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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-001133-MR

KROGER LIMITED PARTNERSHIP I — APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE JEREMY MICHAEL MATTOX, JUDGE
ACTION NO. 16-CI-00435

TIM JENKINS, SCOTT COUNTY PROPERTY VALUATION ADMINISTRATOR; AND SCOTT COUNTY BOARD OF ASSESSMENT APPEALS — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CALDWELL, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: This appeal concerns the fair cash value of real property owned by Kroger Limited Partnership I in Georgetown, Kentucky, as set by Tim Jenkins, the Scott County Property Valuation Administrator (PVA). Kroger has appealed from the June 19, 2019, order of the Scott Circuit Court upholding the

July 12, 2016, final order of the Board of Tax Appeals concluding that the value of this property for the 2015 tax year was $14.094 million as determined by the Scott County Board of Assessment Appeals. Kroger asserts that it had presented substantial evidence that the fair cash value of the property was $6.7 million, while the decision of the Board of Tax Appeals was not supported by substantial evidence. We reverse and remand.

Kroger Limited Partnership I (Kroger) is a limited partnership qualified to do business in Kentucky and has a principal place of business in Louisville. It owns, in fee simple, a parcel of land and improvements at 106 Market Place in Georgetown, Kentucky. This property is comprised of 12.18 acres with a 130,600 square foot retail building, most of which is occupied by a Kroger grocery store (the Property).

For the tax year of 2015, the PVA assessed the value of the Property at $15.2 million. Kroger sought review of the PVA's assessment with the Scott County Board of Assessment Appeals (BAA), the administrative body with the authority to review and change valuation assessments made by the PVA upon the petition of a taxpayer. Kroger asserted that the Property's fair cash value as of January 1, 2015, was $6.6 million based upon an appraisal report from May 2014. In its final decision entered June 15, 2015, following a hearing, the BAA stated that it had considered a recent appraisal and sales of similar properties to determine

that the Property should be assessed at $14.094 million. The BAA calculated that amount as follows:

> Estimated $300,000 per acre times 12.18 acres equals $3,654,000 land value. Sq footage of 130,500 sq. ft. bldg., estimated replacement cost, times $100.00 per sq. ft. equals $13,050,000. Minus 20% for physical & functional depreciation. Leaves bldg. at $10,440,000 plus land value equals $14,094,000.

Kroger filed a petition of appeal to the Board of Tax Appeals (the Board) (File No. K15-S-30). It stated that at the BAA hearing it had presented an appraisal report dated June 11, 2015, prepared by Certified General Real Estate Appraiser David R. Hogan. In that report, Mr. Hogan set the value of the Property at $6.7 million ($4.1 million for the improvement and $2.6 million for the land) using the sales comparison and income approaches but noted there was not enough data to use the cost approach. Kroger argued that the PVA's valuation was arbitrary because it was not based on any admissible evidence and was improperly based on a value-in-use methodology. Kroger and the PVA set forth their positions in their respective prehearing compliance statements, and a hearing was held on June 21, 2016.

The first witness to testify at the hearing was Todd Metzmeier, the real estate manager for the Louisville Division of Kroger. His duties included researching and locating sites for new stores as well as capital planning and improvements in existing and new stores. He worked on the allocation of

resources for the capital to spend on the Property at issue in this case. Mr. Metzmeier said that Kroger owns the Property in fee simple and that the portion of the Property holding the Kroger store is not subject to a lease. There was a lease in place with a subtenant, a Great Clips franchise, which took up about 1,200 square feet. There was also a Kroger Wine and Spirits Shop, which was not subject to a lease. He went on to testify about a tax appeal for this Property in 2013, for which the AGIS Group was Kroger's consultant. The AGIS Group reported to the PVA that the total cost of construction, including the land, was $14.6 million, but Mr. Metzmeier said this amount was overstated by about $2 million because it included an adjacent shopping center Kroger did not own.

