

130 A.D.3d 1510

Supreme Court, Appellate Division, Fourth Department, New York.

In the matter of RITE AID CORPORATION, Petitioner–Respondent,

v.

Stephen HAYWOOD, Assessor, and Board of Assessment Review of Town of Williamson, Wayne County, Respondents–Appellants. (Proceeding Nos. 1 & 2.).

In the Matter of Rite Aid Corporation, Petitioner–Respondent,

v.

Town of Williamson Board of Assessment Review, Assessor of Town of Williamson and Town of Williamson, Wayne County, Respondents–Appellants. (Proceeding No. 3.).

July 10, 2015.

Synopsis

Background: Pharmacy lessee filed petition seeking review of real property tax assessments. Following bench trial, the Supreme Court, Wayne County, [Matthew A. Rosenbaum, J.](#), granted the petitions in part. Town appealed.

[Holding:] The Supreme Court, Appellate Division, held that supreme court’s decision to credit lessee’s expert was against the weight of the evidence.

Affirmed as modified.

[Scudder, J.](#), filed dissenting opinion.

West Headnotes (4)

- [1] **Evidence** → Capitalization of income; rents
Evidence → Comparable sales or values
Taxation → Valuation

Supreme court’s decision to credit tax appraisal of real property offered by pharmacy lessee, whose expert used a comparable sales approach and income capitalization approach to arrive at valuation of \$1.0 million to \$1.1 million on relevant taxable status dates, was against the weight of the evidence in lessee’s petition to reduce tax assessments; lessee’s expert did not give any weight to recent sale of subject property for \$4,650,000, did not consider the actual rent paid by lessee, and did not use readily available comparable sales of national chain drugstore properties in the applicable submarket as evidence of value.

1 Cases that cite this headnote

- [2] **Taxation** → Scope of review

In a proceeding challenging a tax assessment, an appellate court is empowered to make new findings of value where the trial court has failed to give to conflicting evidence the relative weight which it should have, giving due deference to the trial court's power to resolve credibility issues by choosing among conflicting expert opinions.

[Cases that cite this headnote](#)

[3] **Taxation** → Matters considered and methods of valuation in general

Real property is assessed for tax purposes according to its condition and ownership on the taxable status date, without regard to future potentialities or possibilities and may not be assessed on the basis of some use contemplated in the future.

[Cases that cite this headnote](#)

[4] **Taxation** → Market value and sale price; comparable sales

Although several methods of valuing real property are acceptable, the market value method of valuation is preferred as the most reliable measure of a property's full value for tax assessment purposes because the best evidence of value, of course, is a recent sale of the subject property between a seller under no compulsion to sell and a buyer under no compulsion to buy; the scope of a "market" need not be limited to the locale of the subject property and, depending on the nature of the use, it may encompass national and/or international buyers and sellers.

[Cases that cite this headnote](#)

Attorneys and Law Firms

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Robert L. Jacobson, Pittsford, for Petitioner–Respondent.

PRESENT: [SCUDDER](#), P.J., SMITH, [CARNI](#), [SCONIERS](#), AND WHALEN, JJ.

Opinion

MEMORANDUM:

*1510 Petitioner commenced these RPTL article 7 proceedings seeking review of the real property tax assessments for a commercial property located in respondent Town of Williamson for the tax years 2009/2010, 2010/2011, and 2011/2012. In each of the proceedings, respondents appeal from an order and judgment granting the respective petitions in part *1511 and ordering respondents to correct the assessment rolls and to refund the tax overpayments with interest. Respondents concede that the assessment for the 2010/2011 tax year should be reduced to \$3,610,100.

