To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of

MAVIS TIRE SUPPLY CORP.,
Joseph E. St. Onge, Esq., Agent

Petitioners,

- against -

TOWN OF OSSINING,
A Municipal Corporation, its Assessor or Board of Assessors and Board of Review,

Respondents.

For a Review Under Article 7 of the RPTL.

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LaCAVA, J.

DECISION/ ORDER/JUDGMENT

Motion Date: 7/7/10

Index Nos.[1]
21713/90
23477/91
23482/92
18775/93
17690/94
16906/95
17219/96
16220/97
16641/98
16179/99
15912/00
15822/01
17724/02
16905/03
17083/04
18253/05
20445/06
20943/07

The trial of this Tax Certiorari Real Property Tax Law (RPTL) Article 7 proceeding, challenging the valuation by the Town of Ossining (Town or Respondent) of the real property owned by Mavis Tire Supply Corp (Mavis or Petitioner), took place before the Court on September 18, 19, 25, and 26, 2008. The following papers numbered 1 to 4 were considered in connection with the motion by petitioner for reargument and modification of the Court's Decision, Order, and Judgment, entered on November 17, 2009, and respondent's

1. The above index numbers reflect the corrected index numbers as set forth in this Court's Amended Decision/Order/Judgement dated September 27, 2010.

cross-motion for the same relief:

PAPERS	NUMBERED
NOTICE OF MOTION/AFFIDAVIT/EXHIBITS	1
CROSS MOTION/AFFIRMATION/EXHIBIT	2
MEMORANDUM OF LAW	3
REPLY AFFIDAVIT	4

The instant property is owned in fee by Mavis. It is known and designated on the Official Tax Map of the Town and Village of Ossining as Section 89.15, Block 1, Lots 14 and 15 (although it was formerly designated as Section 2, Plate 1, Block 2, Lots 10 and 11.) The parcel is located on Route 9, and is also known as 170 North Highland Avenue. The property is an irregular parcel with a frontage of 168.9 feet on the east side of North Highland Avenue, a depth on its north line of about 124.78 feet, a depth on its irregular south line of about 169.98 feet, and a rear (east) line of about 252.96 feet, containing approximately 25,920 sq. ft. or .595 acre, of which approximately 10,000 sq. ft. is usable, with the remaining approximately 15,920 sq. ft. being unusable hillside. The property is zoned B-2, Neighborhood Business District, which permitted uses include a variety of retail, service, and other commercial establishments. The subject parcel is a conforming use, and was improved with a one-story, plus mezzanine, commercial garage building which had been erected in 1974. The first floor contains approximately 3,888 sq. ft. with a height of 13.5 feet. The ground floor also includes a customer service office, an electric closet, 2 lavatories, and 8 open garage bays. The mezzanine level consists of approximately 1,040 sq. ft. of open storage space, with a 12.5 feet high ceiling. The total floor area of the parcel is 4,928 sq. ft. On the exterior portion of the subject property are two curb-cuts onto North Highland Avenue, and a paved driveway with parking area for 11 cars.

The Testimony

At trial, petitioners presented testimony from their appraiser, Joseph M. Adrian, an appraiser with substantial experience in real estate valuation, who has testified as an expert witness previously before the Court; he was qualified by the Court as an expert in real property valuation, and his appraisal report and the addendum to the report were both admitted into evidence. Adrian employed both a market approach to value (the “sales comparison method”)and an income approach to value (the “income capitalization method”) in his appraisal. As part of his market approach, Adrian used fourteen (14) comparable sales (“comps”),

half of which were located in the Town of Ossining, and some of these which were in the Town were also located in the immediate vicinity of the subject, on North Highland Avenue. Adrian also offered an income capitalization approach to value for the subject property, employing thirteen (13) comparable leases, including, most importantly, three leases of commercial garage buildings by petitioner Mavis. The remaining ten (10) leases employed by Adrian were also of commercial garages. In his appraisal, Adrian concluded, using the market analysis and the income capitalization approach, values for the subject; however, in so doing, he did not present, in either his original appraisal or the addendum, a reconciliation page, or explain in any other way how he arrived at his final value figures (*i.e*. by averaging his income values with his market conclusions).

