SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

800 13TH STREET ASSOCIATES, ET AL.,	:	
	:	
Petitioners,	:	
	:	
v.	:	Tax Docket No. 5301-92
	:	
DISTRICT OF COLUMBIA,	:	
	:	
Respondent.	:	

MEMORANDUM OPINION AND ORDER

This matter came before the Court for trial upon the petition for a partial refund of real property taxes for Tax Year 1992. The parties filed stipulations pursuant to Rule 11(b) of the Superior Court Tax Rules. Upon consideration of the stipulations, the evidence adduced at trial, the applicable law, and having resolved all questions of credibility, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. 800 13th Street Associates ("Petitioners") are the owners of the land and improvements on Lot 47 in Square 250, known variously as 800 13th Street, N.W., 1301 H Street, N.W., and 1301 New York Avenue, N.W., in the District of Columbia ("subject property"). 800 13th Street Associates is a District of Columbia limited partnership.

2. The subject property is a twelve-story building, plus five levels below grade, comprising 183,664 square feet of net rentable area. The upper floors, and one below-grade level, are leased as office space. The ground floor is used for lobby and office space. The remaining four below-grade levels serve as a parking facility. The subject property is zoned C-4 (Central Business District). The Central Business District comprises both retail and office centers, as well as high-density residential and mixed-use developments.

3. The building is 100% leased to the federal government through the General Services Administration ("GSA") for use by the Department of Agriculture. GSA signed a ten-year lease for the building, running through 1995, at which time GSA had an option to renew at market rates. As of the valuation date, January 1, 1991, the lease had five more years to run. The rent was $4,614,838 per year, plus increases in operating expenses and real estate taxes over a 1985 base amount. The parking facility was leased to Parking Management, Inc. until August, 1995 at a rate of $200,000 per year.

4. The assessed value of the subject property for Tax Year 1992 was $44,536,000. Petitioners timely filed an appeal with the District of Columbia Board of Equalization and Review ("BER"), which sustained the District's proposed assessment.

5. Petitioners timely paid all real estate taxes assessed against the subject property valued at $44,536,000, as required

by law, and timely filed this petition for reduction of assessment and refund of excess taxes paid for Tax Year 1992. Petitioners asserted at trial that the fair market value of the subject property for Tax Year 1992 was $39,600,000. The District, at trial, sought to uphold the assessment of $44,536,000.

6. Dennis Duffy, MAI, a principle with the appraisal firm, Ratcliffe, Cali, Duffy, Hughes & Co., was qualified and testified as an expert witness on behalf of the Petitioners.

7. Mr. Duffy is a certified general appraiser licensed in Washington, D.C., Maryland, and Virginia, and this Court admitted him without objection as an expert real estate appraiser with particular expertise in the appraisal of commercial office buildings.

8. As part of his appraisal, Mr. Duffy inspected the subject property, including the public and mechanical areas, parking facilities, and restrooms. Mr. Duffy examined the physical condition, functional utility, and tenant use layout of these areas. He found the subject property to be of average size, with average improvements, and in reasonably good condition.

9. At the time of valuation, the neighborhood of the subject property was undergoing intense redevelopment, from older, low-rise buildings to new high-rise office construction. Mr. Duffy expected this trend in development to last over the

next five to seven years from the valuation date, at which time the neighborhood would reach its mature phase.

10. As of the valuation date, the Washington, D.C. market for office space was relatively strong, despite a continuing supply of new space and delays in investor purchases. There was, however, a weakening of the market as evidenced by a higher vacancy rate and large concession packages. At that time, there were 13.3 million square feet of vacant commercial space in the District of Columbia, representing a four-year supply. As of the valuation date, Mr. Duffy expected the market to continue to soften as those projects in the development pipeline were delivered.

11. The Washington, D.C. real estate market is considered to be one of the strongest in the country for commercial property. Mr. Duffy testified, however, that as of the valuation date, a glut of office space had increased concessions and vacancy rates for all buildings and that the oversupply was expected to remain for the next several years.

12. Beginning in late 1990, there was a sudden and sharp decline in Washington, D.C. real estate values.

13. Mr. Duffy primarily relied on the income approach to value, with corroborative support from the direct sales comparison approach, in achieving an estimated market value of $39,600,000 for the subject property. In reaching his

conclusion, he considered the actions of the market and current economic indicators of comparable properties.

