

Colley/McCoy Management Co. LLC

v.

Town of Pelham

Docket Nos.: 20363-03PT and 21399-04PT

DECISION

The “Taxpayer” appeals, pursuant to RSA 76:16-a, the “Town’s” 2003 and 2004 assessments of \$454,200 (land \$103,200; buildings \$351,000) on Map 35, Lot 7 106, a McDonald’s restaurant on 1.77 acres (the “Property”). For the reasons stated below, the appeal for abatement is denied.

The Taxpayer has the burden of showing, by a preponderance of the evidence, the assessments were disproportionately high or unlawful, resulting in the Taxpayer paying a disproportionate share of taxes. See RSA 76:16-a; TAX 201.27(f); TAX 203.09(a); Appeal of City of Nashua, 138 N.H. 261, 265 (1994). To establish disproportionality, the Taxpayer must show the Property’s assessments were higher than the general level of assessment in the municipality. Id. We find the Taxpayer failed to prove disproportionality.

The Taxpayer argued the assessments were excessive because:

(1) an estimate by the cost approach utilizing the Town’s value for land and yard improvements indicates a market value of \$607,399 for 2003 and \$626,046 for 2004;

- (2) the Town's assessed value for the building, when equalized, indicates a market value for the building of approximately \$235 per square foot, significantly higher than the actual cost to construct and higher than the value per square foot of comparable properties in Town;
- (3) the cost approach is the most reliable approach to value because it relies on the principle of substitution which stands for the proposition the market will not pay more for a property than what it would cost to acquire the land and construct the improvements; and
- (4) the assessments for 2003 and 2004 should be \$323,744 and \$308,641 based on the cost approach estimate and the Town's levels of assessment for those two years.

The Town argued the assessments were proper because:

- (1) the Taxpayer failed to carry its burden because the cost approach does not capture all the value associated with a McDonald's property;
- (2) the location for a McDonald's property is chosen only after substantial feasibility studies are conducted of demographics and traffic flow; the cost of such feasibility studies must be included in estimating any value by the cost approach;
- (3) the Taxpayer's estimate of \$150 per square foot to construct a McDonald's is not reflective of all the indirect and direct costs of such a property including such things as feasibility studies and the tenant fit-up fixtures such as seating, counters, and fixed kitchen equipment;
- (4) equalizing the Town's land assessed value, as done by the Taxpayer, does not produce a reliable estimate of land value given the time elapsed since the last full reassessment and the low equalization ratios for both years;
- (5) equalizing the Town's land value produces a market value indication for 2003 and 2004 equivalent to a house lot value but not a prime commercial location such as McDonald's restaurant; and

(6) the estimate of value by the income approach could potentially capture the value of the Property, but because the Taxpayer did not provide the rent schedule and the percentage rent rate and the gross sales' revenues, the Town was unable to estimate such a value by the income approach;

The parties stipulated the level of assessments were 0.553 and 0.493 for 2003 and 2004 respectively based on the department of revenue administration's (DRA) weighted mean ratios.

Board's Rulings

For the following reasons the board of tax and land appeals ("board") finds the Taxpayer failed to carry its burden of proof in showing it was disproportionately assessed.

As noted above the burden of showing the assessments are disproportionate lies with the Taxpayer. To carry this burden the Taxpayer needs to make a showing of the Property's market value, which when compared to the general level of assessment and the appealed assessment determines whether an abatement should be granted or not. See e.g., Appeal of Net Realty Holding Trust, 128 N.H. 795, 803 (1986); Appeal of Great Lakes Container Corp., 126 N.H. 167, 169 (1985); Appeal of Town of Sunapee, 126 N.H. 214, 217-18 (1985). We find the Taxpayer's estimate of market value fails because it did not establish a reliable indication of market value for the Property as a whole.

The Taxpayer argued the cost approach is most applicable because it captures the value of the "bricks and mortar" real estate rights subject to taxation and does not include the business or franchise value of a McDonald's restaurant. The board generally agrees with this approach;¹ however, the Taxpayer solely critiqued the building portion of the Town's assessment and only

¹ Nine Seventy Six Realty Trust v. City of Portsmouth, BTLA Docket No.: 17951-98PT. McDonald's Corp. v. City of Dover, BTLA Docket No.: 13242-92PT. (Cost approach inherently winnows out any business value leaving value solely attributable to real estate.)

presented testimony relative to the cost to construct McDonald's buildings as the basis for showing disproportionality. The Taxpayer accepted and relied upon the equalized value for the land assessment and the site and yard improvements contained on the Town's assessment-record card, providing no independent market value estimate of its own.

When the cost approach is employed, an initial and important component of the cost estimate is estimating the value of the land and then estimating all direct and in-direct costs including entrepreneur profit relative to the improvements. Appraisal Institute, The Appraisal of Real Estate, 12th ed. at 356. Here the Taxpayer provided no market evidence as to the value of the land but simply relied on the Town's assessed value. Adequate evidence was submitted that the land portion of the assessment is likely understated based on the Town's testimony that the equalized assessed value of the land is equivalent in 2003 and 2004 to residential lot values and not prime commercial sites such as the Property. Further it is the board's experience that when a municipality has not had a reassessment for a number of years, and its ratios are significantly low, as is the case in Pelham, land values generally have appreciated at a faster rate than building values and, thus, land values are underassessed relative to the improvements. This observation is supported by the public record documents of the 2003 and 2004 DRA Equalization Summaries (attached at Addendum A) indicating the land strata of Pelham assessments in 2003 were 36% (.533-.342/.533) and in 2004 were 44% (.493-.279/.493) lower than the corresponding overall weighted mean ratio.

