

REPRESENTATIVE FOR PETITIONER:

Michael A. Sarapata, Attorney

REPRESENTATIVE FOR RESPONDENT:

Christopher Ward, Local Government Representative

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

SMITH ASSET HOLDINGS, LLC,)	Petition No.: 18-014-17-1-3-00663-18
)	
Petitioner,)	
)	
v.)	Parcel No.: 18-10-06-300-003.000-014
)	
DELAWARE COUNTY)	County: Delaware
ASSESSOR,)	
)	
Respondent.)	Assessment Year: 2017

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

May 22, 2019

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:

INTRODUCTION

1. Smith Asset Holdings, LLC (“Smith Holdings”) contested its 2017 assessment. While Smith Holdings offered income and sales-comparison approaches, it failed to provide enough support for its value conclusions under either approach to make a prima facie case for a reduction. We therefore find for the Assessor.

PROCEDURAL HISTORY

2. Smith Holdings contested the 2017 assessment of its distribution facility located at 2301 North Priority Way in Yorktown. On April 16, 2018, the Delaware County Property Tax Assessment Board of Appeals (“PTABOA”) issued a determination assessing the property at \$13,128,200 (\$1,263,400 for land and \$11,864,800 for improvements). Smith Holdings then filed a Form 131 Petition with the Board.
3. On February 26, 2019, our designated administrative law judge, Joseph Stanford (“ALJ”), held a hearing on the petition. Neither he nor the Board inspected the subject property.
4. Smith Holdings appeared by attorney Michael A. Sarapata.¹ The Assessor appeared by local government representatives Christopher Ward and Charles Ward² of PSC Associates, LLC. The Wards and Ryan J. Gibbs³ were sworn and testified.
5. Smith Holdings offered the following exhibits:

Petitioner Exhibit 1:	Income approach; lease-up costs; lease comparable summary
Petitioner Exhibit 2:	Comparable sales
Petitioner Exhibit 3:	Letter from George Early dated July 3, 2017; photographs
6. The Assessor did not offer any exhibits.

¹ While Sarapata did not file a formal notice of appearance with us, he submitted a Power of Attorney executed by Smith Holdings listing him as its authorized representative.

² Charles testified that he submitted documentation showing he is a local government representative for the Assessor, but the Notice of County Assessor Representation form signed by the Assessor only lists Christopher. Because Charles is a certified tax representative and we have little doubt that he was authorized to represent the Assessor, we will treat him as a representative for purposes of this determination. However, we remind Charles to comply with our rules in the future.

³ Although Gibbs is an attorney admitted to practice law in Ohio, he is not admitted in Indiana and appeared solely as a witness for Smith Holdings.

7. The record also includes the following: (1) all pleadings, motions, briefs, and documents filed in these appeals; (2) all orders and notices issued by the Board or our ALJ; and (3) an audio recording of the hearing.

OBJECTIONS

8. The Assessor objected to Gibbs' testimony because he is not licensed to practice law or serve as a tax representative in Indiana. Additionally, the Assessor objected to all of Smith Holdings' evidence because it failed to provide a witness and exhibit list at least 15 days before the hearing. The Assessor further argued that we should limit Smith Holdings' evidence and argument to what it listed on its Form 130 and presented at the PTABOA hearing. Our ALJ took the objections under advisement.
9. We overrule the Assessor's general objection to Gibbs' testimony. Gibbs' role in this hearing was not as Smith Holdings' attorney or tax representative, but as a witness. While a few of his arguments may have approached the line into practicing law, the fact that Gibbs is not licensed to practice law or serve as a tax representative in Indiana does not disqualify him from testifying.
10. The Assessor also objected to all of Smith Holdings' exhibits because it failed to provide a witness and exhibit list at least 15 days before the hearing. Our procedural rules require each party to provide all other parties a list of the witnesses and exhibits it intends to offer at least 15 days before a hearing and copies of its documentary evidence at least five business days before a hearing. 52 IAC 2-7-1(b)(2). This requirement allows parties to be better informed and to avoid surprises. It also promotes an organized, efficient, and fair consideration of the issues. The Board may exclude evidence based on a party's failure to comply with the exchange rule where it appears that admitting the exhibit would prejudice the opposing party. *See* 52 IAC 2-7-1(f).
11. We overrule the Assessor's objection. Smith Holdings failed to timely provide the Assessor with a witness and exhibit list, but it did provide the list before the hearing.