Respondent's appraiser, Barry M. Herbold, was not nearly as experienced an appraiser in tax certiorari matters as Adrian; he admitted that he had recently appraised few properties located in Westchester County, and that all of these were for the Town of Ossining. Believing that most single-occupant retail establishments, such as the subject, tend to be owner-occupied (admittedly, 12 of the 16 Mavis tire stores in Westchester County are so operated); since comparable rental data is often not available under these circumstances, he determined not to use the income approach at all, and instead concluded that **only** the sales comparison approach was appropriate. Herbold utilized only three (3) Comparable Sales for the 1990-1996 period at issue, with only a single sale in the Town of Ossining (his Comparable Sale No. 2, which property was also employed by Adrian), and all either in large or medium cities (Yonkers or New Rochelle) or busy towns. He then employed a trending analysis to arrive at values for the years 1997 through 2000. He then used three (3) different comparable sales during the 2001-2002 time period; two (2) additional sales, and one previously-used comparable, for the 2003-2004 period; and, finally, three (3) sales for the years 2005 through 2007.

In addition, petitioner, upon cross-examination, pointed out many, sometimes significant, errors made by Herbold, particularly numerous instances in which he understated the sizes (i.e. square footage) of the comparable properties, collectively increasing their comparable values substantially by this under-reporting. In particular, Herbold stated in his appraisal, and so testified at trial on direct examination, that Comp #1 for the 1990 - 1996 period, was a property of 4,992 square feet in building size, which figure he arrived at from the property record card. On cross-examination, Herbold was asked if the building size was not, in fact, 22,600 square feet, as measured by Adrian and noted by the

record card[2]. Herbold conceded that, if the building was that size, and not 4,992 square feet, he would not have used the property as a comparable since it was too large.

THE POST-TRIAL DECISION

In the aforementioned November 17, 2009 Decision, Order, and Judgment, the Court stated:

A VALID DISPUTE EXISTS

> This Court finds that, while petitioner's expert is not licensed as an appraiser in the State of New York, and while his appraisal methods might have in some respects proved difficult to follow, and while he may have failed in many instances to conform to the all of the standards applicable to appraisers (*e.g*. USPAP), the Petitioner has submitted substantial evidence based upon "sound theory and objective data" consisting of an appraisal and the testimony of appraiser Joseph Adrian, and has demonstrated the existence of a valid dispute concerning the propriety of the assessments during the tax years at issue herein[3].
>
> *****
>
> The Respondents argue that the Petitioner's valuation evidence failed to rebut the presumption of validity of the assessments, in that the Petitioner's Appraisal was not based upon standard and accepted appraisal techniques and, therefore, did not meet the substantial evidence standard. A party seeking to overturn an assessment must first overcome this presumption of validity through the

2. While the property card was introduced at trial, it was not used on cross-examination of Herbold, and no argument, at trial or in the post-trial memos, was directed to it. The card contains, under a heading "Dimensions", the dimensions and size of each floor and section of the comparable, which numbers must be multiplied and added to arrive at a total square footage (and which measurement is actually somewhat less than 22,600 square feet.)

3. While not necessary to the Burden of Proof analysis, the Court notes also that, to the extent the assessed values differ from respondent's appraised valuations, the respondent concedes that a valid dispute exists as to the proper valuation of the subject parcel.

submission of substantial evidence (*See e.g., Matter of FMC Corp. [Peroxygen Chems. Div.] v. Unmack*, 92 N.Y.2d 179, 187 (1998)[“In the context of tax assessment cases, the ‘substantial evidence’ standard merely requires that petitioner demonstrate the existence of a valid and credible dispute regarding valuation. The ultimate strength, credibility and persuasiveness are not germane during this threshold inquiry ... a court should simply determine whether the documentary and testimonial evidence proffered by petitioner is based on ‘sound theory and objective data’”]; *see also Matter of Niagara Mohawk Power Corp. v Assessor of the Town of Geddes*, 92 N.Y.2d 192, 196, [1998--“In the context of a proceeding to challenge a tax assessment, substantial evidence proof requires a detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser ”]; 22 N.Y.C.R.R. 202.59 [g]2 [appraisal reports utilized in tax assessment review proceedings “shall contain a statement of the method of appraisal relied on and the conclusions as to value reached by the expert, together with the facts, figures and calculations by which the conclusions were reached”]).

