

REPRESENTATIVE FOR PETITIONER: Beth H. Henkel, Law Office of Beth Henkel, LLC

REPRESENTATIVE FOR RESPONDENT: Jess Reagan Gastineau, Office of Corporation
Counsel

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

Square 74 Associates, LLC)	Petition Nos.: See attached
)	
Petitioner,)	
)	Parcel Nos.: See attached
)	
v.)	
)	Assessment Years: 2008-2011
Marion County Assessor,)	
)	
Respondent.)	

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

April 18, 2019

**FINAL DETERMINATION GRANTING SUMMARY JUDGMENT IN FAVOR OF THE MARION COUNTY
ASSESSOR**

I. Introduction

1. Square 74 Associates LLC, which leases restaurant space on the ground floor of a parking garage owned by the City of Indianapolis, moved for summary judgment on multiple Form 133 petitions for correction of error. Square 74 claims that its taxes, as a matter of law, were illegal and that the assessments were against the wrong person because they included an amount for land despite the fact that it leased only improvements. But the fact that the assessments were broken down into components for land and improvements merely distracts from what is really at issue. Square 74 challenged the amount for which its leasehold estate was assessed. To challenge that

inherently subjective determination, it needed to use the general procedures for appealing assessments rather than the correction-of-error process. We therefore deny Square 74's motion and instead grant summary judgment for the Marion County Assessor.

II. Procedural History

2. In November 2012, Square 74 filed Form 133 petitions challenging its assessments for 2008 through 2011 on multiple tax parcels. It alleged that there was a mathematical error in computing the assessments. In February 2016, the Marion County Property Tax Board of Appeals ("PTABOA") partially granted and partially denied the petitions. Square 74 then filed the petitions with us.

3. Square 74 also filed Form 131 petitions for the same parcels covering 2010-2014. In a joint case-management plan addressing both the Form 133 and Form 131 petitions, the parties agreed that we should address the Form 133 petitions before setting the Form 131 appeals for a hearing. They anticipated addressing the Form 133 petitions through dispositive motions. As contemplated, Square 74 filed a motion for summary judgment covering all 20 Form 133 petitions. Square 74 designated the following evidence in support of its motion:

Petitioner's Exhibit 1:	1999 Square 74 Master Lease and Extension Agreement
Petitioner's Exhibit 2:	2001 Master Lease Estoppel, Consent and Agreement
Petitioner's Exhibit 3:	Maps of parcels under review
Petitioner's Exhibit 4:	Ariel view of 102 W. Georgia St.
Petitioner's Exhibit 5:	2017 Property Record Card for Parcel 1024397
Petitioner's Exhibit 6:	Street view of 121 W. Maryland St.
Petitioner's Exhibit 7:	2008 Property Record Card for Parcel 1102261
Petitioner's Exhibit 8:	2008 Property Record Card for Parcel 1102262
Petitioner's Exhibit 9:	Street view of 100 N. Illinois St.
Petitioner's Exhibit 10:	2008 Property Record Card for Parcel 1102263
Petitioner's Exhibit 11:	Street view of 135 N. Illinois St.
Petitioner's Exhibit 12:	2008 Property Record Card for Parcel 1102587
Petitioner's Exhibit 13:	Street view of 100 W. Georgia St.
Petitioner's Exhibit 14:	2008 Property Record Card for Parcel 1102588
Petitioner's Exhibit 15:	Table titled Square 74 Associates LLC

The Assessor filed a response to Square 74's motion and a cross-motion to dismiss the appeal, but did not designate any evidence.

