

STATE OF MICHIGAN
COURT OF APPEALS

SEC ACCOMMODATOR - BURWICK FARMS,
LLC,

UNPUBLISHED
March 19, 2013

Petitioner-Appellee,

v

No. 309558
Tax Tribunal
LC No. 361344

CITY OF HOWELL,

Respondent-Appellant.

Before: BORRELLO, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Respondent appeals by right the portion of the final order and judgment of the Michigan Tax Tribunal determining the true cash value (TCV)¹ of the subject property for the 2010 and 2011 tax years. We affirm.

I. BASIC FACTS AND PROCEDURE

This case concerns petitioner's 264-unit apartment complex spread over three real property parcels. Respondent originally assessed the property's TCVs, state equalized values (SEV), and taxable values (TV), as follows:

Parcel No. 4717-26-400-057 ("Parcel 1"):

Year	TCV	SEV	TV
2009	\$6,942,600	\$3,471,300	\$3,273,566
2010	\$5,858,600	\$2,929,300	\$2,929,300
2011	\$4,978,400	\$2,489,200	\$2,489,200

¹ "True cash value" is defined as a property's "fair market value" or "usual selling price." MCL 211.27(1); see also *President Inn Properties, LLC v Grand Rapids*, 291 Mich App 625, 637; 806 NW2d 342 (2011). (Op, 9)

Parcel No. 4717-26-400-062 (“Parcel 2”):

Year	TCV	SEV	TV
2009	\$8,005,000	\$4,002,500	\$3,764,977
2010	\$6,717,800	\$3,358,900	\$3,358,900
2011	\$5,743,800	\$2,871,900	\$3,871,900

Parcel No. 4717-26-400-073 (“Parcel 3”):

Year	TCV	SEV	TV
2009	\$3,765,800	\$1,882,900	\$1,801,526
2010	\$3,250,600	\$1,625,300	\$1,625,300
2011	\$2,701,200	\$1,350,600	\$1,350,600

Petitioner appealed the assessment to the Tribunal, asserting that respondent incorrectly assessed the property’s TCV. Petitioner provided an appraisal report for the 2009 tax year, prepared by a certified general licensed real estate appraiser, that employed a sales comparison approach and an income comparison approach. Petitioner attempted to offer appraisal reports, prepared approximately three weeks before the November 14, 2011 hearing, for the 2010 and 2011 tax years; however, the Tribunal rejected these reports as untimely, holding that admission of the reports would violate the General Call Order the Tribunal issued in this case, which required that such reports be filed and exchanged on or before June 17, 2011.

Petitioner’s expert opined that the property in the aggregate was worth \$13,000,000 in 2009. Respondent offered property assessment cards into evidence for 2009 through 2011, which were prepared using a modified cost approach, resulting in the assessed values reflected above.

The Tribunal concluded that petitioner failed to submit evidence sufficient to carry its burden of establishing the TCV of the property for 2010 and 2011. See MCL 205.737(3); *President Inn Properties LLC v Grand Rapids*, 291 Mich App 625, 806 NW2d 342, 347 (2011). The Tribunal also gave no weight to petitioner’s expert’s sales comparison approach to valuation. The Tribunal was critical of the expert’s use of an “economic adjustment,” which was a percentage modifier applied to the value per unit of each of the comparable sales. The Tribunal noted that the method used by petitioner’s expert was “not widely accepted in the appraisal industry.” It further noted:

Mr. Parker defended this method based on his experience that an income producing property should be compared using the net operating income of other properties because the technique adequately captures and measures the primary motivation of buyer and sellers for such properties. Mr. Parker fails to provide, however, the basis for this technique or where the net operating income used in calculating this adjustment came from. When questioned on cross-examination, Mr. Parker admitted that he did not know and could not explain what income or expenses were included in the calculation of the net operating income for each of

the comparable properties (unless he appraised them); he just accepted the information that he gleaned from different sources without verification.