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PETITIONER’S BURDEN OF PROOF

Having met its initial burden, the Petitioner must prove, through a preponderance of the evidence, that the assessments are excessive. As indicated above, the Court has considered and evaluated the weight and credibility of the evidence, the arguments of respective counsel, and the submissions of the parties to determine whether the Petitioner has proven that the assessments are in fact excessive.

METHODOLOGIES, COMPARABLES, VALUATIONS, AND REBUTTALS

However, as also noted above, petitioner's appraiser's methodology is unclear in at least two significant respects: how he reports average sales and his computation of lease values. As discussed in greater detail above, his comparable sales and lease grids generally include only one sale or lease for each of the tax years at issue, in both cases, clearly contrary to generally accepted appraisal practice, should they have been the only sales and leases relied upon for valuation in those years. It is, on the other hand, unclear if instead Adrian arrived at these value figures through some trending methodology. Given the uncertainties from petitioner's valuation method, the Court concludes that valuation is to be determined primarily within the bounds of the Ceiling and the Floor, as set forth above; through an examination of respondent's values, as corrected for the significant errors noted above, as well as respondent's appraiser's failure to select the proper unit of comparison for automobile repair facilities such as the subject (price per square foot of gross building area, as opposed to gross sales price utilized by Herbold in his appraisal; see The Appraisal of Real Estate, supra, p. 124), and as checked for accuracy by petitioner's values.

1990-1996

Herbold utilized three properties, comparables #1, #2, and #3, in Yonkers, Ossining, and Yonkers again, respectively, for these tax years. The gross prices of these sales were $630,000.00, $950,000.00, and $1,000,000.00 respectively, or $126, $118, and $156 per square foot. Herbold applied no adjustments to property #1, but determined that net adjustments of -30% were required for properties #2 and #3. Using his net

adjustments of -30% on the latter two comparables yields indicated values of $126, $83, and $109 per square foot for each of the properties. Applied against the 3,888 square feet of gross building area of the subject, this yields comparable values of $500,000.00, $322,000.00, and $424,000.00 rounded (hereinafter "r"), or an average value for the subject, based on these comparables, of $415,000.00 r. Respondent asserts that, based on market trends at that time, this average value figure is reflective of proper value throughout the tax years 1990 through and including 1996, and the Court accepts that opinion.

1997-2000

Herbold argued for reliance on his 1996 value as a basis for determining the appropriate value for the 1997-2000 period as well, adjusting solely by trending for market conditions. The Court accepts his estimate of market increases of 7.0% per year for this period, which, when applied to the Court's value of $415,000.00 for 1996, yields values of $450,000.00, $476,000.00, $510,000.00, and $546,000.00 r, for the years 1997, 1998, 1999, and 2000, respectively.

PETITIONER'S MOTION TO REARGUE

Petitioner now moves to reargue the Court's decision, solely as relates to the Court's derived values for the tax years 1990 through and including 2000, based on Herbold's concession, as set forth above, that if the correct size of 1990 - 1996 Comparable #1 was indeed 22,600 square feet and not 4,992 square feet, he would not have use that comparable in his value computation. Notably, at trial, due to the lack of clarity and argument relating to the property card, the Court was merely faced with inconsistent testimony on the issue of the size of Comparable #1–Herbold's statement that it was 4,992 square feet, and Adrian's statement that it was 22,600 square feet. Absent clear proof on the issue, the Court accepted Herbold's testimony.

Now, however, it is clear that the property card, while it

does not substantiate a size of 22,600 square feet, does permit a calculation of the property size which is far larger than 4,992 square feet. Petitioner argues that such a size discrepancy (between the comparable and the subject), by Herbold's own concession at trial, militates against its use in determining value. In addition, respondent now, for the first time, concedes that Herbold was not accurate in his testimony as to the size of Comparable #1, and further agrees that Comparable #1 should not have been used by Herbold (and, therefore, by the Court) in a value analysis. Consequently, upon concession of the parties now after trial, the Court concedes that employment of Comparable #1 in a value analysis was not proper.

