

Meijer, Inc.,))	CASE NO. 95-A-557
Appellant,)	
)	(REAL PROPERTY TAX)
vs.)	
)	ORDER
Allen County Board of)	
Revision, et al.,)	(Denying Motion for
)	Protective Order and
Appellees.)	Compelling Discovery,
)	in part)

APPEARANCES:

For the Appellant	- Annrita S. Johnson
	Fred Siegel Co., L.P.A.
	42 East Gay Street
	Suite 1301
	Columbus, Ohio 43215
For the County	- David E. Bowers
Applies	Allen County Prosecuting
	Attorney
	By: James R. Gorry
	Special Counsel
	20 East Broad Street, 3rd Floor
	Columbus, Ohio 43215

Entered February 7, 1997

Mr. Johnson, Ms. Jackson, and Mr. Manoranjan concur.

This cause and matter originally came on to be considered by the Board of Tax Appeals upon a motion for order compelling discovery filed herein on September 20, 1995, by counsel for the county appellees. However, two days thereafter, the county's counsel requested that the Board hold said motion due to possible settlement by the parties themselves. Later, in December 1995, this Board received notification from the county appellees' counsel that he desired to renew his motion to compel, as no settlement had been reached. Thereafter, on January 19, 1996, appellant's counsel proceeded to file a memorandum in opposition to

the motion to compel discovery as well as a motion for a protective order. By letter from this Board dated January 24, 1996, arguments regarding the foregoing motion for protective order were set for hearing on March 25, 1996, and due to conflicts in appellant's witness' schedule, said hearing was not convened until April 26, 1996.

This matter is considered by this Board upon the Motion to Compel Discovery, the memorandum in opposition to said motion and accompanying Motion for a Protective Order, as well as the evidence and testimony presented to this Board at hearing. Although having requested the opportunity to file briefs at the conclusion of said hearing, and making very pointed requests for specific briefing schedules (R., p. 39-42), neither party submitted any additional argument, by way of brief, at any time thereafter.

The motion to compel provides in pertinent part that:

"Now comes Appellee, Allen County Auditor, and moves this Board for an order to compel Appellant to produce documents for inspection and copying and to answer interrogatories pursuant to this Board's Rule 5717-1-10.

"Appellee County Auditor previously served upon Appellant a request for the production of documents and answers to interrogatories pursuant to BTA Rule 5717-1-10 (a copy of both of which is attached hereto). However, Appellant failed to respond to the discovery requests.

"Appellee then made an attempt to resolve this discovery matter by mailing Appellant a letter requesting a response to the discovery. A copy of this letter and the affidavit of counsel are attached hereto. In response to this letter, Appellant then provided Appellee with some partial responses,

but has still failed to fully respond to numerous requests for documents and for answers to interrogatories."

Specifically, the county's motion went on to provide for the following specific information:

"1. Requests for Documents Nos. 2, 3, And 7, And Interrogatory No. 1 - Income, Expenses, And Sales Data From Operations Of The Property .

"These discovery items requested Appellant to provide income and expense statements, and gross sales data relating to the property.

"As to the request for income and expense statements, Appellant replied that 'income and expense statements relating to the actual operations of the property do not exist.' Appellee does not believe that Meijer cannot produce some documents showing the amount of income from the property and showing the expenses that it has in connecting [sic] with operating the property!

" * * *

"As to the request for gross sales data from the property, Appellant has refused to provide any such information based upon the allegation that such data is a 'trade secret.'

"It is, of course, essential to obtain both historical income and expense statements and historical sales volume from Appellant's property in order to prepare an appraisal of the property. Gross sales data is necessary simply because large department stores, like the Meijer property, are usually leased on a 'percentage lease' basis. Thus, the use of a standard percentage rent figure (2 percent, for instance) will allow economic rent for Appellant's property to be calculated, once gross sales figures are made available and subject to analysis.

" * * *

"2. Leases Relating To Other Users Of The Property .

"Interrogatory No. 4 requested Appellant to produce

"(4) All contracts, leases, and agreements between Meijer, Inc., and any other party, including Meijer's subsidiaries and related corporations, allowing any other such party to use the property in question for any purpose;

"Appellant objected to this on the grounds that the request 'inadequately specifies the documents sought.' The request clearly identifies the documents in question - those leases or use agreements 'allowing any other party to use the' Meijer store in question. * * *

"3. Market Studies Relating To The Property .

