STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

Habib Habhab,
Petitioner,

v

MTT Docket Nos. 316010

City of Farmington,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith III

OPINION AND JUDGMENT

ORDER DENYING PETITIONER'S MOTION TO AWARD COSTS

ORDER DENYING RESPONDENT'S MOTION TO AWARD COSTS

I. INTRODUCTION

Petitioner, Habib Habhab, is appealing the taxable values determined for the subject property by Respondent, City of Farmington, for years 2005, 2006 and 2007. On September 15, 2005, Petitioner filed a petition with the Tribunal challenging the assessment placed on the subject property for the 2005 tax year. Petitioner subsequently filed motions to include tax years 2006 and 2007, and requested the Tribunal to order a refund, including costs. On August 24, 2007, in opposition to Petitioner's motions, Respondent requested that the Tribunal affirm the 2005 and 2006 taxable values of the subject property, dismiss Petitioner's Petition and award Respondent costs and attorney fees. This matter was heard on briefs filed by the parties, with accompanying Stipulations of Fact filed by each party

II. PETITIONER'S CONTENTIONS

Petitioner contends that Respondent violated the limits provided in MCLA 211.27a(2), which defines taxable value. This section provides that the taxable value of a property is the

taxable value in the immediately preceding year minus any losses, multiplied by the lesser of 1.05 or the inflation rate, plus all additions.

Petitioner states that Respondent raised the taxable value on the subject property in excess of the limits found in MCLA 211.27a(2)(a), because there had been no transfer of the ownership of the subject property, nor had additions occurred during 2004 as the new construction was complete as of December 31, 2003. Petitioner concludes that the taxable value increase for 2005 was unlawful under MCLA 211.27a(2)(a), that the taxable values for 2005 should be lowered in order to comply with MCLA 211.27a(2)(a), and that the taxable values for 2006 and 2007 should also be lowered, as they were based on the unlawful increase in 2005.

Further, Petitioner argues that Respondent's contention that it has granted a one-year poverty/hardship exemption is in violation of Public Act (PA) 390 of 1994. This section provides "poverty exemptions may be granted by the Board of Review to claimants that are owners of homesteads only." Homestead means "portion of a dwelling or unit in a multiple-unit dwelling that is subject to ad valorem taxes and is owned and occupied as a principal residence by the owner of the dwelling or unit." Petitioner contends that poverty exemptions do not apply to the property of a corporation.

III. RESPONDENT'S CONTENTIONS

Respondent opposes Petitioner's petition and motions; it argues that Respondent increased the 2005 taxable value by more than the inflation rate because there were additions to the subject property for the 2005 tax year, as Respondent's assessor appraised the subject property as being only 80% complete as of December 31, 2003.

Further, Respondent argues that Petitioner is barred and precluded from arguing that the poverty/exemption was granted improperly, because Petitioner did not raise this argument timely within 35 days from the board of review's July 20, 2004 decision as required by MCLA 205.735(3) and Petitioner is also barred from making said argument by the doctrine of equitable estoppel.

IV. FINDINGS OF FACT

The property under appeal consists of commercial real property and improvements located in the City of Farmington, having tax identification number 20-23-27-404-002. Petitioner's property is a Shell Service Station/Convenience Store. In April, 2003, Petitioner demolished the previously existing gas-service station located on the subject property and started construction of a new service station/convenience store building. The construction of the building was essentially complete by December 2003, and the service station/convenience store was back in operation by the end of 2003. No new construction which would constitute an addition under MCLA 211.27a occurred in 2004 or thereafter.

For the 2004 tax year, Respondent's assessor assessed the subject property containing the new service station/convenience store building. To reach the 2004 valuation using the cost-less-depreciation approach, the property record card/cost analysis (Respondent's Exhibit B) shows the improvements as 100% complete and then a functional obsolescence multiplier of .80 applied to the completed building. It is upon this basis that the initial taxable value of the property for 2004 was set. Although the service station had been open for business prior to December 31, 2003, nothing appears on the record in this matter indicating that any additional construction occurred in 2004. The assessor applied an economic obsolescence factor of .80 to the

improvements because he agreed with Petitioner's argument that it would take a period of time to get its income stream up to 100%.

At the July 2004 Board of Review, Petitioner argued that he could not afford the taxes resulting from the new assessment and wanted additional relief for the first year. The July 2004 Board of Review granted a one-year poverty/hardship exemption and reduced the 2004 taxable value of the subject property from $372,900 to $290,000. For the 2005 tax year, Respondent increased the taxable value of the subject property to $455,310.

The 2005 taxable value was determined by costing the subject at 100% complete and adding back in the "hardship amount" that the July Board of Review had reduced the 2004 assessed and taxable value by, together with the 2005 CPI increase of 2.3%.