And Smith Holdings exchanged the actual exhibits well before the deadline to do so. Those circumstances weigh against a finding of prejudice. The Assessor's argument that he did not know whether there would be a hearing is specious at best. Smith Holdings exchanged its documentary evidence and made no representation it was withdrawing its petition.

12. The Assessor also argued that Smith Holdings' evidence and "scope of the argument" should be limited to what it listed on its Form 130 and presented at the PTABOA hearing. We assume the Assessor was referring to 52 IAC 2-5-3. However, that procedural rule states that "[t]he board may *not* limit the scope of the issues raised in the appeal petition to those presented to the PTABOA unless all parties agree to the limitation of issues." (emphasis added). And there is no indication that the parties entered into such a limitation agreement in this case. Further, our procedural rules specifically allow parties to offer evidence without regard to whether that evidence was introduced at a PTABOA hearing. *See* 52 IAC 2-7-1(a). Indeed, if parties were so limited, there would be no need for pre-hearing evidence exchange rules, as parties would have already seen all of the evidence. In any event, Smith Holdings is simply challenging the assessment of its property, just as it did at the PTABOA hearing. We therefore overrule the objection.
13. For its part, Smith Holdings objected to the Charles Ward's testimony on behalf of the Assessor because the Assessor failed to provide a witness and exhibit list. We overrule the objection. According to the Form 115, Charles Ward represented and testified on behalf of the Assessor at the PTABOA hearing, so it should have come as no surprise that he would represent or testify on behalf of the Assessor here. And Smith Holdings did not even attempt to explain how it would be prejudiced by the admission of his testimony.
14. Our rulings here should not be construed as excusing the parties' actions. Both parties missed the exchange rule's clear deadline, and neither offered a reasonable excuse for doing so. Had either party shown any real prejudice, our rulings likely would have been different. But based on these facts, we will not exercise the extreme sanction of

excluding either parties' evidence or testimony. Further, we advise the Wards, who are not attorneys, that tax representatives are prohibited from engaging in the practice of law. *See* 52 IAC 1-2-1(b)(4). Objecting to evidence on legal grounds comes close to crossing the line into the practice of law.

SUMMARY OF SMITH HOLDINGS' CASE

15. The subject property's assessment is too high. In Indiana, the only legal interest that can be valued is the fee-simple interest. Fee simple is an unencumbered interest, which means it is the value of the property with no lease in place. The subject property does not actually have a lease. The property is used as a Sav-A-Lot distribution center, and Smith Holdings is related to Sav-A-Lot. Thus, the property is essentially owner-occupied. *Gibbs testimony.*
16. Smith Holdings developed a report that contains two approaches to value, the income approach and the sales-comparison approach. The report was prepared by Chris Bischof, a former employee of the Altus Group and former tax representative for Smith Holdings in this matter. *Gibbs testimony; Pet'r Exs. 1-3.*
17. For the income approach, Gibbs explained that the potential gross income of \$1,002,840 was calculated by multiplying the building's square footage of 334,280 (which included the mezzanine) by \$3 per square foot. That square footage rate is the average of the 20 lease comps listed in the report. While some rates listed are effective leases, most are asking prices, and all of the leases are triple-net. The effective dates of the leases ranged from 2015 to 2018. *Gibbs testimony; Pet'r Ex. 1.*
18. Next, a 10% vacancy rate was projected, which is "typical for any industrial warehouse market." The resulting amount, \$100,284, was deducted from potential gross income, for an effective gross income of \$902,556. *Gibbs testimony; Pet'r Ex. 1.*

