STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

In the Matter of the Application of
S&S REALTY OF ROCHESTER, LLC and
LAKE BEVERAGE CORP.,

Petitioner,

v.
Nathan Gabbert, Assessor, and
The Board of Assessment Review
of the TOWN OF HENRIETTA, MONROE
COUNTY, NEW YORK,

Respondent.

DECISION AND ORDER

Ind # 2002/8798
2003/8096
2004/8391
2005/8299

These Article 7 real property tax assessment proceedings involve a beverage distribution warehouse, which is owner occupied. A preliminary issue in the case is whether the refrigeration equipment contained in the property is non-taxable business equipment. The subject property, located at 900 John Street in the Town of Henrietta, consists of an improved industrial parcel containing a small section of office space, a middle section for loading and unloading trucks, and a rear section used to warehouse beverages for sale and delivery to retailers. The improvements on the property were originally made in 1991, which consisted of heating equipment and insulation and some cooling equipment to keep kegs of beer cold. The keg cooler is within the refrigerated warehouse, and was not considered taxable real property by the assessor. New equipment, installed in 1996, which the proof shows was of the same or substantially similar kind and type as used in the keg cooler, was installed on

a concrete pad outside the building together with piping used to carry the cool air into the structure. The proof at trial showed that the refrigeration equipment added to the existing warehouse in 1996, which was deemed to be taxable real property by the assessor, was installed at a cost of only $104,288. Installation did not require any changes to the structure of the building via additions or its own walls or ceiling; rather the equipment added cools an area inside the existing walls of the warehouse towards the rear. Nothing was done to add or otherwise alter the building's foundation, and no new insulation was needed. The equipment consists of three 20 ton compressors on a concrete pad outside the building together with the piping described above.

Respondent contends that the refrigeration system installed in 1996 is taxable real property pursuant to Real Property Tax Law §102(12)(f), and Matter of Waldbaum's I, Inc. v. Board of Assessors of The County of Nassau, 100 Misc.2d 578, 580-81 (Sup. Ct. Nassau Co. 1979). In essence, respondent contends that this equipment is permanent in nature. Respondent also faults the Losen Appraisal (submitted by petitioner) because it makes no adjustment in the sales comparison approach or the income capitalization approach accounting for the existence of refrigerated warehouse space, and further faults the Losen appraisal by reason of a flawed adjustment based upon cost data from Marshall's Valuation Service for refrigerated warehouse

space which, according to the Losen Appraisal, was located in a moderate climate, as opposed to an extreme climate. Although it is true that, according to MVS, Rochester and most of New York State is located in an extreme climate, and that the Losen Appraisal is thereby flawed in this respect, this presents a quite distinct issue from the preliminary question whether the refrigeration system added in 1996 is taxable real property under Section 102(12)(f). It is to that question that I now turn.

I fully agree with petitioner that the case relied upon by respondent, the Waldbaum case, is fully distinguishable from this case. There, the frozen-food storage area and freezing equipment were held not moveable as contemplated by the exemption provision in Section 102(12)(f) because of the permanency of the wall paneling and the economic impractability of disassembling and relocating the system. The court further noted that a substantial "period of time in excess of one year was consumed in the installation of the complete freezer system" and that the cost of the system was in excess of 2.8 million dollars. The court in Waldbaum also found that the time necessary to remove all elements in dispute was estimated to be between 4-6 weeks, and that the replacement cost as new, before depreciation would be in excess of 4 million dollars. The estimated cost of dismantling the system and removing it to a different site would exceed $1.2 million (in petitioner's view) or well in excess of

$3.3 million (in respondent's view). Id. 100 Misc.2d at 580. Furthermore, the court found that the peculiarities of construction of the refrigerated space so complicated the removal process warranted a finding that the "permanency of this type of construction militates against the 'moveable' nature of this equipment as contemplated by section 102(subd. 12)(f) of the Real Property Tax Law." Id. 100 Misc.2d at 581. Compare People ex rel. General Chemical Company v. Cantor, 228 N.Y. 506 (1920) (machinery and equipment attached to a building, but removable, used in manufacturing chemicals was not real estate), with, City of Lackawanna v. State Bd. of Equalization and Assessment, 16 N.Y.2d 222 (1965).

