

KAO
KASSAB ARCHBOLD & O'BRIEN, L.L.C.

EDWARD KASSAB
WILLIAM CORNELL ARCHBOLD, JR.*
JOSEPH PATRICK O'BRIEN**

OF COUNSEL
JOHN YANOSHAK
FORMER PA HOUSE SPEAKER
HON. MATTHEW J. RYAN
1932-2003

*ALSO MEMBER DC BAR
**LLM TAXATION

Real estate tax appeals after Pennsylvania Supreme Court's decision in Downingtown Area School District v. Chester County Board of Assessment Appeals and Lionville Station S.C. Associates 913 A.2d 194 (2006).

- **15% CLR variance rule abolished**
- **Tax payer can now show lack of constitutional uniformity by proof of assessment ratios of "similar properties of the same nature in the neighborhood"**
- **Base year value now relevant**
- **STEB CLR of current, prior or 2 years prior??**

The Downingtown case involved a Real Estate Tax Assessment Appeal which was initiated before the Chester County Board of Assessment Appeals (Board) by the Downingtown Area School District in Chester County, PA.

The appealed property was an 83,488 square foot neighborhood (strip) shopping center which had been reassessed at approximately \$5,800,000.00 in 1998 as part of the county wide re-assessment of all properties in Chester County effective for 1998 tax year using 100% of the 1996 "Base year" values. Subsequently, in March of 1999, the

1
214 N. JACKSON ST., P.O. BOX 626, MEDIA, PENNSYLVANIA 19063
610-565-3800 PHONE 610-892-6888 FAX
[HTTP://WWW.KASSABLAW.COM](http://www.kassablaw.com)

taxpayers, Lionville Station S.C. Associates "Lionville" purchased the property for approximately \$10,400,000.00. Thereafter, the School District appealed the \$5,800,000.00 assessment to the Chester County Board of Assessment Appeals (Board) in the summer of 1999 for the 2000 tax year and after a hearing before the Board, the Board increased the assessment for the tax year 2000 from the \$5,800,000 assessment to \$6,500,000.00 which was \$77.86 per square foot as opposed to \$69.50 per square foot at the old assessment.

The School District appealed the Board's decision to the Court of Common Pleas of Chester County seeking to have the assessment further increased to \$8,500,000.00 which was \$101.81 per square foot. At the *de novo* court hearing, the parties stipulated that for the 2000 tax year, the fair market value of the property was \$8,500,000.00 and that the Common Level Ratio (CLR) for Chester County, as determined by the Pennsylvania State Tax Equalization Board (STEB) was 85.2%¹ and the Established Predetermined Ratio (EPR) for assessing taxable real estate in Chester County was 100% of the Fair Market Value.

At the trial before Common Pleas Judge Shenkin the Chester County Chief Assessor testified that the average assessment for shopping centers similar to the subject property was \$64.29 per foot and that the \$77.86 per square foot figure (the \$6,500,000.00 assessment) was arrived at by the Board of Assessment in an effort to

¹ It is interesting to note that the stipulation of an 85.2% CLR for the tax year 2000 ignores that fact that according to the STEB website the actual CLR for the year 1998 of 93.4%-which normally would be applied to the tax year 2000 (72 P.S. 5349 (d.2)) was not used.

achieve uniformity with other commercial properties. The taxpayer, Lionville, presented as evidence, the expert testimony of a real estate appraiser who had performed an analysis comparing the subject property with seven other shopping centers in the county which he deemed comparable. As noted by the trial court in the Commonwealth Court decision, the expert testified on cross that he did not conduct a “complete appraisal” on the comparables but that he completed “an exterior inspection similar to a drive by appraisal.”. The taxpayer’s appraiser determined that the assessments per square foot for the comparables ranged from \$47.87 to \$89.62 per square foot and that the ratio of the assessed value to actual value for the comparables was in the range of 34-69%. The tax payer argued that an increased assessment (to 100% of the agreed fair market value of \$8,500,000) would result in a violation of the Constitutional requirements of tax uniformity. Pennsylvania’s Constitution Article VIII § 1 requires that

“all taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.”

The trial court rejected the taxpayer’s argument as well as the evidence of the seven other shopping centers insisting that the “class” of properties should be all real estate within the taxing districts not just the seven shopping centers and that Lionville had failed to produce sufficient evidence to successfully challenge the validity of the assessment. The trial court also determined that since the Common Level Ratio of 85.2% did not vary by more than 15% from the 100% EPR that 100% *of the agreed \$8.5 million fair market value for 2000*, should be used as the assessment. (Even the

Board, in its argument, was willing to apply the 85.2% CLR and not the EPR of 100% to achieve uniformity.)

