STATE OF MICHIGAN

COURT OF APPEALS

CAROL FULGENCIO and SILVIANO FULGENCIO, Petitioners-Appellants, v TOWNSHIP OF MUNDY, Respondent-Appellee.	UNPUBLISHED May 11, 2010 No. 289629 Tax Tribunal LC No. 00-321984

Before: TALBOT, P.J., and FITZGERALD and M. J. KELLY, JJ.

PER CURIAM.

Petitioners appeal as of right an order determining their property's true cash value, assessed value, and taxable value. We affirm.

Petitioners first argue on appeal that the Michigan Tax Tribunal committed error requiring reversal by affirming respondent, Mundy Township's, determination that petitioners' property was not entitled to an economic obsolescence depreciation adjustment for a nearby landfill, and by failing to uniformly apply such a factor. We disagree.

"When fraud is not alleged, appellate courts are limited in their review of [Michigan Tax Tribunal] decisions to determining whether the tribunal made an error of law or adopted a wrong principle. All factual findings are final if supported by competent, material, and substantial evidence. Substantial evidence is the amount of evidence that a reasonable person would accept as being sufficient to support a conclusion; it may be substantially less than a preponderance of the evidence." *Wayne County v Mich State Tax Comm'n*, 261 Mich App 174, 186; 682 NW2d 100 (2004). Further, this action is brought pursuant to the General Property Tax Act, MCL 211.1, *et seq*., and "[w]hile statutory interpretation is a question of law that is reviewed de novo, we generally defer to the tax tribunal's interpretations of the statutes it administers and enforces." *Kok v Cascade Township*, 265 Mich App 413, 416; 695 NW2d 545 (2005).

Under the Act, "all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation." MCL 211.1. Pursuant to MCL 211.27a:

> (1) Except as otherwise provided in this section, property shall be assessed at 50% of its true cash value under section 3 of article IX of the state constitution of 1963.

> (2) Except as otherwise provided in subsection (3), . . . the taxable value of each parcel of property is the lesser of the following:
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> (a) The property's taxable value in the immediately preceding year minus any losses, multiplied by the lesser of 1.05 or the inflation rate, plus all additions. . . .
>
> (b) The property's current state equalized valuation.

Pursuant to MCL 211.27(1), "true cash value" is "the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale. . . . In determining the true cash value, the assessor shall also consider the advantages and disadvantages of location . . . ." "'True cash value' is synonymous with 'fair market value.' Therefore, the assessment must reflect the probable price that a willing buyer and a willing seller would arrive at through arm's length negotiation." *Huron Ridge, LP v Ypsilanti Township*, 275 Mich App 23, 28; 737 NW2d 187 (2007).

In an appeal, petitioners have the burden of proof to establish the true cash value of the property. *Professional Plaza, LLC v Detroit*, 250 Mich App 473, 475; 647 NW2d 529 (2002) MCL 211.27. "The weight to be accorded to the evidence is within the Tax Tribunal's discretion." *Great Lakes Division of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 404; 576 NW2d 667 (1998). "The Tax Tribunal is under a duty to apply its expertise to the facts of a case in order to determine the appropriate method of arriving at the true cash value of property, utilizing an approach that provides the most accurate valuation under the circumstances." *Id.* at 389. "The Tax Tribunal has a duty to make its own, independent determination of true cash value. The Tax Tribunal is not bound to accept the parties' theories of valuation. It may accept one theory and reject the other, it may reject both theories, or it may utilize a combination of both in arriving at its determination of true cash value." *Id*. at 389-390. "[W]hile all relevant circumstances that tend to affect property value should be considered in the valuation process, *there is no rule of law that requires the Tax Tribunal to quantify every possible factor affecting value*." *Id*. at 399 (emphasis added).

"[I]t is well settled that the three most common approaches for determining true cash value are the capitalization-of-income approach, the sales-comparison or market approach, and the cost-less-depreciation approach." *WPW Acquisition Co v City of Troy*, 250 Mich App 287, 298; 646 NW2d 487 (2002). Here, petitioners agree that the tribunal applied the proper method of valuation, i.e., the cost-less-depreciation approach, and further, that the tribunal properly applied an economic condition factor (ECF) of 1. Nevertheless, petitioners contend that the tribunal committed error requiring reversal when it affirmed respondent's adoption of a "wrong principle," that is, the denial of *any* depreciation factor for economic obsolescence due to the property's proximity to a landfill. Petitioners then argue, rather inconsistently, that when the neighborhood's 2007 tax assessments were actually made, petitioners *did* receive an economic obsolescence adjustment of 70 percent, but one parcel received an adjustment of 54 percent and other properties in the neighborhood received a 65 percent adjustment. Thus, petitioners conclude that respondent's assessor failed to uniformly apply the economic obsolescence depreciation adjustment for the landfill. Petitioners have not met their burden of proof.

