REPRESENTATIVE FOR PETITIONER:
Abdul Bakshi

REPRESENTATIVE FOR RESPONDENT:
Cathy Searcy, Elkhart County Assessor

BEFORE THE
INDIANA BOARD OF TAX REVIEW

Habuck, LLC,	)	Petition No.: 20-027-10-1-4-00124
	)	
Petitioner,	)	Parcel No.: 02-20-457-001-027
	)	
v.	)	County: Elkhart
	)	
Elkhart County Assessor,	)	Township: Osolo
	)	
Respondent.	)	Assessment Year: 2010

Appeal from the Final Determination of the
Elkhart County Property Tax Assessment Board of Appeals

January 18, 2013

FINAL DETERMINATION

The Indiana Board of Tax Review ("Board"), having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Introduction

1. Although the March 1, 2010 assessment for Habuck, LLC's property was over 5% more than what the Elkhart County Assessor and Habuck had agreed to in settling an appeal of the property's 2009 assessment, that difference did not trigger Ind. Code § 6-1.1-15-

17.2's burden-shifting provisions. In light of strong policy reasons militating against giving settlements precedential effect, the Board must compare the assessment currently under appeal to the assessment originally determined by the Assessor for the preceding year rather than to the assessment that the parties agreed on in settling the previous year's appeal. Thus, Habuck had the burden of offering probative evidence to establish the subject property's market value-in-use. Because Habuck failed to do so, the Board finds for the Assessor.

Procedural History

2. On April 19, 2011, Habuck filed a Form 130 petition contesting the subject property's March 1, 2010, assessment. The Elkhart County Property Tax Assessment Board of Appeals ("PTABOA") determined that Habuck's appeal was untimely and made no change to the assessment. Habuck then filed a Form 131 petition with the Board.

3. On October 24, 2012, the Board's administrative law judge, Patti Kindler ("ALJ"), held a hearing on Habuck's petition. Neither the Board nor the ALJ inspected the subject property.

Hearing Facts and Other Matters of Record

4. The following people testified under oath:

For Habuck:	Abdul Bakshi Habib Bakshi
For the Assessor:	Cathy Searcy, Elkhart County Assessor

5. Habuck submitted the following exhibits:

Petitioner Exhibit 1:	1065 Tax Return Comparison 2008/2009/2010
Petitioner Exhibit 2:	Standby Creditor's Agreement

6. The Assessor submitted the following exhibits**:**

Respondent Exhibit 1:	Form 11 Notice of Assessment of Land and Structures, dated October 1, 2010
Respondent Exhibit 2:	Treasurer Form TS-1A for tax year pay 2010
Respondent Exhibit 3:	Subject property's property record card for March 1, 2009
Respondent Exhibit 4:	Subject property's property record card for March 1, 2010
Respondent Exhibit 5:	Habuck's Form 130 petition file stamped April 19, 2011
Respondent Exhibit 6:	Habuck's Form 131 petition file stamped May 6, 2011
Respondent Exhibit 7:	Form 115 determination for March 1, 2010 assessment
Respondent Exhibit 8:	Department of Local Government Finance memo titled "Property Tax Assessment Appeals Fact Sheet"
Respondent Exhibit 9:	Copy of Ind. Code § 6-1.1-15-1
Respondent Exhibit 10:	Form 130 section IV – Petitioner conference form for 2008 appeal
Respondent Exhibit 11:	Form 115 determination referencing March 1, 2008 assessment on the first page

7. The Board recognizes the following additional items as part of the record of proceedings:

Board Exhibit A:	Form 131 petition
Board Exhibit B:	Hearing notices
Board Exhibit C:	Hearing sign-in sheet

8. The subject property consists of 2.93 acres of land and a 122-room hotel located at 2820 Cassopolis Street in Elkhart.

9. The PTABOA determined the following assessment:

Land: $879,300 Improvements: $1,055,900 Total: $1,935,200.

10. At the Board's hearing, Habuck requested a total assessment of $1,100,000.

Parties' Contentions

A. Summary of Habuck's Evidence and Contentions

11. Habuck contends that it never received a Form 11 Notice of Assessment of Land and Structures for the 2010 assessment year. Abdul Bakshi, Habuck's owner,[1] met with

[1] That is how Habib Bash described Abdul. The Board assumes that Abdul is a member of Habuck, LLC.

friends and colleagues in the hospitality industry and learned that they had received assessment notices. After discovering that information, on April 19, 2011, Habuck filed a Form 130 petition contesting the subject property's March 1, 2010 assessment. Habuck had filed appeals for the preceding assessment years after receiving notice of the subject property's assessment for those years, and Habuck would have done the same thing for 2010 if it had received notice. *Habib Bakshi testimony; Abdul Bakshi testimony.*

12. Habuck's lawyer and the Assessor agreed to an assessment of $1,600,000 for 2009. The property's assessment then increased by $300,000 for 2010. Habuck had not made any improvements to the property and there had been a major decline in sales. *H. Bakshi testimony.*

13. To support its claims, Habuck offered what appears to be a federal tax form titled "1065 Tax Return Comparison 2008/2009/2010." *Pet'r Ex. 1*. According to Habib Bakshi, Habuck's general manager, that form shows gross sales declining from $718,285 in 2008 to $591,249 in 2010 and net losses in all three years. *H. Bakshi testimony; Pet'r Ex. 1.* Habuck also offered a Standby Creditor's Agreement reflecting Abdul Bakshi's purchase of two promissory notes from Habuck to Key Bank as well as mortgages on the subject property securing repayment of those notes. The notes were for $1,234,500 and $97,700, respectively. Key Bank realized that the hotel was not worth the original loan amount and that income from the hotel could not support repayment. Key Bank therefore advised Abdul to come up with capital to buy the notes instead of filing a bankruptcy petition. Abdul liquidated his 401K account and paid Key Bank $600,000 to buy the notes. *H. Bakshi testimony; A. Bakshi testimony; Pet'r Exs. 1-2.*

14. Habuck also had a loan with the Small Business Administration ("SBA") for $660,000. The transaction with Key Bank did not affect the SBA loan, which remained in effect. SBA therefore became the first lien holder. The balance of the SBA loan was $500,000 at the time of the Board's hearing. *H. Bakshi testimony; Pet'r Ex. 2.*

15. Thus, Habib and Abdul believe that Habuck's entire business, including the subject property, is worth $1,100,000, which equals the sum of what Abdul paid Key Bank for the two notes and the $500,000 balance on the SBA loan. That is also what Key Bank believed the business was worth. *H. Bakshi testimony; A. Bakshi testimony.*

B. The Assessor's Evidence and Contentions

16. Habuck did not timely file its Form 130 petition with the Assessor. The Form 11 notice, which is dated October 1, 2010, "would have been mailed to the taxpayer." *Searcy testimony; Resp't Ex. 1*. The Form 11 notice lists 2820 Cassopolis Street, Elkhart, Indiana as Habuck's address. That is the same address to which all of Habuck's tax bills and notices were mailed. It is also the address that Habuck listed on its Form 131 petition. Although the Form 11 notice informed Habuck that the deadline for filing an appeal was November 16, 2010, Habuck did not file its Form 130 petition until April 19, 2011. *Id.; Resp't Exs. 5-6.*

17. In any case, Habuck had the burden of proof in its appeal to the Board, and Habuck failed to offer any evidence of the subject property's value. Regarding the burden of proof, the property's assessment did not increase by more than 5% between 2009 and 2010, which is required to trigger Ind. Code § 6-1.1-15-17.2's burden-shifting provisions. As shown by the subject property's record card, the Assessor originally assessed the property for $2,313,200 in 2009. Although the Form 11 notice shows the 2009 assessment as $1,600,000, that is the value that the parties agreed to following an informal conference on Habuck's appeal of the subject property's 2008 and 2009 assessments. The fact that the $1,600,000 assessment stemmed from a settlement is actually reflected in the body of the Form 11 notice, which indicates that a property's assessment will appear only as a total value without separating land and structures if it has been corrected by an appeal. The agreement is also reflected in a Form 115 determination for the March 1, 2008 assessment date that shows both the parties' agreement to settle Habuck's 2008 appeal and the values that were carried forward to 2009. *Searcy testimony; Resp't Exs. 3-4, 10-11.*

Discussion

A. Burden

18. Generally, a taxpayer seeking review of an assessing official's determination has the burden of proving that its property's assessment is wrong and what its correct assessment should be. *See Meridian Towers East & West v. Washington Twp. Assessor*, 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); *see also, Clark v. State Bd. of Tax Comm'rs,* 694 N.E.2d 1230 (Ind. Tax Ct. 1998). To make a prima facie case, a taxpayer must explain how each piece of evidence relates to its requested assessment. *See Indianapolis Racquet Club, Inc. v. Washington Twp. Assessor,* 802 N.E.2d 1018, 1022 (Ind. Tax Ct. 2004) ("[I]t is the taxpayer's duty to walk the Indiana Board … through every element of the analysis."). If the taxpayer makes a prima facie case, the burden shifts to the assessor to offer evidence to impeach or rebut the taxpayer's evidence. *See American United Life Ins. Co v. Maley,* 803 N.E.2d 276 (Ind. Tax Ct. 2004); *Meridian Towers,* 805 N.E.2d at 479.

19. Effective July 1, 2011, however, the Indiana General Assembly enacted Ind. Code § 6-1.1-15-17, which has since been repealed and re-enacted as Ind. Code § 6-1.1-15-17.2.[2] That statute shifts the burden of proof to the assessor in cases where the assessment under appeal has increased by more than 5% over the previous year's assessment:

> This section applies to any review or appeal of an assessment under this chapter if the assessment that is the subject of the review or appeal increased the assessed value of the assessed property by more than five percent (5%) over the assessed value determined by the county assessor or township assessor (if any) for the immediately preceding assessment date for the same property. The county assessor or township assessor making the assessment has the burden of proving that the assessment is correct in any review or appeal under this chapter and in any appeals taken to the Indiana Board of the Indiana Tax Court.

I.C. § 6-1.1-15-17.2.

[2] HEA 1009 §§ 42 and 44 (signed February 22, 2012). This was a technical correction necessitated by the fact that two different provisions had been codified under the same section number.

20. To decide whether Ind. Code § 6-1.1-15-17.2 shifts the burden of proof to the Assessor in this case, the Board must compare the assessment under appeal to the amount that the Assessor determined for the previous year. The Assessor originally valued the property at $2,313,200 for March 1, 2009, which is actually more than the assessment currently under review. Granted, the parties later agreed to settle Habuck's appeal of the property's 2009 assessment by reducing that assessment to $1,600,000. But strong policy reasons dictate against using that compromised amount as the baseline for determining whether Ind. Code § 6-1.1-15-17.2 applies.

21. Indiana law strongly favors settlements. They allow courts to operate more efficiently and allow parties to resolve their disputes through mutual agreement. Thus, as the Indiana Supreme Court has explained, the law encourages parties to engage in settlement negotiations by, among other things, "prohibit[ing] the use of settlement terms or even settlement negotiations to prove liability for or invalidity of a claim or its amount. *Dep't of Local Gov't Fin. v. Commonwealth Edison Co.*, 820 N.E.2d 1222, 1227 (Ind. 2005). That strong policy justifies denying settlements precedential effect in property tax cases; to do otherwise would have a chilling effect on the incentive of assessors to resolve cases. *Id.* at 1228. There are many reasons for parties to enter into settlement agreements, and the Board will not speculate as to what those reasons were in any particular case. The Board therefore will not apply a settlement agreement to set a baseline for comparison to future assessments, especially where, as here, there is nothing to show that the parties intended such a result.

22. Thus, because the assessment under appeal actually represents a decrease from the amount that the Assessor originally determined for the immediately preceding year, Habuck has the burden of proof.

B Merits

23. Turning to the merits, Habuck did not make a prima facie case for reducing the subject property's assessment. Indiana assesses real property based on its true tax value, which the 2002 Real Property Assessment Manual defines as "the market value-in-use of a

property for its current use, as reflected by the utility received by the owner or a similar user, from the property." 2002 REAL PROPERTY ASSESSMENT MANUAL 2 (incorporated by reference at 50 IAC 2.3-1-2 (2009)). A party's evidence in a tax appeal must be consistent with that standard. *See id*. For example, a market-value-in-use appraisal prepared according to Uniform Standards of the Professional Appraisal Practice often will be probative. *See id.; see also, Kooshtard Property VI, LLC v. White River Twp. Assessor,* 836 N.E.2d 501, 506 n.6 (Ind. Tax Ct. 2005). A party may also offer actual construction costs, sales information for the subject or comparable properties, and any other information compiled according to generally acceptable appraisal principles. MANUAL at 5.

24. Habuck offered none of the types of evidence that the Manual contemplates. Instead, Habuck pointed mainly to Abdul's purchase of the Key Bank loans and to the balance of the SBA loan at the time of the Board's hearing in October 2012. Habuck did not offer anything to show that such a methodology complies with generally accepted appraisal principles for valuing real property. Apparently, Habuck contends that the transaction between Abdul and Key Bank shows what Key Bank thought about the subject property's value. But the record does not reveal how Key Bank arrived at that opinion. Similarly, the transaction between Key Bank and Abdul did not involve the sale of the property itself, but only of Key Bank's lien interest in the property. And there is no evidence that either the property or the lien interest was exposed to the market. Instead, the transaction was made under the duress of an impending bankruptcy.

25. That does not mean that Habuck failed to offer any evidence that is relevant to the subject property's market value-in-use. Habuck offered a summary of its 2008-2010 federal tax returns, which contains income and expense information. That type of information may be used in the income approach—a generally recognized method for estimating a property's market value-in-use. But the income approach involves far more than simply looking at raw income and expense data. Instead, that approach calls for taking the net income that a property is expected to earn and discounting that income to present value

using a capitalization rate that reflects things such as "apparent risk, market attitudes toward future inflation, the prospective rates of return for alternative investments, the rates of return earned by comparable properties in the past, the supply of and demand for mortgage funds, and the availability of tax shelters." *Lacy Diversified Industries, Ltd. v. Dep't of Local Gov't Fin*., 799 N.E.2d 1215, 1224 (Ind. Tax Ct. 2003) (*quoting* AM. INST. OF REAL ESTATE APPRAISERS, THE APPRAISAL OF REAL ESTATE, 417 (10th ed. 1992).

26. Thus, while Habuck's raw income and expense data might be a start, it falls well short of showing the subject property's market value-in-use, or even a likely range of values. For example, expenses that are allowable in estimating net operating income for purposes of valuing real estate do not necessarily include all expenses that are allowable in computing federal income tax liability. Because the descriptions of the various expenses listed in Habuck's tax summary are too blurry to be legible, the Board cannot determine whether they would be appropriate for an analysis under the income approach. Similarly, Habuck did not even attempt to capitalize the property's net income.

27. Because Habuck did not offer sufficient probative evidence to show the subject property's market value-in-use, or even to show a likely range of values, it failed to make a prima facie case for reducing the property's assessment. The Board's finding in that regard makes it unnecessary to address the Assessor's claim that Habuck failed to timely appeal the property's assessment at the local level.

SUMMARY OF FINAL DETERMINATION

28. Habuck had the burden of proof and failed to make a prima facie case for reducing the subject property's assessment. The Board therefore finds for the Assessor.

This Final Determination of the above captioned matter is issued by the Indiana Board of Tax Review on the date first written above.

_____
Chairman, Indiana Board of Tax Review

_____
Commissioner, Indiana Board of Tax Review

_____
Commissioner, Indiana Board of Tax Review

IMPORTANT NOTICE

- APPEAL RIGHTS -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5, as amended effective July 1, 2007, by P.L. 219-2007, and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice. The Indiana Tax Court Rules are available on the Internet at <http://www.in.gov/judiciary/rules/tax/index.html>. The Indiana Code is available on the Internet at <http://www.in.gov/legislative/ic/code>. P.L. 219-2007 (SEA 287) is available on the Internet at <http://www.in.gov/legislative/bills/2007/SE/SE0287.1.html>.