Mr. Hogan, a commercial real estate appraiser, testified next. He said that the real estate interest to be appraised in this case for its fair market value was the fee simple title as no lease was in place. He searched for sales of properties being sold for the fee simple title and for properties large enough to be comparable with the Kroger Property. He had to go outside of the region of Georgetown to find large, big box, single-tenant facilities to use. He then adjusted each of the sales for elements that would have an impact on the market value, including size, age, condition, and construction quality. Based on the available data, Mr. Hogan explained his calculation of an 11% capitalization rate, which resulted in a value of about $7.2 million. Mr. Hogan chose not to use the cost approach in this appraisal

because for "properties like this a potential buyer is going to consider the cost approach only to the extent that he knows he's not buying a property at a price greater than he could build a new one for. That is the only application of the cost approach in this situation." He focused on vacant buildings in his use of the comparable sales approach. In explaining his methodology in determining the value of a property, Mr. Hogan stated:

> It's very straightforward and it's not a complicated issue. It sometimes strikes people as odd that . . . an owner will spend 12 million dollars and end up with a building they can only sell for six. But it happens all the time because the difference is value and use of the value to that particular owner vs what the value to the market is. And in this case we have to value what is the value to the financial market. What could it be sold for rather than what the financial value to a given owner is which is a value other than real estate.

Mr. Hogan addressed the data the PVA provided regarding the buildings he used to calculate the value of the Property. He would not have used any of the properties as comparables "without a major adjustment for the property rights conveyed[.]" These properties were for the most part purchased subject to a lease fee title rather than a fee simple title. As to the Prospect, Kentucky, Kroger, he stated that it had been purchased in December 2012 based on the exercise of a purchase option that had been negotiated in the past. As to the Lowe's property in Florence, Kentucky, Mr. Hogan said this was part of a portfolio that was purchased and that the price could have been different had it been sold as a single property.

The Kohl's in Georgetown was not purchased for an owner-occupant as in this case but was purchased for investment purposes for the cash flow from the lease in place. The Burlington Coat Factory in Bashford Manor had three excess acres available for development, which would have an impact of more than 10% on the sales price. Another property was a community shopping center and therefore was not comparable. The Big K Center on Nicholasville Road in Lexington was free of a lease, but it was the "up leg" in a 1031 exchange. With that type of purchase, he explained

> you have a very limited window to identify and close on the property that you are acquiring to replace the property that you sold. So it's not uncommon for higher prices to be paid if on an up leg of a 1031 exchange because if you don't buy this property, if you don't get something in place the IRS is going to be off [sic] your butt. There are severe penalties. So you're motivated to pay more than would normally be the case if you had six months to work out a negotiation. Without knowing what the specifics were it's really hard to say how much this reflected an actual market price.

Mr. Hogan came up with a rental rate of $7.00 per square foot for the Property, and he did not know how the PVA would have reached a rental rate of $12.00. He said the sales comparables he used were for vacant structures that would be available for use "at their highest and best use." He said that the value of the use to the owner is not part of the appraisal in Kentucky for property tax purposes.

John Burke, the Chief Deputy for the Scott County PVA, testified next. His duties include assessing commercial property and farms. He was one of the primary people in the PVA's office to set the 2015 assessment for the Property, which he had assessed at $15.2 million. The PVA did not appeal the Board's decision to lower that amount to just over $14 million. He explained how he reached the original assessment amount, using documentation provided by Kroger that the Property was worth a little over $14 million and that the total project cost $16.2 million. The documentation also provided the cost approach of the actual cost of building the structure. For the 2015 assessment, Mr. Burke ran a projected income approach based upon the 2013 numbers and added on Great Clips and the liquor store to reach the amount of the assessment. He looked at the Boulder Group and other sites that do market analysis on big box stores to find a mid-range. He came up with a value of $8.82 per square foot rental rate. He did not agree with Mr. Hogan's use of comparable sales for vacant properties outside of Kentucky. There were plenty of sales in Kentucky that were more comparable to the Georgetown Property.