14. The income approach generates an estimated market value of a piece of property by dividing the net operating income of the property by the capitalization rate.

15. The value indicated by use of the income approach is a reflection of a prudent investor's analysis of an income-producing property. Under this approach, income is analyzed in terms of quantity, quality, and durability. After a projection of gross economic rental, estimated expenses and vacancy allowance are deducted to arrive at a net cash flow, which is then discounted to present value. The income approach is most often relied upon by investors in valuing income-producing properties like the subject property. Anticipated future income is discounted to a present worth through the capitalization process. Mr. Duffy considers the income approach the most appropriate method for valuing the subject property because the property is 100% leased under the terms of the GSA lease, and detailed, actual income and expense data is available.

16. To derive the net operating income, Mr. Duffy used a discounted cash flow analysis. Mr. Duffy testified that he selected the discounted cash flow analysis over the assessor's direct capitalization method because the discounted cash flow analysis requires more detailed data, mirrors the mind set of an

investor, and enables the reflection of changes over time in the appraisal.

17. Using a discounted cash flow analysis, a future income stream is estimated by forecasting the gross earning potential of the property under prevailing and foreseeable market conditions. Mr. Duffy used a projection period of eleven years because the average holding period of investors in income-producing properties is ten years.

18. The net operating income is derived by deducting vacancy and operating expenses, based on market conditions, from the gross earning. Once the net operating income is derived, it is discounted to present value using a yield or capitalization rate.

19. Mr. Duffy derived a capitalization rate by conducting an investor survey of the country's top ten insurance companies, seven pension funds, commercial banks, off-shore investors, and major real estate brokers as they were the logical buyers and financiers in the Washington, D.C. commercial real estate market. Mr. Duffy performs such surveys on a quarterly basis and has been conducting such surveys since the late 1980's. Mr. Duffy regularly relies on the results of these surveys in his appraisals of commercial real property.

20. In his survey, Mr. Duffy collects such data as yield rates, internal rates of return, anticipatory yield rates, terminal capitalization rates, and holding periods.

21. In Mr. Duffy's opinion, the survey method of deriving capitalization rates is a better indicator of buyer sentiment than other methods because it is based on current market conditions. He testified that the survey method measured the decline in market values that resulted from the sharp fall in the real estate market in late 1990. As a result, he was able to incorporate these changes into his appraisal.

22. Mr. Duffy determined that the use of recorded sales to derive a capitalization rate is appropriate when sufficient data is available for similar competitive properties. In late 1990 and early 1991, sales of investor quality office buildings were limited.

23. In response to whether the profession preferred a certain technique of obtaining an appropriate capitalization rate, Mr. Duffy testified that there was no definitional preference on how to arrive at a capitalization rate.

24. Mr. Duffy testified that the capitalization rate build-up method was an inappropriate method to derive a capitalization rate for the subject property during this time period for two primary reasons. First, the capitalization rate build-up method is based on the assumption that financing is available to investors. Mr. Duffy testified that during late 1990 and early 1991, financing was not available to investors. Second, the build-up method was inappropriate because it anticipated

appreciation of real estate values at a time when values were sharply declining.

25. Mr. Duffy determined that a capitalization rate of 11.15%, which includes the 2.15% tax rate, was appropriate. This rate, in his opinion, was reasonable in light of the market conditions and perceptions of risk that were expressed by investors in Mr. Duffy's investor survey for the first quarter of 1991. Mr. Duffy used data from the first quarter of 1991 because it included the valuation date of January 1, 1991. The capitalization rates that Mr. Duffy collected in his survey were based on sales of property that were negotiated months before the survey date.

26. Using the discounted cash flow analysis, Mr. Duffy determined that the value of the subject property as of January 1, 1991 was $39,600,000.

27. Direct capitalization is a method used to convert a single year's estimate of net operating income into a value. Mr. Duffy considered the direct capitalization method and performed the calculation for his report. Using this method, Mr. Duffy reached a result of $40,000,000.

28. In Mr. Duffy's opinion, investors most often rely upon the discounted cash flow rather than a direct capitalization method in the evaluation of commercial properties. Investors favor a discounted cash flow analysis because direct capitalization only provides a "snap-shot" view of the property,

whereas the discounted cash flow method takes into account changes to a property's income-earning capabilities over time.

