

STATE OF MICHIGAN
COURT OF APPEALS

L'ANSE WARDEN ELECTRIC COMPANY,
LLC,

UNPUBLISHED
October 17, 2013

Petitioner-Appellant,

v

No. 312536
Tax Tribunal
LC No. 00-392335

TOWNSHIP OF L'ANSE,

Respondent-Appellee.

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Petitioner, L'Anse Warden Electric Company, LLC, appeals as of right an order of the Michigan Tax Tribunal (MTT) that assessed the subject property's state equalized value (SEV) and true cash value for 2010 and 2011. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

Petitioner, an energy power plant, filed its petition in the MTT to challenge respondent's assessed true cash value of \$17,216,178 for the subject property in tax year 2010. Because respondent failed to answer the petition, petitioner filed a motion to place respondent in default, which the MTT granted. Petitioner then moved to amend its petition, adding a challenge to respondent's assessed true cash value of \$18,258,156 for the tax year 2011.

A hearing was held and petitioner relied on the testimony from its expert in plant appraisals. The expert testified that numerous factors are relevant in valuing the property, including government tax incentives. The expert also reviewed three different approaches to value property, the income, cost, and sales approach, and opined that the sales approach was not a reliable method in this case because of the lack of comparable properties. After reconciling the income and cost approach, the expert testified that the market value of the property was \$6,300,000 as of December 31, 2009, and \$10,300,000 as of December 31, 2010.

The MTT ultimately affirmed respondent's assessment, finding that the true cash value of the property was \$17,216,178 in the tax year 2010, and \$18,258,156 in the tax year 2011. The MTT rejected the income approach and the sales approach, finding that the cost approach was the most reliable method. Upon a motion for reconsideration, the MTT corrected some of its

previous errors, noting that some of the tax incentives were only available in the alternate and that the sale of power plants was not the equivalent of the investment in renewable power. However, the MTT reaffirmed that the cost approach was the most appropriate method, and stated that it did not find petitioner's arguments regarding external obsolescence based on political uncertainty to be meritorious. Further, the MTT found that the de minimus errors it corrected did not affect the outcome of the case. Petitioner now appeals.

II. TRUE CASH VALUE

A. Standard of Review

We apply the following standard of review:

Review of decisions by the Tax Tribunal is limited. In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation. The Tax Tribunal's factual findings are final if they are supported by competent, material, and substantial evidence on the whole record. If the facts are not disputed and fraud is not alleged, our review is limited to whether the Tax Tribunal made an error of law or adopted a wrong principle. [*Michigan Properties, LLC v Meridian Twp*, 491 Mich 518, 527-528; 817 NW2d 548 (2012) (quotation marks and citation omitted).]

B. Background Law

Property may not be taxed in excess of 50 percent of its true cash value. Const 1963, art 9, § 3. True cash value "means the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale." MCL 211.27(1). "True cash value is synonymous with fair market value." *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 389; 576 NW2d 667 (1998).

"[T]he petitioner has the burden to establish the true cash value of property." *President Inn Properties, LLC v Grand Rapids*, 291 Mich App 625, 631; 806 NW2d 342 (2011). Yet, "the Tax Tribunal has a duty to make an independent determination of true cash value." *Id.* The three traditional methods of determining true cash value are: (1) the cost-less-depreciation approach (cost approach); (2) the sales-comparison or market approach (sales approach); and (3) the capitalization-of-income approach (income approach). *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 484-485; 473 NW2d 636 (1991). The Tax Tribunal has a duty to determine which approaches are most useful to reach the most accurate valuation, based on the circumstances of the case, and "[a]ll three approaches should be used whenever possible[.]" *Id.* at 485. Regardless of which method is employed, "the final value determination must represent the usual price for which the subject property would sell." *Id.*

In this case, petitioner contends that two relevant methods are the income approach and the cost approach. Under the income approach, true cash value is derived by "measure[ing] the present value of the future benefits of property ownership by estimating the property's income

stream and its resale value (reversionary interests) and then developing a capitalization rate which is used to convert the estimated future benefits into a present lump-sum value.” *Meadowlanes*, 437 Mich at 485 n 20. “Under the cost approach, true cash value is derived by adding the estimated land value to an estimate of the current cost of reproducing or replacing improvements and then deducting the loss in value from depreciation in structures, i.e., physical deterioration and functional or economic obsolescence.” *Id.* at 484 n 18.¹ Tax benefits and subsidies are factors that must be considered in assessing the value of real property. *Id.* at 496-497; *Antisdale v City of Galesburg*, 420 Mich 265, 284; 362 NW2d 632 (1984).

C. Government Subsidies

Petitioner first argues that the MTT erred in failing to consider the \$13.4 million in subsidies it received through the “1603 Program” and the Tax Increment Financing (“TIF”) program. We agree.

As the Michigan Supreme Court recognized in *Meadowlanes*, 437 Mich at 496, a subsidy may be “a value-influencing factor.” See also *Huron Ridge LP v Ypsilanti Twp*, 275 Mich App 23, 32; 737 NW2d 187 (2007) (“In sum, the Court [in *Meadowlanes*] ordered the Tax Tribunal to estimate the true cash value of the subject property based on all relevant factors, including, but not limited to, comparable properties and the value of the tax credits.”). Subsidies have “value” because they affect the expense associated with ownership of the property. Hence, although they are intangibles, the existence of “tax shelter benefits . . . should be reflected in the assessment process to the extent that they increase or decrease the value of the subject real property.” *Meadowlanes*, 437 Mich at 495-496, citing *Antisdale*, 420 Mich at 284-285.

