COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP768 **Cir. Ct. No. 2010CV1395**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

KOHL'S DEPARTMENT STORES, INC. AND KOHL'S VALUE SERVICES, INC.,

PLAINTIFFS-APPELLANTS,

V.

CITY OF NEENAH,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Kohl's Department Stores, Inc., appeals from a judgment denying its claim to recover excess taxes paid to the City of Neenah after the trial court determined that Kohl's failed to overcome the statutory

presumption in favor of the City's assessment. Kohl's argues that the City's assessment was not entitled to receive the presumption of correctness because: (1) the City abandoned its assessment by failing to call the assessor as a witness at trial; and (2) the City rejected its assessment by calling an expert witness that appraised the property at a higher value. In the alternative, Kohl's argues that it rebutted the presumption in favor of the City's assessment through the testimony of its own expert witness. We conclude that the City was not required to call the assessor at trial and that its assessment was entitled to a presumption of correctness. We also uphold the trial court's findings of fact and conclude that Kohl's failed to offer sufficient credible evidence to overcome the statutory presumption.

¶2 Kohl's leases and operates a department store in the City of Neenah. For the tax year 2009, the City assessed the property at $7,538,000 and Kohl's filed an objection. At an open book review, the City assessor reduced the amount to $6,992,400. In 2010, the property was again assessed at $6,992,400. Kohl's appealed to the City board of review and the board sustained both years' assessments. After timely paying its taxes, Kohl's filed a claim for excessive assessment in the trial court, seeking a refund of the alleged overpayment. *See* WIS. STAT. § 74.37. [1]

¶3 At the court trial, Kohl's called appraiser S. Steven Vitale as an expert witness. Vitale testified that the property had a value of $5,210,000 in 2009, and $4,950,000 in 2010. The City introduced exhibits from the board's

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

review hearing, including the original assessment, the assessor's methodology and calculations, and the open book review notes. The City also presented portions of the Wisconsin Property Assessment Manual for Wisconsin Assessors and called its own expert, appraiser Daniel R. Furdek, who testified that the property had a value of $7,800,000 in 2009, and $7,900,000 in 2010.

¶4 The trial court concluded that Vitale's appraisal was unpersuasive and explained its reasons for rejecting each of Vitale's three valuation analyses. The court found that Vitale's cost approach factored in an economic obsolescence percentage that was "very difficult to believe," that his sales approach considered incomparable properties, and that his income approach involved incomplete accounting and square footage numbers that were "way off." Based on these findings, the trial court concluded that Kohl's had failed to rebut the statutory presumption in favor of the City's $6,992,400 assessment.[2]

¶5 For taxation purposes, real property is to be valued by the assessor "in the manner specified in the Wisconsin property assessment manual." *See* WIS. STAT. § 70.32(1). The assessor's value is "presumptive evidence" of an equitable and correct assessment. *See* WIS. STAT. § 70.49(2); ***Bloomer Hous. Ltd. P'ship v. City of Bloomer***, 2002 WI App 252, ¶11, 257 Wis. 2d 883, 653 N.W.2d 309. A dissatisfied party may appeal the board's determination by bringing an excessive tax assessment claim in the trial court under WIS. STAT. § 74.37(3)(d). The trial

[2] The appellant's appendix purports to include the transcript of the trial court's oral decision which was incorporated by reference in and attached to its written final order. However, the appendix omits the final four pages of that transcript. The omitted pages contain the trial court's findings concerning Vitale's testimony and its ultimate conclusion that Kohl's failed to overcome the statutory presumption of correctness. We expect that future appellant's briefs will fully comply with the requirements of WIS. STAT. RULE 809.19(2)(a).

court independently reviews the excessive tax claim and may hear new evidence not considered by the board. ***Nankin v. Village of Shorewood***, 2001 WI 92, ¶25, 245 Wis. 2d 86, 630 N.W.2d 141. However, the trial court is required to give presumptive weight to the City's assessment. ***Adams Outdoor Adver., Ltd. v. City of Madison***, 2006 WI 104, ¶25, 294 Wis. 2d 441, 717 N.W.2d 803. The taxpayer has the burden to present "significant contrary evidence" in order to overcome the presumption. ***Bloomer Hous***, 257 Wis. 2d 883, ¶11.

