

MEMORANDUM DECISION

Supreme Court, Nassau County, IAS Part 4

In the Matter of:
NASSAU CANDY DISTRIBUTORS, INC.

HON. STEPHEN A. BUCARIA, J.S.C.

INDEX NO. 400265/06

Petitioner,

-against-

THE BOARD OF ASSESSORS AND/OR THE
ASSESSOR OF THE COUNTY OF NASSAU,

Respondents.

DECISION AFTER TRIAL

This matter was tried before this Court on May 8th and 9th, 2008.

Real property assessments are presumed valid, making it the Petitioner's burden to establish that the property is over-assessed (Barnum v Srogi, 54 NY2d 896, 444 NYS2d 914, 1981). This presumption, however, disappears once the taxpayer presents sufficient evidence to make out a **prima facie** case that the assessment is erroneous. Thereafter, the presumption is not evidence in the case and may not be considered in weighing the evidence. (Broadway-Saranac Lake Corp. v Board of Assessors of Saranac Lake, 43 AD2d 649, 349 NYS2d 830, 3rd Dept., 1973).

The presumption of validity can be overcome by substantial evidence that the property has been overvalued (New Cobleskill Associates L.P. v Assessor, Town of Cobleskill, 280 AD2d 745, 720 NYS2d 231, 3rd Dept., 2001, appeal denied, 96 NY2d 715, 754, NE2d 771, 729 NYS2d 668, 2001), with substantial evidence deemed, "a minimal standard. . .[which] requires less than clear and convincing evidence. . .and less than proof by a preponderance of the evidence, overwhelming evidence, or evidence beyond a reasonable doubt" (720 NYS3d at 234 citing Matter of FMC Corp. v Unmack, 92 NY2d 179, 188, 677 NYS2d 269, 1998).

The evidence generally supplied by a Petitioner to overcome the validity of the assessment is a competent appraisal. (FMC Corp. v Unmack, supra, on remand, 254 AD2d 683, 678 NYS2d 426, on remand, 254 NYS2d 684, 678 NYS2d 839, on remand 254 AD2d 686, 680 NYS2d 992, 1998). Once the presumption of validity is overcome, the case becomes one of proof, and Petitioner must establish, by a preponderance of evidence, that the subject property has been erroneously assessed.

“Furthermore, while it is true that the trier of facts is not bound by even uncontradicted opinion testimony, its findings must be based on the evidence presented and not be the product of purely subjective judgment”. (Blue Hill Plaza Associates v Assessors, Town of Orangetown, 230 AD2d 846, 646 NYS2d 836, 2nd Dept., 1996, leave to appeal denied, 89 NY2d 804, 1996).

Any motions heretofore undecided by this Court are hereby **denied**.

Upon the completion of the Petitioner’s case, the County rested and offered no evidence whatsoever at the trial.

BACKGROUND

Nassau Candy, is the net lessee and responsible for all real estate taxes with respect to the real property described on the County Land and Tax Map of Nassau County as Section 11 Block 499, Lots 87, 97, and 98 located at 500, 520 and 530 West John Street, Hicksville, New York (“Subject Property”).

The subject property is improved with three industrial/warehouse buildings which sit on three tax lots. The first parcel, 500 West John Street (Lot 87), is improved with a one and part two-story 26,670 square foot industrial/warehouse building with a loading dock located on the east end of the subject property and sits on a 67,518 square foot parcel. The remainder of the parcel is designated for on-site parking.

The second parcel, 520 West John Street (Lot 98) is improved with a one-story 64,954 square foot industrial/warehouse building and is situated in the middle of the subject property.

The third parcel, 530 West John Street (Lot 97) is improved with a one-story 51,731 square foot industrial/warehouse building and sits on a 91,912 square foot parcel on the west end of the subject property.

During the tax years under review, 2005/06, 2006/07 and 2007/08, and at the present time, two of the three buildings were physically attached, (520 and 530 West John Street) and the third building is connected to the other two with an enclosed walkway (500 West John Street). In addition, the buildings, for each tax year, were and currently are occupied by Petitioner, Nassau Candy, and used in Nassau Candy’s candy making operations and for storage. Two of the three buildings, 520 and 530 West John Street (Lots 98 and 97) have been valued by Nassau Candy in this tax review proceeding as a single economic unit because they are physically attached with openings in the walls to allow free passage between both buildings. The third building, 500 West John Street, (Lot 87) has been separately valued, even though it is connected to 520 West John Street by a covered walkway, it could function as a separate building on each of the tax status dates under review.

Nassau Candy has duly commenced tax review proceedings against the Respondents Nassau County Board of Assessors and Assessment Review Commission (“County”) for the taxable status dates January 2, 2004, January 2, 2005 and January 2, 2006 (Tax Years 2005/06-2007/08).

