IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Transportation Investment Group	:	
	:	
v.	:	
	:	No. 1809 C.D. 2010
Erie County Board of Assessment Appeals	:	
	:	
v.	:	
	:	
City of Erie School District, Appellant	:	
	:	
Transportation Investment Group, Appellant	:	
	:	No. 1980 C.D. 2010
v.	:	
	:	
Board of Assessment Appeals of Erie County	:	
	:	
v.	:	
	:	Argued: April 5, 2011
City of Erie School District	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: August 4, 2011

The City of Erie School District (District) and Transportation Investment Group (Taxpayer) cross-appeal from the August 18, 2010, order of the Court of Common Pleas of Erie County (trial court), which determined the fair market value of

Taxpayer's industrial property for real estate tax assessment purposes for the years 2004-2010. We vacate and remand.

Taxpayer owns real estate located at 1664-1710 Greengarden Road, Erie, Pennsylvania (the property). The property consists of 25.71 acres of land, which is zoned M-2 Heavy Industrial. The real estate is improved with a 486,086 square-foot industrial facility, one of the largest in the Erie area, and it provides commercial space to tenants in the transportation and warehousing industries. At the beginning of this litigation the property had an assessed value of $7,975,700; however, due to the subsequent erection of an additional building, the assessed value increased to $8,280,400 in 2008. (Reproduced Record (R.R.) at 7a-8a.)

Taxpayer filed an appeal with the Erie County Board of Assessment Appeals (the Board) for tax year 2004. The Board denied the appeal, and Taxpayer appealed the Board's decision to the trial court. The matter remained pending in the trial court for years; however, in 2010, after Taxpayer moved for a status conference, the trial court scheduled a hearing. The hearings took place on June 3 and 28, 2010.

Taxpayer presented the testimony of its general manager, Joseph A. Benacci, who purchased the property in 1995 for investment purposes. Benacci testified that he appealed the assessment because the property was over-appraised, which forced his lease rate to a high level--76 cents per square-foot--and caused him to lose business. Benacci stated that he has made efforts to find tenants and fill the facility.

Taxpayer also presented the testimony of Robert McCown, a certified general appraiser, who performed an appraisal of the property. McCown testified that he considered the cost, comparative sales, and income capitalization approaches to appraising the property. However, McCown concluded that the income capitalization

approach was best suited for the property and built his appraisal around that model. McCown analyzed the value of the property by considering the property's actual revenue, rents, expenses, and vacancy rates. To calculate fair market value, McCown applied a 12% capitalization rate to the annual net income for each year at issue. McCown determined that the value indications for the property fluctuated erratically during the years at issue and, for that reason, stabilized the values to reflect the views of a prospective buyer. (Supplemental Reproduced Record (S.R.R.) at 54b.) For tax years 2002—2009, McCown calculated the following values: for 2002--$6,500,000; for 2003--$6,500,000; for 2004--$6,500,000; for 2005--$6,000,000; for 2006--$6,000,000; for 2007--$6,000,000; for 2008--$6,000,000; and for 2009--$6,000,000. (S.R.R. at 61b.)

The District presented the testimony of Robert Glowacki, a certified real estate appraiser, who appraised the property using both the income and the comparative sales approaches. Glowacki examined data on leases, rents, expenses, vacancy rates, and real estate sales. To calculate fair market value under the income approach, he applied a 10% capitalization rate to the years 2003-2007 and a 10.5% capitalization rate for 2008-2009. (R.R. at 168a.) Reconciling his analysis under the income and comparative sales approaches, Glowacki calculated the following fair market values for the property, effective August 1 of each year, as follows: for 2003--$9,050,000; for 2004--$9,100,000; for 2005--$9,090,000; for 2006--$9,390,000; for 2007--$9,210,000; for 2008--$8,520,000; and for 2009: $8,540,000. (S.R.R. at 99b.)

The trial court concluded that the opinions of McCown and Glowacki were generally competent and credible, but nonetheless found significant deficiencies in each expert's opinion that skewed their calculation of the fair market value of the property. The trial court also characterized McCown's opinion as a "value-in-use"

actual income appraisal.[1] For these reasons, the trial court did not adopt the values of either expert, but rather utilized their figures to calculate the following fair market values for the property, which are in the midrange between the findings of the experts: for 2004--$7,775,000; for 2005--$7,550,000; for 2006--$7,545,000; for 2007--$7,695,000; for 2008--$7,605,000; for 2009--$7,260,000, and for 2010--$7,270,000.

These cross-appeals ensued.

On appeal to this Court,[2] the District raises the following contentions for our review: (1) the trial court erred by finding that Taxpayer overcame the assessment

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[1] The trial court stated in its opinion that "the taxpayer's expert produced a value-in-use, actual income appraisal that was not always commensurate with potential gross income as required." (Trial court opinion at 1-2.)

[2] In a tax assessment appeal, our scope of review is limited to determining whether the trial court abused its discretion or committed an error of law or whether its decision is supported by substantial evidence. American Association for Lost Children v. Westmoreland County Board of Assessment Appeals, 977 A.2d 595 (Pa. Cmwlth. 2009).

Moreover, assessment cases are litigated and analyzed in accordance with the following procedure:

> …[T]he taxing authority bears the initial burden of establishing its prima facie case for the validity of the assessment. Deitch Co. v. Board of Property Assessment, Appeals and Review of Allegheny County, 417 Pa. 213, 221, 209 A.2d 397, 402 (1965). This is typically done by presenting the official assessment records and the testimony of an assessment officer. The burden then shifts to the taxpayer to respond with credible, relevant evidence to persuade the court of the merits of his position. Id. (emphasis added). If the taxpayer fails to do so, then the taxing authority prevails. If the taxpayer meets his burden, then the court may no longer presume the taxing authority's assessments are correct. Id. at 221-22, 209 A.2d at 402.
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> The trial court's findings of fact can be reversed only for clear error. Green v. Schuylkill County Board of Assessment Appeals, 565 Pa. 185, 196-97, 772 A.2d 419, 427 (2001). In making its findings, the

(Footnote continued on next page…)

record, when it presented a "value-in-use" appraisal; (2) the trial court erred by finding Taxpayer's appraisal expert credible; and (3) the trial court erred by determining a fair market value for tax year 2010 when Taxpayer failed to present evidence of value for that specific year.

Taxpayer, on the other hand, raises these contentions: (1) the trial court erred by averaging the proposed fair market values offered by Taxpayer and the District because Taxpayer offered competent values and the District's expert opinions were not based on any credible data; (2) the trial court improperly weighed the opinion of Taxpayer's expert by classifying the appraisal as a "value-in-use" appraisal; (3) the trial court gave too much weight to the opinion of the District's expert; and (4) the trial court properly determined the value for the real estate for tax year 2010.[3]

(continued…)

> trial court must state the basis and reasons for its decisions, regardless of whether one expert or multiple experts testify. Id. at 208, 772 A.2d at 433. Where the trial court's conclusions are supported by substantial evidence in the record, this Court may not disturb those findings on appeal. Earl Township v. Reading Broadcasting, Inc. 770 A.2d 794, 798 (Pa. Cmwlth. 2001). When expert testimony conflicts, as it did here, the trial court must determine the weight and credibility to assign each expert's testimony. Pennypack Woods Home Ownership Association v. Board of Revision of Taxes, 163 Pa. Commw. 80, 639 A.2d 1302, 1306 (Pa. Cmwlth. 1994).

Herzog v. McKean County Board of Assessment Appeals, 14 A.3d 193, 200 (Pa. Cmwlth. 2011).

[3] In its reply brief, the District contends that McCown's opinion is a "retrospective appraisal" that violates the requirement in Article VIII, Section 1 of Pennsylvania Constitution that all taxes must be uniform. While the reply brief develops this issue, the argument section of the District's main appellate brief contains only two sentences on this constitutional question, (District's brief at 19), and the uniformity issue is not set forth in the Statement of Questions Involved. In Park v. Chronister, 617 A.2d 863 (Pa. Cmwlth. 1992), we stated the following:

(Footnote continued on next page…)

For purposes of clarity and simplicity, and because their issues overlap, we will consolidate the issues raised in the cross-appeals for analysis where it is possible to do so.