29. Mr. Duffy testified that the GSA lease, which encumbered 100% of the office space in the subject property and expired five years from the date of valuation, was an important consideration in his valuation of the property. The direct capitalization method, which only looks at the net operating income over a one year period, does not take into account the expiration of such leases. The expiration of the GSA lease could be an important reason why the discounted cash flow method produced a more accurate appraisal of the subject property. Mr. Duffy also testified that it was unlikely that GSA would default on the remainder of the lease.

30. Mr. Duffy also employed the direct sales comparison approach as additional support for the value he derived from the income approach. The direct sales comparison approach is a process of analyzing sales of similar, recently-sold properties in order to derive an indication of the most probable sales price of the property being appraised.

31. Using the direct sales comparison approach, Mr. Duffy arrived at an estimated market value of $39,500,000 for the subject property. Mr. Duffy testified, however, that the income approach, using the discounted cash flow method, is the most appropriate and reliable method for valuing the subject property.

He determined that the value of $39,600,000 reached using the income approach was the more reliable result.

32. The tax assessor, Larry Hovermale, of the Department of Finance and Revenue, was called as a witness on behalf of the Respondent District of Columbia.

33. Mr. Hovermale assessed the subject property for Tax Year 1992. Using the income method, he reached an assessed value of $44,536,000 for the subject property. That overall assessment comprised a $21,929,932 value of the subject property's land and a $22,606,068 value for the improvements on the land.

34. In deriving his net operating income, Mr. Hovermale examined the 1989 Income and Expense Form and rent roll submitted by the property owner and applied the appropriate deductions. He testified that he used 1989 data as it was the most current information available at the time he performed the assessment.

35. Mr. Hovermale then converted the net operating income into a value for the property by dividing it by an overall capitalization rate of 8.75%, which included the 2.15% tax rate. Mr. Hovermale did not rely upon the build-up method to arrive at his capitalization rate, but rather took his rate from the Pertinent Data Book, which contains ranges of rates for all types of income-producing properties. These ranges are derived from actual, recorded sales of properties in the District of Columbia.

36. The Pertinent Data Book provided a range of capitalization rates from 8.25 to 9.5 percent. Mr. Hovermale

testified that he selected a capitalization rate from the mid-point range of acceptable rates because the subject property was "not a trophy property, but not a poor property either." He considered the subject property to be a newer building in an average location.

37. The valuations of the comparable sales used in the Pertinent Data Book that occurred in 1988 and 1989 failed to take into account changing market conditions, investor profiles, changes in market expectations for change in value, and changes in actual cash flows in terms of net receipts from rental income that resulted from the decline in the market.

38. Mr. Hovermale checked his value against sales of comparable properties, which supported his valuation of the subject property.

39. Mr. Hovermale did not know when the Pertinent Data Book was compiled or from what sources. He testified that the Pertinent Data Book uses the capitalization rate build-up method to support the rates derived from actual, recorded sales of properties.

40. Mr. Hovermale opined that the direct capitalization of income approach is widely used by assessors because much of the information needed to make the calculation can be derived from market data. Mr. Hovermale did not use the discounted cash flow analysis because the Department of Finance and Revenue has not

adopted that method. It was Mr. Hovermale's opinion that discounted cash flow is overly speculative.

41. Mr. Hovermale did not know whether the real estate market appreciated or depreciated during late 1990 and early 1991; nor did he take into consideration the sharp decline in real estate values that occurred beginning in late 1990.

42. Mr. Hovermale did not take any steps to determine the accuracy of the capitalization rate he used in the assessment of the subject property. He did not study the trend for investment rates or capitalization rates as of the date of value.

43. Mr. Hovermale did not take into consideration the expiration, within five years of the date of valuation, of the GSA lease. Mr. Hovermale also did not factor into his assessment the costs associated with re-leasing the property, such as broker fees, tenant buildouts and improvements.

44. As of January 1, 1991, the 8.75% capitalization rate used by the District assessor was not based on current market information as of the date of value.

LEGAL ANALYSIS

This Court has jurisdiction over this matter pursuant to D.C. Code §§ 47-825 and 47-3303 (1990 Repl.). The Superior Court's review of a tax assessment is a trial de novo necessitating competent evidence to prove the matters in issue. Wyner v. District of Columbia, 411 A.2d 59, 60 (D.C. 1980).