III. Background Facts

4. The City of Indianapolis, Department of Metropolitan Development owned property downtown commonly known as 102 W. Georgia Street. The property contained a 209,888-square-foot parking garage with five restaurant spaces on the ground floor. Those spaces had separate street addresses and parcel numbers but were all part of the same structure. *Pet'r Exs. 1-3.*
5. In 1999, the City leased the five restaurant spaces to Indianapolis Downtown, Inc. under a Master Lease. Indianapolis Downtown then assigned its interests under the Master Lease to Square 74. The Master Lease defined the "Leased Premises" as:

[T]hose portions of the first floor of the Square 74 Garage that are depicted and/or described on Exhibits A-1, attached hereto and incorporated herein by reference, consisting of: (a) Houlihans, which contains 6,239 square feet; (b) Hard Times Café, which contains 2,830 square feet; (c) Steak N Shake, which contains 5,095 square feet; (d) Planet Hollywood, which contains 11,747 square feet; and (e) The Mikado, which contains 4,849 square feet; together with rights and non-exclusive easements in and to: (a) the Common Facilities; (b) those portions of the Square 74 Garage depicted and/or described on Exhibit A-2, attached hereto and incorporated herein for reference, for the maintenance, repair, replacement and cleaning of grease traps; (c) those portions of the Square 74 Garage depicted and/or described in Exhibit A-3 attached hereto and incorporated herein by reference, for the maintenance, repair, and replacement of electrical, plumbing, mechanical, and other equipment and facilities within or exclusively serving the Leased Premises.

Pet'r Ex. 1, Master Lease at 2; see also Pet'r Ex. 1, Extension at 1 (referencing assignment to Square 74).

6. The property record card for each tax parcel assessed to Square 74 contains the description "improvements on leased ground." With the exception of parcel 1102262 (identified as Houlihans under the Master Lease), the original assessments all included

values for land and improvements. On review, the PTABOA increased that parcel's land component from \$0 to \$499,100 for each year. The property record card for the parking garage, which identified the City as the owner and specified that the parcel was exempt, listed \$0 for land value. The legal description described the property as "East ½ Sq. 74 Improvements on Leased Ground to [the restaurant parcels]." *Pet'r Exs. 4, 7-8, 10, 12, 14-15.*

IV. Analysis

A. Summary judgment standard

7. Our procedural rules allow for summary judgment motions made pursuant to the Indiana Rules of Trial Procedure. 52 IAC 2-6-8. 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 Cnty. Prop. Tax Assessment Bd. of Appeals*, 782 N.E.2d 483, 487 (Ind. Tax Ct. 2002). The movant must make a prima facie showing of both those things. *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522, 526 (Ind. Ct. App. 2004). It is not enough for a movant to show an opponent lacks evidence on a necessary element of its claim; instead, the movant must affirmatively negate the opponent's claim. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). If the movant satisfies its burden, the non-movant cannot rest upon its pleadings but instead must designate sufficient evidence to show that a genuine issue exists for trial. *Id.* In deciding whether a genuine issue exists, we must construe all facts and reasonable inferences in favor of the non-movant. *Carey v. Ind. Physical Therapy, Inc.*, 926 N.E.2d 1126, 1128 (Ind. Ct. App. 2010). When any party has moved for summary judgment, we may grant summary judgment for the opposing party on the issues raised in that motion. Ind. Trial Rule 56(B).

B. Square 74 raises valuation claims that require the exercise of subjective judgment to resolve and that could not be properly brought under the correction-of-error statute.

8. We begin with the threshold question of whether Square 74 could properly bring its claims on Form 133 petitions.¹ The Assessor argues that it could not, and we agree
9. For the years at issue in these appeals, a taxpayer had two ways to challenge an assessment: (1) the general appeal procedures laid out under Ind. Code § 6-1.1-15-1, which taxpayers typically used Forms 130 and 131 to prosecute at the local and state levels, respectively, and (2) the correction-of-error process under Ind. Code § 6-1.1-15-12, which taxpayers prosecuted using a Form 133 petition.² The general appeal procedure was only available to challenge a current year's assessment; taxpayers could not use it to challenge assessments from prior years. *Lake County Prop. Tax Assessment Bd. of Appeals v. BP Amoco Corp.*, 820 N.E.2d 1231, 1233 (Ind. 2005). A taxpayer could use the procedure to challenge any aspect of that assessment, but it had to file its appeal within tight deadlines. *See* I.C. § 6-1.1-15-1(c) and (d) (2010 repl. vol.).
10. The correction-of-error process did not have the same restrictive filing deadlines, but the types of errors that could be corrected were much narrower. The correction-of-error statute identified only eight categories of errors that could be addressed. Those categories included that “the assessment was against the wrong person,” that the “taxes, as a matter of law, were illegal,” and that there was a mathematical error in computing the assessment. I.C. § 6-1.1-15-12(a)(2), (6)-(7) (2008 supp.).
11. In interpreting the correction-of-error statute, particularly the ground that there was a mathematical error in computing an assessment, the Tax Court has repeatedly held that the correction-of-error process could “remedy only errors which can be corrected without resort to subjective judgment and according to objective standards.” *Muir Woods, Inc. v. O'Connor*, 36 N.E.3d. 1208, 1213 (Ind. Tax Ct. 2015) (quoting *Hatcher v. State Bd. of*