Utilizing only Herbold's comparables #2 and #3 (in Ossining and Yonkers), rather than #1, #2, and #3, with gross prices of $950,000.00 and $1,000,000.00 respectively, or $118 and $156 per square foot, the Court would apply the same net adjustments of -30% for properties #2 and #3 as in the prior calculation, which yields indicated values of $83 and $109 per square foot for each of these two properties. Notably, the $83 per square foot value calculated by the Court from Herbold's Comparable #2, was identical to the $83 per square foot calculated by Adrian for this same property, also his Comparable #2. Applied against the 3,888 square feet of gross building area of the subject, these two figures ($83 and $109 per square foot) now yield comparable values of $322,000.00 and $424,000.00 r.

In addition, in the aforementioned November 17, 2009 Decision, Order, and Judgment, the also Court stated:

> As indicated above, the Court has elected, based on the lack of clarity attendant to petitioner's appraiser's methodology in deriving either market or income capitalization values, to use Adrian's appraisal as a check on the market values calculated by the Court. Regarding Adrian's market analysis, the Court notes several instances in which upward adjustments to Adrian's values would be appropriate, including in particular with respect to area size (comparables #1, #3, #4, #9, #13, and #14) and location (comparables #1, #2, #5, #6, and #9.) The cumulative effect of the Court's increases to Adrian's comparable sales adjustments in these and other areas would be to increase many of his values by some 15 to 20%. As so increased, Adrian's market value conclusion would still be less than those

> values arrived at by the Court, but, in most cases, only approximately 10% below the Court's indicated values.

In fact, Adrian calculated a value of $80 per square foot for the subject for the tax year 1990; application of the Court's analysis of his calculations, as indicated above, would yield a figure closer to $90 per square foot, or $350,000.00 r. Taking into account also, as the Court did in its original decision, Adrian's other comparables (including the very similar comparable #8, which adjusted for time would have an approximate value of $425,000.00 during this period); his income analysis, as adjusted by the Court previously; along with the Court's own analysis (modified to eliminate Comparable #1), the Court concludes that the proper value for the subject within this range of values is $390,000.00 r, and that, based on market trends at that time, that same value is reflective of the proper value for the subject throughout the tax years 1990 through and including 1996.

In addition, the Court previously concluded, in the aforementioned November 17, 2009 Decision, Order, and Judgment, that increases of 7.0% per year properly reflect market conditions for the period 1997 to and including 2000. Since the court also accepted Herbold's argument for reliance on his 1996 value as a basis for determining the appropriate values for the 1997-2000 period as well, adjusting solely by trending for market conditions for this period, as applied to the Court's value of $390,000.00 for 1996, yields values of $417,000.00, $446,000.00, $477,000.00, and $510,000.00 r, for the years 1997, 1998, 1999, and 2000, respectively.

These calculations, derived by the Court from the previous, extensive alterations to Herbold's appraisal, with the conceded removal of his Comparable #1 from that calculation, yield in sum the following Market Values for the years 1996 to 2000, for the subject parcel:

Assessment Year	Court's Indicated Market Values
1990	$390,000
1991	390,000
1992	390,000
1993	390,000
1994	390,000

1995	390,000
1996	390,000
1997	417,000
1998	446,000
1999	472,000
2000	510,000

which values are well within the range of testimony. *(See Rose v. State,* 24 N.Y2d 80 [1969].)

RESPONDENT'S CROSS-MOTION

Respondent seeks reargument with respect to the presumption of validity and requirement for substantial evidence, both issues which (as set forth above) were dealt with in detail by the Court, and rejected, previously. As petitioner properly points out, a motion for reargument is not a vehicle for asserting once again arguments previously considered and rejected. In addition, and as petitioner also points out, respondent mis-characterizes the Court's opinion in arguing that the Court rejected Petitioner's appraisal. Instead, the Court very clearly stated (as also set forth above) that, due to several unclear points contained in Adrian's appraisal, it would use a methodology which relied chiefly on Herbold's appraisal, although corrected for his numerous factual and methodological errors, and checking it for accuracy by the values derived by Adrian. The Court similarly rejected previously, and rejects here, assertions by the respondent that the Court should not have analyzed the comparables in terms of price per square foot of gross building area, the unit of comparison of choice as delineated in The Appraisal of Real Estate.