"The assessed value of property for real property taxation purposes shall be the 'estimated market value' of the property on January 1st of the year preceding the tax year." District of Columbia v. Washington Sheraton Corp., 499 A.2d 109, 112 (D.C. 1985) (citing D.C. Code § 47-820(a) (1981)). The "estimated market value" is defined as:

> . . . one hundred per centum of the most probable price at which a particular piece of real property, if exposed for sale in the open market with a reasonable time for the seller to find a purchaser, would be expected to transfer under prevailing market conditions between parties who have knowledge of the uses to which the property may be put, both seeking to maximize their gains and neither being in a position to take advantage of the other.

D.C. Code § 47-802(4) (1990 Repl.).

The factors that the assessor must consider in assessing real property are specified in § 47-820(a) of the D.C. Code:

> The Mayor shall take into account any factor which might have a bearing on the market value of the real property including, but not limited to, sales information on similar types of real property, mortgage, or other financial considerations, reproduction cost less accrued depreciation because of age, condition, or other factors, income-earning potential (if any), zoning, and government-imposed restrictions.

D.C. Code § 47-820(a) (1990 Repl.).

According to Superior Court Tax Rule 11(d), with respect to tax assessment challenges, "The burden of proof shall be upon the petitioner, except as otherwise provided by law." See Wyner v.

District of Columbia, 411 A.2d 59, 60 (D.C. 1980) (citing Rule 11(d)). The petitioner's burden for challenging tax assessments of commercial property was stated by the Court of Appeals in District of Columbia v. Burlington Apt. House Co., 375 A.2d 1052, 1057 (D.C. 1977): "[W]here an assessment is based not upon a 'valuation made according to law' but rather upon a figure determined by the court to be 'erroneous, arbitrary, and unlawful,' the figure thus rejected must be considered a mere nullity, incapable of future applicability." Thus, under Burlington Apt., the Petitioner can meet its burden of proof by showing that the Government's assessment is "erroneous, arbitrary, or unlawful." See id.

The Court of Appeals, in Brisker v. District of Columbia, 510 A.2d 1037, 1039 (D.C. 1986), refined petitioner's burden of proof in stating:

> The taxpayers were not required to establish the correct value of their property in order to meet their burden of proof; rather, the taxpayers bore the burden of proving the incorrectness of the government's assessment . . . . The taxpayers met that burden when the evidence showed that the District's . . . valuation was flawed.

Thus, in appealing the Government's assessment, the Petitioner need not establish the correct value of the property and can satisfy its burden of proof by showing that the assessment is incorrect, erroneous, arbitrary, or unlawful. See Brisker, 510 A.2d at 1039; Burlington Apt. House, 375 A.2d at 1057.

Furthermore, the Court of Appeals in Safeway Stores, Inc. v. District of Columbia, 525 A.2d 207, 211 (D.C. 1987) clarified this burden when it held that "a taxpayer bears the burden of proving that an assessment is incorrect or illegal, not merely that alternate methods exist giving a different result." Petitioners cannot meet their burden simply by presenting an expert witness who testifies that, in his opinion, the fair market value of the subject property is lower than that assessed for the property. Rather, the Petitioners must *prove* error in the actual assessment by showing why it is incorrect or specifying those flaws rendering the assessment excessive.

In this case, Respondent moved to dismiss at the close of Petitioners' case in chief, asserting that Petitioners failed to sustain their burden of proof. This Court has the authority to sustain a Motion to Dismiss pursuant to Rule 41(b) of the Superior Court Civil Rules.[1] See Bay General Industries, Inc. v. Johnson 418 A.2d 1050, 1054 (D.C. 1980) (citing Marshall v. District of Columbia, 391 A.2d 1374 (D.C. 1978); Keefer v. Keefer & Johnson, Inc., 361 A.2d 172 (D.C. 1976); Warner Corp. v. Magazine Realty Co., 255 A.2d 479 (D.C. 1969)). Such a dismissal

[1] Rule 41(b) was amended on May 12, 1993, effective July 1, 1993, and, as a result, the language relevant to this matter cannot be found in more current editions of the Superior Court Rules. As of the time of Respondent's Motion to Dismiss, however, the Rules of Practice and Procedure before the Tax Division adhere to the Superior Court Civil Rules as they stood prior to the January 1, 1991 amendments.