Under the cost-less-depreciation approach, "true cash value is derived by adding the estimated land value to an estimate of the current cost of reproducing or replacing improvements and then deducting the loss in value from depreciation in structures, i.e., physical deterioration and functional or *economic obsolescence*." *Wayne County*, 261 Mich App at 208, quoting *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland,* 437 Mich 473, 484 n 18; 473 NW2d 636 (1991) (emphasis added). In this case, there seemed to be a fair amount of confusion regarding the differences between a depreciation factor for economic obsolescence and an ECF, which can be alleviated by consulting the Michigan State Tax Commission's Assessor's Manual.

Pursuant to MCL 211.10e: "All assessing officials, whose duty it is to assess real or personal property on which real or personal property taxes are levied by any taxing unit of the state, shall use only the official assessor's manual or any manual approved by the state tax commission, . . . in preparing assessments . . . ." "[T]he manual may be used as a 'guide,' but does not itself have the force of law." *Danse Corp v City of Madison Heights*, 466 Mich 175, 181, 179; 644 NW2d 721 (2002). According to the Assessor's Manual:

> When appraising a mass of properties, the assessor frequently uses a cost-less-depreciation analysis and relates it to what properties are selling for through the use of an Economic Condition Factor (ECF). The ECF is derived by analyzing properties which have sold and comparing the cost less depreciation of the buildings to that portion of the sale prices attributable to those buildings. . . . If there is a consistent relationship between the cost-less-depreciation analysis and the sale values of the buildings, this relationship is expressed as an ECF, which is used to adjust the cost-less-depreciation estimates to what properties are selling for in the market. [Michigan State Tax Commission Assessor's Manual, p 14-1.]

In short, an ECF takes depreciation factors into consideration.

"Depreciation is a loss of utility and therefore of value from any cause. This loss of value is divided into three categories. They are physical deterioration, functional obsolescence, and *economic obsolescence* (also referred to as locational or *external* obsolescence)." Assessor's Manual, p 13-1 (emphasis added). "*Economic obsolescence is a lessening in value caused by factors external to the property* such as economic forces which affect supply-demand relationships or *proximity to noxious elements* which cause a lessening in value. . . . Economic obsolescence is usually incurable and of substantial duration." *Id*. at 13-3, 13-4 (emphasis added). See also *Fisher-New Center Co v Michigan State Tax Com*, 380 Mich 340, 362-363; 157 NW2d 271 (1968), rev'd on other grounds on reh 381 Mich 713 (1969) (Economic obsolescence "is loss of value occasioned by outside forces.") "The assessor must be very cautious in analyzing economic obsolescence. Sometimes that which appears very reasonable on the surface can be found to be unreasonable upon closer inspection. Consider for example, a recently constructed manufacturing plant. *There may be some negative aspects to the selected location which are offset by positive features of the same location. It would be mistake, then, to consider only the negative aspects while the positive offsetting ones are disregarded*." Assessor's Manual, p 13-4 (emphasis added). "*The measure of allowable obsolescence becomes a subjective determination.* It can vary widely in the minds of individual assessors. All of these decisions, where the reproduction or replacement cost method is used, demand the exercise of judgment." *Fisher-New Center Co*, 380 Mich at 362-363 (emphasis added). "Even a slight

variation in the percentage of depreciation or of obsolescence may produce a considerable difference in valuation. The percentage to be used is a matter of judgment." *Id*. at 369.

Finally, it should be noted that "[e]conomic obsolescence is *not* the same as the economic condition factor . . . although the economic condition factor can sometimes include the effects of economic obsolescence. *Economic obsolescence may apply to only one property whereas the economic condition factor applies to all the properties in a particular neighborhood or group*." Assessor's Manual, p 13-4 (emphasis added). Moreover, "*frequently, it is not possible to mathematically measure obsolescence and good judgment must be relied on*. In the final analysis, the estimating of depreciation is a function of observation, experience, and good judgment. Regardless of the mathematical result, *the depreciation determined should be weighed in the light of the property as a whole.* A method of measuring obsolescence may logically seem credible but produce a result which is unbelievable. The result should not defy common sense. Economic obsolescence should be supported by convincing evidence." *Id*., p 13-5 (emphasis added).