The Tribunal finds that use of economic characteristics as the primary adjustment in a sales comparison approach lacks credibility and accountability. Moreover, the adjustment appears excessive and is suspect. Although Mr. Parker did not duplicate adjustments, the high percentage of the adjustments of 46.26%, 63.26%, and 137.56% leaves the Tribunal to question the actual comparability of the sales. This novel approach is not accepted as a valid independent methodology upon which to determine the market value of the Subject [property] and we give Petitioner's sales approach no weight.

The Tribunal also rejected respondent's modified cost approach, stating that

given the decline in market value of existing properties during the relevant time frame, it is unlikely that a prospective buyer would consider building new as a suitable alternative. The cost approach has little bearing on the market if buyers and sellers would not consider the cost to build as an alternative to buying an existing facility on property."

The Tribunal also stated that the respondent's computation of a true cash value using mass appraisal guidelines asked the Tribunal to "use non-specific information" to establish the TCV of the property. However, the Tribunal did find that respondent's evidence was probative to the extent that it reflected the trend in market conditions over the relevant years.

The Tribunal accepted petitioner's income capitalization approach, with some modifications, for tax year 2009. The Tribunal noted that the income capitalization approach "is generally considered the most accurate method for valuing income-producing property." The Tribunal stated that "[u]nder these circumstances, an income approach would likely yield the most accurate valuation of the Subject [property]." The Tribunal independently adjusted the vacancy rate used by petitioner's expert, so as to conform to the actual vacancy experience of the subject property, and eventually calculated the TCV expressed below.

For tax years 2010 and 2011, the Tribunal used respondent's assessment records to calculate the rate of decline in market values for apartments in the area of the property (Op, 20). It then applied those rates to its 2009 valuation, yielding the figures also listed below.

The Tribunal thus found the values of the property² to be as follows:

Parcel No. 4717-26-400-057 (“Parcel 1”):

Year	TCV	SEV	TV
2009	\$5,231,000	\$2,615,550	\$2,615,550
2010	\$4,426,030	\$2,213,015	\$2,213,015
2011	\$3,754,520	\$1,877,260	\$1,877,260

Parcel No. 4717-26-400-062 (“Parcel 2”):

Year	TCV	SEV	TV
2009	\$6,034,800	\$3,017,400	\$3,017,400
2010	\$5,106,040	\$2,553,020	\$2,553,020
2011	\$4,331,360	\$2,165,680	\$2,165,680

Parcel No. 4717-26-400-073 (“Parcel 3”):

Year	TCV	SEV	TV
2009	\$2,834,100	\$1,417,050	\$1,417,050
2010	\$2,397,930	\$1,198,965	\$1,198,965
2011	\$2,034,120	\$1,017,060	\$1,017,060

II. STANDARD OF REVIEW

“This Court’s ability to review decisions of the Tax Tribunal is very limited.” *President Inn Properties, LLC*, 291 Mich App at 630. “In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation.” Const 1963, art 6, § 28.

In *Great Lakes Div of Nat’l Steel Corp v Ecorse*, 227 Mich App 366, 388-389; 576 NW2d 667 (1998), this Court stated:

While this Court is bound by the Tax Tribunal’s factual determinations and may properly consider only questions of law under this section, a Tax Tribunal decision that is not supported by competent, material, and substantial evidence on the whole record is an “error of law” within the meaning of Const

² The Tribunal calculated all values in the aggregate, then apportioned the resulting figure into the three parcels by the amount of the aggregate assessed value each parcel represented. This calculation again utilized respondent’s assessment evidence.

1963, art 6, § 28. *Oldenburg v Dryden Twp*, 198 Mich App 696, 698; 499 NW2d 416 (1993); *Kern v Pontiac Twp*, 93 Mich App 612, 620; 287 NW2d 603 (1979). Substantial evidence must be more than a scintilla of the evidence, although it may be substantially less than a preponderance of the evidence. *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992). “Substantial” means evidence that a reasonable mind would accept as sufficient to support the conclusion. *Kotmar, Ltd v Liquor Control Comm*, 207 Mich App 687, 689; 525 NW2d 921 (1994).

