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

Kent Beverage Co. Inc.,
Petitioner,

v

MTT Docket No. 310578

City of Wyoming,
Respondent.

Tribunal Judge Presiding
Rachel J. Asbury

FINAL OPINION AND JUDGMENT

INTRODUCTION

On January 3, 2006, the Tribunal entered an Order of Default in the above-captioned case, finding that Respondent had failed to file an Answer to the petition as required by TTR 245. Respondent failed to cure the default. On March 28, 2007, the Tribunal entered an Order Scheduling a Default Hearing. On April 3, 2007, Respondent filed a Motion to Set Aside Default asserting substantive facts related to valuation of the subject property and a statement that to place Respondent in default "would result in manifest injustice and be contrary to the agreement between the parties." On April 25, 2007, the Tribunal issued an Order denying Respondent's Motion to Set Aside Default finding that based upon Petitioner's proof of service, there was no evidence that Respondent had not been served a copy of the petition in this matter and that Respondent had not yet filed an answer to that petition as ordered. On June 19, 2007, the Tribunal issued a Default Hearing Scheduling Order. A default hearing, pursuant to TTR 247, was held on July 20, 2007. Petitioner was represented by Sean P. Fitzgerald, McShane & Bowie. Respondent was presented by Jack R. Sluiter, Sluiter, Agents, Van Gessel.

BACKGROUND

Petitioner appeals the true cash value, assessed value, and taxable value for the 2004 tax year for parcel nos. 41-18-19-204-023 and 41-55-00-203-018. Parcel no. 41-18-19-204-023 represents industrial real property and parcel no. 41-55-00-203-018 is designated as IFT new real property, an industrial facilities exemption for an addition to the warehouse that is part of parcel 41-18-19-204-023. Only parcel no. 41-18-19-204-023 existed for the 2003 tax year. For the 2004 tax year, two separate parcels were created separating the IFT property from the previously existing property. Petitioner appeals the true cash value, assessed value, and taxable value of the two parcels for the 2004 tax year only.

Petitioner's contentions of true cash value, assessed value, and taxable value are:

Parcel Number: 41-55-00-203-018

Year	TCV	AV	TV
2004	$942,635	$471,317	$471,317

Parcel Number: 41-18-19-204-023

Year	TCV	AV	TV
2004	$2,309,600	$1,154,043	$1,152,043

Respondent's contentions of true cash value, assessed value, and taxable value are:

Parcel Number: 41-55-00-203-018

Year	TCV	AV	TV
2004	$1,386,600	$693,300	$693,300

Parcel Number: 41-18-19-204-023

Year	TCV	AV	TV
2004	$2,309,600	1,154,800	1,154,800

PETITIONER'S CONTENTIONS

Petitioner offered the testimony of Kim Gary, Owner and President of Petitioner, Kent Beverage Company. Mr. Gary testified that the building involved in this appeal was originally built in

1983. There have been four additions, the most recent of which is the subject of this appeal. The addition was granted an IFT exemption. For the 2002 tax year the property was assessed as parcel no. 41-18-19-204-014.[1] Mr. Gary testified that during 2002, "we met with the city of Wyoming and worked with them to do an IFT, [which] we applied [for] and received."[2] The IFT certificate indicated that the exemption was effective for December 31, 2002 through December 31, 2015.[3] During 2002, certain walls that were part of the original building were heightened. Mr. Gary testified that the IFT plan was for a two phase construction project. Petitioner completed phase 1 for tax year 2004, but "[p]hase 2 never occurred."[4] Mr. Gary testified that Petitioner's exhibit D was the Application and Certification for Payment for the construction project and documented "the original bid contract or sum that we were to pay which is $942,635."[5] Mr. Gary testified that the last draw was for "$8,890, which completed the project."[6] The contract date was "08/27/2002" with a "to be completed date" of "06/30/2003." Mr. Gary further testified that this documented the completion of phase 1 of the project and that no other payments were made for that project.