Mr. Burke also testified that he was "concerned that they spent which I have trouble fathoming that they spent almost 15 million dollars to build this property and within 5 years they're saying it's worth 6.7." He cited to amounts from the 2013 tax appeal that the AGIS Group provided; the documents stated that

in 2013, the land and building alone were worth almost $8 million, without covering the site improvements. Mr. Burke stated that in using the sales comparison and income capitalization approaches, he did not make any adjustments. He confirmed the data on the six transactions via Cold Star, which is a national site. He said that he did not make adjustments in situations where a building was occupied or vacant: "When it's sold I don't because I take that . . . value that somebody's paid for it as fair market. There is no adjustment at that point. It's just that and figuring out what the cap rate is, the size of the building and then coming up with a square foot. There's no adjustment when it's sold."

Mr. Metzmeier was recalled next to provide additional information about the Prospect Kroger sale. Prior to purchasing the property, Kroger was a tenant with a lease in place, and the terms of the lease provided Kroger with the right of first refusal if it were to be sold. Kroger exercised its option to purchase the property. He said that "the price that was negotiated between the previous landlord and Philips Edison was primarily based on the income stream that Kroger provided when we were a tenant." The purchase price for that property was $19.5 million, and Kroger occupies about 1/3 of the facility, or between 100,000 and 110,000 square feet. Kroger did not have the opportunity to negotiate the price; either it matched the price negotiated between the former landlord and Philips Edison or it did not. But it was not under any compulsion to purchase it.

The Board entered a final order on July 12, 2016, upholding the PVA's assessment amount of $14.094 million. It stated:[1]

> The taxpayer's witness, Mr. David Hogan, was qualified as an expert appraisal witness, and he presented his appraisals for the property[.] Mr. Hogan opined that even though the taxpayer's total cost of construction and purchase of the land in 2011 was $12.6 million, the fair cash value of the property in 2015 was only $6.7 million -- $4.1 for the improvement and $2.6 for the land. He testified that the improvement must be valued as if it were an empty building. He supported his opinion as to value with both a comparable sales study and an income approach. For his comparable sales, he stated in his report that "no similar sales were available in the local market thus our search was expanded to a larger geographic scope." The sales he selected were from Ohio, Wisconsin, Tennessee and Illinois. And two of these five "sales" were only sales listings, rather than actual sales. These sales were also all vacant properties, rather than occupied properties and there was no evidence presented as to the length of time these vacant properties remained on the market prior to their sales dates. For his income approach, the appraiser relied, once again, upon rental information from outside of Kentucky for secondary tenants.
>
> The PVA presented additional information in support of his assessment, which included six sales within Kentucky. None of the sales were of vacant properties. One of the sales presented by the PVA was a 2012 purchase by this taxpayer, of a property which it occupied to operate another one of its grocery stores. No evidence was presented by the Appellant to suggest that this 2012 sale was not an arms-length transaction, and no information was presented by the Appellant as to any adjustments that should be made to this sales price. The

[1] We are omitting references to the record.

PVA's comparable sales ranged from $67 a square foot to $112 a square foot with a median price per square foot of $107. While the PVA did not make any adjustments to any of these sales for age or location, etc., they serve as support for the valuation of the subject property at $14,094,000 or $108 per square foot. These sales were Kentucky sales of occupied properties, which the Board finds were more comparable to the subject property than the Appellant's vacant property sales from outside of Kentucky.

Kroger is the owner of this parcel and the improvement, and it leases out a portion of the property. This property must be assessed at the amount of money that it would bring Kroger at a fair voluntary sale, because that is the sole standard of assessment under the Constitution. It is Kroger's burden to prove that the property has been overvalued. This taxpayer paid $19,500,000 in 2012 for an older improvement, similar in use and size, located in Prospect, Kentucky. It would have been helpful if the appraiser had analyzed this sale and offered his opinion concerning its adjustments, but he did not. While adjustments that would be made to this 2012 sale would have to include those for its location, the age and condition of the property, and any applicable adjustments concerning the tenants, the Board finds that this 2012 Kentucky sale of an occupied property has more probative value than the three out-of-state vacant property sales submitted by the appraiser for the taxpayer. This taxpayer also presented a claim of value to the PVA in 2013 during the protest process for the subject property in the "$14 million range," and no explanation was provided by the taxpayer as to the alleged significant decrease in the property's value two years later.

