

**STATE OF INDIANA  
Board of Tax Review**

THE DUTCH CORPORATION	)	On Appeal from the Elkhart County Property
	)	Tax Assessment Board of Appeals
Petitioner,	)	
	)	Petition for Review of Assessment, Form 131
v.	)	Petition No. 20-035-01-1-4-00005
	)	Parcel No. 34-08-16-127-002
ELKHART COUNTY PROPERTY TAX	)	
ASSESSMENT BOARD OF APPEALS	)	
and MIDDLEBURY TOWNSHIP	)	
ASSESSOR	)	
	)	
Respondents.	)	

**Findings of Fact and Conclusions of Law**

On January 1, 2002, pursuant to Public Law 198-2001, the Indiana Board of Tax Review (IBTR) assumed jurisdiction of all appeals then pending with the State Board of Tax Commissioners (SBTC), or the Appeals Division of the State Board of Tax Commissioners (Appeals Division). For convenience of reference, each entity (the IBTR, SBTC, and Appeals Division) is hereafter, without distinction, referred to as "State". The State having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

**Issue**

Whether the proper pricing schedule has been used.

**Findings of Fact**

1. If appropriate, any finding of fact made herein shall also be considered a conclusion of law. Also, if appropriate, any conclusion of law made herein shall also be considered a finding of fact.

2. The property that is the subject of this appeal is located at 240 U.S. 20, Middlebury, Indiana (Middlebury Township, Elkhart County). The tax year under appeal is 2001.
3. Pursuant to Ind. Code § 6-1.1-15-3, DeWald Property Tax Services, on behalf of The Dutch Corporation, filed a petition requesting a review. The Form 131 was filed on September 17, 2001. The Property Tax Assessment Board of Appeals' (PTABOA) Final Determination on the underlying Form 130 petition is dated August 14, 2001. *Board Ex. A*
4. Pursuant to Ind. Code § 6-1.1-15-4, a hearing was held on December 18, 2001 before Hearing Officer Joseph Stanford. Testimony and exhibits were received into evidence. Edwin K. DeWald of DeWald Property Tax Services represented the Petitioner. Cathy Searcy, Recording Secretary, represented the PTABOA. Veronica Williams, County Deputy, and R. Eugene Inbody, County Assessor, represented Middlebury Township.
5. At the hearing, the subject Form 131 petition was made part of the record and labeled Board Ex. A. The Notice of Hearing on Petition was labeled Board Ex. B. In addition, the following items were received into evidence:
  - Petitioner's Ex. 1 – Subject property record card.
  - Petitioner's Ex. 2 – Listing of model specifications.
  - Petitioner's Ex. 3 – Drawings of floor types from manual.
  - Petitioner's Ex. 4 – Photographs of subject property.
  - Petitioner's Ex. 5 – Subject building specifications.
  - Petitioner's Ex. 6 – Copy of the Procedural rules  
  - Respondent's Ex. 1 – Copy of Form 130, Form 115, and PTABOA Findings.
  - Respondent's Ex. 2 – Letter from Cathy Searcy concerning PTABOA hearing.
  - Respondent's Ex. 3 – Written response to appeal.
  - Respondent's Ex. 4 – Written response to Petitioner's Ex. 6.

6. Subsequent to the hearing additional evidence was submitted by both the Petitioner and Respondent. The Petitioner submitted a copy of the procedural rules applicable to filing additional evidence with the Form 131 petition (Petitioner's Ex. 6). The PTABOA filed a written response to this evidence (Respondent's Ex. 4).
7. The assessed value under appeal is \$22,500 (land) and \$2,243,000 (improvements). The Hearing Officer did not view the property.