is considered an "involuntary dismissal" under Rule 41(b), which provides in pertinent part:

> After the plaintiff, in an action tried by the Court without a Jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The Court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

Super. Ct. Civ. R. 41(b); see Bay Gen. Indus., 418 A.2d at 1054. In this matter, the Court exercised its discretion to decline rendering judgment until the close of all the evidence. See Super. Ct. Civ. R. 41(b); see also Wealden Corp. v. Schwey, 482 F.2d 550, 551 (5th Cir. 1973) ("Under Rule 41(b), . . . the trial judge has the option of weighing the evidence and rendering judgment against the plaintiff or declining to render judgment until the close of all the evidence."); King and Shuler Corp. v. Petitioning Creditors, 427 F.2d 689, 690 (9th Cir. 1970) ("Under Fed.R.Civ.P. 41(b), the trial court is not required to rule upon such a motion made at the close of the plaintiff's case, but may elect to render judgment after the close of all the evidence."); A. & N. Club v. Great American Insurance Co., 404 F.2d 100, 103 (6th Cir. 1968) (stating that it is "within the discretionary power of the trial judge to either act upon the motion immediately or to reserve his decision until later").

When a motion for dismissal is held in abeyance, federal courts have established that the better practice is to consider all of the evidence presented at trial when rendering a final judgment. See A. P. Hopkins Corp. v. Studebaker Corp., 496 F.2d 969, 971 (6th Cir. 1974) (stating that where the district court reserved ruling pursuant to Rule 41(b), at the conclusion of all the proof in the case, "the trier of facts should look to the entire evidence in deciding the case on the merits"); King and Shuler Corp. v. Petitioning Creditors, 427 F.2d 689, 690 (9th Cir. 1970) ("[W]hen such a motion is not granted, the merits of the case are to be determined in the light of all the evidence received at trial."); A. & N. Club v. Great American Insurance Co., 404 F.2d 100, 103 (6th Cir. 1968) (citing O'Malley v. Cover, 221 F.2d 156, 158 (8th Cir. 1955) in stating that "[t]he Eighth Circuit sees no difference in cases where the defendant has proceeded with its case after a motion under Rule 41(b), . . . has been reserved or denied").

This court accepts the Federal Circuit rationale that where ruling on a Rule 41(b) motion for dismissal has been held in abeyance, in order to decide the case on its merits, the trial court should consider all of the evidence presented at trial. Thus, in this matter, the evidence adduced in Petitioners' case in chief as well as the testimony of Mr. Hovermale, the District's assessor, shall be considered in determining whether Petitioners have met their burden of proof.

In light of the totality of the evidence presented at trial, this Court finds that Petitioners have met their burden of proving incorrectness in the Government's assessment.

The Petitioners forward several arguments in its attempt to illustrate error in the District assessment.

Its first argument is that the District's assessment is excessive by virtue of the fact that Petitioners' appraiser achieved a lower estimated market value than did the District assessor. In their case in chief, Petitioners examined Mr. Duffy as an expert witness, who testified that he achieved an estimated market value for the subject property of $39,600,000, contrary to the District's assessment of $44,536,000. In opposing the District's Motion for Involuntary Dismissal, Petitioners argued that the lower estimated market value achieved by their appraiser illustrates that the District's assessment is excessive, thus meeting their burden of proof. This Court finds Petitioners' argument unconvincing.

The mere establishment that a disparity exists between the tax assessment and the appraised value does not demonstrate that the District's assessment is excessive. The Court of Appeals directly addressed this point in Safeway Stores, Inc. v. District of Columbia when it stated that a taxpayer cannot met its burden by simply establishing that "alternate methods exist giving a different result." 525 A.2d 207, 211 (D.C. 1987). It is not enough merely to demonstrate a difference in values achieved.

Rather, Petitioners must attack the District's assessment and illustrate error, either independently, by showing, for example, that the assessor failed to fulfill the statutory requirements of § 47-820(a) of the D.C. Code, or dependently, by showing that their own appraisal is more accurate than the District's assessment. Petitioners in this case, relying solely on the discrepancy between proposed market values as indicative of excessiveness in the District's assessment, have done neither. Furthermore, the Court has no basis for determining whether the discrepancy is due to error on the part of the District assessor or on the part of Petitioners' appraiser.

