings. It appears that the board of revision increased the valuation of the subject property to reflect the \$1,007,500 sale price for the real estate alone, minus \$422,980 attributable to personal property, for a total market value of \$584,520.<sup>2</sup> The board of education, dissatisfied with the BOR’s decision, appealed such determination to this board.

At the outset, we note the decisions in *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1994), 68 Ohio St.3d 336, 337, and *Springfield Local*

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<sup>2</sup> Based upon notations on the BOR hearing worksheet, S.T., Ex. B, it appears that the BOR relied upon documentation provided by the property owner to substantiate the value of the personal property, although the mathematical computations for the ultimate value determined are not included in the record.

*Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493, 495, wherein the Supreme Court held that an appealing party has the burden of coming forward with evidence in support of the value which it has claimed. Once competent and probative evidence of true value has been presented, the opposing parties then have a corresponding burden of providing evidence which rebuts appellant's evidence of value. *Id.*; *Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision* (1988), 37 Ohio St.3d 318, 319.

As we consider the valuation question before us, we acknowledge that 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.”

The Ohio Supreme Court has consistently held that the best evidence of true value of real property is an actual, recent, arm's-length sale. Specifically, in *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005-Ohio-4979, the Supreme Court held “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.’ R.C. 5713.03.” *Berea*, at 5. See, also, *Zazworsky v. Licking Cty. Bd. of Revision* (1991), 61 Ohio St.3d 604; *Hilliard City School Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1990), 53 Ohio St.3d 57; *State ex rel. Park Investment Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St.

410. An arm's-length sale is characterized by these elements: it is voluntary, i.e., without compulsion or duress; it generally takes place in an open market; and the parties act in their own self-interest." *Walters v. Knox County Bd. of Revision* (1988), 47 Ohio St.3d 23.

It is also well established that when a sale occurs, there is a rebuttable presumption the sale price reflects the true value of the property in question. Consequently, a rebuttable presumption extends to all of the requirements which characterize true value. It is then the burden of the party who claims that a sale is other than arm's length to counter such presumption. However, the burden of persuasion does not change, as it is still on the appealing party to establish, through the presentation of competent and probative evidence, a different value than that found by the board of revision. See *Cincinnati Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (1997), 78 Ohio St.3d 325; *Bd. of Edn. of the Columbus City School Dist. v. Franklin Cty. Bd. of Revision* (Nov. 28, 1997), BTA No. 1996-S-93, unreported.

Initially, we have reviewed the evidence of the sale of the subject, including the deed and conveyance fee statement, the purchase agreement, and the closing statement, as well as the testimony before this board and the BOR of Landen's president, who was involved in the purchase. S.T., Ex. A; Exs. 1 and 2; H.R. At this board's hearing, Mr. Shtayyeh, who operated the subject location for 18 years as the president of the tenant, Landen Food Mart, Inc., testified to the circumstances surrounding the purchase of the subject. H.R. at 10. Specifically, Mr. Shtayyeh testified that the owners (Shell Oil/True North Energy, LLC) did not place the subject

property on the open market and the sale price was dictated by the owners, with no negotiation. He indicated that the total price paid for the subject was approximately \$1.1 million, after the \$92,500 allocated for the equipment, i.e., personal property, was included. H.R. at 10, 13. He testified that “[b]asically, they approached me if I would be interested because they’re going to sell the location. If I don’t buy, they just have to sell it, and whenever my lease expired, it’s over.” H.R. at 13. The subject lease was due to expire in approximately one year. H.R. at 13. Mr. Shtayyeh testified that he could not relocate the business anywhere else because “[i]t’s all location, location, location.” H.R. at 14. He further indicated that the sale constituted a 1031 exchange, where he “sold two locations in Cincinnati, Ohio \*\*\*. And we had identified three other properties, you know, and this came in between and we just decided to shift from what we were going to buy to this.” H.R. at 17-18. In conclusion, Mr. Shtayyeh reiterated that he seeks a reduction in value for all of the non-real estate items that he contends were included in the contract price of \$1,007,500. H.R. at 22.