We begin with the District's contention that Taxpayer's expert, McCown, developed a value-in-use appraisal, which is not permissible in tax assessment cases. The District argues that, because Taxpayer's value-in-use appraisal is insufficient as a matter of law, Taxpayer never overcame its initial burden of proof.

Pennsylvania law provides that value-in-use appraisals are not relevant evidence in tax assessment cases:

> …*[U]se value or value-in-use represents the value to a specific user and*, hence, does not represent fair market value. Authorities in the field of real estate valuation

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(continued…)

> An appellant has a general right to file a reply brief 'to matters raised by appellee's brief not previously raised in appellant's brief . . . .' Pa.R.A.P. 2113(a). A reply brief may not be used as an opportunity to raise additional issues on appeal. G. Ronald Darlington, et al., Pennsylvania Appellate Practice § 2113:2. Rather than responding to issues raised by the Department, Park's reply brief attempts, *inter alia*, to argue issues he raised but inadequately developed in his brief. It is not the purpose of a reply brief to remedy a discussion of issues presented in an appellant's brief that is so poorly developed as to preclude meaningful appellate review. See Leonard S. Fiore, Inc. v. Department of Labor and Industry, Prevailing Wage Appeals Board, 526 Pa. 282, 585 A.2d 994 (1991) (Supreme Court granted appellee's motion to suppress portions of appellant's reply brief which reargued issues previously raised and argued in appellant's brief). We, therefore, decline to consider the aforementioned issues.

Id. at 871. Therefore, following Park, we decline to consider the constitutional issue.

distinguish between market value (or value-in-exchange) and use value:

> Use value is a concept based on the productivity of an economic good. Use value is the value a specific property has for a specific use . . . . Use value may vary, depending on the management of the property and external conditions such as changes in the business . . . . Real property may have a use value and a market value.

Strictly speaking, value-in-use does not fit the criteria discussed in the definition of market value above [willing buyer/willing seller] and should not be considered equivalent to or a substitution for market value.

Because value-in-use is based on the use of the property and the value of that use to the current user, it may result in a higher value than the value in the marketplace. Value-in-use, therefore, is not a reflection of fair market value and is *not relevant* in tax assessment cases because only the fair market value (or value-in-exchange) is relevant in tax assessment cases. Thus, *we hold that a property's use and its resulting value-in-use cannot be considered in assessing the fair market value of property for tax assessment purposes in Pennsylvania*.

F & M Schaeffer Brewing Co. v. Lehigh County Board of Appeals, 530 Pa. 451, 457-58, 610 A.2d 1, 6-7 (1992) (emphasis added) (citations omitted) (footnote omitted).

An appraiser applies the improper value-in-use methodology when he or she develops a valuation based on the productivity of a business located on the real estate. Hershey Entertainment and Resorts Co. v. Dauphin County Board of Assessment Appeals, 874 A.2d 702 (Pa. Cmwlth. 2005) (holding that an expert used an impermissible value-in-use approach, where he developed an income-based valuation that relied on revenue generated by Hershey's amusement and entertainment businesses---admissions to Hershey Park and Zoo America---that are

located on the property, rather than the value of the property itself). Professor Goodman cogently explained the law as follows:

> In Hershey … the appellate court examined the appropriate methodology of valuing income-producing properties by disallowing any appraisal approach that resulted in the capitalization of income from the business run on the property. The correct method under the income approach to value was to capitalize the income generated from the real estate component of the property. The court found that to value the business run on the property was a violation of previous court decisions and the Pennsylvania statutory law.
>
> ….
>
> …[A]ppraisers in Pennsylvania, for tax assessment purposes under the income approach, cannot value any revenue derived from non-real-estate operations on a property. The income approach must be used to capitalize the income stream derived from the realty itself, not from non-real estate business ventures conducted on the property. This is a common mistake and great care must be taken to separate the non-real-estate operations on the property from the real-estate cash flow; otherwise, the appraisal will be based on the prohibited value-in-use methodology.