Petitioners argue next based on the testimony of its expert, Mr. Duffy, who opined that the discounted cash flow method is preferred over the direct capitalization method for valuing commercial property under the capitalization of income approach to valuation. He explained that under the discounted cash flow method, the net operating income is calculated over a ten or eleven-year period, and then discounted back to determine the net operating income for the present year. Mr. Duffy explained that the advantage of the discounted cash flow method is that it considers such factors as future expiring leases and declining real estate markets, whereas the direct capitalization method is merely a "snapshot," only considering the net operating income for the current year. Mr. Hovermale, on the other hand, explained that the Department of Finance and Revenue generally

disfavors using the discounted cash flow analysis, claiming that it is too speculative, and that direct capitalization is a generally reliable method.

In this case, the subject property was 100% leased to the GSA, a lease that would expire five years after the valuation date. Petitioners allege that Mr. Hovermale erred by failing to factor into his assessment the expiration of the five-year GSA lease. The basis for such a failure to constitute error is in § 47-820(a) of the D.C. Code, which mandates consideration of "any factor which might have a bearing on the market value of the real property." D.C. Code § 47-820(a) (1990 Repl.). It is insufficient, however, to simply allege that the failure to consider a factor "bears" on the market value without further proof. As the Court of Appeals stated in Wolf v. District of Columbia, 609 A.2d 672, 676 (D.C. 1992), "[i]f a factor is not shown to 'have a bearing upon the market value,' then the assessor commits no misdeed in failing to consider it." In that case, the Court of Appeals affirmed the trial court's holding that the appellants failed to meet their burden of proof by merely giving the unsupported stipulation that the assessor omitted consideration of a ground lease in the assessment where "the trial court found, and appellants presented, no evidence of the magnitude of the ground lease's possible impact." See id. Petitioners, in this case, similarly failed to demonstrate how

omission of consideration of the GSA lease would affect, if at all, the estimated market value for the subject property.

While it is Petitioners' position that the failure to consider the lease resulted in an overestimation of the market value, without further substantive proof, not only have they failed to support this argument, but they have similarly failed to dispel the argument that leasing the entire property to one tenant relieves the owners of the burdens generally suffered by a landlord. First, as GSA leased the entire building, the owners suffered no loss of income due to vacancy. Second, leasing costs generally incurred as a result of changing tenants did not exist as no leases were due to expire at or shortly after the time of valuation. Third, since the GSA lease had five more years to run, and the Petitioners' expert, Mr. Duffy, admitted on cross-examination that it was unlikely for GSA to default on their lease, the Petitioners enjoyed the security of a stable income-producing property in a declining market not typical of multiple short-term lease properties.

Petitioners here have only adduced the fact that the direct capitalization method does not account for such leases. What makes the direct capitalization method *generally* acceptable, however, is that the omission of certain factors will have no bearing on the property's market value. Without demonstrating the impact of Mr. Hovermale's failure to consider the GSA lease in his assessment, Petitioners have not distinguished use of the

direct capitalization method in this case from its general acceptance. Furthermore, Mr. Duffy corroborated the reliability of the value he achieved using the discounted cash flow analysis with the strikingly similar value he achieved using the direct capitalization method, illustrating his approval of the method's general reliability.

Petitioners further argue that the direct capitalization method fails to take into consideration the fact that the real estate market was declining at the time of valuation. While it may be true that direct capitalization does not consider such a factor, such a failure alone is not enough to render the method per se invalid. Rather, as explained above, the excluded factor, in order to render an assessment incorrect under § 47-820(a), must be *shown* to have a bearing on the market value of the real property. Mr. Duffy's discussion of the effects of the declining real estate market on Washington D.C. was with respect to real estate generally, and not with respect to the subject property particularly. In fact, the only discussion of the declining real estate market by Mr. Duffy occurred in Petitioners' case in chief, at a time when there had not yet been any mention of the District's assessment. This Court is hesitant to apply general economic theories to specific instances without further evidence that the general theory actually applies in this particular instance.

Where Petitioners have met their burden is with respect to the capitalization rate used by Mr. Hovermale. Mr. Hovermale selected his capitalization rate from the Pertinent Data Book, a book compiled by the Department of Finance and Revenue in which capitalization rates are derived from recorded sales of properties in the District of Columbia. Petitioners allege error in two ways with respect to the capitalization rate used by Mr. Hovermale: first, that Mr. Hovermale's reliance on the Pertinent Data Book to select his capitalization rate was erroneous; and second, that the actual capitalization rate used was over-optimistic and thus, incorrect considering the state of the market. Only the second of these two arguments has merit.