The Board finds that the taxpayer has failed to prove that its property has been overvalued for the 2015 tax year, and that it would only be worth $6.7 million in a fair voluntary sale. The Board concludes that the value

> for the 2015 tax year shall be $14,094,000 as established by the Scott County Board of Assessment Appeals.

On August 11, 2016, Kroger filed a petition for review of the Board's final order with the Scott Circuit Court. The parties briefed the issues, and Kroger asserted that the assessment was not based upon substantial evidence pursuant to Kentucky Revised Statutes (KRS) 13B.150(2)(c). The court entered an order denying the appeal and upholding the Board's final order on June 19, 2019. Citing to *Jefferson County Property Valuation Administrator v. Ben Schore Co.*, 736 S.W.2d 29, 30 (Ky. App. 1987), the circuit court analyzed the issue as follows:

> The PVA must assess property at its *estimated* value on the 1st day of each year. Petitioner claims that because the PVA used estimates, it does not meet the standard of substantial evidence. This is not correct. Respondents correctly state that property value assessments are not an exact science. It is not possible to value property for what fair market value would be without estimating based on credible pertinent data. All property valuations are estimations. The PVA, Local Board, and KBTA all found the 2015 assessment of $14,094,000.00 to be a valid property valuation. Further, the KBTA noted that Petitioner's expert (David Hogan) did not use Kentucky sales/rental information in [his] conclusions. Also, the Board noted that the PVA used occupied structures within Kentucky, not vacant, out-of-state structures.
>
> As stated above, an assessment is not invalid merely because of the method used, so long as that method "is fairly designed for the purpose of reaching, and reasonably tends to reach, an approximation of the fair voluntary sale price."

> First, the trial court exceeded its authority under KRS 131.370(3) when it chose to accept the income method of valuation urged upon it by the taxpayer and no one else. It is clear to us that question is not whether the income method is a better one than the comparable sales method, both of which are acceptable methods, but the question is whether the evidence supports the conclusion of the BTA on the valuation of the taxpayer's property at a fair market value regardless of what method is employed by the PVA in making the assessment. The burden was upon the taxpayer to prove the incorrectness of the assessment . . . and this he failed to do.

The standard above applies perfectly to the case at bar. Here, Respondents' use of the cost and sales approaches were a valid basis for calculating the properties [sic] fair market value as of 2015. Petitioner makes much of the fact that Respondents use sales to "support" their cost-based valuation. This sales evidence is precisely that: support. It's not the calculations themselves, which were done using the cost approach, and done correctly. Respondents' use of sales evidence as support of their calculations for the cost approach does not violate KRS 132.191(2)(a). That part of the statute reads as follows: "(a) A cost approach, which is a method of appraisal in which the estimated value of the land is combined with the current depreciated reproduction or replacement cost of improvements on the land[.]"

It is important to reiterate that the "support" was not the actual cost approach calculations themselves, the "support" is simply similarly situated sales to illustrate that the cost approach was accurate. There is nothing within the above statute that would prohibit this practice. Further, this Court sees no mathematical or logical

> inconsistencies within the PVA's methodology that would indicate the evidence presented was not substantial.
>
> KRS 13B.150(2) prohibits this Court from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. Here, Petitioner argues that the KBTA's order was without the support of substantial evidence. This Court disagrees. The KBTA found that the PVA's sales were more comparable to the subject property than Kroger's expert appraisal. Under KRS 132.191(2), the PVA used two valid valuation methods, the cost approach and the sales approach. Furthermore, the KBTA confirmed that the PVA based [his] findings on substantial evidence. Petitioner failed to meet [its] burden to prove that the Respondents' assessment was incorrect. Petitioner must first disprove Respondents' valuation methods before they can prove their own. They failed to do so.
>
> Petitioner's assertion that they *utilized true comparable sales*, which proved that as of January 1, 2015, the property's fair cash value was $6.7 million is incorrect. Petitioner's use of sales of unoccupied structures outside of Kentucky were inappropriate. Further Petitioner was incorrect in stating that the [PVA] failed to present any comparable sales and thus did not present any relevant or substantial evidence. The PVA was correct in his sales comparison analysis because he utilized sales of occupied structures within Kentucky. Therefore, this Court finds the PVA's assessment of the subject property to be substantial evidence and affirms the ruling of the KBTA.