¹ In its briefing, Square 74 addressed its standing to file these appeals, apparently in response to arguments the Assessor made below. Because the Assessor has not contested Square 74's standing in any of the materials he filed with us, we do not address that issue.

² The legislature repealed Ind. Code § 6-1.1-15-1 and § 6-1.1-15-12 in 2017. 2017 Ind. Acts 232 §§ 9, 17.

Tax Comm'rs, 561 N.E.2d 852, 857 (Ind. Tax Ct. 1990)). Valuation questions require subjective judgment to resolve. *See id.* at 1213 (*quoting Wirth v. State Bd. of Tax Comm'rs*, 613 N.E.2d 874, 878 (Ind. Tax Ct. 1993); *see also, Town of St. John, et al. v. State Bd. of Tax Comm'rs*, 698 N.E.2d 399, 400 (Ind. Tax Ct. 1998) (“[A] calculation of the effect of real world evidence on an individual assessment will typically require subjective judgment The court does not foresee any opportunity to apply real world evidence retroactively by using the Form 133 process.”).

12. Perhaps recognizing that limitation, Square 74 now points to two other categories under the correction-of-error statute, arguing that its taxes, as a matter of law, were illegal and that the assessment was against the wrong person.³ *See Petitioner’s Memorandum in Support of Motion for Summary Judgment at 11-14; Petitioner’s Reply in Support of Motion for Summary Judgment and Response in Opposition of Assessor’s Motion to Dismiss at 7-8.* It grounds both claims on its assertion that it did not lease land from the City, yet its assessments all included land values. In making those claims, Square 74 simply attempts to re-package what is really a valuation challenge as something else.

13. Land and improvements owned by the City are exempt from taxation. *See I.C. § 6-1.1-10-4* (property owned by a political subdivision is exempt) *and § I.C. 6-1.1-1-13* (defining “political subdivision” to include a city or county). Where a private entity leases property from the government for private use, however, that entity’s leasehold interest is taxable:

If real property that is exempt from taxation is leased to another whose property is not exempt and the leasing of the real property does not make it taxable, the leasehold estate and the appurtenances to the leasehold estate shall be assessed and taxed as if they were real property owned by the lessee or his assignee.

I.C. § 6-1.1-10-37(b).

³ We assume, without deciding, that Square 74 could bring a claim under subdivision (a)(2)—that the assessment was against the wrong person—before us. For errors listed under subdivisions (a)(6)-(8), the correction-of-error statute contemplated review by the county PTABOA and the Board if two of three local officials (the county auditor, county assessor, and township assessor (if any)) did not approve the correction. But the statute did not specify what, if any, review was available where the county auditor failed to make a correction under subdivision (a)(2).

