

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

George D. Zamias, :
Appellant :
v. : No. 925 C.D. 2006
Warren County Board of Assessment : Submitted: January 18, 2008
and Revision of Taxes :

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: April 1, 2008

George D. Zamias (Taxpayer) appeals an order of the Court of Common Pleas of the 37th Judicial District, Warren County Branch (trial court), finding he failed to present sufficient evidence to overcome the presumptive validity of a property tax assessment. On appeal, Taxpayer maintains the trial court's rejection of his expert's testimony is not entitled to deference and is not supported by the record. We affirm.

Taxpayer owns 24.58 acres of land in Warren County (Property). Taxpayer operates a shopping mall on the Property, known as the Warren Mall. In 2005 and 2006, the Warren County Board of Assessment and Revision of Taxes (Board) assessed the Property pursuant to Section 704 of The Fourth to Eighth Class County and Selective County Assessment Law.¹ Disagreeing with these assessments, Taxpayer filed a timely appeal with the trial court.

¹ Act of May 21, 1943, P.L. 571, as amended, 72 P.S. §5453.704.

Before the trial court, the Board introduced its assessment records into evidence. The records demonstrated the 2005 fair market value of the Property as \$12,991,778, and the 2006 fair market value as \$13,421,653. Common level ratios were stipulated. Assessed value for both years was \$4,776, 389. The Board rested.

In opposition, Taxpayer presented the testimony and written appraisal of William M. Bender, a certified real estate appraiser (Taxpayer's Expert). Taxpayer's Expert opined the fair market value of the Property is \$8,000,000 for both years. Taxpayer's Expert utilized the income capitalization approach to valuation, as opposed to the cost or sales comparison approaches.

In applying the income capitalization approach, Taxpayer's Expert relied on three years of revenue and expenditure data from 2001, 2002, and 2003, which Taxpayer provided to him. Notably, Taxpayer's Expert did not independently audit this data and assumed Taxpayer utilized the cash accounting method.

On cross-examination, the Board demonstrated that from 1999 through 2003, Taxpayer received the benefit of lease cancellation fees, averaging \$101,950 per year. Expert admitted he excluded the 2002 lease cancellation fees from his report, amounting to \$200,000, because he deemed this a one-time event.

In addition, the Board proved a majority of the Property's leases contain overage rent clauses, which provide increased income to Taxpayer when a tenant's sales exceed a certain dollar amount. Moreover, numerous leases also contain real estate tax reimbursement clauses, which require tenants to contribute to the Property's real estate taxes. For net income purposes, overage rents are offset by the

real estate tax reimbursements.² Nevertheless, Taxpayer's Expert testified any current or future reduction in real estate taxes would not increase the amount of net income from overage rents. He further testified a formula does not exist to account for a tax reduction under the income capitalization approach.

For impeachment purposes, the Board produced an audio tape from a previous proceeding wherein Taxpayer's Expert testified a reduction in real estate taxes would increase Taxpayer's net income. At this proceeding, Taxpayer's Expert contrarily testified a formula does exist to account for a tax reduction when calculating net income.

Finally, the Board demonstrated that Taxpayer's Expert's appraisal overstated Taxpayer's 2003 real estate taxes by \$72,015.14, and that Taxpayer reported his income and expenses to his Expert using inconsistent accounting methods.

Based upon the evidence, the trial court determined Taxpayer did not rebut the presumptive validity of the Board's assessment. To that end, the trial court found Taxpayer's Expert's appraisal not credible. The present appeal followed.

Before addressing Taxpayer's arguments on appeal, we note the procedural framework in which a trial court evaluates the evidence. As this Court

² Hypothetically, if a Property lease contained both overage rent and tax reimbursement clauses, and the tenant paid \$50,000 in overage rent and \$10,000 in real estate tax reimbursement, Taxpayer's net income would increase \$40,000.

noted in Green v. Schuylkill County Board of Assessment Appeals, 730 A.2d 1017, 1019 (Pa. Cmwlth. 1999), aff'd, 565 Pa. 185, 772 A.2d 419 (2001):

[T]he taxing authority first present[s] its assessment record into evidence. Such presentation makes out a prima facie case for the validity of the assessment in the sense that it fixes the time when the burden of coming forward with evidence shifts to the taxpayer. If the taxpayer fails to respond with credible, relevant evidence, then the taxing body prevails. But once the taxpayer produces sufficient proof to overcome its initially allotted status, the prima facie significance of the Board's assessment figure has served its procedural purpose, and its value as an evidentiary device is ended

Moreover, in a tax assessment appeal, a trial court cannot become an assessor or an appraiser.