On appeal from the trial court, the Commonwealth Court affirmed the decision of the lower court noting the provision of the Second Class A and Third Class County Assessments Law (72 P.S. § 5349 (d.2)) that required using the 100% EPR when there was less than a 15% variance between the CLR and the EPR. The Commonwealth Court also noted that the traditional method of mounting a uniformity change i.e., offering an expert to compute a ratio of assessments based upon County records might no longer be permissible in light of the 1982 legislative change (72 P.S. § 5349 (d.2)) as well as a similar holding in another Commonwealth Court decision *Hromsin v. Board of Assessment Appeals of Luzerne County* 719 A.2d. 815, 819 (PA. Cmwlth.1998); allocatur denied, *558 Pa. 634, 737 A.2d 1227 (1999)*.

Commonwealth Court Judge Freidman, in her dissenting opinion to her Court's decision in *Downingtown*, stated that proof establishing the average assessment to value ratio of property within taxing districts is relevant in a uniformity challenge and that the Supreme Court had specifically endorsed this approach in prior cases when the tax payer offered evidence regarding assessment to value ratios similar to the to the one at issue: *In re: Brooks, Bldg.*, 391 PA 94, 101; 137 A. 2d, 273, 276, (1958), *Deitch Co. Asssesment Appeals and Review of Allegheny County* , 417 PA 213; 223; 209 A. 2d 397, 402-03 (1965). In her dissent Judge Freidman opined that to the extent that the

“15%” rule purported to eliminate the comparison of assessments under *Brooks* and *Deitch* above it had usurped the court’s function of interpreting the Constitution.

The Supreme Court granted discretionary (allocatur) review of the Commonwealth Court’s *Downingtown* decision limited to the issues of whether the “15% rule” superceded methods of determining uniformity and whether if other methods of proving uniformity were permitted, the Commonwealth Court erred in disregarding the uncontradicted testimony of Lionville’s expert on the seven other similar shopping centers.

The Supreme Court held in *Downingtown* that the “15% rule” was unconstitutional. The Supreme Court said that:

“...Thus in allowing the use of the EPR rather than the CLR, the general assembly has in effect, carved out a class of taxpayers who are subjected to an unfairly high tax burden-mainly those whose assessment is appealed by any taxing district in which the property is located. Because this classification is not based on a legitimate distinction between the targeted and non targeted properties, it is arbitrary and thus unconstitutional...”

The Court cited with approval Judge Friedman’s dissent in *Vees v. Carbon County Board of Assessment Appeals*, 867 A.2d 742 (Pa. Cmwlth.2005).

“...[the] statutory scheme at issue [72 P.S. 5349 (d.2)] suffers from an internal, systemic defect which arguably renders it unconstitutional on its face. In this regard, the statute expressly prescribes that as a mere consequence of the lodging of an assessment appeal, the benefit of equalization that is otherwise required of the statutory scheme is lost, unless and until a deviation criterion that spans thirty percent range is met.”

The Supreme Court also concluded that:

“A taxpayer may prove non uniformity by presenting evidence of assessment to value ratio of ‘similar properties of the same nature in the neighborhood’.” at 7

citing its prior holdings in *Brooks Bldg.* and in *Deitch*. The Supreme Court cited with favor its prior decision in *Deitch*, as elaborated upon by the Commonwealth Court in *Fosko v. Board of Assessment Appeals* 646 A.2d 1275 (PA Cmwlth 1994) and repeated its prior holding that within the context of the uniformity challenge, the trial court may rely upon evidence concerning the assessment to value ratio of similar properties as was found in *Brooks Bldg* stating that:

“the tax must be applied with uniformity to similar kinds of business or property”because such ‘similar properties’ evidence while not comprehensive, is nevertheless relevant to the uniformity analysis; further it would be a practical impossibility to require the tax payer to evaluate the assessment to value ratio of every parcel in the taxing District. See *Keebler*, 496 PA at 143, 436 A 2.d 584, *Harleigh*, 299 Pa. at 390, 149 A. at 655.) Moreover given that it is relevant, such proof much be considered. (See *Deitch* ...Where the taxpayer’s testimony is relevant, credible and unrebutted, it must be given due weight and cannot be ignored by the Court.”);..” at 8.