19. Expenses were estimated to be 10% of effective gross income, or \$90,256. According to Gibbs, management fees, repairs, and items that cannot be passed on to a tenant were considered in this amount. No amount was deducted for reserves for replacement. Thus, a net operating income of \$812,300 was computed. From there, a capitalization rate of 8.5% was applied, resulting in a stabilized value of \$9,556,475 for the building. *Gibbs testimony; Pet'r Ex. 1.*

20. Finally, the stabilized value is converted from a market-rent basis to a fee-simple, unencumbered value. This is accomplished by deducting lease-up costs and deferred maintenance. Essentially, the calculation assumes the lease-up to have occurred over two years. It accounts for the rent lost during the time to find a tenant, commissions paid, and tenant improvements, which are estimated at \$2 per square foot. The lease term is assumed to be five years. The total amount calculated for lease-up costs, \$1,680,099, was deducted from the stabilized value, resulting in a market value via the income approach of \$7,876,000. *Gibbs testimony; Pet'r Ex. 1.*

21. Smith Holdings also presented a sales-comparison approach using 26 sales comps that sold from 2015 to 2017 for an average price of \$30/SF. Multiplying that rate by 334,280 square feet results in a value of \$10,028,400. Next, because all of those sales were leased-fee sales, the same \$1,680,099 adjustment for lease-up costs was made. The resulting value for the sales approach is \$8,348,000. *Gibbs testimony; Pet'r Ex. 2.*

22. According to Gibbs, based on an engineering report, the building suffers from \$365,000 of deferred maintenance. Yet, the Assessor has allowed only 3% abnormal obsolescence. Further, the property would need to generate \$303,000 more income to support the current assessment, which Gibbs referred to as an "NOI shortfall." And the property, a distribution facility, would not be as valuable to another retailer unless that retailer had substantially similar store locations to Sav-A-Lot. *Gibbs testimony.*

23. Based on the income and sales-comparison approaches, Smith Holdings requested an assessment of \$8 million for 2017. *Gibbs testimony; Pet'r Ex. 3.*

SUMMARY OF THE ASSESSOR'S CASE

24. While Gibbs kept referring to fee-simple, the standard in Indiana is market value-in-use. The standard is not what the property would sell for tomorrow, but the value based on the use of the current tenant or owner. *Charles Ward testimony.*
25. The Assessor is confused as to why Smith Holdings would offer comparable leases to prove the value of a property where a lease does not exist. Smith Holdings and Sav-A-Lot are related entities, so the property is owner-occupied. The arguments and methodology Gibbs applied here have historically been limited to retail property. And even if comparable leases should be considered, the majority of them are asking prices rather than actual leases. *Charles Ward testimony.*
26. In Smith Holdings' valuation evidence, there are no time adjustments made to any of the comparable property sales. *Christopher Ward testimony.*

BURDEN OF PROOF

27. Generally, a taxpayer seeking review of an assessing official's determination has the burden of proof. Indiana Code § 6-1.1-15-17.2 creates an exception to that general rule and assigns the burden of proof to the assessor in two circumstances—where the assessment under appeal represents an increase of more than 5% over the prior year's assessment, or where it is above the level determined in a taxpayer's successful appeal of the prior year's assessment. I.C. § 6-1.1-15-17.2(b), (d).
28. Here, Charles Ward testified that the subject's assessment did not change from 2016 to 2017. And Smith Holdings offered no argument that the burden of proof should shift to the Assessor. Smith Holdings therefore bears the burden.

