COMMONWEALTH OF MASSACHUSETTS

**APPELLATE TAX BOARD**

**POWERSCOURT REALTY TRUST v.   BOARD OF ASSESSORS OF**

**THE CITY OF WOBURN**

Docket Nos. F330190, F332390   Promulgated:

  December 3, 2018

These are appeals filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65 from the refusal of the Board of Assessors of the City of Woburn (“assessors” or “appellee”) to abate a tax on certain real estate in the City of Woburn, owned by and assessed to Powerscourt Realty Trust (“appellant”) under G.L. c. 59, §§ 11 and 38, for fiscal years 2016 and 2017 (“fiscal years at issue”).

Commissioner Chmielinski heard these appeals. Chairman Hammond and Commissioners Scharaffa, Rose, and Good joined him in the decision for the appellee.

These findings of fact and report are made pursuant to a request by the appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.

*Matthew A. Luz,* Esq*.* for the appellant.

*Anthony M. Ambriano*, Esq. for the appellee.

**FINDINGS OF FACT AND REPORT**

On the basis of the testimony and exhibits offered into evidence at the hearing of these appeals, the Appellate Tax Board (“Board”) made the following findings of fact.

On January 1, 2015 and January 1, 2016, the relevant valuation and assessment dates for the fiscal years at issue, the appellant was the assessed owner of a 3-acre corner parcel improved with a 52,870-square-foot industrial building with 102 parking spaces (“subject property”).

For fiscal year 2016, the assessors valued the subject property at $2,768,100 and assessed a tax at a rate of $25.79 per thousand in the amount of $71,389.30. The appellant timely paid the tax due without incurring interest and, on January 21, 2016, timely filed an abatement application with the assessors. The assessors denied the application on April 14, 2016 and the appellant timely filed its appeal with this Board on June 8, 2016.

For fiscal year 2017, the assessors again valued the subject property at $2,768,100. The appellant timely paid the tax assessed of $69,119.46, computed at a rate of $24.97 per thousand. On January 12, 2017, the appellant timely filed its abatement application with the assessors, which they denied on April 10, 2017. The appellant timely filed its appeal with this Board on April 26, 2017.

On the basis of these facts, the Board found that it had jurisdiction to hear and decide these appeals.

The subject property is owner-occupied and is used by the appellant to manufacture, store, and ship plastics. It has a building area of 52,870 square feet; an unfinished mezzanine area and front aluminum vestibule area is not included in the building area.

The subject property is located approximately 1.5 miles from Route 93 in a small cluster of general industrial-zoned properties in the southeastern portion of Woburn. The site is in close proximity to major highways and municipal transportation. At all material times, the area surrounding the subject property experienced a period of revitalization for industrial uses, as evidenced by sales and leasing activity within the surrounding neighborhood.

The appellant presented its case through the testimony and appraisal report of Peter R. Reilly, whom the Board qualified as an expert witness in the area of commercial real estate valuation. The assessors presented their case through the testimony and appraisal report of John F. Connolly, whom the Board qualified as an expert witness in the area of commercial real estate valuation.

Both appraisers relied on the income capitalization approach to value the subject property. The net operating incomes determined by both appraisers are substantially similar; in fact, the net operating incomes determined by the assessors’ appraiser are actually less than those determined by the appellant’s appraiser, given that the assessors’ appraiser used a lower rent and higher vacancy rate than the appellant’s appraiser. The fundamental disparity in the analyses employed by the appraisers was in their selection of a base capitalization rate and their determination of whether a tax factor should be added to the capitalization rate.

Regarding the propriety of using a tax factor, both appraisers agreed that the typical lease structure for industrial properties in the relevant market during the time periods at issue was triple net, where the tenant is responsible for the payment of real estate taxes, among other expenses. Consistent with a triple-net lease, the assessors’ appraiser did not use a tax factor in his capitalization rate because the landlord would not be responsible for payment of real estate taxes.

The appellant’s appraiser, however, despite acknowledging that triple-net leases would be typical in the relevant market, chose to use a “modified gross” approach. He even found triple-net-lease rents in his purported comparable properties, but adjusted them to fit his modified gross model. The net effect of his use of a modified gross approach was to shift the payment of real estate taxes from the tenant to the landlord. Because he concluded that the landlord would be responsible for the payment of real estate taxes, the appellant’s appraiser used a tax factor in his capitalization rate

The failure of the appellant’s appraiser to value the property based on a triple-net-lease model rendered his opinion of value fundamentally flawed. Because the subject property is appropriately valued using a triple-net-lease model and the tenant is responsible for the payment of real estate taxes in a triple-net lease, the appellant’s appraiser erred by using a full tax factor in his capitalization rate. Only a percentage of the tax factor, representing the landlord’s obligation to pay real estate tax on vacant space, would be appropriate in valuing the subject property using the income-capitalization approach.