Here, the tribunal failed to make any specific findings about the subsidies at issue. Petitioner presented evidence that government subsidies played an important role in the financial feasibility of constructing and operating an energy power plant, and that petitioner had received \$11,690,566 from the 1603 Program and had spent over \$1,700,000 on environmental cleanup costs that were essentially reimbursed through the TIF program. Petitioner also presented evidence that some of these subsidies, such as the 1603 Program, may be onetime grants that had extinguished. While the MTT was not required to adopt the arguments petitioner advanced regarding these subsidies, it was obligated to make an independent determination of how or if these subsidies affected the true cash value of the property. *Meijer, Inc*, 240 Mich App at 8.

Because the tribunal’s failure to consider these subsidies is contrary to the law established in *Meadowlanes*, *supra*, remanding is necessary for the MTT to determine whether these subsidies had any effect on the true cash value of the property.

¹ “The term ‘functional obsolescence’ refers to a loss in value brought about by failure or inability of the assessed property to provide full utility.” *Meijer, Inc v City of Midland*, 240 Mich App 1, 4 n 4; 610 NW2d 242 (2000). Economic or external obsolescence can be understood as “loss of value occasioned by outside forces.” *Fisher-New Ctr Co v Michigan State Tax Comm*, 380 Mich 340, 362; 157 NW2d 271 (1968) (quotation marks and citation omitted).

D. Cost & Income Approach

Petitioner next argues that the MTT erred in limiting its determination of true cash value to the cost approach, as it also should have considered the income approach. We disagree, in part.

“The Tax Tribunal is under a duty to apply its expertise to the facts of a case in order to determine the appropriate method of arriving at the true cash value of property, utilizing an approach that provides the most accurate valuation under the circumstances.” *Great Lakes Div of Nat’l Steel Corp*, 227 Mich App at 389. Here, in rejecting the income approach, the MTT reasoned that the property was a special-purpose property that did not produce income. The MTT found that the cost approach was the most reliable method of determining the true cash value because it was not distorted by considerations of the business producing income.

Consistent with that ruling, this Court has recognized that “the adjusted cost-of-reproduction-less-depreciation method is most suitable for industrial facilities for which no market, an inadequate market, or a distorted market exists.” *Great Lakes Div of Nat’l Steel Corp*, 227 Mich App at 403, citing *Tatham v City of Birmingham*, 119 Mich App 583, 591; 326 NW2d 568 (1982). As the tribunal correctly found, the facility at issue in this case was a special-purpose facility, and therefore most conducive to the cost approach.

Petitioner, however, argues that the income approach, commonly used to assess the true cash value of subsidized rental housing complexes, should also have been used. However, the property at issue in this case is not rental property. While the power plant is a business that produces income, the property itself does not produce income like an apartment complex.² In other words, while petitioner obtains income through the production and sale of electricity using biomass, it does not obtain income by owning, leasing, renting, or selling the subject property itself. Thus, the cases petitioner cites are inapposite.

Because it is apparent from the record that the MTT applied its expertise to arrive at an appropriate method for determining the true cash value, there was no error of law or adoption of a wrong legal principle in using the cost approach.³ However, as we are remanding for the MTT’s determination of the effect subsidies may have had on the true cash value, the tribunal may wish to revisit whether the cost approach is the most reliable method in light of subsidies.

² Petitioner’s arguments based on *Presque Isle Harbor Water Co v Presque Isle Twp*, 130 Mich App 182, 192-193; 344 NW2d 285 (1983), are therefore distinguishable because this Court focused on income producing property being assessed using the income approach. Further, this Court specifically stated in *Presque Isle* that “[t]he cost of reproduction less depreciation method is most appropriate for industrial facilities for which no market, an inadequate market, or a distorted market exists.” *Id.* at 194 n 14.

³ We also decline to address petitioner’s arguments relating to two findings of facts relating to the income approach because petitioner specifically limited these arguments to “if this Court orders that the Tribunal consider the capitalization of income approach.”

E. External Obsolescence

Petitioner further argues that the MTT erred in rejecting its analysis of external obsolescence. As the tribunal properly recognized, external obsolescence is “loss of value occasioned by outside forces.” *Fisher-New Ctr Co v Michigan State Tax Comm*, 380 Mich 340, 362; 157 NW2d 271 (1968). As the MTT found, petitioner did not present any evidence of “outside negative influence to the subject property” but merely presented evidence that was “property specific.” In its corrected final opinion and judgment, the tribunal further specified that it discredited petitioner’s external obsolescence calculation because it found that petitioner did not justify “the imposition of external obsolescence based on political uncertainty.” This finding is supported by the record. Moreover, while the tribunal was required to make an independent analysis of external obsolescence, it did in the instant case, finding that there was none.

III. CONCLUSION

The MTT erred in failing to make any findings regarding whether the government subsidies affected the true cash value of the property. While the MTT did not err in using the cost approach, it failed to consider subsidies in its calculation. Lastly, the tribunal did not err in declining to adopt petitioner’s calculation of external obsolescence. We have reviewed all other arguments in petitioner’s brief and find them to be without merit. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.⁴

/s/ Michael J. Riordan
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly

⁴ Respondent’s default status is not altered as a result of this appeal.