Respondent also concedes the need, based on Herbold's testimony, for the Court to recalculate the values for 1990 through and including 2000 absent his Comparable #1. However, they assert that Herbold's calculated value was based on his judgment, not averaging, while the Court improperly relied on averaging the three comparables to arrive at a market value, and that it is equally inappropriate now for the Court to simply calculate value based on averaging Comparables #2 and 3 alone. To be sure, the Court on occasion in the November 17, 2009 Decision, Order, and Judgment did employ averaging, but such use was not inconsistent with the very section quoted by respondent in its moving papers: "[no] mechanical formula is used to select one indication [of value] over another."

The Appraisal of Real Estate (13th ed, 2008), p 560. Averaging may be, and here was mainly, used as a tool (along with several other tools used by the Court in each set of tax years) to derive a range of values, and from which range, through analysis and rounding, a particular value point was selected.

Respondent also cites *Latham Holding Co. v. State*, 16 N.Y.2d 41 (1965) on the issue of improper averaging of values. In fact, the methodological error cited in *Latham* is not simply the averaging of values; rather, it is the averaging of dissimilar, unadjusted values. There, the Court noted at 16 N.Y.2d, 45-46:

> The difficulty in applying expert Babbitt's method of averaging front foot valuations is that these parcels could not have been exactly comparable -- particularly the one with an indicated front foot value of $400 as contrasted with the one with an indicated value of $95. Properties cannot be comparable if one is worth more than four times the value of the other. Sales of other parcels, where used as criteria in the evaluation of the subject property, need to be adjusted to differences between one another and between each of them and the subject property...an expert cannot reach his result mechanically by the mere mathematical process of averaging front footage sales prices, of parcels having obvious differences one from another as denoted by their locations and sales prices, without making adjustments for the prices of those that are more similar or dissimilar to the one in question.

Averaging thus may be, previously was, and here is, solely used to derive a range of values from already-adjusted, similar properties. The Court, after adjusting for differences, employed multiple techniques, including averaging, in each set of tax years to derive these ranges of values, and from these ranges, through analysis and rounding, to select a particular value point. Therefore, as set forth above, the Court's analysis simply derives a range of values (here, to recalculate the 1990 to 2000 values) among adjusted comparable properties, and from that range selects a figure which best approximates the true market value of the subject for those years.

FINAL MARKET VALUES, ASSESSMENT, AND REFUND

The final adjusted Indicated Market Values, solely as relates to the Court's derived values for the tax years 1990 through and including 2000[4], as concluded by the Court are as follows:

Assessment Year	Court's Indicated Market Values
1990	**$390,000**
1991	**390,000**
1992	**390,000**
1993	**390,000**
1994	**390,000**
1995	**390,000**
1996	**390,000**
1997	**417,000**
1998	**446,000**
1999	**472,000**
2000	**510,000**
2001	**587,000**
2002	**628,000**
2003	**650,000**
2004	**715,000**
2005	**793,000**
2006	**865,000**
2007	**865,000**

CONCLUSION

4. As set forth above, Petitioner's motion relates solely to the tax years 1990 through and including 2000; the Court merely restates those values previously arrived-at for the subsequent tax years at issue.

Based upon the foregoing, it is hereby

ORDERED, that the motion by respondent seeking reargument of the Court's Decision, Order, and Judgment, entered on November 17, 2009, is denied; and it is further

ORDERED, that the motion by petitioner seeking reargument of the Court's Decision, Order, and Judgment, entered on November 17, 2009, is granted solely to the extent that the Court agrees to renewal and reargument of the prior motion, and upon such renewal and reargument, it is hereby

ORDERED, that the final Indicated Market Values for the tax years at issue as concluded by the Court are as set forth above; and it is further

ORDERED, that the Petitions, with costs [R.P.T.L. §722[1]], are sustained to the extent indicated above, the assessment rolls are to be corrected accordingly by the assessor utilizing the aforesaid final Indicated Market Values and the agreed-upon equalization rates as set forth previously, and any overpayments of taxes are to be refunded with interest.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Submit Judgment on notice.

Dated: White Plains, New York
September 23, 2010

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HON. JOHN R. LaCAVA, J.S.C.

Joseph E. St. Onge, Esq.
Attorney for Petitioners
560 White Plains Road
Scarsdale, New York 10583

Thomas R. Beirne, Esq.
DelBello Donnellan Weingarten Wise & Wiederkehr, LLP
Attorney for Respondents
One North Lexington Avenue
White Plains, New York 10601