
State of Minnesota
In Supreme Court

McNEILUS TRUCK & MANUFACTURING, INC.,

Relator.

vs.

COUNTY OF DODGE,

Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF ISSUES

I. WERE THE DETERMINATIONS OF VALUE BY THE TAX COURT CLEARLY ERRONEOUS?

A. The Tax Court based its determinations of value upon the opinion testimony and appraisal report of Respondent's expert appraiser and found further support in the testimony and report by its review appraiser.

B. Apposite cases: Northwest Airlines, Inc., v. Commissioner of Revenue, 265 N.W.2d 825 (Minn. 1978); Evans v. County of Hennepin, 548 N.W. 2d 277 (Minn. 1996); Marquette Bank National Association v. County of Hennepin, 589 N.W.2d 301 (Minn. 1999).

II. DID THE TAX COURT IMPROPERLY EXCLUDE EVIDENCE OF OUT-OF-STATE COMPARABLE SALES?

The Tax Court received evidence of all out-of-state comparable sales offered by Relator, weighed that evidence, and ultimately rejected them as being not similar enough to the Subject Property to warrant comparison.

Apposite cases: Colby v. Gibbons, 276 N.W.2d 170 (Minn. 1979); E.C.I. Corp. v. First Nat'l Bank, 237 N.W.2d 627 (Minn. 1976); Hiedeman v. Hiedeman, 187 N.W. 2d 119 (Minn. 1971); Kellett v. Wasnie, 112 N.W.2d 820 (Minn. 1962).

STATEMENT OF THE CASE

Relator owns a large industrial property in Dodge Center, Minnesota, where refuse and cement trucks are manufactured on an approximately 90-acre site in approximately 645,000 square feet of manufacturing and office space. The Dodge County Assessor valued the subject property at \$6,739,900 as of January 2, 2001, and \$6,743,900 as of January 2, 2002. Relator challenged the assessments pursuant to Minn. Stat. Ch. 278. At trial, it was learned that the assessor had substantially underestimated the square footage of the building space. Each party presented expert opinion evidence as to value, each expert relying primarily on comparable sales. Each also used both in-state and out-of-state sales. Relator maintained the subject property had a fair market value of only \$2,600,000 on both January 2, 2001, and January 2, 2002. Respondent's expert testified the values were \$9,100,000 and \$9,300,000 for the years in question. The Tax Court found the values for the respective years to be \$8,800,000 and \$9,000,000. In lengthy memoranda accompanying its original Findings, etc., and in denying Relator's post-trial motions, the Tax Court explained why the Relator's comparable sales were not found to be similar to the subject property and why the Respondent's were. The Tax Court's Judgment was entered and docketed on January 4, 2005. This appeal followed.

STATEMENT OF FACTS

1. The Factual Basis For The Tax Court's Judgment.

Respondent presented its evidence of value through the expert testimony of Dennis W. Jabs, MAI, and his report, Ex. 7.

In his primary analysis, Mr. Jabs selected five sales of large industrial properties (Trial Ex. 7 at p. C-14, details at tab Exhibit C) from almost 50 industrial sales in total (the last page of Exhibit C). He selected them from the market he had identified that the subject property was in. Tr. 2/27/04, p. 52. The market he identified was around the I-90 and I-35 interstate highways in southern Minnesota and northern Iowa and west into eastern South Dakota. He distinguished it from the market further east that is dominated by Milwaukee and Chicago where the inventory of industrial properties is much larger and the labor tends to be unionized. Tr. 2/24/04, pp. 165 to 168. There is also much higher external obsolescence in that market. Tr. 2/24/04, pp. 55-56.

His opinion of the highest and best use of the subject property was its current use, manufacturing. Trial Ex. 7, pp. C-2 and C-3. Although Mr. Jabs noted the difficulty in finding comparable sales of large industrial facilities, he testified that in his experience buyers of such properties would use space as warehousing or manufacturing interchangeably, and they would look for large properties. He noted the difference between the warehousing and manufacturing

properties is that manufacturing has higher improvements and the question became one of evaluating whether a buyer would pay full value for those heavier features. Tr. 2/27/04, p. 52. It is important to note that Mr. Jabs did not appraise the subject property as a warehouse distribution center¹. Tr. 2/27/04, p. 111. Because of the lack of “transferability” of the full value of a manufacturing facility’s heavier components, he generally adjusted comparables that were warehousing downward by 10%. Tr. 2/27/04, p. 48.