14. This statute prevents non-exempt entities from gaining tax benefits afforded to exempt property owners. *Sangralea Boys Fund v. State Bd. of Tax Comm'rs*, 686 N.E.2d 954, 958 (Ind. Tax Ct. 1997). But it does not make the property itself taxable; it instead provides for taxing the lessee's possessory interest. Courts in other states with nearly identical statutes have explained the distinction between valuing the property itself as opposed to a leasehold estate. In *People ex rel. Korzen v. American Airlines, Inc.*, the Illinois Supreme Court noted that the tax being appealed by lessee of an airport hangar owned by the City of Chicago "was not levied on the demised premises, which are owned by the City, but on the leasehold estate, which is the property of the lessee, American." *People ex rel. Korzen v. American Airlines, Inc.*, 233 N.E.2d 568, 570 (Ill. 1967). The New Jersey Tax Court emphasized the same point in *Gourmet Dining, LLC v. Union Twp.* explaining that, when an exempt entity leases its property to a non-exempt entity "the real estate does not become taxable; rather, it is the leasehold interest that is subject to taxation." *Gourmet Dining, LLC v. Union Twp.* 30 N.J. Tax 381, 420 (N.J. Tax Ct. 2018).
15. Square 74 claims that the Master Lease gave it no possessory interest in the land underneath the restaurant spaces largely because the description of the leased premises does not refer to land. We have serious doubts that leasing ground floor space in a structure carries with it no interest in the underlying land, particularly where the lease does not plainly say so.
16. We need not decide that question, however. Even if we assume Square 74 had no interest in the land under the restaurants, it does not follow that Square 74 was assessed for another taxpayer's property. The fact that the assessments were broken down into components for land and improvements is beside the point. By statute, the interest being assessed was Square 74's possessory interest, not the land or improvements themselves or fee ownership in them. If Square 74 is right and the Assessor and PTABOA improperly considered the underlying land in determining Square 74's assessments, that error simply goes to whether they correctly valued the leasehold. As with other valuation

issues, Square 74 needed to raise that claim, in the first instance, through the general appeal procedure.⁴

17. The Indiana Supreme Court has previously rejected similar attempts to bypass the general appeal procedure (and its accompanying strict time limitations) when challenging an assessment. In *BP Amoco*, the taxpayer had timely challenged its 1999 assessment through the general appeal process, but had also filed Form 133 petitions challenging its assessments for previous years on grounds that its taxes, as a matter of law, were illegal. *BP Amoco*, 820 N.E.2d at 1232. The Court reviewed the differences between the general-appeal and correction-of-error procedures. Based on a regulation promulgated by the now-defunct State Board of Tax Commissioners, the Court found that a taxpayer had to challenge the legality of an assessment through the general appeal procedure, and that the correction-of-error process was simply a vehicle for correcting the assessment once its illegality was determined:

We think it apparent from the language and structure of Regulation 3-12 that appeals could not be made on Form 133 to challenge a “procedure or method used in determining [an] assessment” on grounds that the taxes were illegal as a matter of law. Such challenges to “the methodology used in generating an assessment” were required to utilize the “appeal provisions for that purpose” (i.e., Form 130). Said differently, if the Tax Court had decided a challenge on Form 130 to “a procedure or method used in determining [an] assessment...in favor of [the] taxpayer,” that would have constituted a declaration that the taxes were illegal as a matter of law, and then the challenging taxpayer (and certain other taxpayers) would have been entitled to use Form 133 to have their assessments corrected and Form 17T to obtain refunds.

...

In short, appeals challenging the legality of assessments were required to be made on Form 130. Assessments determined to be illegal could be corrected (and refunds obtained) using Form 133.

⁴ Dividing assessments into values for land and improvements is a function of how most assessments are initially determined—through a mass-appraisal version of the cost approach. *See generally*, 2011 REAL PROPERTY ASSESSMENT GUIDELINES. Even if a lessee has a possessory interest in both land and improvements, it does not necessarily follow that the cost approach is an appropriate method for valuing its leasehold estate. We need not decide that question, however, because it goes to valuation.

Id. at 1236 (internal citations omitted); *see also, Lake County Property Tax Assessment Bd. of Appeals v. U.S. Steel Corp.*, 820 N.E.2d 1237, 1240 (Ind. 2005) (holding that the “legislative and regulatory scheme required [the taxpayer] to set forth in its contentions that local property tax officials had illegally reduced the aggregate assessed valuation in the relevant jurisdiction on Form 130, subject to the time limitations and other requirements of Indiana Code Section 6-1.1-15-1 and Indiana Administrative Code Title 50 Section 4.2-3-4.”).