For a taxpayer to prevail and to carry its burden, it must show that its entire estate is disproportionately assessed, not just one portion of it. Sunapee at 217. While it is possible the building component of the Town's assessment may be high, the land component is low. Without

the Taxpayer presenting competent market evidence of the Property as a whole, the Taxpayer fails in its burden.

Mr. John F. Loftus, Chief Financial Officer of the Taxpayer, testified that McDonald Corporation owns the Property and leases it to the Taxpayer. The Taxpayer is aggrieved because the operating agreement assigns the responsibility to pay the property taxes to the Taxpayer. Mr. Loftus stated McDonald's Corporation buys the land, improves the site with the building, and the Taxpayer as tenant, fits up the property with seating, equipment, electronics, exterior yard items such as lighting, paving, and landscaping to make an operational McDonald's restaurant. The Taxpayer argued that a number of the fit-up items are not taxable as real estate and thus, are not included in its \$150.00 per square foot replacement cost. While it is true some of these items may be personality as furniture and fixture, some may be taxable real estate as fixtures. However, the board need not pursue that analysis because the Taxpayer, in addition to providing no independent estimate of the land and site improvements, provided no definitive argument, other than asserting they are not, as to how those features are not taxable under New Hampshire case law. See e.g. 590 Realty Co. Ltd., v. City of Keene, 122 N.H. 284 (1982).

“When property is appraised, all factors relevant to its value should be considered, Paras v. Portsmouth, 115 N.H. at 67-68, 335 A.2d at 308, including special architectural features and equipment. Although it may be difficult to estimate, the special features and equipment have *some* market value. “[T]o hold there is no market value... would mean that valuable property would entirely escape its just share of the burden of taxation.” Public Service Co. v. New Hampton, 101 N.H. 142,146,136 A.2d 591,595 (1957).”

Last, while not pivotal to the board reaching its conclusion the Taxpayer failed to carry its burden, the board notes the Taxpayer filed its appeal with the board stating different grounds than those argued at hearing. Both years' appeals when filed with the board stated the reason for

the appeal was that the Property was overassessed based on an income approach estimate to value stating “[a]n income approach to value is appropriate for this [P]roperty.” The appeal grounds paragraph then went on to estimate market value by utilizing economic rent, vacancy, expenses, and a capitalization rate with no supporting documentation or discussion of these assumptions. The Town, in an attempt to understand the Taxpayer’s income approach estimate requested lease information from the Taxpayer. The Taxpayer submitted a copy of the lease but not the rent schedule or the percentage lease rate and applicable gross revenues which comprise the two primary financial components of the lease arrangement between the Taxpayer and McDonald’s Corporation. The board finds the Taxpayer’s lack of full response to the Town’s inquiry was purposely evasive to avoid the obvious reason the Town was requesting this information. Because the Taxpayer was relying upon the income approach to value in its appeal, it should be more forthcoming with its contract rents for the Town and the board to review. The fact the income approach of the contract rents co-mingles real estate and business value is not a basis for not providing such information. It is information that is discoverable under that board’s and superior court’s discovery rules. TAX 201.19. An income approach estimate of a property such as McDonald’s will always have a co-mingling of realty and business values that will have to be segregated out. However, the income approach is certainly a valid approach to consider and to compare and correlate with the other two approaches if such data for the other two approaches is available. The Taxpayer also could have requested, but did not, the information be kept confidential if it believes it is exempt from RSA ch. 91-A right-to-know as “commercial or financial information.” RSA 91-A:5, IV.

Also, no evidence was provided at hearing to explain why the grounds of the appeal changed from the time it was filed from an income approach (no cost approach was mentioned in

any of the appeal documents) to solely the cost approach at the time of the hearing. TAX

203.03(b)(6)and(g) require the appeal document state the specific grounds supporting the appeal

and that “the grounds stated in the appeal document shall control the issues before the board.”

The board could have found the Taxpayer’s arguments at hearing were not compliant with this rule and limited the Taxpayer to an income approach argument at hearing. However, the Town did not raise the issue and the Taxpayer failed anyway in carrying its burden in arguing different grounds (cost approach) for abatement at hearing for the reasons already discussed.

A motion for rehearing, reconsideration or clarification (collectively “rehearing motion”) of this decision must be filed within thirty (30) days of the clerk’s date below, not the date this decision is received. RSA 541:3; TAX 201.37. The rehearing motion must state with specificity all of the reasons supporting the request. RSA 541:4; TAX 201.37(b). A rehearing motion is granted only if the moving party establishes: 1) the decision needs clarification; or 2) based on the evidence and arguments submitted to the board, the board’s decision was erroneous in fact or in law. Thus, new evidence and new arguments are only allowed in very limited circumstances as stated in board rule TAX 201.37(f). Filing a rehearing motion is a prerequisite for appealing to the supreme court, and the grounds on appeal are limited to those stated in the rehearing motion. RSA 541:6. Generally, if the board denies the rehearing motion, an appeal to the supreme court must be filed within thirty (30) days of the date on the board’s denial.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Douglas S. Ricard, Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Mark F. Murphy, Esq., Wulsin & Murphy, LLP, 30 Walpole Street, Norwood, MA 02062, Taxpayer Representative; and Chairman, Board of Selectmen, Town of Pelham, 6 Village Green, Pelham, NH 03076-3172.

Date: June 23, 2006

Anne M. Stelmach, Clerk