"Appellee requested documents relating to any market studies Appellant may have done in connection with construction of the new store. This requests [sic] reads as follows:

"(10) Any and all feasibility studies, market studies, location studies, or other types of studies or analyses that Meijer prepared or had prepared in connection with the acquisition of the land in question and the construction of store in question, including market data or market penetration studies, estimated sales studies, estimated operating costs studies, and analysis of competition.

"An examination of this type of material will most likely provide the Auditor's appraiser with information concerning the value of the land, the desirability of the location of the store, the expenses connected with operating the property, an analysis of competitors in the area, and other information that would be valuable to an appraiser. In picking the location of this property, examining competition in the area, and determining whether the [sic] build of the property, Meijer went through much of the exact same kind of analysis that the Auditor's appraiser will go through in attempting to determine the true value of the property. The

Auditor is entitled to have access to this data in order to appraiser the property.

" * * *

"4. Information On Stores Over 150,000 Square-Foot In Size .

"The Auditor requested Meijer to provide it with any information it might have as to other retailers who operate stores of over 150,000 square feet. Meijer has contended in other cases before this Board that its stores are too large and thus suffer from a massive amount of functional obsolescence (a contention that this Board rejected in the Montgomery County Meijer cases, supra).

"Nonetheless, the Auditor is entitled to discover whether Meijer knows of other retailers who operate large retail stores in this Country. This data will help the Auditor's appraiser determine whether there is, in fact, a market for a store like Meijer's (a fact which Meijer has denied). Meijer is engaged in the retail business and has, no doubt, gathered much valuable data in this regard which the Auditor is unable to obtain on its own.

" * * *

"5. Sales Data On Competitors .

"The Auditor requested Meijer to provide the Auditor with any information it has on sales data from competitors, as follows:

"(Int. 13) State whether Meijer gathers, maintains, or estimates gross sale data or other sales data or information for stores or other retailer [s] or discounters that it considers to be in competition with it.

"(Doc. Re q. 11) Provide all documents reflecting information or data that Meijer keeps, gathers, or maintains that are described in answer to Interrogatory No. 13, below.

"This data will assist the Auditor in developing a stabilized gross sales figure for the Meijer property in his appraisal. Data that Meijer might have on other similar stores is critical in doing this. Meijer is in the

retail business and will have more information in this regard than the Auditor's appraisers will be able to gather from outside sources. Meijer cannot object to providing the Auditor with market data relating to its competitors (if it has any such data). * * * "

In response to the foregoing, appellant filed both a memorandum in opposition and a motion for protective order. Specifically, within the memorandum in opposition, appellant indicated the following with regard to subsections 2 and 4 of appellee's motion:

"2. Leases Relating to Other Users of the Property

"There are no leases relating to other users of the property. The subject is owner occupied. The appellant objected to the form of the question because licenses to use the property are granted to various vendors such as Pepsi, Wonder Bread, etc. to stock the shelves. Thus, the appellant's response 'there are no contracts or leases' satisfies this discovery request.

" * * * "

"4. Information on Stores Over 150,000 Square Feet in Size

"In its memorandum the auditor states it 'requested Meijer to provide it with any information it might have as to other retailers who operate stores over 150,000 square feet.' Memo, p. 5. The appellant stands by its initial objection that the interrogatory is overbroad and imposes an undue burden because the nature of the information sought is not clear. Nevertheless, the appellant does not keep track of stores over 150,000 square feet."

With regard to subsections 1, 3, and 5 of the auditor's motion to compel, appellant responded thereto and asked that, in the alternative, if such information was determined to be

discoverable by this Board, a protective order be issued to protect said information from public disclosure. Specifically, appellant responded as follows:

"1. Requests for Documents Nos. 2, 3, and 7, and Interrogatories No. 1 - Income, Expenses and Sales Data from Operations of the Property

"A. Income and Expense Statements

"With respect to Profit and Loss statements and Income and Expense statements, the appellant repeats that such statements do not exist. The appellant cannot produce something it does not have.

"B. Gross sales data

"With regard to gross sales from property, the appellant renews its objection. First, the appellant objects because the requests were not clearly stated. Gross sales from the property do not exist, the property is owner-occupied, not income producing.

"Secondly, assuming gross sales from the business operated on the property were requested, the appellant's objections are twofold: a) gross sales are trade secrets, and b) gross sales are not relevant because the subject property was in its first years of operation.