**Whether the proper pricing schedule has been used.**

8. The Petitioner operates a restaurant on the subject property, doing business as Das Dutchman Essenhaus. *Board Ex. A.*
9. Mr. DeWald contends that the dining area of the subject property, which is currently priced from the GCM-Dining Lounge schedule, should be priced from the GCR-Dining Lounge schedule.
10. In support of his contention, Mr. DeWald listed features such as the subject's foundation, exterior walls, wall height, HVAC, and windows, which he claims all more resemble the GCR schedule. He also noted that the subject is wood joist.
11. Mr. DeWald, who is not an attorney, cites *Herb v. State Board of Tax Commissioners*, 656 N.E. 2d 890, 893 (Ind. Tax 1995) as stating "the model that most closely resembles the subject improvement with respect to physical features is used." He also cites *Peter Zakutansky vs. State Board of Tax Commissioners*, Cause No. 45T10-9609-TA-00123 as stating "[t]he taxpayer is entitled to have his property assessed using the correct cost schedule."
12. The local officials argue that the building has more features in line with the GCM schedule and is priced accordingly. Besides the dining area, the building features a commercial kitchen and bakery area, and offices. Ms. Williams

contends that the building is unique and it is difficult to use a pricing schedule to price it.

13. The PTABOA objected to all evidence and testimony submitted by Mr. DeWald. Mr. DeWald did not appear at the PTABOA hearing on this matter, and therefore submitted no testimony and evidence. Mr. DeWald contends that 50 IAC 17-7-1 allows a petitioner to submit additional evidence within 30 days after the filing of the Form 131 petition. Mr. DeWald attached the additional evidence to the petition itself. The PTABOA contends, however, that Mr. DeWald filed the petition only to the County Assessor, and therefore failed to serve copies of the additional evidence on the PTABOA and the Township Assessor, as required by 50 IAC 17-7-1.

### **Conclusions of Law**

1. The Petitioner is statutorily limited to the issues raised on the Form 130 petition filed with the Property Tax Assessment Board of Appeals (PTABOA) or issues that are raised as a result of the PTABOA's action on the Form 130 petition. Ind. Code §§ 6-1.1-15-1, -2.1, and -4. See also the Forms 130 and 131 petitions. In addition, Indiana courts have long recognized the principle of exhaustion of administrative remedies and have insisted that every designated administrative step of the review process be completed. *State v. Sproles*, 672 N.E. 2d 1353 (Ind. 1996); *County Board of Review of Assessments for Lake County v. Kranz* (1964), 224 Ind. 358, 66 N.E. 2d 896. Regarding the Form 130/131 process, the levels of review are clearly outlined by statute. First, the Form 130 petition is filed with the County and acted upon by the PTABOA. Ind. Code §§ 6-1.1-15-1 and -2.1. If the taxpayer, township assessor, or certain members of the PTABOA disagree with the PTABOA's decision on the Form 130, then a Form 131 petition may be filed with the State. Ind. Code § 6-1.1-15-3. Form 131 petitioners who raise new issues at the State level of appeal circumvent review of the issues by the PTABOA and, thus, do not follow the prescribed statutory scheme required by the statutes and case law. Once an appeal is filed with the

State, however, the State has the discretion to address issues not raised on the Form 131 petition. *Joyce Sportswear Co. v. State Board of Tax Commissioners*, 684 N.E. 2d 1189, 1191 (Ind. Tax 1997). In this appeal, such discretion will not be exercised and the Petitioner is limited to the issues raised on the Form 131 petition filed with the State.

2. The State is the proper body to hear an appeal of the action of the County pursuant to Ind. Code § 6-1.1-15-3.

### **A. Indiana's Property Tax System**

3. Indiana's real estate property tax system is a mass assessment system. Like all other mass assessment systems, issues of time and cost preclude the use of assessment-quality evidence in every case.
4. The true tax value assessed against the property is not exclusively or necessarily identical to fair market value. *State Board of Tax Commissioners v. Town of St. John*, 702 N.E. 2d 1034, 1038 (Ind. 1998)(*Town of St. John V*).
5. The Property Taxation Clause of the Indiana Constitution, Ind. Const. Art. X, § 1 (a), requires the State to create a uniform, equal, and just system of assessment. The Clause does not create a personal, substantive right of uniformity and equality and does not require absolute and precise exactitude as to the uniformity and equality of each *individual* assessment. *Town of St. John V*, 702 N.E. 2d at 1039 – 40.
6. Individual taxpayers must have a reasonable opportunity to challenge their assessments. But the Property Taxation Clause does not mandate the consideration of whatever evidence of property wealth any given taxpayer deems relevant. *Id.* Rather, the proper inquiry in all tax appeals is “whether the system prescribed by statute and regulations was properly applied to individual

assessments.” *Id* at 1040. Only evidence relevant to this inquiry is pertinent to the State’s decision.