Bert M. Goodman, Assessment Law & Procedure in Pennsylvania, (2010 ed.) at 211, 213. Compare In re Appeal of V.V.P. Partnership, 647 A.2d 990 (Pa. Cmwlth. 1994) (holding that, although an appraiser used actual business income figures of a tennis club, including athletic court rentals, to develop the income approach to valuation, the methodology was not improper because the appraiser placed a value on the property applicable to any owner and unique features of the property provided sound business reasons for relying upon business income).

In this case, McCown testified as follows:

> Q. So we're clear, you used the actual income and expenses in developing your report. What actually happened with the property over the last six years?
>
> A. Yes, *the income* that Mr. Benacci—or that the company collected, and expenses *that we felt related to the real estate* had nothing to do with those businesses or mortgage or interest or depreciation or anything like that.

(R.R. at 61a.) (Emphasis added.) McCown thus appraised the property consistent with the principle that appraisers must be careful to avoid valuing revenue derived from non-real estate operations and focus instead on the income stream derived from the realty itself. Moreover, McCown's report reveals that his analysis started with the rental income received by Taxpayer, (S.R.R. at 47b-54b), which is income from the real estate itself, and not income generated by business ventures unrelated to the real estate. We observe that McCown's opinion is quite different from the value-in-use analysis that was applied by the expert in Hershey:

> [T]he trial court determined that [the expert's] methodology was not the usual approach to income-based valuation, which is primarily used for rental properties such as apartments, office space and shopping centers. That approach generally begins with a determination of the available square footage and is based on the premise that the space available for leasing has a potential for producing income by the simple act of permitting a third party to occupy it for a period of time. The trial court noted that the usual income approach is a far cry from [the expert's] complex income-based analysis, '*which starts with an examination of revenues derived from a complex combination of real and personal property, tangible assets, good will, advertising, marketing, management and other factors* which go into the day-to-day operation of a complex business….'

Id. at 705-06 (emphasis added).

The District argues that McCown considered improper factors such as Taxpayer's actual income and Benacci's ability to manage the property. However, McCown opined that the actual income of the property was the same as the potential gross income of the property, (R.R. at 76a, 81a-82a, 188a-19a), and we stated in V.V.P. Partnership that an expert's use of actual income, rather than hypothetical figures, does not amount to a value-in-use method. Furthermore, McCown merely testified that Benacci was a credible person because he provided accurate financial information, was not "cooking the books," behaved prudently, and was doing his best to lease the property. (R.R. at 64a-65a.)

Therefore, reading both his testimony and his extensive appraisal report (S.R.R. at 1b-85b) as a whole, we conclude that McCown did not issue a value-in-use appraisal.[4]

Both the District and Taxpayer challenge the trial court's assessment of the weight and credibility of the expert testimony. Specifically, the District contends that the trial court erred in relying upon McCown's testimony because he did not follow the Uniform Standards of Professional Appraisal Practice, which require an appraiser to analyze comparable rental data and the potential earning capacity of the property, and because he used tax returns to perform a retrospective analysis. On the other hand, Taxpayer contends that Glowacki's opinion is not legally and factually sound because he failed to give proper weight to the income approach and his calculations, vacancy, and capitalization rates were unsupported by concrete data.

[4] It is important to note that the trial court declined to adopt McCown's fair market value calculations and, instead, utilized McCown's and Glowacki's valuations to calculate its own determination of fair market value.

However, it is well-settled that the trial court is the ultimate finder of fact and, as fact-finder, maintains exclusive province over matters involving the credibility of witnesses and the weight afforded to the evidence. Parkview Court Associates v. Delaware County Board of Assessment Appeals, 959 A.2d 515 (Pa. Cmwlth. 2008). This Court is prohibited from making contrary credibility determinations or reweighing the evidence in order to reach an opposite result.[5] Id. Furthermore, in assessment cases courts apply the following analysis to evaluate the weight and credibility of testimony:

> In determining the credibility of an expert witness and the weight of the testimony, the fact finder treats the expert as any other witness, and applies the same standards of credibility that would be applied to any other witness. The fact finder may believe all or none of the expert's testimony, or part of one expert's testimony and part of another expert's testimony. The fact finder should consider the method by which the expert reached his or her conclusion. The fact finder is not bound to accept the expert's testimony merely because it is the testimony of someone having special skill or knowledge. *All the components that the expert*