In this case, respondent's assessor, Angela Spencer, informed petitioners on August 30, 2006, that she agreed that their property, located across the street from a landfill, should receive "the same *external obsolescence percentage* as the other residences in the area due to the landfill location." She further stated that she "reduced the assessed and taxable values for that consideration," however, "[o]n your proposed values, you took a 54% depreciation value that I cannot agree with since your house is brand new construction." Additional correspondence again indicated that Spencer believed that petitioners had requested that their property be depreciated 54 percent, based on age, but Spencer disagreed because the residence was built in 2005. Petitioners clarified, however, that their requested 54 percent depreciation factor was *not* related to the age of their house, but rather, was related "to the presence of the landfill directly across Cook Road" from their property.

Petitioners had apparently cited the depreciation factor used on 9065 Circle Drive, which showed (based on a record printed on May 26, 2006) an economic depreciation factor of 54 percent because of the landfill. Spencer responded, "I have determined that there is *no* reason the property located at 9065 Circle Drive should receive a reduction greater than any of the other properties in the neighborhood. For the assessment year 2007 this error will be corrected. I will not perpetuate this error by applying the same incorrect reduction to your house." The letter continued:

> For 2007, I will review all of the assessments in your neighborhood and will recalculate values using an Economic Condition Factor. Currently, a reduction has been taken for "functional obsolescence." Functional obsolescence as defined by the Appraisal Institute's *Dictionary of Real Estate Appraisal* is "an element of accrued depreciation resulting from deficiencies or super adequacies in the structure." None of the homes in your neighborhood suffer from functional obsolescence. The problem with properties in your neighborhood is the proximity of the landfill. The proper adjustment for that is an Economic Condition Factor. An ECF is derived from sales which have occurred in a specific area. I am in the process of analyzing sale information to determine the correct ECF and when I have completed my analysis I will apply the adjustment uniformly to *all* properties in your neighborhood for 2007.

Based on the information from the Assessor's Manual quoted above, it is clear that Spencer, in this last letter, confused functional and economic obsolescence,[1] and further, it would be quite appropriate to consider proximity to a landfill as economic obsolescence, which is an external consideration having nothing to do with the age of a residence. In fact, the records submitted by petitioners show quite clearly that neighborhood properties had received *economic* depreciation adjustments due *specifically* to the presence of the landfill.

Nevertheless, Spencer repeats this confusion in respondent's evidence submitted on August 23, 2007, to the tribunal, explaining that the neighborhood "has recently been re-valued by our department with direction from the Genesee County Equalization Department. Until recently, these properties received a reduction for *functional obsolescence*. Thorough research determined that none of the homes in this area suffer from functional obsolescence. The errors discovered were not perpetuated to the subject properties and all properties were uniformly assessed. The research also shows that the landfill has minimal impact on the value of this area. The ECF was redeveloped to encompass what small effect was there." (Emphasis added.) According to the tribunal's written opinion and judgment, Spencer's testimony at the hearing was more accurate regarding what had happened in the past: "[A]lthough, *prior to 2007, some properties were depreciated based on their proximity to the landfill*, no such depreciation was applied to the subject property because it was new construction, and further, as of 2007, no land fill depreciation was applied to any property near the landfill."

Petitioners submitted several property card records for neighboring properties, printed on May 26, 2006, which showed that respondent applied an economic obsolescence depreciation factor of 70 percent for the landfill to two other properties on the same street as petitioners. Five additional properties in the neighborhood received a 70 percent economic depreciation factor, while two received a 65 percent adjustment. One property received a 54 percent adjustment. As of May 26, 2006, petitioners' property record card did not show a depreciation factor for the landfill, and additional records confirm that they did not receive the adjustment for 2006.[2] Petitioners seem to argue in their brief on appeal that they *did* receive the depreciation in *2007* (but allege that it was 70 percent and not 54 percent, as they believe they are entitled to), but a record they submitted, printed on January 16, 2007, indicates that no economic obsolescence depreciation factor was applied, which is confirmed by the 2007 record submitted by respondent. This is in line with respondent Spencer's testimony that *no* property would receive an economic obsolescence depreciation factor in 2007. Petitioners claim that this testimony is fraudulent;

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[1] Her letter discusses *functional* obsolescence, but *economic* obsolescence is the proper term for the type of depreciation taken for an external factor such as a landfill. Assessor's Manual, p 13-3.