(Footnotes omitted.) This appeal now follows.

KRS 13B.150 sets forth the process of judicial review from decisions made by an administrative agency:

> (1) Review of a final order shall be conducted by the court without a jury and shall be confined to the record, unless there is fraud or misconduct involving a party engaged in administration of this chapter. The court, upon request, may hear oral argument and receive written briefs.
>
> (2) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is:
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> > (a) In violation of constitutional or statutory provisions;
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> > (b) In excess of the statutory authority of the agency;
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> > (c) Without support of substantial evidence on the whole record;
> >
> > (d) Arbitrary, capricious, or characterized by abuse of discretion;
> >
> > (e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;
> >
> > (f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2); or
> >
> > (g) Deficient as otherwise provided by law.

In this case, Kroger claims that there was insufficient substantial evidence to support the Board's final order pursuant to KRS 13B.150(2)(c).

Our general standard of review in administrative appeals is set forth in *Parrish v. Commonwealth*, 464 S.W.3d 505, 509-10 (Ky. App. 2015):

> A party aggrieved by the circuit court's final judgment may then appeal to the Court of Appeals. KRS 13B.160. In reviewing an agency decision, we must be ever mindful of our limited role. If the agency's decision is supported by substantial evidence, we must uphold that decision, even if there is conflicting evidence in the record and even if we might have reached a different conclusion. *500 Associates, Inc. v. Natural Res. & Envtl. Prot. Cabinet*, 204 S.W.3d 121, 131 (Ky. App. 2006).
>
> Substantial evidence does not mean that the record could not support any other conclusion. "The test of substantiality of evidence is whether when taken alone or in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men." *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). If there is substantial evidence in the record to support the Board's findings, they will be upheld, despite other conflicting evidence in the record. *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981); *see also* KRS 13B.150(2). We may not reinterpret or reconsider the merits of the claim, nor can we substitute our judgment for that of the agency as to the weight of the evidence. *Id*. We further note that "[i]n its role as a finder of fact, an administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses[.]" *Aubrey v. Office of Attorney Gen.*, 994 S.W.2d 516, 519 (Ky. App. 1998); *see also McManus v. Kentucky Ret. Sys.*, 124 S.W.3d 454, 458 (Ky. App. 2003).

With this in mind, we shall consider Kroger's arguments.

As it did below, Kroger asserts that its expert's valuation of the Property was supported by substantial evidence while the PVA's valuation was not. The appellees dispute this argument and contend that Kroger's sales and income comparisons were irrelevant, as the Board found, and that Kroger's expert failed to use information about Kentucky sales and rental data to calculate the valuation.

In *Evans Oil & Gas Co. v. Draughn*, 367 S.W.2d 453 (Ky. 1963), the former Court of Appeals discussed the relative burdens in tax assessment appeals:

> It is conceded that the burden was on the taxpayer to prove the assessment incorrect. Since it appeals from an adverse factual determination in that respect, the question here is whether, under all the evidence, the taxpayer's claim was so strongly proved that a reasonably and fairminded trier of the facts, adhering to proper legal principles with respect to the weight and competence of the evidence, was compelled to find in the taxpayer's favor.
>
> In regard to the weight and effect of the 'presumption' that the taxing authority's valuations are not excessive, we concur with the following statement from People ex rel. Wallington Apartments v. Miller, 1942, 288 N.Y. 31, 41 N.E.2d 445, 141 A.L.R. 1036:
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> > 'Such a presumption is not evidence but serves in place of evidence until the opposing party comes forward with his proof, whereat it disappears. It has no weight as evidence and is never to be considered in weighing evidence. In other words, it merely obviates any necessity, on the part of the assessors, of going forward

> with proof of the correctness of their valuation. So understood, 'the presumption of correctness' is merely another way of saying that the burden of proof in a proceeding to review an assessment is on the relator-taxpayer. On him that burden has always rested. * * *
>
> 'So when we say that the burden of proof in such cases is on the relator and that there is a presumption that the assessment is correct, we are not saying two things, but saying the same thing twice. Once such a proceeding goes to trial and the relator goes forward with evidence, the presumption has no further place or effect of any sort in the proceedings.'