[5]Although case law provides that the weight of the evidence is before the appellate court for review, see e.g. Green v. Schuylkill County Board of Assessment Appeals, 565 Pa. 185, 772 A.2d 419 (Pa. Cmwlth. 2001), our Supreme Court long ago explained that this principle does not grant appellate courts broad fact finding powers in assessment appeals:

> In an appeal from an assessment for taxes, the findings of fact of the court below have great force, and these findings will not be set aside unless clear error is made to appear: Rockhill Iron & Coal Co. v. Fulton County, 204 Pa. 44. While the weight of the evidence is before this court, *findings of the court below that are based on the weight of evidence, will not be disturbed*: Lehigh & Wilkes-Barre Coal Co.'s Assessment, 298 Pa. 294, 308. *We do not reverse its findings except for clear error*: Thompson's Appeal, 271 Pa. 225, 229.

Appeal of Westbury Apartments, Inc., 314 Pa. 130, 131, 170 A. 267 (1934) (emphasis added).

> *considered are matters which the fact finder considers in determining the persuasive quality of the testimony.* The fact finder weighs the opinions of the experts against one another to determine credibility and weight.

In re Appeal of Avco Corp., 515 A.2d 335, 338 (Pa. Cmwlth. 1986) (emphasis added). Furthermore, questions involving financial data, calculations, and the methodology applied by an expert go to the weight and credibility of an expert's opinion. 1198 Butler St. Assocs. v. Board of Assessment Appeals, 946 A.2d 1131 (Pa. Cmwlth. 2008); In re Penn-Delco School District, 903 A.2d 600 (Pa. Cmwlth. 2006).

Here, both parties are unhappy with the trial court's assessment of the weight and credibility of the evidence and they invite us to re-examine the details of each expert's analysis. Because questions regarding the data and/or methodology utilized by an expert to value real estate go to the weight and credibility of the opinion and are matters within the exclusive province of the trial court to decide, we decline those invitations.

The District and Taxpayer argue that the trial court further erred by using its assessment of the weight and credibility of the expert's opinions to justify splitting the difference between the valuations of each expert. However, when presented with conflicting experts, both of whom are found to be competent and credible, the fact-finder may determine the fair market value of the property lies somewhere between the values reached by the competing experts. Jackson v. Board of Assessment, 950 A.2d 1081 (Pa. Cmwlth. 2008). In this case, because the trial court found both experts to be credible and competent, the trial court did not err by exercising its authority to select a value for the property in the mid-range of the experts' appraisals.

Nevertheless, the trial court's opinion reflects the trial court's erroneous belief that McCown's opinion was a value-in-use appraisal, and that the trial court factored that conclusion into its assessment of the weight of the evidence. (Trial court op. at 1-2.) In light of our disposition of the value-in-use question, we will vacate the trial court's order and remand the case to allow the trial court to reweigh the evidence and issue a new decision.

Lastly, we address the District's contention that the trial court erred by finding a market value of $7,270,000 for the year 2010, because there is no competent evidence in the record pertaining to that tax year. When a tax appeal is pending, subsequent tax years are also included in the appeal. Strawbridge & Clothier v. Board of Assessment Appeals of Delaware County, 492 A.2d 108 (Pa. Cmwlth. 1985). Here, the trial court had extensive expert testimony regarding the value of the property over the course of many years, and we conclude that the trial court properly relied upon that evidence to determine a value for 2010.[6]

Accordingly, the trial court's order is vacated and the case is remanded for the trial court to issue a new decision in accordance with this opinion.

PATRICIA A. McCULLOUGH, Judge

[6] The trial court's value of the property for the year 2010, $7,270,000, rests midway between McCown's 2009 calculation of $6,000,000 and Glowacki's 2009 calculation of $8,540,000.

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	:	
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ORDER

AND NOW, this 4th day of August, 2011, the August 18, 2010, order of the Court of Common Pleas of Erie County is vacated and the case is remanded for the trial court to issue a new decision in accordance with the foregoing opinion.

Jurisdiction relinquished.

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PATRICIA A. McCULLOUGH, Judge