### **B. Burden**

7. Ind. Code § 6-1.1-15-3 requires the State to review the actions of the PTABOA, but does not require the State to review the initial assessment or undertake reassessment of the property. The State has the ability to decide the administrative appeal based upon the evidence presented and to limit its review to the issues the taxpayer presents. *Whitley Products, Inc. v. State Board of Tax Commissioners*, 704 N.E. 2d 1113, 1118 (Ind. Tax 1998) (citing *North Park Cinemas, Inc. v. State Board of Tax Commissioners*, 689 N.E. 2d 765, 769 (Ind. Tax 1997)).
8. In reviewing the actions of the PTABOA, the State is entitled to presume that its actions are correct. “Indeed, if administrative agencies were not entitled to presume that the actions of other administrative agencies were in accordance with Indiana law, there would be a wasteful duplication of effort in the work assigned to agencies.” *Bell v. State Board of Tax Commissioners*, 651 N.E. 2d 816, 820 (Ind. Tax 1995). The taxpayer must overcome that presumption of correctness to prevail in the appeal.
9. It is a fundamental principle of administrative law that the burden of proof is on the person petitioning the agency for relief. 2 Charles H. Koch, Jr., *Administrative Law and Practice*, § 5.51; 73 C.J.S. Public Administrative Law and Procedure, § 128. See also Ind. Code § 4-21.5-2-4(a)(10) (Though the State is exempted from the Indiana Administrative Orders & Procedures Act, it is cited for the proposition that Indiana follows the customary common law rule regarding burden).
10. Taxpayers are expected to make factual presentations to the State regarding alleged errors in assessment. *Whitley*, 704 N.E. 2d at 1119. These

presentations should both outline the alleged errors and support the allegations with evidence. "Allegations, unsupported by factual evidence, remain mere allegations." *Id* (citing *Herb v. State Board of Tax Commissioners*, 656 N.E. 2d. 890, 893 (Ind. Tax 1995)). The State is not required to give weight to evidence that is not probative of the errors the taxpayer alleges. *Whitley*, 704 N.E. 2d at 1119 (citing *Clark v. State Board of Tax Commissioners*, 694 N.E. 2d 1230, 1239, n. 13 (Ind. Tax 1998)).

11. The taxpayer's burden in the State's administrative proceedings is two-fold: (1) the taxpayer must identify properties that are similarly situated to the contested property, and (2) the taxpayer must establish disparate treatment between the contested property and other similarly situated properties. In this way, the taxpayer properly frames the inquiry as to "whether the system prescribed by statute and regulations was properly applied to individual assessments." *Town of St. John V*, 702 N.E. 2d at 1040.
12. The taxpayer is required to meet his burden of proof at the State administrative level for two reasons. First, the State is an impartial adjudicator, and relieving the taxpayer of his burden of proof would place the State in the untenable position of making the taxpayer's case for him. Second, requiring the taxpayer to meet his burden in the administrative adjudication conserves resources.
13. To meet his burden, the taxpayer must present probative evidence in order to make a prima facie case. In order to establish a prima facie case, the taxpayer must introduce evidence "sufficient to establish a given fact and which if not contradicted will remain sufficient." *Clark*, 694 N.E. 2d at 1233; *GTE North, Inc. v. State Board of Tax Commissioners*, 634 N.E. 2d 882, 887 (Ind. Tax 1994).
14. In the event a taxpayer sustains his burden, the burden then shifts to the local taxing officials to rebut the taxpayer's evidence and justify its decision with substantial evidence. 2 Charles H. Koch, Jr. at §5.1; 73 C.J.S. at § 128. See *Whitley*, 704 N.E. 2d at 1119 (The substantial evidence requirement for a

taxpayer challenging a State Board determination at the Tax Court level is not “triggered” if the taxpayer does not present any probative evidence concerning the error raised. Accordingly, the Tax Court will not reverse the State’s final determination even though the taxpayer demonstrates flaws in it).