Evans Oil, 367 S.W.2d at 453-54. Succinctly stated,

> When the taxpayer appeals, the question on appeal is whether, under all the evidence, the taxpayer's claim was so strongly proved that a reasonable and fair-minded trier of the facts was compelled to find in the taxpayer's favor. [*Evans Oil*, 367 S.W.2d at 453-54.] Stated differently, the burden is upon the taxpayer to establish that the assessment was wrong, and if there is testimony of competent valuation witness/es in support of the assessment, even though conflicting, a finding adverse to the taxpayer cannot be set aside as clearly erroneous.

Ben Schore Co., 736 S.W.2d at 30.

In *Revenue Cabinet, Commonwealth of Kentucky. v. Gillig*, 957 S.W.2d 206 (Ky. 1997), the Supreme Court of Kentucky more recently addressed the valuation of property for tax purposes. It stated:

[T]he courts have held that it is the tax assessor's duty to estimate what the market value *logically should be*—not to determine what the market value *actually is* for the property. *Fayette County Board of Sup'rs v. O'Rear*, Ky., 275 S.W.2d 577, 579 (1954). While recognizing that the tax assessor's valuation merely reflects an estimation of what the market logically should be, since at least 1932, the law of Kentucky has also granted the estimated property tax assessment a presumption of validity and has placed the burden of establishing that the assessment was incorrect on the taxpayer. *Evans Oil & Gas v. Draughn*, Ky., 367 S.W.2d 453, 454 (1963). Moreover, in *Hyden v. Breathitt County Board of Sup'rs*., 244 Ky., 505, 51 S.W.2d 441 (1932), the court explained the taxpayers burden of proof as follows:

> When the property owner is notified of a tentative raise or reduction in his assessment he is thereby informed that in the opinion of the board the assessment which the property owner has turned in does not represent that fair cash value of the property. He may not presume that the board acted arbitrarily, but must assume that it acted at least upon the information the members had concerning the value of the property in dispute. It then devolves upon the property owner, if he feels aggrieved, to produce evidence to convince the board of its error, and if he fails to so convince them, he has a full remedy by appeal . . . .

Id. 51 S.W.2d at 441-42.

The cases of *O'Rear*, *supra*, and the more recent case of *Commonwealth v. Kroger*, Ky., 503 S.W.2d 722 (1974), best illustrate the operation of the presumption of validity and the burden of proof in a property tax case. In *Fayette County Board of Sup'rs v. O'Rear*, Ky., 275 S.W.2d 577, 579 (1954), the taxpayer claimed, as do the

Appellees in the present case, that the "method or procedure followed by the tax commissioner violat[ed] the 'sole standard' fixed by Section 172 of the Constitution, which is 'fair cash value estimated at the price it would bring at a fair voluntary sale.'" In rejecting the taxpayer's claim, the Court stated as follows:

> In substance, the contention is that the methods employed in assessing must be designed to acquire information as to what the market value actually is, rather than to form an estimate of what the market value logically should be. It is our opinion that an assessment cannot be held invalid merely because of the method employed in making, so long as the method is fairly designed for the purpose of reaching and reasonably tends to reach an *approximation* of the fair voluntary sales price.

Id. at 579 (emphasis added). The court ultimately ruled that the assessment method "had sufficient prima facie validity to require it to be upheld in the absence of a showing by the taxpayer that the assessment exceeded the fair voluntary sale price." *Id*. The court concluded that the taxpayer failed to meet his burden of establishing that the assessment was incorrect and, consequently, the assessment was upheld. *Id*.