[2] A property record card for the subject property, printed on September 19, 2006 (in the midst of the petitioners' correspondence with Spencer), *does* indicate an economic depreciation factor of 70. However, the property record card for 2006 submitted by respondent, printed in 2008, shows that petitioners' received *no* economic obsolescence depreciation factor for their property in *any* year.

however, they did not submit any updated records for the neighborhood to prove that other properties received the depreciation in 2007.

The tribunal, in explaining its valuations (which, notably, were a lesser amount than respondent's valuations) concluded, similarly to Spencer, "the landfill was in existence at the time petitioners' originally purchased their property. As such, the value impact of the landfill would have been reflected in the price they paid for the property." The definition of economic obsolescence, however, as explained in the Assessor's Manual, does not reference age of a structure because it is specifically an *external* factor. Nevertheless, as noted, the application of an economic obsolescence depreciation factor is subjective and does not require uniformity, and further, positive aspects of a structure's location must also be taken into account. Assessor's Manual, pp 13-5, 13-14, 14-4; *Fisher New Center Co*, 380 Mich at 362-363. Therefore, it was not an error of law for the Tax Tribunal to conclude that the effects of the landfill would not be as severe on petitioners' new construction home, which, while it had a landfill on one side, had a lake on the other. Moreover, although other neighborhood properties did receive the economic obsolescence depreciation for the landfill in 2006 while petitioners did not, the tribunal determined that the 2006 true cash value of their property was $60,933 less than the amount contended by respondent. Finally, if respondent, as well as the tribunal, chose to use an ECF instead of an economic obsolescence depreciation factor on all of the neighborhood property for tax years 2007 and beyond, petitioners cannot establish that they employed a "wrong principle" because an ECF takes depreciation into account, as explained above. Assessor's Manual, p 14-1. Therefore, the tribunal did not adopt wrong principles or make an error of law in determining the true case value of petitioners' property.

Petitioners next argue that they were prejudiced by respondent's fraudulent withholding of information. We disagree.

As noted above, "[a]bsent fraud this Court's review of a Tax Tribunal decision is limited to determining whether the tribunal made an error of law or adopted a wrong legal principle." *Meijer, Inc v City of Midland*, 240 Mich App 1, 5; 610 NW2d 242 (2000). In addition, "[t]his Court may review the tribunal's rulings regarding evidentiary issues if they involve errors of law." *Georgetown Place Coop v City of Taylor*, 226 Mich App 33, 50; 572 NW2d 232 (1997).

"The Tax Tribunal has original and exclusive jurisdiction over those tax issues which involve the accuracy and methodology of the property tax assessment. Under MCL 205.735(3), '[t]he jurisdiction of the tribunal in an assessment dispute is invoked by a party in interest, as petitioner, filing a written petition on or before June 30 of the tax year involved.' Failure to correct assessments and evaluations in the manner and time provided by statute precludes later attack on the assessment." *Toll Northville, Ltd v Northville Twp*, 272 Mich App 352, 360; 726 NW2d 57 (2006), aff'd in part, vac'd in part on other grds 480 Mich 6 (2008). Pursuant to MCL 211.53b(1), however, "[i]f there has been a qualified error, the qualified error shall be verified by the local assessing officer and approved by the board of review. . . . If the qualified error results in an overpayment or underpayment, the rebate, including any interest paid, shall be made to the taxpayer or the taxpayer shall be notified and payment made within 30 days of the notice. . . . Except as otherwise provided in subsection (6) and section 27a(4), *a correction under this subsection may be made in the year in which the qualified error was made or in the following year only*." (Emphasis added.) A "qualified error" includes "[a]n error of measurement or

calculation of the physical dimensions or components of the real property being assessed." MCL 211.53b(8)(d)(i).

After the hearing below, the tribunal requested additional information from respondent. Petitioners filed an objection to consideration of the following documents on the grounds that they had not been provided to petitioners within 14 days before the hearing, pursuant to Tax Tribunal Rule 205.1342(2)[3]: (1) sketch/area table, (2) tax record card for the subject property marked "2006," and (3) tax record card for the subject property marked "2007." However, petitioners further stated that they *waived* their objection to consideration of the tax record card for the subject property marked "2005," because it been specifically requested by the Tax Tribunal, and further, the information supported petitioners' "contention that there was clerical error in the square footage computation . . ., thus entitling petitioner[s] to appeal the 2005 (and by implication, the 2004) tax assessments." Petitioners maintained, however, that the 2005 records should not be used to their "detriment," because the records had not been provided despite repeated requests. On appeal, petitioners again claim that they did not protest the error in measurement on their property's 2005 property record card (showing what they allege to be a 44 percent error in measurement of the physical dimension of their residence) because the evidence was not turned over by respondent until after the hearing. Petitioners contend that this failure to disclose the evidence constituted fraud on the part of respondent and should have relieved them of the obligation to protest their 2005 assessment to the Board of Review. Further, petitioners contend that they were deprived of a full and fair opportunity to both prepare for and represent themselves at the hearing, which addressed the 2006 and 2007 assessments. We disagree.