Rather, in assessment cases, as in others, the trial court must make its determination on the basis of the evidence put before it. The credibility and weight of such evidence is for the trial court to determine. Thus, ... [t]he duty of the trial court in hearing a tax assessment appeal de novo is to independently determine the fair market value of the parcel on the basis of the competent, credible and relevant evidence presented by the parties.

Green, 565 Pa. at 196, 772 A.2d at 426 (internal citations and quotations omitted).

Of particular import here, although it is the role of the trial court to determine the credibility and weight of the evidence before it, there is a difference between credibility as a matter of personal veracity and as a matter of substantive reasonableness. Craftmaster Mfg., Inc. v. Bradford County Bd. of Assessment Appeals, 903 A.2d 620 (Pa. Cmwlth. 2006); Koppel Steel Corp. v. Bd. of Assessment

Appeals of Beaver County, 849 A.2d 303 (Pa. Cmwlth. 2004). As the Supreme Court explained in Green:

While the trial court’s determinations concerning the former are unreviewable by an appellate court, the same is not true of the latter. See McKnight [Shopping Ctr., Inc., v. Bd. of Prop. Assessment, Appeals & Review, County of Allegheny, 417 Pa. 234, 209 A.2d 389 (1965)] (rejecting the trial court’s conclusion that expert testimony was not credible, where such conclusion rested on an incorrect factual assumption); see also Traylor v. City of Allentown, 378 Pa. 489, 493, 106 A.2d 577, 579 (1954) (observing that even though the taxpayers’ witnesses “were credible in the sense that their veracity was not impeached, the weight to be given their testimony, which was oral and opinion, was nonetheless for the [trial] court to evaluate”).

565 Pa. at 209 n. 11, 772 A.2d at 434 n. 11.

On appeal,³ Taxpayer initially argues the trial court’s reasoning and conclusions as to the validity of his Expert’s testimony and appraisal report are fully reviewable by this Court. Taxpayer maintains that the trial court rejected Taxpayer’s Expert’s opinion for specified reasons other than on the basis of veracity.

The trial court first determined Taxpayer’s Expert properly utilized the income capitalization approach. Trial Ct. Slip Op., 4/10/2006, at 5. However, the trial court went on to reject Taxpayer’s Expert’s calculations under this approach, due, in part, to inconsistent evidence. In relevant part, the trial court stated:

³ Our review of tax assessment matters is limited to determining whether the trial court abused its discretion, committed an error of law or reached a decision not supported by substantial evidence. Green v. Schuylkill County Bd. of Assessment Appeals, 565 Pa. 185, 772 A.2d 419 (2001).

In weighing the merits of [Taxpayer's] case, the Court was particularly influenced by the omission of lease cancellation fees and overage rents [from] income ... as well as the disparity between several of the figures used [to calculate fair market value.]

In his report ... [Taxpayer's Expert] excluded a lease cancellation fee of \$200,000 in 2002 as he viewed it to be a one time event. However, upon presentation of lease cancellation fees over a five-year time frame, [Taxpayer] admitted the accuracy of the figures which indicated an annual average of \$101,950.00 that was not factored in [Taxpayer's Expert's] report. [Taxpayer's Expert's] reasoning for the exclusion of the lease cancellation fees was that it was something that a mall owner does not want to see as lease cancellation fees are associated with a drop in occupancy rate. In spite of this revelation, however, [Taxpayer's Expert] did admit that during the relevant timeframe, the Warren Mall lease occupancy was consistent at approximately 88 percent. Such an understatement of income as a result of the lease cancellation fees would have a significant impact on determining the fair market value
....

In addition [Taxpayer's Expert's] appraisal did not take into account current and future overage rents for purposes of fair market value. On this issue, [Expert's] testimony was unpersuasive. On cross-examination, [Taxpayer's Expert] denied any knowledge of a formula that could calculate a tax reduction into the net operating income. In response to this, however, counsel for [the Board] played a recording from the Board of Assessment hearing, in which [Expert] stated that there would be an increase in net income due to overage rents. Accordingly, the Court finds that when the property taxes are reduced the overage rent paid to the owner increases. Such overage rent was not included in [Expert's] appraisal and casts further doubt as to the credibility of [the] appraisal.

The next and perhaps most troubling problem with [the Expert's] appraisal is the use of seemingly inconsistent figures in the valuation of the [Property]. ... During the course of the trial, four different sets of income and expense figures prepared by [Taxpayer] were presented, all of which

were in disagreement. In one such instance, the 2001 net operating income on [Expert's report] was more than \$200,000 less than the 2001 net operating income provided by [Taxpayer's] own accounting firm. [Taxpayer] attributed the discrepancies to the use of the cash accounting method of revenue figures for the [Expert's] appraisal and the use of the accrual method ... for the expense figures enumerated in the [Expert's] appraisal.