Similarly, in *Kroger, supra,* the court ruled that the PVA's assessment formula would meet the presumption of validity set forth in *O'Rear,* however the court went on to state:

> [T]he strength of its prima facie validity is another matter . . .
>
> Kroger's evidence . . . was fairly indicative of actual sale value as distinguished from

> purely estimated sales value. In view of the evidence, we cannot say that the Board of Tax Appeals was required to accept the assessment based on the formula.

Id. at 724 (citations omitted).

Gillig, 957 S.W.2d at 209-10.

In 2012, the General Assembly enacted KRS 132.191, which sets forth the valid valuation methods to be used in assessing the fair cash value of property for property tax purposes. That statute provides in relevant part as follows:

> (1) The General Assembly recognizes that Section 172 of the Constitution of Kentucky requires all property, not exempted from taxation by the Constitution, to be assessed at one hundred percent (100%) of the fair cash value, estimated at the price the property would bring at a fair voluntary sale, and that it is the responsibility of the property valuation administrator to value property in accordance with the Constitution.
>
> (2) The General Assembly further recognizes that property valuation may be determined using a variety of valid valuation methods, including but not limited to:
>
> > (a) A cost approach, which is a method of appraisal in which the estimated value of the land is combined with the current depreciated reproduction or replacement cost of improvements on the land;
> >
> > (b) An income approach, which is a method of appraisal based on estimating the present value of future benefits arising from the ownership of the property; [and]

> (c) A sales comparison approach, which is a method of appraisal based on a comparison of the property with similar properties sold in the recent past[.]
>
> . . .
>
> (3) The valuation of a residential, commercial, or industrial tract development shall meet the minimum applicable appraisal standards established by:
>
> > (a) The Kentucky Department of Revenue, as stated in its Guidelines for Assessment of Vacant Lots, dated March 26, 2008; or
> >
> > (b) The International Association of Assessing Officers.

This Court recognized in *Ben Schore Co.*, 736 S.W.2d at 30, that

> the question is not whether the income method is a better one than the comparable sales method, both of which are acceptable methods, but the question is whether the evidence supports the conclusion of the BTA on the valuation of the taxpayer's property at a fair market value regardless of what method is employed by the PVA in making the assessment. The burden was upon the taxpayer to prove the incorrectness of the assessment, *Evans Oil & Gas Co. v. Draughn*, *supra*, and this he failed to do.
>
> > It is our opinion that an assessment cannot be held invalid merely because of the method employed in making it, so long as the method is fairly designed for the purpose of reaching, and reasonably tends to reach, an approximation of the fair voluntary sale price.

> *Fayette County Board of Supervisors v. O'Rear*, Ky., 275 S.W.2d 577, 579 (1955).

Kroger's expert relied upon both the comparable sales approach and the income approach to reach his opinion on the valuation of the Property at $6.7 million. For the comparable sales approach, Mr. Hogan used listings from Ohio, Wisconsin, Tennessee, and Illinois to calculate a value of $6.32 million ($3.71 million for the land and $2.62 million for the improvement). Based on the income approach, Mr. Hogan estimated a market rent of $7.00 per square foot, which equated to $7.26 million for the fee simple market value indication. Reconciling the two values, Mr. Hogan reached a value of $6.7 million. Mr. Hogan did not use the cost approach for various reasons, including the age of the improvements and lack of data concerning depreciation. But to go forward with evidence of its proposed valuation, Kroger must first overcome the presumption that the PVA's valuation was correct and was not supported by substantial evidence of record.

Kroger contends that the PVA's use of unadjusted sales of leased properties and a claim of value from 2013 did not constitute substantial evidence. Mr. Hogan testified that the six transactions the PVA relied upon were not comparable to the Property for various reasons, including that they were leased or were a portfolio sale, had acreage for excess development, were not a big box property, or were part of a 1031 exchange. The properties were so dissimilar that it would not be possible to adjust them to make them comparable. Kroger cites to

Dolan v. Land, 667 S.W.2d 684, 687 (Ky. 1984), for the Supreme Court's observation that "[t]he method used by the PVA could be valid as to individual properties only if it were adjusted to take into account the specific characteristic of each farm."