"[T]o constitute actionable fraud, it must appear: (1) [t]hat [the] defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery." *Johnson v Wausau Ins Co*, 283 Mich App 636, 643; 769 NW2d 755 (2009), quoting *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). In addition, "[s]uppression of facts and truths can constitute silent fraud where the circumstances are such that there exists a legal or equitable duty to disclose. A legal duty to disclose commonly arises from a circumstance in which the plaintiff inquires regarding something, to which the defendant makes a false or misleading representation by replying incompletely with answers that are truthful but omit material information." *Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 500; 686 NW2d 770 (2004). "Because fraud

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[3] "A copy of the valuation disclosure or other written evidence to be offered in support of a party's contentions as to the subject property's value shall be filed with the tribunal and served upon the opposing party not less than 14 days before the date of the scheduled hearing. Failure to comply with this subrule may result in the exclusion of the evidence at the time of the hearing because the opposing party may have been denied the opportunity to adequately consider and evaluate the evidence before the date of the scheduled hearing." *Kok*, 255 Mich App at 544, quoting Tax Tribunal Rule 205.1342(2).

must be pleaded with particularity, MCR 2.112(B)(1), and is not to be lightly presumed, but must be clearly proved by clear, satisfactory and convincing evidence, trial courts should ensure that these standards are clearly satisfied with regard to all of the elements of a fraud claim." *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008) (internal citations omitted). Finally, "to establish a claim of fraudulent misrepresentation, the plaintiff must have reasonably relied on the false representation. *There can be no fraud where a person has the means to determine that a representation is not true*." *Cummins v Robinson Twp*, 283 Mich App 677, 696; 770 NW2d 421 (2009) (internal citations omitted; emphasis added).

Respondent submitted documents post-hearing, including: (1) a "Sketch/Area Table/Addendum," showing that the subject property had a livable area of 2,067 square feet, (2) the 2005 property record card, which listed the floor area as 2,888 (3) the 2006 property record card, stating that the floor area was 2,058, and (4) the 2007 property record card, stating that the area was 2,058. In its opinion, the tribunal stated, "[p]etitioners assert that respondent used different square footage measurements for different tax years. While respondent's record cards do show different square footage amounts, the property record cards submitted by both parties show the same measurements with one exception: petitioners' property record cards' measurements indicate that the house is 2.8 feet shorter on one side than the other. Nevertheless, the tribunal accepts respondent's measurements and concurs with respondent's square footage determination based on those measurements." The tribunal determined that home's square footage was 2,067 square feet.

Petitioners' argument is focused on the fact that they had not obtained a copy of the 2005 property record card 14 days prior to the hearing, in violation of Tax Tribunal Rule 205.1342(2). However, the court found that "the documents submitted by respondent after the hearing pursuant to the tribunal's request are public documents that were available to petitioners for inspection, and, as such, are properly admitted into evidence." Pursuant to MCL 211.10a: "All property assessment rolls and property appraisal cards shall be available for inspection and copying during the customary business hours." Thus, petitioners cannot show that they reasonably relied on any false representations – or withholding of information – by respondent. Furthermore, it should be noted that, among the several printouts of the record card for their property submitted by *petitioners*, was a printout from March 1, 2006, showing that their property measured 3,034 square feet (on the record card) and 3,049 from (from the sketch/area table). These are the highest figures of any documents submitted by either party. In fact, petitioners testified at the hearing that they had disputed the square footage from the 2006 assessment before the Board of Review in 2006 and the issue was resolved. Therefore, petitioners cannot show prejudice because they were on notice at that time that a "qualified error" may have existed on the 2005 assessment. Because they did not appeal their 2005 assessment to the Board of Review, the tribunal properly ruled that it did not have jurisdiction over any claims from that tax year. MCL 205.735(3).

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Michael J. Kelly