### **C. Review of Assessments After *Town of St. John V***

15. Because true tax value is not necessarily identical to market value, any tax appeal that seeks a reduction in assessed value solely because the assessed value assigned to the property does not equal the property’s market value will fail.
16. Although the Courts have declared the cost tables and certain subjective elements of the State’s regulations constitutionally infirm, the assessment and appeals process continue under the existing rules until a new property tax system is operative. *Town of St. John V*, 702 N.E. 2d at 1043; *Whitley*, 704 N.E. 2d at 1121.
17. *Town of St. John V* does not permit individuals to base individual claims about their individual properties on the equality and uniformity provisions of the Indiana Constitution. *Town of St. John*, 702 N.E. 2d at 1040.

### **D. Whether the Petitioner’s evidence should be considered by the State Board**

18. The PTABOA objected to all evidence and testimony submitted by Mr. DeWald. Mr. DeWald did not appear at the PTABOA hearing on this matter, and therefore submitted no testimony and evidence. Mr. DeWald contends that 50 IAC 17-7-1 allows a petitioner to submit additional evidence within 30 days after the filing of the Form 131 petition. Mr. DeWald attached the additional evidence to the petition itself. The PTABOA contends, however, that Mr. DeWald filed the petition only to the County Assessor, and therefore failed to serve copies of the



additional evidence on the PTABOA and the Township Assessor, as required by 50 IAC 17-7-1.

19. Mr. DeWald filed the Form 131 petition and additional evidence with the County Assessor. In this case, in doing so Mr. DeWald also effectively filed his petition with the Elkhart County PTABOA, since the County Assessor is the Secretary of the PTABOA. The PTABOA therefore knew of the additional evidence at the time of the filing of the petition.
20. While Mr. DeWald failed to serve copies of the evidence on the Middlebury Township Assessor, it is noted that the Township Assessor did not appear at this hearing. In this case, the Township Assessor was represented by the County Assessor and a deputy of the County Assessor's office. Thus, the Middlebury Township Assessor was not put at any disadvantage by not receiving a copy of the evidence. Again, the County Assessor's office received copies of the additional evidence with the petition.
21. While Mr. DeWald may have been deficient in his filing of the additional evidence, the deficiency, in this particular case, did not disadvantage any party to this hearing. Mr. DeWald filed additional evidence with the Form 131 petition, and all parties present at the hearing are employed in the office where evidence was filed. For this reason, the State Board will consider the evidence submitted by Mr. DeWald.

#### **E. Whether the correct pricing schedule is used**

22. The model is a conceptual tool used to replicate reproduction cost of a given structure using typical construction materials. The model assumes there are certain elements of construction for a given use type.
23. While the parties agree that the use of the property is for a dining lounge, the parties disagree on the type of construction. The local officials have assessed

the structure as having construction typically associated with mercantile districts (GCM) while the Petitioner argues that the structure most closely resembles residential (GCR) construction.

24. The burden in this case is on the Petitioner in this case to show that the dining area of the subject should be priced from the GCR schedule.
25. In comparing the models in question with the specifications of the subject building, there appear to be many features where the subject is not identical to either model. In other features, the subject matches one model or the other, or both.
26. Differences between the subject and the model can sometimes be accounted for with adjustments to the base rate. For example, in this case, the fact that the subject is wood joist is accounted for with a base rate adjustment.
27. While there are certainly differences between the subject and the GCM model, there are also differences between the subject and the GCR model. The construction of the building, both interior and exterior, is unique. The Petitioner's listing of a few of these specifications that happen to differ from the GCM model does not constitute probative evidence that the building is priced incorrectly.
28. The photographs of the subject show a building that, while not absolutely identical to the GCM model, appear to show construction much more typical of a mercantile district than of residential construction. It is noted that other areas of the building are also priced from the GCM model, and the pricing of these areas was not appealed. The dining area's exterior construction is identical to the remainder of the building.
29. For the reasons set forth, the Petitioner has failed to show that the dining area of the subject is priced from an incorrect schedule. There is no change in the assessment as a result of this issue.

The above stated findings and conclusions are issued in conjunction with, and serve as the basis for, the Final Determination in the above captioned matter, both issued by the Indiana Board of Tax Review this \_\_\_\_ day of \_\_\_\_\_, 2002.

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Chairman, Indiana Board of Tax Review