

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

D&C REAL ESTATE TRUST

v.

BOARD OF ASSESSORS OF
THE TOWN OF PEMBROKE

Docket Nos.: 199785, 211615
219315, 225693

Promulgated:
April 4, 2001

These are appeals under the formal procedure, pursuant to G.L. c. 59, §§ 64 and 65, from the refusal of the appellee to abate taxes on certain real estate in the Town of Pembroke owned by and assessed to the appellant under G.L. c. 59, § 38, for fiscal years 1992, 1993, 1994 and 1995.

Former-Commissioner Lomans heard these appeals. Chairman Burns, Former-Chairman Gurge and Commissioners Scharaffa and Gorton joined her in the decision for the appellant.

These findings of fact and report are made pursuant to a request by the appellee under G.L. c. 58A, § 13, and 831 CMR 1.32.

David J. Rasnick, Esq. for the appellant.

Ellen Hutchinson, Esq. and *Joseph Dalton, Esq.* for the appellee.

FINDINGS OF FACT AND REPORT

On January 1, 1991, January 1, 1992, January 1, 1993 and January 1, 1994, D&C Real Estate Trust (the "appellant") was the assessed owner of Unit #1, Liberty Shops Condo, 295 Old Oak Street, Pembroke, Massachusetts (hereinafter the "subject property").

The subject property is one unit of a two-unit condominium complex with a total gross land area of 5.29 acres, of which the subject property occupies approximately 3.51 acres. The building located on the subject property is a one-story concrete block and steel frame structure that has a gross unit area of approximately 31,755 square feet.

Since its construction in 1988, the unit has been occupied by the Christmas Tree Shops, a large retail operation with multiple stores throughout New England. Mr. Bilezikian, a Trustee of the appellant, is also a principal of the Christmas Tree Shops. The parties agreed that the present use, single-occupant commercial space, is the highest and best use.

The Board of Assessors ("Assessors") valued the property and assessed taxes thereon for the fiscal years at issue as follows:

Docket Number	Fiscal Year	Assessed Value	Tax Rate	Assessed Tax
199785	1992	\$4,649,200.00	\$12.30	\$57,185.16
211615	1993	\$4,330,000.00	\$13.74	\$59,494.20
219315	1994	\$4,330,000.00	\$14.10	\$61,053.00
225693	1995	\$4,330,000.00	\$14.62	\$63,304.60

In all of these appeals, the appellant timely paid the real estate taxes without incurring interest. The appellant seasonably filed its applications for abatement and subsequent petitions to the Appellate Tax Board ("Board") appealing the Assessors' deemed denials of the appellant's abatement requests. The relevant jurisdictional information for each of the appeals is summarized in the following table.

Fiscal Year	Docket Number	AA¹ Filed	AA Denied or Deemed Denied	Petition Filed at Board
1992	199785	11-18-91	03-18-92 ²	06-18-92
1993	211615	12-08-92	04-08-93 ¹	07-07-93
1994	219315	12-14-93	03-14-94	06-13-94
1995	225693	11-10-94	02-06-95	05-04-95

On the basis of the foregoing, the Board found that it had jurisdiction over these appeals.

Two witnesses testified at the hearing of these appeals: Robert Deemer, accounting manager for the Christmas Tree Shops, and Robert Saben, a real estate appraiser. Both testified on behalf of the appellant. The

¹ As used in this table, "AA" refers to the relevant application for abatement.

² Taxpayer granted the Assessors a thirty-day extension to act upon the abatement application.

Assessors offered no witnesses. Based on the testimony of appellant's witnesses, exhibits and reasonable inferences drawn therefrom, the Board made the following findings of fact.

Mr. Saben testified that he used the income capitalization approach to value the subject property. In his analysis, Mr. Saben did not use the property's actual rent because he determined that the lessor and lessee were, for all practical purposes, the same and therefore, the lease was not at arms'-length. Instead, Mr. Saben estimated the subject property's potential gross income based on the market rents the subject property could be expected to attract. The market rent was estimated by comparing the subject property to five comparable properties, making appropriate adjustments for the timing differences between the lease dates and the dates of assessment, and differences in size, location and condition. Accordingly, Mr. Saben determined that the appropriate rental value for the subject property was \$9.00 per-square-foot for fiscal year 1992, with a \$1.00 per-square-foot increase for each of the three succeeding fiscal years. He then allowed a deduction for vacancy, using a rate of ten percent. The resulting figure was the property's effective gross income ("EGI").