As stated above, the properties the PVA relied upon were subject to leases, unlike the Property in this case. Kroger points out that a lease has its own value: "[T]he fair market value of a leasehold (if any) can be ascertained by simply subtracting the fair market value of the land as a whole if sold subject to the lease from the fair market value of the land as a whole if sold free and clear of the lease." *Kentucky Dep't of Revenue v. Hobart Mfg. Co.*, 549 S.W.2d 297, 300 (Ky. 1977). And additional information is needed to value properties with leases:

> The true income approach to fix fair cash value is a valid one and income from or rental value of real property is a proper factor to be considered in fixing its valuation for tax purposes. However, the courts throughout the United States are in complete agreement that income or earnings are neither the only element nor the controlling element to be considered in determining the valuation of realty for tax purposes. See Commonwealth, et al. v. J. B. Clay & Company, 215 Ky. 125, 284 S.W. 428 (1926). A number of other elements necessarily enter into the value, such as original cost, location, cost and character of improvements, rental history, location as to future growth of the adjacent area, sales of adjacent property, sales of comparable property, type of building or property, etc.
>
> Where the income approach is used, all jurisdictions, including Kentucky, require that net income

> and not gross income be the factor. Other considerations are the terms of the lease, such as requirements for maintenance, alterations or improvements, fixed rent or percentage of sales; prospective earnings as well as past earnings; length or duration of the lease; options at increased or decreased rentals; and, of considerable importance, the type of tenant and his financial stability.

Helman v. Kentucky Bd. of Tax Appeals, 554 S.W.2d 889, 891 (Ky. App. 1977). Because the PVA did not introduce any evidence of this type to apply the necessary adjustments, Kroger argues that the valuation was erroneous.

Kroger cites to the unreported case of *College Heights Corp. v. Oxendine*, No. 2011-CA-000546-MR, 2013 WL 645981, at *3 (Ky. App. Feb. 22, 2013), to argue that the property sales relied upon by the PVA were not comparable because they were leased:

> The Sizemore appraisal is solely based upon comparable sales. However, none of the sales Sizemore included in his appraisal could be called "comparable." Significantly, not one of Sizemore's comparables was a low-income property. Moreover, not one of the comparables was near Knox County. Five of these properties were located in Lexington and one was in Richmond. Clearly these properties were far more urban than the College Heights property. Yet Sizemore's appraisal made no adjustment for these factors-a violation of USPAP guidelines. But perhaps most glaring is the fact that not one of the "comparables" was a leased property as is College Heights. Even Sizemore acknowledged that a downward departure would be necessary but he provided no evidence as to what this figure might be. While the Hearing Officer maintained that she had not "consider[ed] anything that might have been alluded to but not made a part of the record," in

> making her determinations, clearly she must have done so. Absolutely no evidence was presented as to what appropriate downward dollar departure to Sizemore's appraisal was necessitated by the leasehold issue. Consequently, to do so was nothing more than speculation not supported by facts.

Therefore, Kroger contends that the PVA's assessment is invalid because the evidence does not support his valuation under the comparable sales approach.

Based upon our review of the properties relied upon by the PVA to determine comparable sales, we must agree with Kroger that the evidence it presented to counter the PVA's assessment compels a finding that the Property was overvalued. As Mr. Hogan testified before the Board, each of the property sales the PVA relied upon were not comparable to the Property in this case. They were subject to leases or were parts of other specific transactions, such as being part of a portfolio sale or a 1031 exchange, or were not a big box store. Therefore, these sales could not provide a basis for the PVA's assessment, and the circuit court erred in affirming the Board's final order.

We also agree with Kroger that the statement of value by Kroger's consultant in 2013 cannot be substantial evidence of its fair cash value as of January 1, 2015, two years later.

Accordingly, we reverse the order of the Scott Circuit Court upholding the final order of the Board of Tax Appeals and remand this matter with

directions that the circuit court remand the case to the Scott County Board of Assessment Appeals to reconsider the proper assessment utilizing proper evidence.

ALL CONCUR.

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