Mr. Gary asserted that for tax year 2003, Respondent created parcel no. 41-18-19-204-023. For the 2004 tax year, the IFT was removed from parcel no. 41-18-19-204-023, a new parcel, parcel no. 41-55-00-203-018, was created, and "the base for the 2004 for parcel 023 was incorrect."[7] To calculate the taxable value of the 023 parcel, Petitioner asserts that Respondent moved land with a value of $90,900 from parcel no. 41-18-19-204-004, to the 023 parcel, in addition to the

[1] Valuation of that parcel was the subject of MTT Docket No. 303395, which was resolved by Consent Judgment.
[2] Transcript, p 20, ll 13-14
[3] Petitioner's exhibit C
[4] Transcript, p 21, l 24
[5] Transcript, p 22, ll 7-8
[6] Transcript, p 22, ll 9-10
[7] Transcript, p 27, ll 5-6

building from parcel no. 41-18-19-204-014. Based on this, Petitioner calculated the 2003 taxable value for the 023 parcel to be $1,018,900 (014 value) plus $90,900 (land value) for a total taxable value of $1,109,500. Petitioner then applied the CPI for 2003 of 1.015 to establish its contention of 2003 taxable value of $1,126,142 for the 023 parcel.[8] For the 2004 tax year, applying the CPI of 2.3%, Petitioner asserts that the taxable value for the 023 parcel would be $1,152,043.[9]

For the 2004 tax year, Petitioner asserts that Respondent included "what they considered the completion, what we had completed by 12-31-02 of our IFT"[10] in the proposed assessment of parcel no. 41-18-19-204-023.

Mr. Gary testified that "a cost breakdown of the proposed phase 2 office addition, which was going to go inside our current warehouse"[11] was prepared but that phase 2 "[d]id not occur."[12]

RESPONDENT'S CONTENTIONS

Based upon its default, Respondent was precluded from offering evidence and testimony.

FINDINGS OF FACT

The Tribunal's factual findings must be supported by competent, material, and substantial evidence. *Antisdale v Galesburg*, 420 Mich 265; 362 NW2d 632 (1984). In that regard, Tribunal finds that for the 2003 tax year, the subject property was assessed as one parcel, parcel no. 41-18-19-204-023. For the 2004 tax year, the subject property was assessed as two separate

[8] Petitioner's trial brief, p 3
[9] Petitioner's trial brief, p 5
[10] Transcript, p 26, ll 9-11
[11] Petitioner's exhibit E
[12] Transcript, p 23, ll 13-17

parcels, parcel no. 41-18-19-204-023, and parcel no. 41-55-00-203-018. The 018 parcel consisted of the IFT new construction and the 023 parcel consisted of land and the original building before the IFT addition.

The Tribunal finds Petitioner's cost approach utilizing the actual cost of the Stage 1 construction for which the IFT was certified and assessed under parcel no. 41-55-00-203-018, to be the valuation methodology that is most accurate and bears a reasonable relationship to that property's true cash value. The 023 property is new construction and Petitioner's credible evidence of actual cost is the most reliable determinant of the actual cost of construction.

The Tribunal further finds that, there being no evidence of additions to parcel no. 41-18-19-204-023, the taxable value for that parcel is limited to the taxable value for the 2003 tax year, less the value of the IFT, increased by the CPI. The Tribunal finds Petitioner's calculation of assessed and taxable value for parcel no. 41-18-19-204-023 for the 2004 tax year reliable.

CONCLUSIONS OF LAW

The Michigan Court of Appeals has recognized that "the power of the tax tribunal to dismiss a petition because of a party's noncompliance with a rule or order of the tribunal is unquestionable," and stated that "the Tribunal's actions are reviewable for abuse of discretion." *Stevens v Bangor Township,* 150 Mich App 756, 761; 389 NW2d 176 (1986).

In determining whether the Tribunal has abused its discretion, the Court of Appeals also stated in *Professional Plaza, LLC v City of Detroit* 250 Mich App 473, 475; 647 NW2d 529 (2002), that an abuse of discretion exists where the result is "so palpably and grossly violative of fact and

logic that it indicates a perversity of will, a defiance of judgment, or the exercise of passion or bias."

Prior to the holding in *Stevens*, the Tribunal did not have a default process. Rather, the Tribunal would exercise its discretion and dismiss a case or conduct a default hearing for a party's failure to comply with a Tribunal rule or order without giving notice to that party of its failure and an opportunity to cure the failure.

Notwithstanding the above, the Tribunal's exercise of such discretion has never been result driven, but rather focused on the party's failure to comply with a Tribunal rule or order. More specifically, the fact that a party may prevail does not change the fact that the party has failed to properly comply with a Tribunal rule or order. Nevertheless, the Tribunal, in response to the holding in *Stevens* (i.e., "the Tribunal's imposition of the harshest available sanction was an abuse of discretion") and to avoid any future such *Stevens* "abuses," developed a default process and revised its Rules of Practice and Procedure in 1996 to provide parties with notice of their failure to comply with a Tribunal rule or order and a reasonable opportunity to cure that failure before the dismissal of their case or the conducting of a default hearing, as appropriate, for a party's failure to timely cure its default. See TTR 247. See also the unpublished decision in *Cassar Group v City of Keego Harbor*, COA Docket No. 282115 (February 3, 2009). As such, the exercise of the discretion noted in *Stevens* is now uniformly governed by rule.