Next, Mr. Saben determined the subject property's net operating income by deducting from the EGI the subject property's estimated operating expenses. In his appraisal report prepared for the hearing, Mr. Saben allowed an expense for real estate taxes, insurance, condominium fee, management fee, major repair and maintenance, a reserve for replacement, and a miscellaneous expense. With respect to the taxes and insurance, Mr. Saben concluded that generally the tenant is responsible for these expenses and that the landlord is responsible for only that portion attributable to the vacancy, 10% in this case.

As for the condominium fee, Mr. Saben noted that none had been established nor collected by the Association. Instead he noted, each tenant was responsible for this expense with the landlord responsible, again, only for the 10% vacancy portion. He estimated the remaining expenses based on information provided by the property owner, municipal records and the witness' experience with similar properties, and concluded that they were stabilized over the years at issue. After deduction, the resulting figure was the subject property's net operating income.

Mr. Saben then applied a capitalization rate to arrive at his opinion of fair cash value. Using the Mortgage Equity Method and based on his independent research and

experience, Mr. Saben determined that the appropriate capitalization rates to be applied were ten-and-a-quarter-percent for fiscal year 1992 and ten-percent for fiscal years 1993, 1994, and 1995. Mr. Saben then concluded that the subject property's fair cash value was \$2,200,000, \$2,5400,000, \$2,750,000 and \$3,000,000 for fiscal years 1992, 1993, 1994 and 1995, respectively.

No witnesses testified on behalf of the Assessors. The Assessors did, however, question Mr. Saben regarding an earlier appraisal report which he prepared in connection with a refinancing of the subject property ("refinancing report"). The refinancing report was prepared in July, 1993 and valued the subject property as of July 13, 1993. In this report, Mr. Saben determined that the appropriate rental value for the subject property was \$12.00 per-square-foot, as opposed to \$11.00 per-square-foot used in the present report for fiscal year 1994. This figure was arrived at by comparing the subject property to five comparables, all different from those used in the report prepared for the subject appeals, and making appropriate adjustments. Also, in this report Mr. Saben allowed for a five-percent vacancy, noting that the market had stabilized compared to earlier years.

Mr. Saben then deducted the subject property's operating expenses. Again, these figures were based on information provided by the owner, municipal records and Mr. Saben's professional experience. There were, however, several differences between the refinancing report and the one prepared for the subject appeals. In the refinancing report, Mr. Saben did not make an allowance for real estate taxes or condominium fees, noting that both of these were a tenant expense. Also, he allocated 100% of the insurance expense to the landlord. As for the management fee, repairs and maintenance, reserves for replacement and miscellaneous expense, these were all calculated as percentages of EGI, eight-percent in total.

After calculating the property's operating income, Mr. Saben applied a twelve-percent capitalization rate, calculated by the Band of Investment Method, to arrive at his opinion of fair cash value as of July, 13, 1993 in the amount of \$2,750,000.

The Board found that parts of the analysis and some of the figures relied on by Mr. Saben in his refinancing report were appropriate to use in valuing the subject property for the years at issue. Accordingly, in its income-capitalization methodology, the Board used a rental value of \$11.00 per-square-foot for fiscal years 1992 and

1993, and considering the improving real estate market, \$12.00 per-square-foot for fiscal year 1994 and \$12.50 per-square-foot for fiscal year 1995. The Board also allowed a vacancy rate of five-percent for the first three fiscal years and, taking into account the improving market conditions and the property's actual performance relative to occupancy, a 4% vacancy for fiscal year 1995.

In calculating the operating expenses, the Board agreed with Mr. Saben's 1993 refinancing report that no allowance should be made for real estate taxes, as this was a tenant expense, nor for condominium fees. As noted in the later report prepared in anticipation for hearing of the subject appeals, the Association had neither established nor collected a condominium fee. As for the insurance expense, the Board found that the evidence presented in the two reports was conflicting and that the appellant failed to adequately prove which method was appropriate. Based on the evidence presented and the Board's own experience and expertise, the Board concluded that insurance would be paid by the tenant and that any necessary insurance expense incurred by the landlord could reasonably be subsumed in the miscellaneous expense. Lastly, with respect to the management fee, the repairs and maintenance, the reserves for replacement, and the

miscellaneous expense, the Board found that in total the proper allowance was eight-percent of EGI, the same as that used by Mr. Saben in his 1993 refinancing report.

Next, using the capitalization rates suggested by Mr. Saben in his report prepared for the subject appeals, ten-and-a-quarter-percent for fiscal year 1992 and ten-percent for fiscal years 1993, 1994 and 1995, with no addition of a tax factor, the Board determined that the fair cash values of the subject property on the January 1, 1991, 1992, 1993 and 1994 assessment dates were \$2,978,500, \$3,053,000, \$3,330,500 and \$3,505,800, respectively. The Board's income-capitalization methodology is summarized in the following table.