The individual comparable sales one through five are discussed at Tr. 2/24/04, pp. 168-187. The adjustments are thoroughly explained. Comparable five deserves separate comment, however, because it was heavily criticized by Relator, was the subject of a tax appeal itself, and has the highest level of adjustment made by Mr. Jabs. Mr. Jabs spent considerable effort in evaluating that sale. Because of the date of the sale, almost three years after the date of valuation in the Tax Court case, SPX Corporation v. County of Steele, 2003 Minn. Tax Lexis 31, File No. C1-00-35 (Minn. Tax Ct. July 23, 2003), he stated he thought the appraisers in that case did not use it as a comparable. Also, it had undergone a zoning change that was not foreseeable at the date of valuation. However, Mr. Jabs did think it was a good sale for his analysis of the subject industrial property with valuation dates of

¹ Relator’s attorney spent a lot of time and effort on his criticism that Mr. Jabs has not calculated the costs of converting the subject property to a distribution warehouse. Mr. Jabs felt it unnecessary to go through that process. In his experience, these large industrial properties are interchangeable, whether warehouse or manufacturing. Also, in the marketplace, a seller of a manufacturing facility will not be able to get full value for the heavier components of such properties. Thus, although in the marketplace the properties are interchangeable, a value adjustment is appropriate.

January 2, 2001, and 2002. The sale took place on September 30, 2001. Mr. Jabs explored the transaction in detail. It had been the subject of an appraisal near the time of the sale, had been marketed as industrial property, and it was bought on the basis of an industrial price. Tr. 2/24/04, pp. 183-187; Tr. 2/27/04, pp. 90-95; Trial Ex. 7, p. C-16. It was adjusted downward slightly for age and features, 20% for location, 18% for size, and 10% for buyer motivation. Trial Ex. 7, p. C-14. These are appropriate adjustments.

Size variances also deserve separate comment. Mr. Jabs made no size adjustment to comparables 1-3, his largest-sized comparables. He explained that in his experience buyers of properties of that size are not as sensitive to size as they are with smaller properties. This is because costs of existing space are much less than new construction, and the buyer can buy more space and still have total costs well under the cost of new construction. Tr. 2/27/04, pp. 79-80. Also, because the subject property is not all under one roof, he felt size to be less of a factor than otherwise. Tr. 2/24/04, pp. 202-203. For the smaller comparables, he did recognize the conventional wisdom that smaller properties yield a higher per-square-foot price. Trial Ex. 7, p. C-14.

Mr. Jabs performed a second "Alternative" analysis where he considered the value of the property split up and sold in smaller pieces. He checked with Dodge Center (where the subject property is located) zoning authorities and found them

very familiar with the property and very positive about the probability of splitting the property with set back variances.² He theorized a buyer with a need for industrial space similar to the single largest building on the subject property (approximately 352,000 sq. ft) might provide the opportunity of breaking up the remainder into smaller pieces for lease or resale. He had seen such thinking in his consulting work and in other properties such as the 3M campus on Highway 94 and the Cray Research campus in Eagan. T. 2/24/04, pp. 206-208. Using additional comparable sales of smaller properties, and using a development cost approach, he opined that the property had a value of \$8,850,000 (compared to \$9,350,000 arrived at by the sales comparison approach as a single facility). He gave the alternative lesser weight because of its many assumptions, and concluded that the subject property had a market value of \$9,300,000 as of January 2, 2002, via the Sales Comparison Approach. Trial Ex. 7, p. C-21.

Mr. Jabs also performed a cost approach analysis of the property, and he gave it significant weight in his analysis. Trial Ex. 7, p. C-26. Trial Ex. 22 shows Mr. Jabs' worksheet documentation of the summary form Replacement Cost New calculation at Trial Ex. 7, p. C-8. He did his analysis on a building-by-building basis³ because each one had individual characteristics. He used heavy

² Although Relator was critical of the feasibility of this concept, no one but Mr. Jabs checked with the city zoning authorities, and he found them supportive and receptive to the idea.