" * * * *

"3. Market Studies Relating to the Property

"The auditor totally fails to address the objection of the appellant to this request. Feasibility/Market studies by the appellant for the subject property in 1986 are not relevant to the value of the subject property for tax year 1994. Moreover, the criteria the appellant utilizes to select a site in 1986 is not relevant to what a willing buyer would purchase the land and buildings located on the subject in 1994.

"Disclosure of feasibility/market studies will cause irreparable harm to the appellant. Such exposure will jeopardize the appellant's ability to compete or even exist in the marketplace.

"Feasibility/Market studies are confidential commercial information. It is a business plan which qualifies as a trade secret pursuant to R.C. 1331.51.

" * * * *

"5. Sales Data on Competitors

"This request was objected to as overbroad. At this time the appellant withdraws its objection and states that it does not compile or have any document showing gross sales of its competitors."

First, we will address the items in the motion to compel discovery that are unrelated to the motion for protective order, specifically items 2 and 4.

Item 2, "Leases Relating to Other Users of the Property," has been sufficiently responded to by appellant. If the auditor seeks information concerning the store's licenses or any other type of agreement, he must more specifically indicate same in his request.

Although this Board finds that Item 4, "Information on Stores Over 150,000 Square Feet in Size", to be overbroad, covering the entire United States, it appears to have already been answered by appellant in its memorandum in opposition to the motion to compel where it states "appellant does not keep track of stores over 150,000 square feet." If the appellee auditor seeks further information on this topic, it must narrow the scope of the question.

With regard to the items objected to that relate to the pending motion for protective order, this Board notes that appellant, in its memorandum in opposition to the motion to compel,

withdrew its objection to Item 5, "Sales Data on Competitors," indicating that "it does not compile or have any document showing gross sales of its competitors."

In addition, with regard to Item 3, this Board finds such type of information to be speculative, at best, and as such, lacking in relevance. Without more specific representations from the appellee to indicate how it or its appraiser would utilize such information, we will not compel the production of such information.

With regard to the information sought in Item 1, this Board finds that, clearly, such information "reasonably appears to be relevant to the subject matter of the pending action," Parma Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision (Feb. 14, 1992), B.T.A. Case Nos. 91-D-89, et seq., unreported. We disagree with appellant's characterization of Meijer, Inc. v. Montgomery Cty. Bd. of Revision (February 8, 1995), B.T.A. Case Nos. 93-M-731-733, unreported, as representing the position that "gross sales in the first year of operation are not relevant." By not relying upon the income approach to determine value in said case, we made no conclusions as to the relevancy of information relating to the first year of a business' operations. However, with regard to appellee's request for income and expense statements appellant has already indicated herein that they do not exist. Therefore, such documents are excepted from our finding that Item 1 is discoverable.

Since this Board has found Item 1 discoverable, appellant now seeks the issuance of a protective order to protect its gross sales information, which it claims are trade secrets

and/or commercial information and its feasibility/market studies, which it claims are trade secrets.

In support of their position, appellant presented the testimony of Robert Riley, senior vice president, general counsel and secretary of the board of directors of Meijer, Inc. Riley stated that the release of gross sales information to the public would hurt Meijer, Inc. by 1) hurting the Meijer family welfare by releasing information associated with their personal wealth and making them a target for kidnapping, etc., 2) affecting employee morale by publishing information about a store's sales, 3) giving the union an advantage at the bargaining table if they become aware of the corporation's position in the market, and 4) by teaching competitors about their business and revealing information to them about which markets to enter and where to place their stores. (R., p. 11-21)

Civ. R. 26(C) requires that a party requesting a protective order demonstrate "good cause" for the issuance of such order. Based upon the standards for "good cause" which this Board previously set forth in Meijer Realty Co., et al. v. Franklin County Board of Revision, et al. (May 3, 1996), B.T.A. Case No. 93-K-1046, unreported, we find that appellant's claimed need for the issuance of a protective order is unsubstantiated and, accordingly, we conclude that it has failed to demonstrate "good cause" as required by Civ. R. 26(C). Simply stating that competitors could generally use the data to their advantage in determining which markets to enter does not constitute the "good cause" contemplated by the Civil Rules.

Accordingly, based upon the foregoing, the auditor's motion to compel is hereby granted in part. Upon appellant's representation that certain portions of the information requested do not exist, it will not be compelled to provide same. It is therefore the order of the Board of Tax Appeals that the Taxpayer, within fourteen days of the issuance of this order, shall respond to the auditor's discovery request (with the exceptions thereto, as noted herein) by submitting the requested documents and providing the requested information. ohiosearchkeybta