	Fiscal Year 1992	Fiscal Year 1993	Fiscal Year 1994	Fiscal Year 1995
Rent psf	\$11.00	\$11.00	\$12.00	\$12.50
Gross Rent	\$349,305	\$349,305	\$381,060	\$381,060
Less Vacancy	\$ 17,465	\$ 17,465	\$ 19,053	0
Effective Gross Income	\$331,840	\$331,840	\$362,007	\$381,060
Less Expenses 8% EGI	\$ 26,547	\$ 26,547	\$ 28,961	\$ 30,485
Net Operating Income	\$305,293	\$305,292	\$333,046	\$350,575
Cap Rate	0.1025	0.1000	0.1000	0.1000
Estimate of Value	\$2,978,464	\$3,052,926	\$3,330,464	\$3,505,752
Rounded Fair Cash Value	\$2,978,500	\$3,053,000	\$3,330,500	\$3,505,800

On this basis, the Board found that the subject property was overvalued for the fiscal years at issue and issued a decision for the appellant which granted abatements in the amounts of \$20,549.61, \$17,545.98,

\$14,092.95 and \$12,049.80, for fiscal years 1992, 1993, 1994 and 1995, respectively.

OPINION

The assessors are required to assess real estate at its fair cash value. G.L. c. 59, § 38. Fair cash value is defined as the price on which a willing seller and a willing buyer will agree if both of them are fully informed and under no compulsion. ***Boston Gas Co. v. Assessors of Boston***, 334 Mass. 549, 566 (1956). Generally, real estate valuation experts, the Massachusetts courts, and this Board rely upon three approaches to determine the fair cash value of property: income capitalization, sales comparison, and cost. ***Correia v. New Bedford Redevelopment Authority***, 375 Mass. 360, 362 (1978).

"The board is not required to adopt any particular method of valuation." ***Pepsi-Cola Bottling Co. v. Assessors of Boston***, 397 Mass. 447, 449 (1986). In these appeals, the Board ruled that neither the sales-comparison nor the cost approaches were appropriate under the circumstances. The Board adopted the appellant's expert real-estate appraiser's opinion that there were not enough market sales of reasonably comparable properties to meaningfully estimate the value of the subject property using a sales-

comparison technique. Furthermore, the Board ruled that "[t]he introduction of evidence concerning the value based on [cost] computations has been limited to special situations in which data cannot be reliably computed under the other two methods." **Correia v. New Bedford Redevelopment Authority**, 375 Mass. at 362. The Board found here that no such "special situations" existed, and, even if they did, there was no evidence on which to base a value using a cost approach. Accordingly, the Board ruled that this method of valuation was not an appropriate technique to use for valuing the subject property during the fiscal years at issue in these appeals.

The use of the income-capitalization approach is appropriate when reliable market data are not available. **Assessors of Weymouth v. Tammy Brook Co.**, 368 Mass. 810, 811 (1975); **Assessors of Lynnfield v. New England Oyster House**, 362 Mass. 696, 701-702 (1972); **Assessors of Quincy v. Boston Consolidated Gas Co.**, 309 Mass. 60, 67 (1941). It is also an appropriate technique to use for valuing income-producing property. *Id.* at 64-65. In these appeals, the Board relied exclusively on the value determined from the income-capitalization approach because the other methods were not appropriate, and the approach that the Board used was equivalent to what buyers and

sellers in the marketplace would have used under the circumstances. See **Foxboro Associates v. Board of Assessors of Foxborough**, 385 Mass. 679, 682-683 (1982); **New Boston Garden Corp. v. Assessors of Boston**, 383 Mass. 456, 469 (1981).

In determining fair market value, all uses to which the property was or could be adapted to on the relevant assessment dates should be considered. **Irving Saunders Trust v. Assessors of Boston**, 26 Mass. App. Ct. 838, 843 (1989). The idea is to determine the maximum value of the property for any legitimate and reasonable use. **Id.** If the property is particularly well suited for a certain use or uses that are not prohibited, then that or those uses may be reflected in an estimate of the property's fair market value. **Colonial Acres, Inc. v. North Reading**, 3 Mass. App. Ct. 384, 386 (1975). On this basis, the Board agreed with the appellant's expert that the highest and best use of the subject property during the fiscal years at issue in these appeals was its existing commercial use.