18. Both *BP Amoco* and *U.S. Steel* rely heavily on an administrative regulation that, while effective for the assessment years at issue in those cases, had been repealed by the time the Court issued its decisions. Nonetheless, the Court explained, “we do not discern anything in current law that is inconsistent [with the repealed provision] or the interpretation we give it today.” *BP Amoco*, 820 N.E.2d at 1234. The *U.S. Steel* Court also noted that the “legislative and regulatory scheme” required taxpayers to use the general appeal process when challenging the legality of the officials’ actions. *U.S. Steel*, 820 N.E.2d at 1239. Because the legislative scheme referenced in *U.S. Steel* largely remained intact through the times relevant to this case, and the repealed regulation is consistent with that law, we are bound by the Supreme Court’s holdings in *BP Amoco* and *U.S. Steel*.
19. Square 74 has not shown that it is entitled to judgment as a matter of law. To the contrary, because Square 74 did not raise claims for which relief could be granted under the correction-of-error process, the Assessor is entitled to have those petitions dismissed as a matter of law.

V. Final Determination

20. There is no genuine issue of material fact in this case. Despite how it now couches its claims, Square 74 challenged how its leasehold estate was valued. That is a subjective determination that could not be appealed using a Form 133 petition. We deny Square

74's request for summary judgment and grant summary judgment in the Assessor's favor.
There is no just reason for delay and we enter our final determination for the Assessor.

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

Chairman, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

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 within forty-five (45) days of 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 Rules are available at <<http://www.in.gov/judiciary/rules/tax/index.html>>.

ATTACHMENT

Petition Number	Petitioner Name	Key/Parcel Number
49-101-08-3-4-00912-16	Square 74 Associates LLC	(1102263) 49-11-11-184-039.005-101
49-101-09-3-4-00913-16	Square 74 Associates LLC	(1102263) 49-11-11-184-039.005-101
49-101-10-3-4-00914-16	Square 74 Associates LLC	(1102263) 49-11-11-184-039.005-101
49-101-11-3-4-00915-16	Square 74 Associates LLC	(1102263) 49-11-11-184-039.005-101
49-101-08-3-4-00916-16	Square 74 Associates LLC	(1102261) 49-11-11-184-039.001-101
49-101-09-3-4-00917-16	Square 74 Associates LLC	(1102261) 49-11-11-184-039.001-101
49-101-08-3-4-00918-16	Square 74 Associates LLC	(1102262) 49-11-11-184-039.002-101
49-101-10-3-4-00919-16	Square 74 Associates LLC	(1102261) 49-11-11-184-039.001-101
49-101-09-3-4-00920-16	Square 74 Associates LLC	(1102262) 49-11-11-184-039.002-101
49-101-11-3-4-00921-16	Square 74 Associates LLC	(1102261) 49-11-11-184-039.001-101
49-101-10-3-4-00922-16	Square 74 Associates LLC	(1102262) 49-11-11-184-039.002-101
49-101-08-3-4-00923-16	Square 74 Associates LLC	(1102588) 49-11-11-184-039.004-101
49-101-11-3-4-00924-16	Square 74 Associates LLC	(1102262) 49-11-11-184-039.002-101
49-101-09-3-4-00925-16	Square 74 Associates LLC	(1102588) 49-11-11-184-039.004-101
49-101-11-3-4-00926-16	Square 74 Associates LLC	(1102588) 49-11-11-184-039.004-101
49-101-10-3-4-00927-16	Square 74 Associates LLC	(1102588) 49-11-11-184-039.004-101
49-101-11-3-4-00928-16	Square 74 Associates LLC	(1102587) 49-11-11-184-039.003-101
49-101-10-3-4-00929-16	Square 74 Associates LLC	(1102587) 49-11-11-184-039.003-101
49-101-09-3-4-00930-16	Square 74 Associates LLC	(1102587) 49-11-11-184-039.003-101
49-101-08-3-4-00931-16	Square 74 Associates LLC	(1102587) 49-11-11-184-039.003-101