The Court finds [Taxpayer's] attempts to explain the discrepancies wholly incredible. First and most importantly, [Taxpayer's Expert] stated that he presumed that both the revenue and expense figures provided by [Taxpayer] were based upon the cash accounting method. ... [Taxpayer] testified that the [data he provided] was used for "inside purposes" and had little meaning for outside purposes. ... [Taxpayer's Expert] also acknowledged that he did not perform an independent audit of [the income/expense figures provided] and that the income approach is only as accurate as the figures used. ...

Taken as a whole, [Expert's] appraisal reflected a fair market value to \$8,000,000 cannot be viewed as credible. [Taxpayer] did very little to convince the Court that the inconsistencies in figures were mere mathematical errors or simple oversights. [Id. at 6-7.]

Unquestionably, the trial court rejected Taxpayer's Expert's opinion because he excluded lease cancellation charges and overage rents and, he relied on inconsistent and unaudited data. Id. Since the trial court provided these reasons, Taxpayer now argues the trial court's findings are not entitled to deference. Taxpayer further asserts the trial court's reasons are not supported by substantial evidence.

While the trial court provided reasons for rejecting Taxpayer's Expert's opinion, a careful reading of the trial court's opinion reveals these reasons ultimately go to Taxpayer's Expert's personal veracity. Most obviously, impeachment by prior inconsistent statement directly impacts a witness' personal veracity. See Pa. SSJI

(Civ.) §2.20. Here, the Board successfully impeached Taxpayer's Expert's testimony regarding the availability of a formula to account for overage rents and the effect that a reduction in real estate taxes has on net income. See R.R. at 74a-77a. Based on these prior inconsistent statements, the trial court found Taxpayer's Expert's testimony not worthy of belief. This determination is not subject to review here. Green.

Similarly, the fact-finder may consider contradictory evidence in determining a witness' personal veracity. See Pa. SSJI (Civ.) §1.44(f). As to the exclusion of lease cancellation income, the contradictory evidence here was evidence showing that the fees were not a one-time event but rather were recurring. Also, in deciding personal veracity the fact-finder may consider whether testimony makes sense. See Pa. SSJI (Civ.) §1.44(g). The exclusion of lease cancellation income because it is associated with a drop in occupancy rates makes no sense when compared to the high occupancy rates established by the evidence here. These determinations are not subject to review. Green.

Further, the opinion of an expert only has value when the fact-finder accepts the facts on which it is based. See Pa. SSJI (Civ.) §5.31. See generally Gilmour Properties v. Bd. of Assessment Appeals, 873 A.2d 64 (Pa. Cmwlth. 2005). Taxpayer's Expert admitted he appraised the Property under the assumption that Taxpayer provided him financial data calculated under the cash accounting method. R.R. at 99a. To the contrary, however, Taxpayer actually provided data calculated under the accrual accounting method. R.R. at 152a.

In some instances, the discrepancies between the accounting methods amounted to a \$200,000 understatement in income within Expert's appraisal report, which negatively impacted fair market value. See R.R. at 152a, 154a-155a. Such self-contradictory statements may be evaluated by a fact-finder in determining credibility of a witness. See Pa. SSJI (Civ.) §1.44(d).

Moreover, we agree “[Taxpayer] did very little to [demonstrate] the inconsistencies in figures were mere mathematical errors or simple oversights.” Trial Ct. Slip Op. at 7; see Pa. SSJI (Civ.) §1.44(i).

Based on these discrepancies, the trial court clearly found Taxpayer's Expert's opinion not credible as a matter of personal veracity, and this determination is not subject to review here. Green.⁴ Therefore, the trial court is affirmed.

ROBERT SIMPSON, Judge

⁴ Even if we reviewed the trial court's determinations for substantive reasonableness, Taxpayer would not prevail. The record here clearly reveals Taxpayer's Expert excluded lease cancellation fees and did not account for tax reductions and the resulting effects on overage rent income. Reproduced Record (R.R.) at 62a, 74a-78a. These items are clearly includable as income. In addition, Taxpayer's Expert utilized inconsistent financial data which substantially understated the Property's net income. R.R. at 152a, 154a-155a. Under these circumstances, the record fully supports the trial court's rejection of Taxpayer's Expert's opinion.

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ORDER

AND NOW, this 1st day of April, 2008, the order of the Court of Common Pleas of the 37th Judicial District, Warren County Branch is **AFFIRMED**.

ROBERT SIMPSON, Judge