The Tribunal specifically finds that the increase of $165,310 in taxable value between 2004 and 2005 consisted of the following components:

1. $82,900, which was the taxable value increase for 2005 as a result of adding back the amount that the City of Farmington July 2004 Board of Review had exempted for poverty/hardship pursuant to MCLA 211.7u.
2. $75,740, which was the taxable value increase for 2005 resulting from the building on the subject property being appraised at 100% complete as of December 31, 2004 (as opposed to the 80% complete that the subject property had been treated for the 2004 tax year);
3. $6,670, which represented the 2.3% CPI increase for 2005 as authorized by MCLA 211.27a(2)(a).

For reasons stated below, the Tribunal finds that Respondent's calculations are partially incorrect and partially correct.

As of December 31, 2003 the improvements were 100% complete. No new construction occurred that would have constituted an "addition" within the meaning of the statute in 2004 and, as a result, Respondent is precluded from increasing the taxable value over and above the CPI

factor for 2005. Further, the property record card shows the property 100% complete so there is no omitted property present.

The fact that the Respondent's assessor tried to give Petitioner a break in applying an economic obsolescence factor does not alter this fact. At most, what occurred in this case was "omitted value," not omitted property.

V. CONCLUSIONS OF LAW

Under MCLA 211.27a(2)(a), the taxable value of a property is "the property's taxable value in the immediately preceding year minus any losses, multiplied by the lesser of 1.05 or the inflation rate, plus all additions." Under MCLA 211.34d(1)(b), "omitted real property," or "new construction," is considered as "additions." Respondent for tax year 2004 treated the new construction on the property as 100% complete using the cost-less-depreciation approach. Respondent then applied a .20 "functional obsolescence factor."

Respondent's argument that the improvements were only 80% are misplaced and are contradicted by Respondent's exhibits. As set forth in the Findings of Fact portion of this Opinion and Judgment, Respondent's alternative argument that somehow the 20% characterized as functional obsolescence should be considered as "previously existing tangible real property not included in the assessment." Omitted real property shall not increase taxable value as an addition unless the assessing jurisdiction has a property record card or other documentation showing that the omitted real property was not previously included in the assessment. MCLA 211.34d(1)(b)(i). Here, Respondent misinterprets the definition of "omitted real property" and "functional obsolescence." As the court in *Teledyne Continental Motors* stated, "functional obsolescence" is "any loss of value" rather than incomplete construction. At the July 2004

Board of Review, Respondent's assessor stated that "he had used a 20% functional obsolescence adjustment for the current year's valuation to phase in the increase and allow time for the property to start generating adequate income to support the investment." This shows that he included the entire existing tangible real property and assessed it as 100% complete, but reduced its value by 20% because he found "undesirable features" in the property as it had not generated enough cash flow to support the investment. Therefore, the property that was subject to 20% functional obsolescence adjustment was not an "omitted real property."

Under MCLA 211.34d, new construction means "property not in existence on the immediately preceding tax day and not replacement construction. New construction includes the physical addition of equipment or furnishings, subject to the provisions set forth in section 27(2)(a) to (o)." Here, Petitioner did not make any physical addition of equipment or furnishings in 2004; all properties subject to assessment for the 2005 taxable value were already assessed in 2004. As Petitioner did not make any physical addition to the property, there was no "new construction" made in the 2005 tax year.

MCLA 211.7u(1) defines poverty exemption as follows:

> The principal residence of persons who, in the judgment of the supervisor and board of review, by reason of poverty, are unable to contribute toward the public charges is eligible for exemption in whole or in part from taxation under this act. This section does not apply to the property of a corporation.

In order to be eligible for poverty exemption, the taxpayer must "occupy as a principal residence the property for which an exemption is requested." MCLA 211.7u(2)(a). MCLA 211.7u(7) defines "principal residence" as "principal residence or qualified agricultural property as those terms defined in section 7dd."

Here, the subject property is a gas/service station, so it is used for commercial purposes. Therefore, this property is not a principal residence or qualified agricultural property. As Petitioner correctly argues, the subject property is not eligible for poverty exemption. However, for 2004 neither party appealed the July Board of Review's improper grant of a partial "hardship exemption" and the Tribunal has no jurisdiction over Respondent's s improper grant of the partial exemption for tax year 2004. Petitioner in effect received a windfall.

Although this property was not eligible for a poverty exemption, the July 2004 Board of Review erroneously granted a one-year poverty exemption to Petitioner, and reduced the 2004 taxable value of the subject property from $372,900 to $290,000. The General Minutes of the July 2004 Board of Review indicates, "the Board agreed to reduce the 2004 assessment and taxable value on the property to $290,000, which was close to cutting the 2004 increase in half. The board emphasized that this reduction on the basis of a hardship was for one year only." These statements show that the July 2004 Board of Review erroneously granted a poverty exemption to Petitioner and reduced the 2004 taxable value by $82,900.

To rectify the error made by the July 2004 Board of Review, the Tribunal corrects the 2005 taxable value by adding back $82,900 multiplied by the inflation rate. In *Nicholson v Birmingham Board of Review*, the Court stated, "[a]lthough MCLA 277.7u plainly grants local officials the discretion to approve or deny requests for that exemption, it does not necessarily follow that a taxpayer's right to review ends at that level. … [T]he Tax Tribunal has jurisdiction to hear claims of exemption following a protest to a board of review." *Nicholson v Birmingham Board of Review*, 477 NW2d 492, 495 (1991). Here, the Board of Review granted the poverty exemption to Petitioner by error. However, such decision by the Board of Review is not final;

the Tribunal has jurisdiction to hear claims of exemption. To correct the 2005 taxable value, MCLA 277.34d(iv) states as follows:

> "[P]reviously exempt property" means property that was exempt from ad valorem taxation under this act on the immediately preceding tax day but is subject to ad valorem taxation on the current tax day under this act. (A) The value of property previously exempt under section 7u is the taxable value the entire parcel of property would have had if that property had not been exempt, minus the product of the entire parcel's taxable value in the immediately preceding year and the lesser of 1.05 or the inflation rate.

This property was subject to poverty exemption under 277.7u, but this exemption was erroneously granted. This shows that the property is "previously exempt property," and its taxable value needs to be corrected based on the above indicated formula. Therefore, the Tribunal adds back the reduction of the 2004 taxable value in the amount of $82,900, multiplied by the inflation rate, to the 2005 taxable value.

Both Petitioner and Respondent requested the Tribunal award them costs and attorney fees. TTR 205.1145(1) states that "the tribunal may, upon motion or upon its own initiative, allow a prevailing party in a decision or order to request costs." MCR 2.625(A)(1) states, "Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." MCR 2.625(A)(2) states that "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCLA 600.2591." MCLA 600.2591(3)(a)(i-iii) provides that an action or defense is frivolous if it meets one or more of the following conditions:

(i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
(ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
(iii) The party's legal position was devoid of legal merit.

Certainly, TTR 205.1145(1) grants discretion to the Tribunal to award costs and/or attorney fees. Here, the Tribunal determines that neither costs nor attorney fees are warranted.

Both Petitioner and Respondent raised colorable issues. However, Petitioner failed to show that he was not granted a poverty exemption, and Respondent failed to show that there was an addition made to the subject property in establishing the 2005 taxable value.

This Tribunal has considered Petitioner's Petition, his Brief, Respondent's Answer to Petition, its Brief and its Response Brief to Petitioner's Brief under the criteria set forth under MCLA 211.7u, 211.27a, 211.34d, 211.53b and 600.2591. Reduction in the taxable value resulting from the 20% functional obsolescence adjustment cannot be added back in the following year as an "addition." However, the July 2004 Board of Review erroneously granted a one-year poverty exemption to a property owned by a corporation. Therefore, the $82,900 taxable value reduction made in 2004 based on a poverty exemption, multiplied by the inflation rate, shall be added back to the 2005 taxable value.

JUDGMENT

The Tax Tribunal determines the following Taxable Values:

Parcel No.	2005 TV[1]	2006 TV[1]	2007 TV[1]
20-23-27-404-002	$381,480	$394,070	$408,650

[1] In reaching the taxable value, the following Consumer Price Index was used.
2005 – 1.023
2006 – 1.033
2007 – 1.037

IT IS ORDERED that Petitioner's Motion for a refund, including costs, is DENIED.

IT IS FURTHER ORDERED that Respondent's Motion for Costs and Attorney Fees is DENIED.

IT IS ORDERED that the subject property's true cash, state equalized, and taxable values for the tax years at issue are as set forth in this Final Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reflect the property's true cash and taxable values as finally shown in this Final Opinion and Judgment within 20 days of the entry of the Final Opinion and Judgment, subject to the processes of equalization. See MCL 205.755. To the extent that the final level of assessment for a given year has not yet been determined and published, the assessment rolls shall be corrected once the final level is published or becomes known.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund as required by the Final Opinion and Judgment within 90 days of the entry of the Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and of penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Final Opinion and Judgment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2004, at the rate of 2.07% for calendar year 2005, (ii) after December 31, 2005, at the rate of 3.66% for calendar year 2006, (iii) after December 31, 2006, at the rate of 5.42% for calendar year 2007, and (iv) after December 31, 2007, at the rate of 5.81% for calendar year 2008.

This Final Opinion and Judgment resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: September 17, 2008
ek/sms

By: Kimbal R. Smith III, Tribunal Judge