In consideration of the foregoing, we must first evaluate whether all of the elements of an arm’s-length transaction have been met. First, with regard to whether the subject sale took place in an open market, Mr. Shtayyeh testified that the subject was not offered on the market and that he had been approached by the then current owners regarding his possible interest in buying the subject. We are mindful that the Supreme Court, in *Walters*, supra, when considering what constitutes an arm’s-length sale, indicated that arm’s-length transactions “generally” take place in an open market, thus not necessarily “always.” This board has repeatedly held that just

because a sale was not advertised to the general public, it is not necessarily rendered non arm's length. *Beatley v. Franklin Cty. Bd. of Revision* (June 18, 1999), BTA Nos. 1997-M-262, 263, unreported. In *Bd. of Edn. of Plain Local Schools v. Franklin Cty. Bd. of Revision* (June 9, 1995), BTA No. 1994-S-361, unreported, we rejected the notion that sales must *always* occur in such a manner in order to constitute the best evidence of a property's value:

“The county appellees assert that this sale was not an arm's-length transaction because the property was not offered for sale on the open market. We disagree. While the lack of advertisement on the open market may have influenced the price paid for the subject property, it does not necessitate a finding that the subject sale was not arm's length in nature.” *Id.* at 10.

See, also, *Willoughby-Eastlake City School Dist. Bd. of Edn. v. Lake Cty. Bd. of Revision* (May 20, 2005), BTA No. 2003-B-1654, unreported; *Dublin City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (May 5, 1995), BTA No. 1993-T-1107, unreported, affirm'd (Mar. 7, 1996), Franklin App. No. 95APH06-718, unreported; *MACQ, Inc. v. Marion Cty. Bd. of Revision* (Sept. 11, 1998), BTA No. 1996-K-1457, unreported; *Poley v. Montgomery Cty. Bd. of Revision* (Sept. 24, 2004), BTA No. 2003-M-1784, unreported. At the time the property went into contract, it apparently had not been offered on the market yet, although Mr. Shtayyeh indicated that it was the sellers' intent to sell the subject to another entity if Mr. Shtayyeh was not interested. There is no indication in the record that by not being offered on the market, the resultant sale price was based on non-market-driven forces, and accordingly, without

something in the record to indicate otherwise, we find that the first requirement of an arm's-length transaction has been met.

Further, if it is Mr. Shtayyeh's contention that he was compelled to purchase the subject, and, as such, did not act voluntarily, we find no evidence of such level of duress in the record. In *Lakeside Avenue Ltd. Partnership v. Cuyahoga Cty. Bd. of Revision* (1996), 75 Ohio St.3d 540, the Supreme Court held that certain compelling business circumstances were sufficient to establish that a recent sale was not arm's length or representative of true value. The court found from the evidence the purchase price was not negotiable and the purchaser's only choice was between the purchase of the property and corporate death. The compulsion or duress the property owner felt was caused by the owner's dire financial straits which caused it to agree to a non-negotiable sales price in order to save its business, regardless of the fact that the price was well beyond that which the market dictated. See, also, *Columbus Bd. of Edn. v. Grange Mutual Casualty Co.* (Jan. 28, 1992), Franklin App. No. 90AP-317, unreported; *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (Sept. 29, 1992), Franklin App. No. 92AP-281, unreported. But compare *Bd. of Edn. of the Columbus City Schools v. Franklin Cty. Bd. of Revision* (Jan. 30, 1998), BTA No. 1996-A-986, unreported, where this board relied upon the presumption, finding the property owner did not establish that he entered into a sale agreement under duress, but only purchased a particular property for competitive business reasons.

Herein, Mr. Shtayyeh's only reason for not being able to move his business was "location, location, location," arguably because he believed no other

location would be as successful as the subject's. H.R. at 14. Mr. Shtayyeh testified that he owned 17 other locations, H.R. at 18, and that the subject sale was part of a 1031 exchange<sup>3</sup> involving several of his business locations. H.R. at 17. The purchase contract terms were voluntarily agreed to by Mr. Shtayyeh and there has been no demonstration that the purchase price was not reflective of the market. We find nothing in the record before us to indicate that the sale price paid by Landen was not reached voluntarily, with Mr. Shtayyeh acting on behalf of Landen in his own self interest in making his own business decisions. Considering the information provided, there is not sufficient, competent and probative evidence before us which could support a finding that Landen was in any way required to purchase the property under compelling circumstances which would have made the price paid unreflective of true value. *Lakeside*, supra. As such, we find any suggestion that Mr. Shtayyeh acted out of duress in making the instant purchase to be unsupported in the record. Clearly, Mr. Shtayyeh was making a business decision that the subject's location was important to Landen's financial success and was willing to pay the sale price not only to maintain that business' success, but also to, according to his representations, apparently