³ This contrasts with the analysis done by Mr. DeCaster for the Relator, who chose an overall 30%/70% allocation of light vs. heavy manufacturing costs without a building-by-building analysis. Tr. 2/18/04, pp. 104 and 108.

manufacturing costs only when the building was appropriate. Tr. 2/27/04, pp. 14-15. Also, he calculated the weighted average age of the facilities to be 12 years, so the facilities are relatively new. His conclusion of value based on the cost approach was \$9,200,000.

Relator heavily criticized the use of a cost approach. However, the Tax Court has recognized some value in a cost approach for industrial properties. See, DeZurik Corporation vs. County of Stearns, C4-91-1393, C6-91-1394, C2-92-2536, 1993 Minn. Tax LEXIS 41, April 13, 1993. That case involved the valuation of industrial property improved with three structures totaling approximately 334,000 sq. ft, where the original building was constructed in 1941 and had at least 18 additions at various times from 1950 through 1983. Thus, it was a significantly older facility than the subject. Nevertheless, the Court stated: "...in this instance the income approach is not available and the sales, while the best available have been presented to this Court, are of questionable comparability. We therefore give the greatest weight to the market approach, but give some weight to the cost approach." Also, in Rahr Malting Company vs. County of Scott, 92-05497 and 92-10875, 1993 Minn. Tax LEXIS 65, August 30, 1993, the Court relied solely on the cost approach because of the unavailability of acceptable comparable sales.

The Tax Court specifically found Mr. Jabs to be persuasive and credible. A.7 and 20. His testimony and report provide a sufficient factual basis for the Tax Court's judgment.

The Tax Court explained the evidentiary basis for its judgment and its reasoning in detail in memoranda totaling 11 pages, A.2-8 and 18-21.

2. The Trial Court's Treatment Of The Out-Of-State Sales.

Relator presented its evidence of value through the testimony of its expert, Steven M. DeCaster, MAI, and his report, Ex. 8. He relied on the comparative sales approach. Ex. 8, p. 47. He felt four comparables, 1, 3, 4, and 5, all out-of-state sales, to be most similar to the subject property. Ex. 8, p. 39. The Tax Court received evidence of all those sales and heard extensive testimony concerning them.

Two of those sales were very dated and entitled to be given little weight for that reason. Sales 2 and 3 indicated in the DeCaster appraisal date from February and August 1997. Ex. 8, p. 38. The February sale is approximately four years old for the tax year payable 2002 and five years old for payable 2003. The other sale is only ½ year newer.

All of the out-of-state comparable sales offered by Mr. DeCaster have serious flaws in terms of comparability.

Relator's Comparable One is a good example of how flawed its analysis is. Comparable One is the sale of a former Caterpillar facility in Edgerton, Wisconsin. Edgerton is west of Milwaukee, south of Madison, and north of Beloit. The property had been sold two times within approximately three months, both times for non-manufacturing purposes. Ex. 12 tells a lot about the property. It is a state-generated form regarding the transaction, but it had not been previously reviewed by Mr. DeCaster. The author reports the roof will have to be replaced, with one roofer estimating the cost to be \$4,000,000.00⁴. Water damage to mechanicals and insulation are reported, and the paving is said to be beyond repair. Access is difficult for trucks because it's only access to an interstate is through town. The comparable has an average age of 30 years (compared to the average age of 12- 13 years for the subject property). There is a surplus of large buildings in similar condition in the area of Relator's Comparable One. Nevertheless, Mr. DeCaster makes only a 15% upward adjustment to the subject based on age/condition and no adjustment for location or market conditions.

Mr. Alan P. Leirness, MAI, COM, testified at trial as Respondent's review appraiser and submitted his report, Ex. 15, into evidence. Mr. Leirness commented about Comparable One as well. Tr, 2/18/04, pp. 189-191. He noted that the only

⁴ Mr. DeCaster's later testimony on re-direct that the present owner has not made the roofing repairs is not persuasive. He did report that the owner owns a roofing company and could do the work for \$2.00 per square foot. That does not rebut the fact that the market would feel the work would be necessary, and the out-of-pocket cost to a roofing company would still be \$1,736,000.00 (\$2.00 per sq. ft. times 868,000 sq. ft.) Most potential buyers would not be expected to own a roofing company.

access to the facility was over a winding, hilly road. There were also a couple of other large industrial facilities nearby that were vacant and signed “For Sale” or “For Rent”. He was of the opinion that it was part of the market leading northwest out of Chicago along the Interstate 90 corridor, on the western edge of the Chicago-Milwaukee market. More industrial facilities had been built there historically, and there are more vacant industrial facilities there.