III. ASSESSMENT

Respondent essentially argues that the Tribunal erred in conducting an independent determination of the TCV of the property for tax years 2010 and 2011. According to respondent, once the Tribunal determined that petitioner had failed to carry its burden of proof of establishing the TCV of the property, the Tribunal was prohibited from relying on any of the respondent’s evidence (which was offered in support of the rejected cost approach) in making its independent determination, or should have simply accepted respondent’s determination of the property’s TCV. This argument misapprehends the applicable law.

“A proceeding before the Tribunal is original and independent and is considered de novo.” MCL 205.735(2). Thus, the Tribunal “has a duty to make its own independent determination of true cash value.” *Great Lakes Div of Nat’l Steep Corp*, 227 Mich App at 389. “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 case value.” *Id.* at 389-390. “In the Tax Tribunal, a property’s assessed valuation on the tax rolls carries no presumption of validity.” *President Inn Properties*, 291 Mich App at 640. “Regardless of the method employed, the Tax Tribunal has the overall duty to determine the most accurate valuation under the individual circumstances of the case.” *Id.* at 631.

The Michigan Constitution provides for the taxation of property assessed at not in excess of 50 percent of its TCV. Const 1963, art 9, § 3. “[T]rue cash value’ means the usual selling price at the place where the property to which the term is applied at the time of assessment, being the price that could be obtained for the property at private sale” MCL 211.27(1). TCV is synonymous with “fair market value.” *President Inn Properties*, 291 Mich App at 350. In *President Inn Properties*, this Court summarized the TCV determination as follows:

Courts have generally recognized that the three most common approaches to valuation are the capitalization-of-income approach, the sales-comparison approach or market approach, and the cost-less-depreciation approach. Our Supreme Court has described these three common valuation techniques, quoting from the Michigan State Tax Commission Assessor’s Manual. Regardless of the valuation approach employed, the final value determination must represent the usual price for which the subject property would sell. In other words, a valuation method is wrong only if it does not lead to the most accurate determination of the taxable property’s true cash value or fair market value. Thus, the Tax Tribunal has a duty to select the approach which provides the most accurate valuation

under the circumstances of the individual case. [*Id.* at 639 (quotation marks and internal citations omitted).]

Contrary to respondent's argument, the Tribunal was *required* to make an independent determination of the property's TCV. *Jones & Laughlin Steel Corp*, 193 Mich App at 355. In *Jones & Laughlin Steel Corp*, this Court stated explicitly:

The Tribunal further erred in failing to make an independent determination of the true cash value of the property. The Tribunal apparently believed that no such determination was necessary after it concluded that petitioner had failed to meet its burden of proof and dismissed petitioner's appeal. The Tribunal correctly noted that the burden of proof was on petitioner, MCL 205.737(3). This burden encompasses two separate concepts: (1) the burden of persuasion, which does not shift during the course of the hearing, and (2) the burden of going forward with the evidence, which may shift to the opposing party. The Tribunal's decision, however, seems analogous to the entry of a directed verdict upon the failure of a plaintiff's proofs. To the extent this analogy may be accurate in this case, the entry of judgment against petitioner for its failure to provide sufficient evidence was erroneous because, while petitioner may not have met its burden of persuasion, *it did meet its burden of going forward with evidence*. [*Id.* (emphasis added).]

Here, the Tribunal stated that petitioner's evidence failed to carry its burden of establishing the TCV of the property for tax years 2010 and 2011; it did not, however, state that petitioner failed to meet its burden of going forward with evidence. The Tribunal noted that petitioner's rent rolls for 2010 and 2011 were admitted, which provided the Tribunal with rental and vacancy information. In context, we read the Tribunal's statement as making reference to the failure of the petitioner's ultimate burden of persuasion. Therefore, the Tribunal did not err in making an independent determination of the property's TCV, and indeed would have erred in not doing so. *Pontiac Country Club v Twp of Waterford*, ___ Mich App ___; ___ NW2d ___ (2013), slip op at 4; *Jones & Laughlin Steel Corp*, 193 Mich App at 355.