The Supreme Court acknowledged that while it had interpreted the Uniformity Clause

“as precluding real property from being divided into different classes for purposes of systemic property tax assessment, we do not find that this general uniformity precept eliminates any opportunity or need to consider meaningful subclassifications as a component of the overall evaluation of uniform treatment in the application of the taxation scheme. Indeed, this would represent an irreversible departure from federal equal protection jurisprudence which sets the floor for Pennsylvania uniformity assessment...” at 10

The Court then held

“while the Commonwealth may certainly seek to achieve overall uniformity by attempting to standardize treatment of differently situated property owners, its efforts in this regard do not shield it from the prevailing requirement that similarly situated tax payers should not be deliberately treated differently by taxing authorities.” [The Court footnoted that “deliberate” treatment does not exclusively connote wrongful conduct but also includes any intentional or systematic method of enforcement of the tax laws.] at 11.

The Supreme Court further noted that Pennsylvania’s method of tax equalization using the Common Level Ratio

“...obviously yields substantial leeway for potential discrimination by local officials among similarly situated property owners who are under represented in the general population, giving way to the significance of range of the application of averages, (often expressed in the terms of a “co-efficient” of dispersion and the fact that under representation in a surveyed population yields diminished impact on resulting averages...”at 12.

In essence the Court concluded that the methodology heretofore approved in *Deitch* as elaborated upon in *Fosko* acts as an essential check on achieving uniformity and avoiding any discriminatory treatment.

The also Court noted (*in dicta*(?)) the “discrepancy between present-year dollars and base year dollars, when a county board of assessment appeals alters the value associated with a particular piece of property” citing an expectation that the board would designate “the new value in terms of base year dollars”.

The Court cited 72 P.S.5342.1 mentioned in Judge Frieman’s dissent in *Vees*.

“...(defining “base year” and “stating that” {r}eal property values should be equalized within the county and any changes at the Board of Assessment Appeals shall be expressed in terms of such base year values”), accord to 72 P.S. 5020-402 (requiring that selling prices, estimated or actual,” shall

be subject to revision of increase or decrease to accomplish equalization with other, similar property within the taxing district”).”

The Downingtown Court gave an example where there was new construction suggesting that the proper procedure is to determine what the now improved property would have been worth in the base year [as improved] multiplied by the base year, EPR which becomes the parcel’s new assessed value for the present tax year. Taking the current fair market value times the EPR defeats the uniformity that is sought.

Accordingly, the case was remanded to the Trial Court for consideration of the test under Deitch as elaborated upon in Fosko and as further reconciled with federal equal protection jurisprudence. Ironically, in the Fosko decision, the Commonwealth Court, in a 2-1 panel decision, dismissed a taxpayer’s appeal for failure to meet the burden of proof of current market value of comparable properties holding:

“A taxpayer could satisfy his or her burden by producing evidence establishing the ratios of assessed values to market values of comparable properties based upon actual sales of comparable properties in the taxing district for a reasonable time prior to the assessment date. A taxpayer may also meet this burden by offering evidence of assessments of comparable properties, so long as the taxpayer also presents evidence to show that the actual fair market value of the comparable properties is different than that found by the taxing authority. Albarano v. Board of Assessment & Revision of Taxes & Appeals, 90 Pa. Commw. 89, 494 A. 2d 47 (1985); [9] Valley Forge Golf Club, Inc. Tax Appeal, 3 Pa. Commw. 644, 285 A. 2d. 213 (1971). However, this Court has stated that without current market value information regarding the comparable properties, the court has no basis upon which to determine the issue of uniformity. Albarano. When a taxpayer fails to refute the presumed uniformity of a predetermined ratio by presenting credible, relevant and competent evidence to the contrary, the assessment of the taxing body must prevail. Chartiers Valley Sch. Dist.”

It is important to note the disjunctive in *Fosko* that a taxpayer meets her burden EITHER by producing evidence of “actual sales of comparable properties in the taxing district for a reasonable period of time prior to the assessment date” OR essentially by providing current market values of comparables compared to their assessments. The latter is much more difficult and expensive to accomplish but no doubt taxing districts will question the adequacy of recent sales or the number of them as an indicator. While prior case law appears to have suggested a large number of “comparables” in the taxing district were necessary, the fact that the court in *Downingtown* suggests that evidence of 7 “comparables” which were not full appraisals is probative and may be justification for a few comparables as is the language about “similar properties of the same nature in the neighborhood.”

DISSENT

Chief Justice Cappy joined by Justice Eakin, filed a dissenting opinion disassociating the minority from

“the majority discussion that properties subject to assessment appeals end up carrying a heavier tax burden than other properties.”

which the dissent felt the majority had in turn taken from Judge Friedman’s dissent in *Vees v. Carbon County Board of Assessment* 867 A.2d 742 (Pa. CMWLTH Ct 2005).

Justice Cappy observed that the majority opinion

“...produces an argument asserting that the methodology used for valuing properties following an appeal by a taxing authority (emphasis added) differs from that employed in the other assessments; the majority also states that because of this differing methodology, properties which are

subject to an appeal filed by a taxing authority are taxed more heavily than other properties...”