No weight should be put on Petitioner’s Comparable One for those reasons.

Petitioner’s Comparable Two is also entitled to no weight. As noted above, the sale is old. The sale was to a property company for resale, not to the operator of a manufacturing facility. In fact, the property had been sold only the year before to a development company. These are facts that show the market to be very unstable. The facility had an average age of 46 years (again, compared to the subject’s 12 years). Mr. DeCaster again made minimal adjustment for age/condition—10%, and he made no adjustment for location or market conditions.

Mr. Leirness testified (Tr. 2/18/04, pp. 192-193) that Comparable Two was on the south edge of the Chicago market where the availability of supply of such facilities depresses the price. When he visited there some of the building depicted in Mr. DeCaster’s report had been demolished, and more demolition was in progress. It appeared that the buyer was looking at likely splitting it up into pieces and renting it to a variety of tenancies.

Relator's Comparable Two is entitled to no weight.

Relator's Comparable Three is in the quad city area with a population of 200,000 to 250,000. Mr. Leirness characterized it as part of the Chicago-area market. Tr. 2/18/04, pp. 194-195. It was bought by a marketer of industrial space early in 1997; so, again the sale is quite old. They have broken the space down into industrial warehouse space, crane service space, and office space; little of the space has been leased since its purchase. At the time of the purchase it had an age of 33 or 34 years and was noted to be dusty and dirty due to 25 years of heavy manufacturing use. Mr. DeCaster made a 20% adjustment due to the age/condition of the comparable, but, again no adjustment for location or market conditions.

Due to the age of the sale and the differences in the market, Relator's Comparable Three should be given no weight.

Relator's Comparable 4 is located on the south side of Chicago in a very old industrial area that has a large amount of large industrial properties, many of which are either vacant or being offered for sale or lease. It had an average age of 27 years and was sold to a user that warehouses and distributes rolled steel. It was originally listed for over \$7,000,000.00 and was sold in nine months for a little over a million and a half. Mr. DeCaster found Comparable Four to be 15% superior to the Subject with respect to location and market conditions. Again, these adjustments defy logic and objectivity. Comparable Four ought to be given

no weight. Mr. Leirness's testimony regarding Comparable 4 is at Tr. 2/18/04, pp. 195-197.

Comparable Five is also located in the broader Chicago market. When Mr. Leirness visited it two different tenants were occupying it and the owner was trying to lease the balance. Tr. 2/18/04, pp. 197-199. Again, because of market differences, Comparable Five should be given no weight.

Mr. Leirness also testified that he reviewed those comparables for environmental issues as well. Tr. 2/18/04, pp. 200-206. Comparable One appeared pretty clean. It was identified as a hazardous waste generator of significant amounts, but no apparent problems existed at the time of the sale. Comparable Two had a history of minor violations of regulations and did not appear to be fully investigated, which could be a problem if it were to be torn down for replacement. Comparable Three was similar. Comparable Four was on the equivalent of the super fund list, as was Comparable Five. Other than Comparable Three, Mr. DeCaster had no indication in his report that he even considered environmental issues as a factor. T. 2/18/04, pp. 205-206.

The Tax Court received all of Relator's evidence regarding the out-of-state sales, considered it, and found the opinions of Mr. DeCaster to be unpersuasive and those of Mr. Jabs to be persuasive. A.6, 7. The Tax Court specifically noted "we considered the testimony and appraisal reports of both expert witnesses... ."

A.7. It further commented that the regional sales offered by Relator were rejected because Relator “failed to demonstrate that the out-of-state properties were similar enough to the Subject Property to warrant comparison.” A.19.

LAW AND ARGUMENT

I. Standard of Review.

The standard of review for Tax Court decisions is the same as for any other trial without a jury: it must be upheld unless clearly erroneous in the sense that the evidence as a whole does not reasonably support the decision. Northwest Airlines, Inc., v. Commissioner of Revenue, 265 N.W.2d 825, 829 (Minn. 1978); Evans v. County of Hennepin, 548 N.W. 2d 277, 278 (Minn. 1996); Marquette Bank National Association v. County of Hennepin, 589 N.W.2d 301, 305 (Minn. 1999). Because property assessment is an inexact science, the Supreme Court defers to the Tax Court’s decisions unless the Tax Court “has clearly overvalued or undervalued the property, or has completely failed to explain its reasoning.” Marquette, id. Reversal comes only if the Supreme Court is “left with a definite and firm conviction that a mistake has been committed.” Marquette, id., citing Evans.