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<sup>3</sup> While we must also acknowledge "that a like-kind exchange can produce motivational factors which may affect the validity of equating sales price with fair market value," the only documentation in the record that acknowledges the 1031 transaction, save the property owner representative's testimony, is a line entry on the closing statement. *Columbus Board of Education v. Franklin Cty. Bd. of Revision* (May 10, 1996), BTA No. 1994-R-719, unreported. See, also, *Bd. of Edn. of the Gahanna-Jefferson Public Schools v. Franklin Cty. Bd. of Revision* (Mar. 20, 1998), BTA No. 1996-A-44, unreported, affirmed (Dec. 31, 1998), Franklin App. No. 98AP-460, unreported. Thus, without more specific information about the sale and the 1031 exchange, we cannot surmise what effect, if any, it could have had on the subject sale price. In light of the fact that the property owner's only basis for seeking a reduction in the valuation of the subject property is the inclusion of personal property value in that number, we do not believe that the 1031 exchange, as part of the subject sale transaction, affected the sale price's reflection of market value.

complete a 1031 exchange that would benefit his overall business holdings. Further, approximately one year remained on Mr. Shtayyeh's lease of the subject premises, and, arguably, he had time to attempt to negotiate another deal with the owners or find another location for his business.

Finally, in considering whether such sale can be considered recent enough to be indicative of the value of the subject, we note that the Supreme Court has recognized that a sale may be considered recent for purposes of R.C. 5713.03 even though the sale occurs months either before or after tax lien date. See *R.R.Z. Associates v. Cuyahoga Cty. Bd. of Revision* (1988), 35 Ohio St.3d 198; *Hilliard City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1990), 53 Ohio St.3d 57; *W.S. Tyler Co. v. Lake Cty. Bd. of Revision* (1991), 57 Ohio St.3d 57. Clearly, the instant sale, which occurred within one month of the tax lien date under consideration, constitutes a recent sale.

Thus, based upon the foregoing, this board finds that the subject sale had all the indicia of, and consequently was, an arm's-length sale. While appellant claims that the subject's value is something less than the full sale price due to deductions that it claims should be made for the value of personal property that was part of such purchase price, there is little evidence in the record to support such contentions. Mr. Shtayyeh provided the BOR with an "appraisal" of the subject personal property which indicated the "depreciated replacement cost of the subject improvements." S.T., Ex. B. However, there is nothing on such document to indicate where such equipment is located, i.e., there is no address associated with such report, other than a handwritten

notation indicating the subject's address. Further, the "appraisal" apparently constitutes two pages out of a multi-page report, and we do not have the entire document in front of us to establish the context from which it was taken. Finally, the author of such "appraisal" did not testify to it before the BOR and as such, there is insufficient information in the record to allow this board to determine the report's accuracy or completeness. Before this board, Mr. Shtayyeh provided a list of assets for a similar property, apparently to support the numbers previously submitted to the BOR. Ex. 2. However, all of the documents associated with the sale, including the conveyance fee statement, the agreement of sale, and the closing statement, all indicate that \$92,500 was the value allocated to personal property and such value was in addition to the amount allocated to the land and building, i.e., \$1,007,500. S.T., Ex. A; Exs. A, B. Therefore, without written agreements or other documents confirming an amount other than that which is in the record, we cannot make a different deduction for personal property that allegedly was included in the sale.

Accordingly, we find that the price paid by the property owner for the subject property represents the true value of the property for tax year 2006. The property owner did not meet its burden of proving that the sale was not arm's length, and, as such, the value of the subject for tax year 2006 shall be \$1,007,500, based upon the listed sale price of the real estate in the closing statement and conveyance fee statement, specifically:

	TRUE VALUE	TAXABLE VALUE
Land	\$ 305,640	\$ 106,970
Bldg	701,860 <sup>4</sup>	245,650
Total	\$1,007,500	\$ 352,620

Thus, it is the decision and order of the Board of Tax Appeals that the Montgomery County Auditor shall list and assess the subject property in conformity with this decision.

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<sup>4</sup> Consistent with the action taken by the BOR, we have attributed the increase in value to the improvements.