By contrast, the equipment at issue in this case is more similar to that in Matter of Honeoye Storage Corporation v. Board of Assessors of the Town of Bristol, 77 A.D.2d 468 (4th Dept. 1980), in which the court held that the equipment in question, used to transmit gas for storage, was not subject to real property tax. "As the equipment here is present solely for use in Honeoye's business of natural gas storage, and not for general energy consumption to make the plant facility functional, it is not encompassed by this definition of real property." Id. The refrigeration system in this case was installed solely to cool beer as required by petitioner's supplier, Anheuser-Busch, and was constructed solely for use in petitioner's business of beer

storage and distribution, and not for general energy consumption to make the plant facility functional. As in Honeoye Storage, the equipment at issue here "is not of such tremendous size, and its installation of such a permanent nature as to make its movement both physically and economically unfeasible." Id. Compare Matter of City of Lackawanna v. State Board of Equalization and Assessment of the State of New York, 16 N.Y.2d at 226 ("equipment of 'monumental size' which could not be moved without 'dismantling or cutting' into smaller pieces"); Anitec Image Corp. v. Assessor of City of Binghamton, 109 A.D.2d 962 (3d Dept. 1985)(for film-coating machines not exempt as moveable because two of the machines were two stories high, all of the machines exceeded 300 feet in length, and the buildings housing the machines had either brick masonry walls or walls of metal panels, some of which would have to be removed if the machines themselves were attempted to be removed.

Similarly, respondent's reliance upon 2 op. Counsel S.B.E.A. No. 31 (Oct. 10, 1972) is misplaced. In that case it was opined that compressors and cooling coils installed in a refrigerated storage building together with a 50 ton in-ground scale were taxable real property because the "cooling coils [we]re attached to walls throughout the storage area and motors, compressors, and condensers used to produce and move the gases and liquids through the cooling coils for cooling purposes [we]re located in a motor

room." Furthermore, the cooling system was "adapted and is even essential to the use to which the building in which it is located would be applied," and because "the building in which the cooling system is being installed is designed to contain the system . . . such that an intent to install it permanently [may readily be inferred]." The 50 ton in-ground scale was also considered taxable real property but the opinion was careful to distinguish the issue of any moveable parts of the scale ("only those parts of the scale which cannot be moved for use elsewhere are taxable real property"). In this case it is undisputed that the storage cooler consisted of a 50 foot by 60 foot pre-fabricated construction placed upon the concrete floor, and that this area was serviced with refrigeration equipment consisting of three 20 ton outdoor condensing units and six 5 ton unit coolers mounted to the ceiling frame together with piping and controls, which readily may be dismantled and removed without damage to the overall structure. R. 39.

Machinery and pre-fabricated space of this kind is covered by the exemption of §102(12)(f), assuming it was meant to be included in §102(12)(f) at all. See Wallace v. Tompkins County Board of Assessment Review, 92 A.D.2d 708 (3d Dept. 1983)(machinery and equipment owned by a scrap-metal processor improperly assessed as part of taxable real property because the equipment was not essential to the support of any building,