II. The Tax Court’s Determinations Of Value Have Ample Support In The Record.

The Jabs report, Ex. 7, provides the Tax Court with ample evidence to support its decision. Mr. Jabs relied on comparable sales, both in-state and out-of-

state, for his main analysis. His analysis was thoroughly discussed and accepted by the Tax Court. He supported it with an alternative theory of breaking the property down into smaller parcels, and further supported it with a cost approach that was based upon a building-by-building analysis. He specifically identified the relevant market, which did not include the out-of-state sale areas used by Relator. This market identification excluded those out-of-state areas used by Relator, not because they were simply out of state, but because they were in a market where older, essentially abandoned, industrial properties were prevalent and union labor forces were dominant.

In his testimony as Respondent's review appraiser, Mr. Leirness, another MAI, confirmed that market analysis.

Clearly, there is adequate evidence in the record to support the Tax Court's determinations of value. Its decision should be affirmed.

III. The Tax Court Did Not Make An Exclusionary Evidentiary Ruling, Or In any Event, Such A Ruling Was Within The Appropriate Discretion Of A Trial Court.

Relator characterizes the Tax Court's treatment of its out-of-state comparables as the application of an "unpromulgated rule of evidence." Relator's Brief at p. 16. Amici characterized it as a "*de facto* rule of *per se* exclusion." Amici Brief at p. 17. The Tax Court did neither.

First, the Tax Court did not “exclude” any evidence. Relator argues that the correct relevant rules are Minn. R. Evid., 702 and 703. Rule 702 allows an expert to testify “in the form of an opinion or otherwise.” Respondent accepts the application of this rule. However, Mr. DeCaster was allowed to testify as to his opinion and all of the allegedly comparable sales he could identify. Rule 702 was not violated. Rule 703 allows the expert to testify about the facts or data upon which he bases an opinion, even if the facts or data are not admissible in evidence. Again, Mr. DeCaster was afforded that opportunity. Rule 703 was not violated. No exclusionary rule was applied.

Where Relator actually lost the case was on the merits of the analyses of the testimony and facts that were admitted. The Tax Court was not persuaded that Relator’s out-of-state sales, which were the subject of literally days of testimony, were “similar enough to the Subject Property to warrant comparison.” It certainly did not help Relator’s case that its expert, Mr. DeCaster, had not even visited the out-of-state comparable sale sites until after he had (1) given his written opinions in his report, (2) conducted his direct testimony, and (3) been cross examined. His lack of credibility is clearly evident in the Tax Court’s memoranda.

Likewise, the record shows no application of a *de facto* rule of *per se* exclusion. If the Amici are truly concerned about such a rule, then they should take up that cause in a case where such a rule has actually been applied. What the

Tax Court has done in the instant case is simply to require sufficient similarity between a subject property and comparative sale property to warrant comparison. In this writer's experience in the context of condemnation and tax court litigation, any appraiser must be prepared to demonstrate sufficient similarity with the subject property to warrant any fact-finder's reliance on a comparable sale—that goes for in-state comparable sales as well as out-of-state comparable sales. The out-of-state sales comparisons have not been discriminated against; on the merits, the Tax Court felt they were not sufficiently similar to support a value determination on the Subject Property.

Generally, rulings on the admissibility of evidence are left to the discretion of the trial court. Colby v. Gibbons, 276 N.W.2d 170, 175 (Minn. 1979); E.C.I. Corp. v. First Nat'l Bank, 237 N.W.2d 627,630 (Minn. 1976); Hiedeman v. Hiedeman, 187 N.W. 2d 119, 124 (Minn. 1971); Kellett v. Wasnie, 112 N.W.2d 820, 824 (Minn. 1962). Thus, were the Tax Court's decision actually based on a ruling of admissibility, Relator would certainly have a weak case on appeal. However, in the instant case no adverse ruling on admissibility was ever made. In the end, the Relator's out-of-state comparable sales were found to be so lacking in similarity to the Subject Property that they did not warrant substantive consideration.

CONCLUSION

For the above-stated reasons, the decision of the Tax Court should be affirmed.

Dated: 4-7-05

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