With respect to the first argument, that Mr. Hovermale's reliance on the Pertinent Data Book was incorrect, the Court is not persuaded. During Petitioners' cross-examination of Mr. Hovermale, he admitted that he did not know when the recorded sales used in the Pertinent Data Book took place, whether the sales were of properties comparable to the subject property, when the Pertinent Data Book was compiled, or from what sources. Petitioners argue that Mr. Hovermale's inability to answer these questions indicates error in his overall assessment because he relied on information from the Pertinent Data Book. It is Petitioners, however, who bear the burden of demonstrating how at least one of the points raised in their cross-examination would render the assessment erroneous. The onus is not on the

Respondent to affirmatively support its assessment or the methods used to achieve that assessment. Rather, the Petitioners must show how, if at all, the assessor's inability to answer their questions with respect to the Pertinent Data Book renders the assessor's assessment incorrect. This Court feels that the assessor's inability to provide answers to the Petitioner's questions does not meet Petitioner's burden of proof.

The Court of Appeals addressed this point in Wolf v. District of Columbia 609 A.2d 672, 675 (D.C. 1992). There, one of four issues was whether reliance on a formula, in assessing real property, rendered the assessment erroneous. The court held that "[t]he fact that [the assessor used a] formula . . . is of no consequence, unless appellants can prove either that the basis of the formula is unlawful or that the assessor's computation of the formula in this case was inaccurate." Id. Comparing Wolf to this case, the Pertinent Data Book relied upon by Mr. Hovermale is analogous to the "formula" used there: both were generally relied upon by assessors in determining market value without the assessors understanding completely the derivation of the formula or book. Applying the Wolf holding to the present case, unless Petitioners can demonstrate unlawfulness either in the underlying foundation for the Pertinent Data Book or in Mr. Hovermale's use

of it, his assessment will be upheld. In this case, Petitioners demonstrate neither.

In order to attack the underlying foundations for the Pertinent Data Book, Petitioners needed to examine those persons responsible for the book's compilation, namely, those at the Department of Finance and Revenue who provide the assessors with the capitalization rates. It must be shown, and not merely alleged, that the properties used in the calculations of the capitalization rates were not comparable to the subject property, or that their sales were sufficiently dated to render them inappropriate. Petitioners needed to demonstrate that the methodology involved in the book's compilation suggests sufficient inaccuracy for this Court to conclude that an assessor's incorporation of those capitalization rates in his assessment is erroneous. Otherwise, it may very well be the case that the capitalization rates used are perfectly appropriate even though the particular assessor does not know exactly why, and the Court today endeavors only to determine the subject property's correct value, not to examine the assessor's familiarity with the origins of the Pertinent Data Book.

Similarly, Petitioners did not demonstrate that Mr. Hovermale's use of the Pertinent Data Book was unlawful. While

Mr. Hovermale chose his rate from the midpoint of the Pertinent Data Book's range of capitalization rates based solely on the conclusion that the subject property was "neither a trophy property nor a poor property," Petitioners made no allegations that such methodology was arbitrary or incorrect in any way. Rather, with respect to the Pertinent Data Book, Petitioners chose to focus exclusively upon Mr. Hovermale's unfamiliarity with its foundations.

Petitioners' second argument with respect to the capitalization rate used by the District assessor does have merit, thus meeting their burden of proof. Petitioners demonstrated through the rebuttal testimony of Mr. Duffy, their expert witness, called to rebut the redirect examination of Mr. Hovermale by the Government, that the Pertinent Data Book's reliance on comparable sales of properties that occurred in 1988 and 1989 was incorrect in that use of those sales failed to take into account changing market conditions, investor profiles, changes in market expectations for change in value, and changes in actual cash flows in terms of net receipts from rental income, all resulting from the declining real estate market. Although the Pertinent Data Book generated a range of capitalization rates that failed to take into consideration these market forces, it is