Justice Cappy felt that this constitutional issue was not an issue properly raised by the parties, and further disagreed with the continuation of the *Deitch* method asserting that the STEB method was more “sound”:

“Also, the Deitch method requires only the scantest of evidence to establish the Common Level Ratio. Deitch cited with approval a case in which a taxpayer adduced evidence relative to merely three other similar properties in the county....*Deitch*, 209 A. 2d at 403 (citing *Brooks Building Tax Assessment Case*, 137 A. 2d 273 (Pa. 1958)).

See also the 12/5/08 Decision of the Pennsylvania Commonwealth Court in Chartiers Valley Industrial and Commercial Development Authority, Maurice A. Nernberg and Nancy N. Nernberg, Appellants v. Allegheny County, City of Pittsburgh, City of Pittsburgh School District, Appellees No. 286 C.D. 2008 which expands upon use of sales v. appraisals and focuses on type of properties and area of “the neighborhood”.

Questions raised by Downingtown:

1. Is the holding limited to situations where there has been an appeal by the School District or other taxing authority to the Board of Assessment-in this instance of a property that sold for more than its assessment-where the application of the Estimated Predetermined Ratio (EPR) instead of the Common Level Ratio (CLR) will result in a higher assessment?

Suggested Answer: No, it simply eliminates the 15% variance test permitting use of the CLR; it may discourage Districts Appeals because the Taxpayer can now use the CLR.

2. Can any taxpayer appeal its assessment to the Board and raise a question of whether its assessment is uniform with other similarly situated properties or is this only available in appeals where School Districts have filed an Appeal?

Suggested Answer: Yes, Downingtown says that a taxpayer is not limited to CLR times fair market value but, as an alternative, may prove the average ratio of assessments of similar property of the same nature in the neighborhood EITHER by showing assessment ratios and sales occurring within a reasonable time period prior to the tax year OR by proving the value of such properties by expert appraiser testimony compared to the properties assessment to get the ratio. Note: 12/5/08 Chartiers Valley supra.

3. Are all tax appeals by School Districts or taxing authorities prohibited or does this case only apply to tax appeals where the EPR has less than a 15% variance from the CLR which will result in its application?

Suggested Answer: The case does not prohibit Taxing District Appeals per se (although the Webster County West Virginia

Supreme Court decision known as “Welcome Stranger” is cited but not for this purpose. The Vees and Appeal of Ridley School District cases may address this issue if given allocatur.

4. What are “similar comparable properties of the similar nature in the neighborhood”? Must they be in the same school district or municipality of the appealed property? Can you look at assessments of “comparables” in an appraisal (e.g. per square foot or per apartment) or must there be an appraisal of each “comparable” to get a ratio of assessment? Is recent sales price of a comparable sufficient? Is a “limited” appraisal “drive by” sufficient? How many “comparables” are necessary? Should the appraisal take this court’s approval of 3-7 comparables to prove the fair market values of the subject and then also include recent sales to compare assessments? Can the taxpayer not produce evidence but simply cite the ratios of assessment of the “comparables” cited in the taxing authority’s appraisal? When will an appellant be charged with being “too selective”?

Suggested Answer: It may depend upon the “nature” of the property appealed. There may be hundreds of relatively new residential properties of the same approximate size and price range within a few blocks or at least within the same Municipality but, looking at Downingtown , it was necessary to look at 7 strip shopping center ranging throughout the County. What is a “neighborhood” for commercial or industrial property? It is not unusual to see a “comparable” in appraisals, cite a property even in another county, especially for commercial industrial and investment properties. Recent sales of which may be scarce. As Justice Cappy pointed out in his dissent, Downingtown seems to approve as few as 3-7 “comparables”. Assuming the comparables in an appraisal are at least in the county of course arguments will arise that other sales, also be included in the “average” and perhaps

“similar property of the same nature” is not as limiting as the rules for “comparables” for an appraisal. For purposes of assessment averages no adjustment is seen to the sale price we expect that appraise rule will evolve.

Note: see Chartiers Valley discussion.

5. Can a taxpayer present evidence of fair market values of an appealed property, (had it existed) in the “Base Year” in lieu of current fair market value under 72 P.S. 5349 (d.4)?

Suggested Answer: While some would argue that the Base Year discussion was dicta, it can be argued that this was an appropriate decision particularly because of the statutory authority for the approach

See also Chartiers Valley.

See also www.kassablaw.com

NOTE: The foregoing is only the opinion of the writer and should not be taken as legal advice. Every matter stands on its own facts and circumstances. On a specific matter speak to an attorney licensed in Pennsylvania.