ANALYSIS

29. Indiana assesses property based on its “true tax value,” which is determined under the rules of the Department of Local Government Finance (“DLGF”). I.C. § 6-1.1-31-5(a); I.C. § 6-1.1-31-6(f). True tax value does not mean “fair market value” or “the value of the property to the user.” I.C. § 6-1.1-31-6(c) and (e). The DLGF defines “true tax value” as “market value-in-use,” which it in turn defines as “[t]he market value-in-use of a property for its current use, as reflected by the utility received by the owner or by a similar user, from the property.” 2011 REAL PROPERTY ASSESSMENT MANUAL at 2.
30. The cost, sales-comparison, and income approaches are three generally accepted ways to determine true tax value. MANUAL at 2. In an assessment appeal, parties may offer any evidence relevant to a property’s true tax value, including appraisals prepared in accordance with generally accepted appraisal principles. *Id.* at 3; *see also Eckerling v. Wayne Twp. Ass’r*, 841 N.E.2d 674, 678 (Ind. Tax Ct. 2006) (reiterating that a market value-in-use appraisal that complies with the Uniform Standards of Professional Appraisal Practice (“USPAP”) is the most effective method for rebutting the presumption that an assessment is correct). Regardless of the method used, a party must explain how their evidence relates to the relevant valuation date. *Long v. Wayne Twp. Ass’r*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005). Otherwise, the evidence lacks probative value. *Id.* For 2017 assessments, the valuation date was January 1, 2017. Ind. Code § 6-1.1-2-1.5(a).
31. We first address the overall credibility of Smith Holdings’ evidentiary presentation. Gibbs testified that he is an attorney and tax representative in Ohio. However, he offered nothing regarding his background and education in property valuation, or his qualifications to value property in Indiana. Additionally, he did not actually prepare the income and sales-comparison approaches he presented. Instead, it appears that Gibbs simply submitted excerpts from a report prepared by Chris Bischof, formerly of the Altus Group. But Smith Holdings failed to offer details regarding Bischof’s qualifications.

More importantly, there is no indication that Bischof complied with USPAP when preparing either valuation method.

32. The income approach Smith Holdings presented relied on lease rates from 20 properties to determine its market rent estimate. But Smith Holdings did not explain how any of the properties actually compared to the subject, and it failed to adjust the lease rates to account for any relevant differences. Additionally, more than half of the lease rates were asking rates, not rates from consummates leases. Thus, we are not convinced that the \$3/SF rate used to calculate potential gross income is credible. Furthermore, Smith Holdings offered insufficient support for the use of a 10% vacancy rate or a 10% operating expense allowance. We also find the decisions and explanations regarding lease up costs, deferred maintenance, and obsolescence confusing at best. Finally, we note that Smith Holdings offered no basis for the 8.5% capitalization rate it applied. We therefore give Smith Holdings' value conclusion under the income approach no weight.
33. We also give no weight to the sales-comparison approach offered by Smith Holdings. Other than providing a list of 26 properties and calculating their average price per square foot, Smith Holdings did little to identify their relevant characteristics or compare them to the subject property. And Smith Holdings completely failed to explain how any relevant differences affected the values. That failure is particularly concerning given the substantial differences in age, acreage, and size of the purportedly comparable sales. Thus, Smith Holdings' sales-comparison approach falls well short of providing the level of analysis the Tax Court has explained is necessary when relying on comparative sales data. *See Long*, 821 N.E.2d at 470-71 (holding that taxpayers' comparative sales data lacked probative value where they failed to compare relevant characteristics or explain how differences affected value).
34. As part of making a prima facie case, "it is the taxpayer's duty to walk the [Indiana Board and this] Court through every element of [its] analysis." *Long*, 821 N.E.2d at 471 (quoting *Clark v. Dep't of Local Gov't Fin.*, 779 N.E.2d 1277, 1282 n. 4 (Ind. Tax Ct.

2002)). Although Smith Holdings offered several pages of analysis prepared by its former tax representative, it failed to demonstrate that either of the valuation approaches it offered are probative evidence of the subject property's market value-in-use.

35. Because Smith Holdings offered no probative market-based evidence to demonstrate the property's correct market value-in-use for 2017, it failed to make a prima facie case for a lower assessment. Where a Petitioner has not supported its claim with probative evidence, the Respondent's duty to support the assessment with substantial evidence is not triggered. *Lacy Diversified Indus. v. Dep't of Local Gov't Fin.*, 799 N.E.2d 1215, 1221-1222 (Ind. Tax Ct. 2003).

SUMMARY OF FINAL DETERMINATION

36. We find for the Assessor and order no change to the 2017 assessment.

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

- 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>>.