

STATE OF MICHIGAN
COURT OF APPEALS

MEIJER, INC.,

Petitioner-Appellant/Cross-
Appellee,

v

CITY OF MIDLAND,

Respondent-Appellee/Cross-
Appellant.

UNPUBLISHED

March 24, 2005

No. 252660

Tax Tribunal

LC No. 00-190704

Before: Hoekstra, P.J., and Whitbeck, C.J., and Neff, JJ.

PER CURIAM.

Petitioner Meijer, Inc. appeals as of right from an opinion and judgment on remand entered by the Tax Tribunal. On appeal, petitioner argues that this Court should again remand to the Tax Tribunal with direction that petitioner be awarded discounts from the assessed value of the property, as directed by this Court in *Meijer, Inc v City of Midland*, 240 Mich App 1; 610 NW2d 242 (2000) (*Meijer I*). On cross-appeal, respondent City of Midland argues that the Tax Tribunal began with an incorrect starting point when using the cost approach to assess the property's market value, and also erred by deducting from its original valuation a five-percent "developer fee." We affirm.

In *Meijer I*, petitioner asserted that "the Tax Tribunal committed legal error in determining the true cash value of petitioner's property under the replacement cost approach when it failed to include a deduction for functional obsolescence due to the cost of modifying the buildings for use by another retailer if the buildings were leased or sold." *Id.* at 5-6 We agreed and remanded the case "to the Tax Tribunal to make an independent determination of how much functional obsolescence exists due to modification costs." *Id.* at 8. After affording the parties the opportunity to brief the issue, the Tax Tribunal examined the record and found no evidentiary support for a reduction of the assessed value of the property for functional obsolescence. Now, on appeal again to this Court, petitioner argues that the Tax Tribunal violated both the law of the case doctrine and the principles of res judicata because this Court's opinion in *Meijer I* required a deduction from the assessed value for functional obsolescence. We disagree.

The doctrine of res judicata generally precludes relitigation of matters involving the same parties that have been, or could have been, fully litigated and finally resolved. See, e.g.,

Andrews v Donnelly (After Remand), 220 Mich App 206, 209; 559 NW2d 68 (1996). Although the doctrine is typically applied to bar multiple actions between the same parties, the principles of res judicata are arguably applicable in the context of remand proceedings to bar relitigation of issues that have been previously raised on appeal. See, e.g., *Gose v Monroe Auto Equipment Co*, 409 Mich 147, 160; 294 NW2d 165 (1980) (res judicata is to be broadly applied in Michigan). Similarly, under the law of the case doctrine, a previous decision of an appellate court must generally be followed in order to “maintain consistency and avoid reconsideration of matters” in the course of a single, continuing lawsuit. *Bennett v Bennett*, 197 Mich App 497, 499-500; 496 NW2d 353 (1992). Here, we find no breach of these principles in the Tax Tribunal’s opinion and judgment on remand.

In challenging the Tax Tribunal’s resolution of this matter on remand, petitioner misconstrues our opinion in *Meijer I*. Relying on language found in the analysis of the functional obsolescence issue presented on appeal in *Meijer I*, petitioner construes the opinion to require on remand that the Tax Tribunal find and deduct from the assessed value a positive amount for functional obsolescence. Although we acknowledge that language in *Meijer I* could broadly be interpreted as petitioner has, ultimately the holding was to remand for “an independent determination of how much functional obsolescence exists due to modification costs.” *Id.* at 8. Consistent with that directive, the Tax Tribunal searched the record and concluded that the answer was zero. What petitioner fails to acknowledge is that zero is a potential amount that could result from the “independent determination” ordered in *Meijer I*. Presumably, if the amount to be deducted for functional obsolescence was certain and knowable, this Court would have remanded with instructions to deduct that amount. But that was not the case and is not what this Court ordered in *Meijer I*. Rather, the Court’s specific instruction left it to the Tax Tribunal to review the evidence and make its finding. That finding plainly is not what petitioner anticipated. But tellingly, petitioner does not challenge the Tax Tribunal’s determination of this fact question on grounds that the findings were not supported by competent, material, and substantial evidence on the record. And absent a finding of such error, we are without authority to order the Tax Tribunal to make a deduction from the assessed value of the property. See *Comcast Cablevision of Sterling Heights, Inc v Sterling Heights*, 218 Mich App 8, 11; 553 NW2d 627 (1996) (“the factual findings of the tax tribunal are final, provided that they are supported by competent, material, and substantial evidence on the whole record”); see also *STC, Inc v Dep’t of Treasury*, 257 Mich App 528, 533; 669 NW2d 594 (2003). Consequently, under the circumstances, petitioner’s claim that the Tax Tribunal violated the doctrines of law of the case and res judicata are unavailing because on remand the Tax Tribunal carried out this Court’s instruction to it and arrived at a logically consistent conclusion.

On cross-appeal, respondent argues that the Tax Tribunal erred in using replacement cost rather than reproduction cost as the starting point for the cost approach to assess the market value of the property. Because the issue is not properly before us we decline to address this claim. This issue is one that relates to the methodology used by the Tax Tribunal in its first decision and was subject to appeal in *Meijer I*. However, the issue was not raised or decided in that appeal. On remand following this Court’s decision in *Meijer I*, respondent raised the issue, apparently for the first time, in its brief before the Tax Tribunal. Rightfully, the Tax Tribunal did not address this issue in its opinion and judgment on remand because resolution of the issue was unnecessary to decide the two issues identified by the Court in *Meijer I* as requiring decision on

remand. In sum, this issue should have been raised in the first appeal and was not, and consequently it is not preserved for decision in this appeal following remand. See *VanderWall v Midkiff*, 186 Mich App 191, 201; 463 NW2d 219 (1990).

Finally, we reject respondent's claim that the Tax Tribunal exceeded the scope of its authority on remand by deducting from the property's valuation a five-percent "developer's fee." Contrary to respondent's assertion, it is clear from the record that the amount deducted by the Tax Tribunal was that characterized as "entrepreneurial profit" in *Meijer 1, supra* at 8-13, and found by this Court to have been erroneously included in the Tax Tribunal's original valuation. See *id.* at 13.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff