BEFORE THE
INDIANA BOARD OF TAX REVIEW

KOKOMO URBAN DEVELOPMENT LLC,	)	Petition No. 34-002-16-3-4-01993-17
Petitioner,	)	
v.	)	Parcel No. 34-03-36-277-008.000-002
HOWARD COUNTY ASSESSOR,	)	
Respondent.	)	2016 Assessment Year

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Procedural Background

1. The Petitioner, Kokomo Urban Development LLC ("Kokomo Urban"), owns property that was declared an "economic revitalization area" and granted a 50% real property tax deduction pursuant to an abatement schedule for 2016 ("revitalization deduction.")[1] Kokomo Urban contends that the Respondent, the Howard County Assessor (the "Assessor"), failed to properly apply the revitalization deduction in calculating the tax liability under the tax cap statute.

2. Kokomo Urban filed a Form 133 on July 17, 2017. The Howard County Property Tax Assessment Board of Appeals denied relief on October 25, 2017. Kokomo Urban appealed to the Board on November 3, 2017.

3. After the matter was set for hearing, both parties moved to vacate the hearing in order to have the matter heard via summary judgment. Both parties submitted motions for summary judgment and accompanying designations and briefs.

[1] Some of the documents refer to the tax relief as an abatement, and Kokomo Urban refers to it as an "abatement deduction." As discussed in detail below, it is best described as a revitalization deduction.

Statement of Facts

4. Neither party raises an issue of factual dispute. The property consists of a parking garage and apartments assessed at $6,211,600. The parking garage is exempt. The apartments are assessed at $2,424,200[2] for the building and $32,500 for the land. Through a series of resolutions passed by the Common Council of the City of Kokomo under the statutory authority of I.C. § 6-1.1-12.1, the property was declared an "economic revitalization area" and it received a deduction pursuant to a 2-year abatement schedule of 100% in year 1 and 50% in year 2. *See Resp. Memo. in Supp. of M. for S.J. at Ex. A (Resolution 2689 and Memorandum of Agreement at 2), Ex. B (Resolution 2690 at Section 5), Ex. C (Resolution 2016-8 and Memorandum at 2).* This appeal relates to year 2 of the schedule. The parties agree that the property is subject to the 2% tax cap.

Analysis

5. Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Wittenberg Lutheran Village Endowment Corp. v. Lake County Property Tax Assessment Bd. of Appeals*, 782 N.E.2d 483, 487 (Ind. Tax Ct. 2002).

6. Kokomo Urban does not argue that the revitalization deduction was incorrectly calculated.[3] Rather, Kokomo Urban argues that the tax cap statute was improperly applied because the Assessor "should have applied the tax rate cap after the application of Kokomo Urban's abatement deduction." *Pet'r Br. in Supp of M. for S.J. at 4.*

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[2] The Assessor's brief mistakenly states the building is assessed at $2,424,100. *Resp. Memo. in Supp. of M. for S.J. at 2.* The Affidavit of Martha Lake is controlling. *See Resp. Memo. in Supp. of M. for S.J. at Ex. D.*

[3] In Kokomo Urban's calculations, it does not exclude the value of the land in calculating the revitalization deduction. However, Kokomo Urban does not allege that the Assessor's exclusion of the land was in error. The Assessor cites to I.C. §6-1.1-12.1-1(4), and (6), for the proposition that the revitalization deduction excludes land because "'property' means a building or structure, but does not include land." *See Resp. Memo. in Supp. of M. for S.J. at Ex. 7.* To the extent the issue is in dispute, the Board finds that Kokomo Urban has waived the issue by failing to present a cogent argument.

7. Commonly referred to as the "tax cap," Indiana law generally limits a property's tax liability to 1%, 2%, or 3% of its "gross assessed value." I.C. § 6-1.1-20.6-7.5(a). Gross assessed value is defined as "the assessed value of the property after the application of all exemptions under IC § 6-1.1-10 or any other provision." I.C. § 6-1.1-20.6-1.6. Kokomo Urban argues that the statutory definition of exemption should be broadly construed:

> The term exemption means **any** provision or situation where property is not taxable – this clearly includes not only "exempt" property in the generic sense under IC 6-1.1-10, **but also property that is abated or subject to other deductions**, and therefore is exempt, i.e. not taxable.

Pet'r. Br. in Supp. of M. for S.J. at 5 (emphasis in original). The Assessor disagrees.

8. The parties agree that the revitalization deduction is based on I.C. § 6-1.1-12.1. On page 2, paragraph 5 of the memorandum adopted by the Common Council of the City of Kokomo, the abatement was granted "to the extent permissible" under I.C. § 6-1.1-12.1-4.5 pursuant to a two-year abatement schedule. *Resp. Memo. in Supp. of M. for S.J. at Ex. A.* The Board first looks to the language of that specific statute.

9. A very distinct pattern emerges in the language the Legislature chose for I.C. § 6-1.1-12.1-4.5. A "*deduction* application" must be filed by "a person who desires to obtain the *deduction* provided by section 4.5 of this chapter." I.C. § 6-1.1-12.1-1(8)(B) (emphasis added). The "designating body shall determine whether an area should be designated an economic revitalization area or whether the *deduction* shall be allowed" based on certain findings. I.C. § 6-1.1-12.1-4.5(b) (emphasis added). Once those findings are made, the "designating body shall determine the number of years the *deduction* is allowed under section 17 or 18 of this chapter." I.C. § 6-1.1-12.1-4.5(e) (emphasis added). The term "abatement" comes from the schedules determining the years and amounts of the deductions:

> A designating body may provide to a business that is established in or relocated to a revitalization area and that receives a *deduction* under section 4 or 4.5 of this chapter an *abatement schedule* based on the following factors . . . .

IC §6-1.1-12.1-17(a)(emphasis added). The language of the statute granting the property tax relief in this case clearly supports the notion that it is a deduction.

10. Under the definitions broadly applicable to Article 6-1.1, the terms "exemption" and "deduction" are defined, but "abatement" is not.

> "Exemption" means a situation where a certain type of property, or the property of a certain type of taxpayer, is not taxable under this article.

I.C. § 6-1.1-1-6.

> "Deduction" means a situation where a taxpayer is permitted to subtract a fixed dollar amount from the assessed value of his property.

I.C. § 6-1.1-1-5. Because exemptions and deductions have separate definitions, the Board finds that the two terms are not synonymous.

11. The Board also notes that another distinct pattern appears in statutes creating an exemption. In Chapter 10, the Legislature has exempted dozens of types of properties and property owners. Each is accompanied by the phrase "is exempt from property taxation." I.C. § 6-1.1-10, et. seq. In contrast, I.C. § 6-1.1-12.1 consistently uses the term "deduction."

12. James Whitcomb Riley is widely credited with the origination of the Duck Test: "[w]hen I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck." *See Walczak v. Labor Works - Fort Wayne LLC,* 983 N.E.2d 1146, 1148, (Ind. 2013). Under the Duck Test, the Board finds that a tax relief statute that is drafted like a deduction and subtracted like a deduction should be interpreted as a deduction rather than an exemption.

13. Under the doctrine of *expressio unius est exclusio alterius*, "[w]hen certain items or words are specified or enumerated in a statute then, by implication, other items or words not so specified or enumerated are excluded." *State v. Willits*, 773 N.E.2d 808, 813 (Ind. 2002) (*quoting Forte v. Connerwood Healthcare, Inc.*, 745 N.E.2d 796, 800 (Ind. 2001)). The Board can only conclude that the Legislature uses the word exemption in the tax cap statute to the exclusion of deduction or abatement. Including as exempt "property that is abated or subject to other deductions," is simply Kokomo Urban's attempt to rewrite the statute. The Board cannot engraft additional or new words onto a statute. *See Kitchell v. Franklin*, 997 N.E.2d 1020, 1026 (Ind. 2013).

14. In a secondary argument, Kokomo Urban argues that this interpretation "undermines (and in some cases completely negates) the tax benefits that are negotiated in an abatement." *Pet'r Br. in Supp of M. for S.J. at 6.* Kokomo Urban illustrates this by stating that the 50% abatement only results in a savings of $790.49 rather than $25,217 if the deduction were to the gross assessed value. In other words, due to the operation of the tax cap statute, Kokomo Urban's abatement only reduces its tax liability from $49,134 to $48,134. But this is the result of a 2% tax cap in a tax district with a tax rate of 3.8342%. *See Resp. Memo. in Supp. of M. for S.J. at Ex. D.* Cutting the tax rate nearly in half, or cutting the assessed value in half, reaches roughly the same number.

15. These circumstances are not unique to revitalization deductions under I.C. § 6-1.1-12.1. By way of illustration, Kokomo Urban's situation is no different than that of a hypothetical homeowner:

Kokomo Urban		**Homeowner**	
Gross Assessed Value	$ 2,456,700	Gross Assessed Value	$ 100,000
Revitalization Deduction	$ (1,212,100)	Homestead Deduction	$ (45,000)
Assessed Value	$ 1,244,600	Assessed Value	$ 55,000
Tax Rate	0.038342	Tax Rate	0.038342
Tax Liability	$ 47,720	Tax Liability	$ 2,109
Tax Liability with Cap of 2%	$ 49,134	Tax Liability with Cap of 1%	$ 1,000

The homeowner's liability would be the same with or without the deduction due to the operation of the tax caps. Whether good policy or not, the way deductions are calculated means the tax relief phases out as the tax rate exceeds the property's tax cap.

16. Finally, Kokomo Urban argues that applying the deduction before the caps makes "practical sense" because it results in what the parties intended. Kokomo Urban negotiated a 50% revitalization deduction under I.C. § 6-1.1-12.1, and that is what it received. The Board cannot ignore the law simply because a taxpayer failed to understand how it would be applied.

17. Because the Assessor applied the revitalization deduction as a deduction, and not an exemption, the deduction and tax cap were properly applied.

Conclusion

18. The Assessor has shown the deduction was properly applied and is entitled to judgment as a matter of law.

Issued this date JUNE 20, 2018.

Ted J. Holaday
Commissioner, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

Jonathan R. Elrod
Commissioner, Indiana Board of Tax Review

- APPEAL RIGHTS -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5 and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required not later than forty-five (45) days after the date of this notice. The Indiana Code is available on the Internet at <http://www.in.gov/legislative/ic/code>. The Indiana Tax Court's rules are available at <http://www.in.gov/judiciary/rules/tax/index.html>.