¶6 On appeal, the trial court's findings of fact will not be overturned unless clearly erroneous. ***Id.***, ¶12. Where there is conflicting testimony, the weight and credibility afforded the opinions of expert witnesses is a determination for the trial court. ***Id.*** The reviewing court must also give presumptive weight to the City's assessment. ***Adams***, 294 Wis. 2d 441, ¶25.

¶7 The trial court denied Kohl's refund request because it rejected the opinion of its expert witness and concluded that Kohl's failed to rebut the City's presumptively correct assessment. On appeal, Kohl's does not contend that the trial court's factual findings were clearly erroneous. Rather, Kohl's attempts to persuade us that the well-established statutory presumption favoring the City's assessment should not apply in this case. To this end, Kohl's first contends that the City was required to present the assessor's testimony at trial and that by failing to do so, the City "abandoned the presumption."

¶8 We reject Kohl's argument that because the assessor did not testify at the court trial, "no evidence was introduced by Neenah in support of the Assessments." First, the City presented the board's record which included documentation of the assessor's valuation using the cost approach, income approach, and sales comparison approach. The City's assessment and supporting

documentation were entered into evidence without objection.[3] Additionally, Kohl's stipulated on the record to the amount of the City's assessment.[4]

¶9 Second, Kohl's has not provided any authority for the proposition that the assessor must testify at trial before the statutory presumption can be applied.[5] The City, on the other hand, points us to ***State ex rel. North Shore Development Co. v. Axtell***, 216 Wis. 153, 157, 256 N.W. 622 (1934), where the court stated that given the presumptively correct nature of the assessor's value, the taxing authority need not introduce its own testimony in order to prevail at a board of review hearing. In fact, even in the absence of the assessor's testimony, unrebutted evidence offered by the taxpayer's witnesses might be construed to support the City's assessment. ***Id.*** The statutory scheme directs the assessor's presence only at hearings before the board, and his or her testimony only upon inquiry. *See* WIS. STAT. § 70.48; *Cf.* ***State ex rel. Gregersen v. Board of Review***, 5 Wis. 2d 28, 92 N.W.2d 236 (1958) (subject to reasonable regulation, the taxpayer has the right to call and to cross-examine the assessor at a board of review hearing, even where the board has not offered the assessor's testimony). It

[3] In contrast, Kohl's successfully objected to the admission of a separate private appraisal by Harry Nicholson on the ground that Nicholson was not present at trial. The City offered the assessor's documents and the Nicholson appraisal simultaneously as part of a single exhibit, and there was extensive discussion on the record concerning the exhibit's admissibility. Despite the opportunity, Kohl's explicitly asserted that the Nicholson appraisal was "the only part of the exhibit" to which it objected.

[4] In reliance, after the stipulation, the City confirmed that it would not call the assessor as a witness.

[5] The case cited by Kohl's, ***Carr v. Amusement, Inc.***, 47 Wis. 2d 368, 177 N.W.2d 388 (1970), is simply inapt. ***Carr*** states that "the failure of a party to call a material witness … whom it would be more natural for such party to call than the opposing party," ***id***. at 375 (citation omitted), may, within the trial court's discretion, support a jury instruction permitting a persuasive inference against such party.

was Kohl's burden to prove that the City's assessment was improper or incorrect, and the City was not required to call the assessor as a witness.

¶10 Further, we reject Kohl's contention that because the City introduced Furdek's testimony appraising the property at a higher value, the City somehow "rejected" its own assessment and the statutory presumption of correctness. Furdek's appraisal was higher than the City's assessment and did not criticize the assessor's analysis. Furdek's testimony supported the City's claim that its assessment was not excessive and rebutted Vitale's opinion that the assessor overvalued the property.

¶11 Finally, we conclude that Kohl's did not carry its burden to prove that the City's assessment was excessive. The trial court weighed the evidence and the competing expert opinions and found that Vitale's appraisal was not credible. The trial court's findings were not clearly erroneous. Additionally, Vitale did not directly attack the City assessor's methodology or adherence to protocol, but instead offered an alternative approach resulting in a lower appraisal. The use by both trial experts of the valuation approaches employed by the City's assessor supported the presumptive correctness of the City's assessment. Kohl's evidence was insufficient to "compel the conclusion that the assessor's valuation was incorrect[,]" ***Xerox Corp. v. DOR***, 114 Wis. 2d 522, 528, 339 N.W.2d 357 (Ct. App. 1983), and therefore Kohl's failed to rebut the statutory presumption in favor of the City.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.