The parties have stipulated to the assessed value of each of the protested parcels for all years under review as follows:

<u>Tax Year</u>	<u>Lot 87</u>	<u>Lot 97</u>	<u>Lot 98</u>
2005/06	\$14,326	\$33,730	\$31,438
2006/07	\$16,390	\$39,526	\$36,361
2007/08	\$18,191	\$42,646	\$41,401

The parties have also stipulated to the following ratios to be utilized in these proceedings for each tax status date as follows:

<u>Tax Status Date</u>	<u>Tax Year</u>	<u>Ratio</u>
1/1/04	2005/06	.0935
1/1/05	2006/07	.0935
1/1/06	2007/08	.0965

Once petitioner has offered “substantial evidence”, the presumption is overcome and disappears. At that point, when the substantial evidence burden has been met, the petitioner’s burden of proof to establish its claims is measured against the more traditional standard that of a “preponderance of the evidence” (see, **FMC Corp. v Unmack**, *supra*, at 191). Here, the report and testimony of petitioner’s expert provided sufficient evidence to overcome the “presumption of validity”, in that such proof represents evidence of a valid and credible dispute regarding valuation.

This Court finds that Nassau Candy has not only overcome the presumption and the correctness of the assessment, it has proved, by a preponderance of the evidence, that its property has been over assessed for each tax year.

Before discussing the merits of petitioner’s arguments with respect to value, another issue merits discussion. It became clear that the respondents had retained their own expert to prepare an appraisal of the subject property. As indicated, counsel for respondent rested at the conclusion of petitioner’s case without offering evidence. The failure to call their expert, without explanation, has given rise to the strongest of inferences that such expert would not have contradicted the testimony and opinions of petitioner’s expert (see, **Nassau County Dept. Of Social Services v Denise**, J, 87 NY2d 73, 637 NYS2d 666, 1995; **Crowder v Wells & Wells Equipment**, 11 AD3d 360, 783 NYS2d 552, 1st Dept., 2004; **Noce v Kaufman**, 2 NY2 347, 1956; **Laffin v Ryan**, 4 AD2 21 3D Dept., 1957; PJ1.1.75).

Given the fact that this Court has considered the petitioner's expert's report and testimony as sufficient to meet the "substantial evidence" standard, I need not consider whether such inference is properly considered in connection therewith and have limited the inference's possible applicability to whether petitioner has established its claim by a "preponderance of the evidence".

The Court so finds.

In a tax review proceeding entitled **Blumberg v Sherman** (185 Misc.2d 402, 407, 2000) decided at Supreme Court, Essex County, where the Town of Westport offered no appraisal evidence at trial, the court, in reducing petitioner's assessments observed:

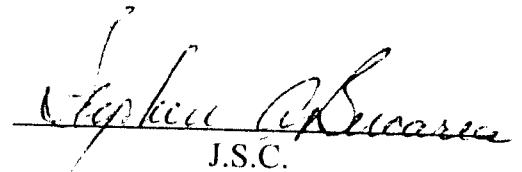
That conclusion forces the inquiry of whether the petitioner's satisfaction of this initial burden entitles him to recover absent proof by the respondents to support their assessment. In *Matter of Gullo v Semon* (265 AD2d 656 [3d Dept. 1999], supra), the appellate Court had occasion to review a trial court's decision on a very similar procedural footing as the matter before this court. In *Gullo*, the trial court denied respondent's motion to strike the petitioner's appraisal and denied respondent's motion to dismiss the petition for failure to demonstrate substantial evidence. As in this case, these motions were made at the close of petitioner's case. The respondent rested after their motions were denied. Thereafter, the trial court reduced the assessments. The Appellate Division, not citing *FMC* (supra) which was decided six days earlier, wrote that:

"[b]ased upon our review of the record, we are satisfied that petitioner presented sufficient evidence to establish a prima facie case that the assessment was erroneous and, therefore, overcame the presumption of validity". (Id., at 657). But "sufficient evidence" or the establishment of a "prima facie" case alone does not equal a preponderance of the evidence since the former terms only pertain, or should only pertain, to the petitioner's initial burden. Nonetheless, where a respondent fails to present any proof in the face of that burden being met by a petitioner, the petitioner wins. (Id.) Here, therefore, the court

finds that since the petitioner met his prima facie burden of establishing overvaluation of the assessments and there being no evidence to support the assessments, the petitions are granted and the assessments are reduced". (emphasis supplied)

This constitutes the decision and Judgment of the Court. Settle Judgment on notice.

Dated JUL 28 2008


J.S.C.