Moreover, the data on which the appellant’s appraiser relied suffered from numerous deficiencies. For example: he relied on rental information from an unidentified appraiser for six of his ten comparable leases; he used rentals from renewal leases in the remaining four comparables; the majority of his comparable leases were for space in multi-tenant buildings for significantly smaller spaces; and he failed to verify any of the essential terms of his comparable leases. These deficiencies, coupled with his use of a full tax factor in his capitalization rate, rendered his opinion of value unreliable and unpersuasive.

Regarding the selection of an overall capitalization rate, the appellant’s appraiser did not provide substantiating data to support his selection of the rate. Although he mentioned his reliance on “national and regional surveys” of capitalization rates, he provided no survey data to support his conclusions regarding his base capitalization rate. In contrast, the assessors’ appraiser provided detailed data from the four surveys that he reviewed and focused on the subject property’s proximity to highways and public transportation as well as the strength of the industrial market in the subject property’s neighborhood to arrive at a base capitalization rate of 8.1 percent.

Applying the capitalization rate of 8.1 percent plus 10 percent of the tax factor based on the higher of the two vacancy rates used by the appraisers to either appraiser’s net operating incomes results in indicated values in excess of the assessed values for both of the fiscal years at issue. Accordingly, the Board found and ruled that the appellant failed to meet its burden of proving overvaluation in these appeals.

**OPINION**

Assessors are required to assess real estate at its fair cash value. G.L. c. 59, § 38. Fair cash value is defined as the price on which a willing seller and a willing buyer will agree if both of them are fully informed and under no compulsion. ***Boston Gas Co. v. Assessors of Boston,*** 334 Mass. 549, 566 (1956). The appellant has the burden of proving that the subject property’s fair cash value was lower than its assessed value. “‘The burden of proof is upon the petitioner to make out its right as [a] matter of law to [an] abatement of the tax.’” ***Schlaiker v. Assessors of Great Barrington***, 365 Mass. 243, 245 (1974) (quoting ***Judson Freight Forwarding Co. v. Commonwealth***, 242 Mass. 47, 55 (1922)).

In appeals before the Board, taxpayers “‘may present persuasive evidence of overvaluation either by exposing flaws or errors in the assessors’ method of valuation, or by introducing affirmative evidence of value which undermines the assessors’ valuation.’” ***General Electric Co. v. Assessors of Lynn,*** 393 Mass. 591, 600 (1984) (quoting ***Donlon v. Assessors of Holliston***, 389 Mass. 848, 855 (1983)).

Both parties relied on the income-capitalization approach to value and their experts were in substantial agreement on the net operating incomes to be capitalized. The fundamental disagreement between the parties is the selection of a base capitalization rate and whether a tax factor should be added to the capitalization rate.

Because the subject property is a single-user, owner-occupied property, comparable leases for the subject property would be on a triple-net basis with the tenant responsible for taxes, among other expenses. *See* ***EJR Real Estate Trust v. Assessors of Worcester,*** Mass. ATB Findings of Fact and Reports 2002-29, 35-36 (ruling that the witness erroneously applied a tax factor in calculating his capitalization rate for single-user, owner-occupied property). Moreover, the appellant’s appraiser concedes that triple-net leases were the typical lease structure for industrial properties in the relevant market. Because the subject property is appropriately valued using a triple-net-lease model and the tenant is responsible for the payment of real estate taxes in a triple-net lease, the Board ruled that the appellant’s appraiser erred by using a full tax factor in his capitalization rate. *See generally* ***Alstores Realty Corp. V. Assessors of Peabody***, 391 Mass. 60, 70 (1984) (where tax reimbursements are not reflected in the landlord’s income, the capitalization rate must be reduced to reflect the tenants’ payment of real estate taxes). Only a percentage of the tax factor, representing the landlord’s obligation to pay real estate tax on vacant space, would be appropriate in valuing the subject property using the income-capitalization approach. *See, e.g.,* ***Market Forge Industries, Inc. v. Assessors of Everett,*** Mass. ATB Findings of Fact and Reports 2014-186, 201, 209-10.

Regarding the selection of a base capitalization rate, the appellant’s appraiser provided insufficient credible data and support for his selection of a capitalization rate. The failure to provide such credible data or support renders his conclusions entitled to no weight. *See, e.g.,* ***HRS Trust No. 3 v. Assessors of West Boylston,*** Mass. ATB Findings of Fact and Reports 2002-10, 17 (rejecting appraiser’s capitalization rate for failure to provide “corroboration or verification” of various elements that she considered in arriving at a capitalization rate); ***EJR Real Estate Trust,*** Mass. ATB Findings of Fact and Reports at 2002-35 (same).

Accordingly, the Board found and ruled that the appellant failed to meet its burden of proving that the assessed value of the subject property exceeded its fair cash value for the fiscal years at issue and issued a decision for the appellee in these appeals.

**THE APPELLATE TAX BOARD**

**By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Thomas W. Hammond, Jr., Chairman**

**A true copy,**

**Attest: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Clerk of the Board**