TTR 247 provides:

(1) If a party has failed to plead, appear, or otherwise proceed as provided by these rules or as required by the Tribunal, then the party may be held in default by the tribunal on motion of another party or on the initiative of the Tribunal. A party placed in default shall cure the default as provided by the order placing the party in default and file a motion to set aside the default accompanied by the appropriate fee within 21 days of entry of the order placing the party in default or as otherwise ordered by the Tribunal. Failure to comply with an order of default may result in the dismissal of the case or the scheduling of a default hearing as provided in this rule.

(2) For purposes of this rule, "default hearing" means a hearing at which the defaulted party is precluded from presenting any testimony or submitting any evidence not submitted to the Tribunal before the entry of the order placing the party in default and may not, unless otherwise ordered by the Tribunal, examine the other party's witness.

As such, the Tribunal decides this matter based only on the file and testimony and evidence presented by Petitioner at hearing.

"The petitioner has the burden of proof in establishing the property's true cash value." MCL 205.737(3); *Kern v Pontiac Twp*, 93 Mich App 612; 287 NW2d 603 (1979).

The assessment of real property in Michigan shall not exceed 50% of its true cash value. Michigan Const 1963, art IX, sec 3. "True cash value" means "the usual selling price…." MCL 211.27(1). "True cash value" means "fair market value." *CAF Investment Co v State Tax Commission*, 392 Mich 442, 450; 221 NW2d 588, 592 (1974).

The Tribunal is required to make an independent determination of true cash value. *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348; 483 NW2d 416 (1992). "We note that the tribunal is not bound to accept either of the parties' theories of valuation. It may accept one theory and reject the other, it may reject both theories, or it may utilize a combination of both in arriving at its determination." *Id.*, p 356.

The Tribunal is required to select the valuation methodology that is accurate and bears a reasonable relationship to the property's true cash value. *Safran Printing Co v Detroit*, 88 Mich App 376; 276 NW2d 602 (1979).

Section 10(1) of 1974 PA 198, MCL 207.560 provides,

> The assessor of each city or township in which there is a speculative building, new facility, or replacement facility with respect to which 1 or more industrial facilities exemption certificates have been issued and are in force shall determine annually as of December 31 the value and taxable value of each facility separately, both for real and personal property, having the benefit of a certificate.

Section 17(1) of 1974 PA 198, MCL 207.564 provides,

> The assessor of each city or township in which is located a facility with respect to which an industrial facilities exemption certificate is in force shall annually determine, with respect to each such facility, an assessment of the real and personal property comprising the facility having the benefit of an industrial facilities exemption certificate which would have been made under Act No. 206 of the Public Acts of 1893, as amended, if the certificate had not been in force. A holder of an industrial facilities exemption certificate shall furnish to the assessor such information as may be necessary for the determination.

The Tribunal concludes that Petitioner's evidence of the cost of construction of the new facility, parcel no. 41-55-00-203-018, is credible and reliable and, there being no evidence of value submitted by Respondent, bears the most reasonable relationship to the property's true cash value.

The taxable value for parcel no. 41-18-19-204-023 was established pursuant to the Consent Judgment entered by this Tribunal in MTT Docket No. 303395. That taxable value included the partially completed IFT property which, for the 2004 tax year, was separated and assessed as parcel no. 41-55-00-203-018. There being a minimal difference between Petitioner's and

Respondent's contentions of taxable value for parcel no. 41-18-19-204-023, and without evidence from Respondent as to its calculations, Tribunal accepts Petitioner's calculation of taxable value for the 2004 tax year for that parcel.

JUDGMENT

IT IS ORDERED that the property's true cash, assessed, and taxable values for the tax year at issue are:

Parcel Number: 41-18-19-204-023

Year	TCV	AV	TV
2004	$2,309,600	$1,154,800	$1,152,043

Parcel Number: 41-55-00-203-018

Year	TCV	AV	TV
2004	$942,635	$471,317	$471,317

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 90 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, 2003, at the rate of 2.16% for calendar year 2004, (ii) after December 31, 2004, at the rate of 2.07% for calendar year 2005, (iii) after December 31, 2005, at the rate of 3.66% for calendar year 2006, (iv) after December 31, 2006, at the rate of 5.42% for calendar year 2007, (v) after December 31, 2007, at the rate of 5.81% for calendar year 2008, and (vi) after December 31, 2008, at the rate of 3.31% for calendar year 2009.

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

MICHIGAN TAX TRIBUNAL

Entered: April 13, 2009 By: Rachel Asbury