The income stream used in the income-capitalization method must reflect the property's earning capacity or economic rental value. **Pepsi-Cola Bottling Co. v. Assessors of Boston**, 397 Mass. at 451. Imputing rental income to the subject property based on fair market rentals

from comparable properties is evidence of value if, once adjusted, they are indicative of the subject property's earning capacity. See **Correia v. New Bedford Redevelopment Auth.**, 5 Mass. App. Ct. 289, 293-94 (1977), *rev'd on other grounds*, 375 Mass. 360 (1978); **Library Services, Inc. v. Malden Redevelopment Auth.**, 9 Mass. App. Ct. 877, 878 (1980) (rescript); **AVCO Manufacturing Corp. v. Assessors of Wilmington**, 12 Mass. App. Tax Bd. Rep. 132, 143 (1990). After accounting for vacancy and rent losses, the net-operating income is obtained by deducting the landlord's appropriate expenses. **General Electric Co. v. Assessors of Lynn**, 393 Mass. 591, 610 (1984). The expenses should also reflect the market. **Id.**

The Board's selection of its effective gross-income was consistent with those suggested by the appellant's expert real-estate appraiser and was supported by the evidence and his reports. Similarly, the Board's vacancy rates were based on the evidence presented. The Board's expense deductions were also based on the testimony of appellant's expert real-estate appraiser and information contained in his reports.

The capitalization rate selected should consider the return necessary to attract investment capital. **Taunton Redevelopment Assoc. v. Assessors of Taunton**,

393 Mass. 293, 295 (1984). Based on the evidence presented, the Board selected capitalization rates of ten-and-a-quarter-percent in fiscal year 1992, and ten-percent in fiscal years 1993, 1994 and 1995. Since the property was a single tenant, owner-occupied building, the Board did not add a tax factor. Generally, it is appropriate to add a tax factor to the capitalization rate only in a multiple tenancy scenario where the landlord is assumed to be responsible for paying the real estate taxes. **Taunton Redevelopment Assoc. v. Assessors of Taunton**, 393 Mass. at 295-96. Accordingly, neither the appellant's expert nor the Board included a tax factor in the capitalization rate.

In reaching its opinion of fair cash value in these appeals, the Board was not required to believe the testimony of any particular witness or to adopt any particular method of valuation that an expert witness suggested. Rather, the Board could accept those portions of the evidence that the Board determined had more convincing weight. **Foxboro Associates v. Board of Assessors of Foxborough**, 385 Mass. at 683; **New Boston Garden Corp. v. Assessors of Boston**, 383 Mass. at 473; **Assessors of Lynnfield v. New England Oyster House, Inc.**, 362 Mass. at 702. In evaluating the evidence before it,

the Board selected among the various elements of value and formed its own independent judgment of fair cash value. **General Electric v. Assessors of Lynn**, 393 Mass. at 605; **North American Philips Lighting Corp. v. Assessors of Lynn**, 392 Mass 296, 300 (1984).

The Board need not specify the exact manner in which it arrived at its valuation. **Jordan Marsh v. Assessors of Malden**, 359 Mass. 106, 110 (1971). The fair cash value of property cannot be proven with "mathematical certainty and must ultimately rest in the realm of opinion, estimate and judgment." **Assessors of Quincy v. Boston Consol. Gas Co.**, 309 Mass. at 72. "The credibility of witnesses, the weight of the evidence, and inferences to be drawn from the evidence are matters for the board." **Cumington School of the Arts, Inc. v. Assessors of Cumington**, 373 Mass. 597, 605 (1977).

"The burden of proof is upon the [appellant] to make out [its] right as a matter of law to abatement of the tax.'" **Schlaiker v. Board of Assessors of Great Barrington**, 365 Mass. 243, 245 (1974), quoting **Judson Freight Forwarding Co. v. Commonwealth**, 242 Mass. 47, 55 (1922). The appellant must show that it has complied with the statutory prerequisites to its appeals, **Cohen v. Assessors of Boston**, 344 Mass. 268, 271 (1962), and that

the assessed valuation of its property was improper. See ***Foxboro Associates v. Board of Assessors of Foxborough***, 385 Mass. at 691. The assessment is presumed valid until the taxpayer sustains its burden of proving otherwise. ***Schlaiker v. Board of Assessors of Great Barrington***, 365 Mass. at 245. The Board ruled here that the appellant met its burden of proving that the subject property was overvalued in the relevant fiscal years.

The Board applied these principles in reaching its opinion of the fair cash values of the subject property during the fiscal years at issue in these appeals. On this basis, the Board decided that the property was overvalued in the amounts of \$1,670,700, \$1,277,000, \$999,500 and \$824,200 for fiscal years 1992, 1993, 1994 and 1995, respectively.

APPELLATE TAX BOARD

By _____
Abigail A. Burns, Chairman

A true copy,

Attest: _____
Clerk of the Board