Even if the Tribunal's statement referred to the failure of petitioner to carry its burden of persuasion, such failure would not have relieved the Tribunal of the obligation to conduct an independent determination. In *Jones & Laughlin Steel Corp*, this Court stated:

Even if the Tribunal had correctly concluded that petitioner's proofs had failed, the Tribunal still would be required to make an independent determination of the true cash value of the property. *The Tribunal may not automatically accept a respondent's assessment, but must make its own findings of fact and arrive at a legally supportable cash value*. [*Id.* (emphasis added).]

Therefore, the Tribunal was required to make an independent assessment of the TCV of the property, notwithstanding any failure of proofs on the part of petitioner.

Respondent additionally argues that the Tribunal erred in making its independent valuation on the grounds that there was no evidence upon which the Tribunal could base its

findings for 2010 and 2011. Respondent appears to base this claim on the fact that the Tribunal rejected its own cost approach, and also rejected petitioner's sales comparison approach. We disagree. The Tribunal did admit respondent's evidence as probative of declining market trends in the area, and also admitted petitioner's rent rolls, which provided income and vacancy information. The Tribunal also relied upon evidence admitted for the 2009 tax year in making its determination. From this evidence, it found that "market values decreased for the Subject property based on the cost approach and factors received from the Livingston County Equalization Department." The Tribunal is permitted, indeed obligated, to make factual findings supported by competent, material, and substantial evidence *on the whole record*. *Oldenburg*, 198 Mich App at 698 (emphasis added). "Generally, competent and material evidence supports the Tribunal's determination if is *within the range of evidence advanced by the parties*." *Pontiac Country Club*, slip op at 5 (emphasis added). Here, the Tribunal made factual findings from evidence offered by both parties. It then applied these factual findings in its use of an approved method, the income capitalization approach, for determining the property's TCV. We find no error of law in the Tribunal's determination of the property's true cash value.

IV. MOTION FOR DIRECTED VERDICT

At the close of petitioner's proofs, respondent moved the Tribunal for a directed verdict (relative to tax years 2010 and 2011). The Tribunal took the motion under advisement. The Tribunal never explicitly ruled on respondent's motion. Respondent now argues that the Tribunal erred in "denying" its motion for a directed verdict. Although this court does not generally review issues not decided in the first instance by the Tribunal, *GMC v Dep't of Treas*, 290 Mich App 355, 386: 803 NW2d 698 (2010), here we conclude that respondent did preserve this issue by raising it below and pursuing it on appeal. See *Caron Fisher Potts v Hyman*, 220 Mich App 116, 119; 559 NW2d 54 (1996).

However, we conclude that respondent's argument lacks merit. A motion for a directed verdict in a bench trial is treated as a motion for involuntary dismissal under MCR 2.504(B)(2). *Samuel D. Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995).³ MCR 2.504(B)(2) states:

In an action, claim, or hearing tried without a jury, after the presentation of the plaintiff's evidence, the court, on its own initiative, may dismiss, or the defendant, without waiving the defendant's right to offer evidence if the motion is not granted, may move for dismissal on the ground that, on the facts and the law, the plaintiff has no right to relief. The court may then determine the facts and render judgment against the plaintiff, or may decline to render judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in MCR 2.517.

³ Because the Tribunal Rules do not provide for a motion for a directed verdict, the Michigan Rules of Court govern. See TTR 205.1111 (4), 1999 AC, R 205.1111(4); see also *County of Wayne v MSTC*, 261 Mich App 174, 194; 682 NW2d 100 (2004).

To the extent that this rule is ever applicable to Tribunal proceedings, it does not relieve the Tribunal of its duty to make an independent assessment of the true cash value of the subject property. *Jones & Laughlin Steel Corp*, 193 Mich App at 355. The Tribunal was required to make such an assessment even if it determined that plaintiff's proofs had failed utterly. *Id.* Further, as stated above, we read the Tribunal's opinion as stating that petitioner did not carry its ultimate burden of persuasion, not that it failed to meet its burden of coming forth with evidence. We therefore find no error in the Tribunal's implicit denial of respondent's motion for directed verdict.

Affirmed.

/s/ Stephen L. Borrello

/s/ Michael J. Kelly

/s/ Mark T. Boonstra