structure, or super structure and it could be removed without injury to the land or building); Matter of Leonhard Michel Brewing Co. v. Cantor, 119 Misc. 854 (vats and kettles used in making ice and beer were similarly treated); People ex rel. Jacob Ruppert Realty Corp. v. Cantor, 115 Misc. 519, affd. 204 App. Div. 863 (machinery in an artificial ice plant similarly treated); id. 115 Misc. at 535-537 (tracing history behind the taxation of this kind of corporate property and finding that the ice plant machinery which was assembled and erected in the building was capable of being disassembled and removed, and hence was not to be treated for tax purposes as real estate); Matter of Tri-County Asphalt & Stone Co. v. Board of Assessors of Town of Kingsbury, 17 Misc.2d 437(same). Accordingly, I agree that the refrigeration system installed in 1996 together with the inside cooler is not taxable real property within the meaning of Real Property Tax Law §102(12)(f). Martin v. Gwynn, 18 A.D.2d 851 (3d Dept. 1963)("the special definitions of section 102(12)(f) of what is and what is not personal property should apply to removable equipment used in trade or manufacture. (N. Y. Legislature Joint Committee on Taxation and Retrenchment, February, 1919, pp. 838-848; 1035-1037; People ex rel. General Chemical Co. v. Cantor, 105 Misc. 62, affd. 188 App. Div. 959, affd. 228 N.Y. 506: People ex rel. Jacob Ruppert Realty Corp. v. Cantor, 115 Misc. 519, affd. 204 App. Div. 863; Bell,

Classification of Property in New York for Purposes of Real Property Taxation, 25 Albany Law Rev., pp. 83-89)").

In other aspects, however, I find that petitioner's case was wholly wanting. Petitioner, of course, met its initial burden of proving a genuine issue concerning valuation under the two tiered analysis applicable in Article 7 proceedings. But I find that its proof did not otherwise meet its burden during the second stage analysis to show that the subject property should be assessed in the amounts proposed by Mr. Losen in his appraisal report. First, Losen's income capitalization approach employed an unacceptable use of the assessor's formula by only estimating taxes paid at the comparable leased properties instead of "grossing up" market rent for the actual tax burden at the comparable leased properties. Matter of VGR Associates v. Assessor of the Town of New Windsor, 13 Misc.2d 1218 (Sup. Ct. Orange Co. 2006); Appraisal Institute, The Appraisal of Real Estate 511 (12th ed. 2001). Accordingly, the court cannot employ the capitalization rate used by Losen.

Second, Losen's Webster comparable was, as respondent contends, a distressed sale and therefore not a reliable indicator particularly given the substantial adjustments attempted on this so-called comparable. Matter of City of Troy v. Kusala, 227 A.D.2d 736, 740 (3d Dept. 1996)("given the high adjustments, it was not unreasonable for Supreme Court to

determine that the comparables were not reliable indicators of the property's value"). Losen also made a rather high adjustment for the Chili comparable. Id.

Finally, respondent's appraisal identified reliable comparable sales and adequately explained the adjustments made; his opinion was based on sound theory and was highly credible, except that he included value by reason of his assumption that the refrigeration equipment and prefabricated refrigerated space within the building (some 40% of it) was taxable real property. In this one aspect alone, he was in error. Petitioner's effort to impeach Bruckner's use of the 520 Metro Park comparable was wholly speculative and not based on admissible proof. Bruckner testified credibly that his subsequent appraisal of that property in 2005 verified that the sale he chose as a comparable was, in fact, an arms length transaction. Indeed, even Losen conceded that he had no evidence that Golisano was connected to Realty Assoc. Fund IV except by reference to the contemplated tenant. I find that Bruckner's use of this transaction did not taint his sales comparison analysis. Petitioner's other objections to the Bruckner report concern the weight to be given the testimony, not its admissibility. Yet I find his opinion credible.

Petitioner's appraiser placed great emphasis on the sales comparison approach, and respondent's appraiser stated no preference for either the sales comparison or income

capitalization approach, but reconciled the two *generally* in favor of the sales comparison figure in each of the years in question. Given the greater reliability of the Bruckner sales comparison analysis, the court adopts it except with respect to the adjustments he made in the comparable sales for refrigerated space, in each instance 8%. Accordingly, elimination of the refrigerated space adjustment yields the following values:

YEAR	**Bruckner Value**	**Less 8%**	**Assessment Reduction**
2002	$3,150,000	$2,898,000	$430,000
2003	$3,190,000	$2,934,800	$394,000
2004	$3,275,000	$3,013,000	$315,000
2005	$3,325,000	$3,059,000	$269,000

Submit judgment accordingly.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: May 18, 2007
Rochester, New York