still necessary for the Petitioners to establish that the *actual* capitalization rate used in valuing the subject property similarly failed to reflect these forces. If, for instance, the assessor's choice of a capitalization rate from the middle of the range was inaccurate in that the subject property deserved a rate from the lower end of the range, but that this inaccuracy compensated for the failure to consider the declining market, then this Court could not find that the overall value was inaccurate. It is necessary for the Petitioners to establish that such a "cancellation of errors" did not occur, which they did through Mr. Duffy's rebuttal testimony that as of January 1, 1991, the 8.75% capitalization rate used by the District assessor was optimistic and "incorrect in that it was not based on current market information as of the date of value." As this testimony went unrebutted by Respondent, this Court, admitting its inexpertness for selecting appropriate rates, gives deference to the testimony of Petitioners' expert witness. As a result, this court finds that the capitalization rate used by the District's assessor failed to adequately consider the state of the real estate market as of the date of valuation and that the rate used by Petitioners' expert adequately did.

When a taxpayer appeals an assessment, this court has the authority to affirm, cancel, reduce or increase the assessment. D.C. Code § 47-3303 (1990 Repl.). In this case, the court finds that the Petitioners' rate of 0.1115 rather than the district's rate of 0.875 is the appropriate rate to be used in calculating the value of the subject property. As market value determination under the capitalization of income approach involves dividing the net operating income of the subject property by the appropriate capitalization rate, in order for this court to determine an accurate market value, the appropriate net operating income also must be determined. The District assessor proposed a net operating income of $3,896,910, whereas the net operating income used by Petitioners' expert, Mr. Duffy, in order to achieve an overall value of 39,600,000, must have been approximately $4,415,400. In effect, Petitioners are conceding that the net operating income should actually be higher than that used by the District, but that the capitalization rate is so erroneous as to render the entire value achieved by the district overestimated. Considering the fact that the net operating income was not at issue in this case, and that the Petitioners concede to a higher net operating income, this Court is of the opinion that use of the Petitioners' net operating income would be more appropriate than implementing Petitioners' capitalization rate into the District's formula to achieve the total value. Thus, in determining the subject property's value, the Petitioners' net

operating income as well as capitalization rate shall be used. In effect, Petitioners' total estimated value of $39,600,000 shall be the determined market value of the property.

Therefore, it is this 14th day of January 1997,

ORDERED, that the Respondent's Motion for Involuntary Dismissal, made at the close of Respondent's case in chief is **DENIED**; it is further

ORDERED, that the assessed value for the subject property is determined to be $39,600,000 for Tax Year 1992; it is further

ORDERED, that the assessment record card for the property maintained by the District shall be adjusted to reflect the value determined by this order; it is further

ORDERED that the Petitioner shall submit a proposed order providing for a refund of the overpayment of taxes due to the Petitioner, along with interest as allowed by law. A copy of the proposed order shall be served on Respondent and filed with the Court no later than February 5, 1997.

Wendell P. Gardner

JUDGE WENDELL P. GARDNER, JR.
(Signed in chambers)

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

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CLERK OF SUPERIOR COURT OF THE DISTRICT OF COLUMBIA TAX DIVISION

800 CLEVELAND STREET ASSOCIATES, ET AL.)
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA TAX DIVISION)
Petitioners,)
)
v.)
)
DISTRICT OF COLUMBIA)
)
Respondent.)

Tax Docket No. 5301-92

ORDER

In accordance with the Memorandum Opinion and Order of this Court dated the 14th day of January, 1997, and it appearing to the Court that Petitioner is entitled to a refund of part of the real property tax paid for Tax Year 1992, beginning July 1, 1991, and ending June 30, 1992, in the amount of $106,124.00 for Lot 47 in Square 250, it is this 11th day of February, 1997,

ORDERED, that Petitioners are entitled to a refund of part of the real property tax paid for Tax Year 1992, beginning July 1, 1991, and ending June 30, 1992, on Lot 47 in Square 250 in the District of Columbia, and that the total amount of the refund is $106,124.00 together with interest thereon at the rate of six (6) percent per annum, as provided by law, from March 31, 1992, to the date of the refund; and, it is

FURTHER ORDERED, that the assessment for purposes of District of Columbia real property taxation for Tax Year 1992 for Lot 47 in Square 250 is as follows:

Lot	Land	Improvements	Total Assessment
47	$21,929,932.00	$17,670,068.00	$39,600,000.00

Judge

Consented to as to form:

Frederick W. Chockley

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