^[1] Petitioner is the lessee under a 20-year triple net lease of a 2.36 acre parcel of real property located at 4061 Route 104 in the Town of Williamson, which is improved by a 14,690-square-foot single-tenant retail pharmacy. Rent is \$377,000 per annum or approximately \$25.73 per square foot. The pharmacy building was constructed in 2003 under a build-to-suit arrangement with petitioner's predecessor, Eckerd Drugs. The build-to-suit arrangement in this case involved the assemblage of five separate parcels of real property situated on a corner lot with a traffic light. Under the terms of the lease, petitioner is responsible for, among other things, the payment of real property taxes. The property was sold in 2003 in what the parties agree was an arm's length sale for \$4,650,000. In 2009, 2010, and 2011, the property was assigned an assessed value of \$3,750,000 by respondent Stephen Haywood, **525 assessor of the Town of Williamson. Petitioner commenced three proceedings pursuant to RPTL article 7 challenging those assessments. A nonjury trial was conducted at which the parties presented expert testimony. In granting the petitions in part, Supreme Court credited the appraisal and valuation approach of petitioner's expert and concluded, inter alia, that the 2003 sale of the subject property was of "no probative value" in determining the fair market value of the fee simple interest in the property. We conclude that the court's decision to credit the appraisal of petitioner's expert was against the weight of the evidence, and we modify the order and judgment accordingly (see *Matter of Rite Aid Corp. v. Otis*, 102 A.D.3d 124, 127, 954 N.Y.S.2d 666, lv. denied 21 N.Y.3d 855, 2013 WL 1876601; see also *Matter of Kohl's Ill. Inc. # 691 v. Board of Assessors of the Town of Clifton Park*, 123 A.D.3d 1315, 1317, 999 N.Y.S.2d 250).

We note at the outset that respondents do not dispute that petitioner came forth with substantial evidence, in the form of the appraisal report and testimony of its expert, to rebut the presumption of validity of the tax assessments (see generally *Matter of Techniplex III v. Town & Vil. of E. Rochester*, 125 A.D.3d 1412, 1412–1413, 3 N.Y.S.3d 521). Nor do respondents contend that the approach to valuation used by petitioner's expert, which rejects drugstore comparables on the ground that they are "build-to-suit" and, thus, subject to above-market leases which encompass purchasing, often at a premium, and assembling various pieces of property, demolition and construction *1512 costs, is not plausible (see *Matter of Brooks Drugs, Inc. v. Board of Assessors of City of Schenectady*, 51 A.D.3d 1094, 1095, 856 N.Y.S.2d 304, lv. denied 11 N.Y.3d 710, 872 N.Y.S.2d 72, 900 N.E.2d 555).

^[2] Within this framework, an appellate court is empowered to make new findings of value where the trial court "has failed to give to conflicting evidence the relative weight which it should have" (*People ex rel. MacCracken v. Miller*, 291 N.Y. 55, 61, 50 N.E.2d 542, quoting *Matter of City of New York [Newton Creek]*, 284 N.Y. 493, 497, 31 N.E.2d 916 [emphasis omitted]), giving due deference to the trial court's power to resolve credibility issues by choosing among conflicting expert opinions (see *Brooks Drugs, Inc.*, 51 A.D.3d at 1095, 856 N.Y.S.2d 304).

^[3] ^[4] It is well settled that real "[p]roperty is assessed for tax purposes according to its condition [and ownership] on the taxable status date, without regard to future potentialities or possibilities and may not be assessed on the basis of some use contemplated in the future" (*Matter of Addis Co. v. Srogi*, 79 A.D.2d 856, 857, 434 N.Y.S.2d 489, lv. denied 53 N.Y.2d 603, 439 N.Y.S.2d 1026, 421 N.E.2d 853; see RPTL 302[1]; *Matter of BCA-White Plains Lanes v. Glaser*, 91 A.D.2d 633, 634–635, 457 N.Y.S.2d 299, appeal dismissed 59 N.Y.2d 673). Although several methods of valuing real property are acceptable, "the market value method of valuation is preferred as the most reliable measure of a property's full value for assessment purposes" (*Matter of General Elec. Co. v. Town of Salina*, 69 N.Y.2d 730, 731, 512 N.Y.S.2d 359, 504 N.E.2d 686), because "[t]he best evidence of value, of course, is a recent sale of the subject property between a seller under no compulsion to sell and a buyer under no compulsion to buy" (*Matter of Allied Corp. v. Town of Camillus*, 80 N.Y.2d 351, 356, 590 N.Y.S.2d 417, 604 N.E.2d 1348, rearg. denied 81 N.Y.2d 784, 594 N.Y.S.2d 720, 610 N.E.2d 393). A recent sale has been characterized as evidence of the "highest rank" in determining market value (*Matter of F.W. Woolworth **526 Co. v. Tax Commn. of City of N.Y.*, 20 N.Y.2d 561, 565, 285 N.Y.S.2d 604, 232 N.E.2d 638 [emphasis omitted]; see *Plaza Hotel Assoc. v. Wellington Assoc.*, 37 N.Y.2d 273, 277, 372 N.Y.S.2d 35, 333 N.E.2d 346, rearg. denied 37 N.Y.2d 924, 378 N.Y.S.2d 1027, 340 N.E.2d 754). The scope of a "market" need not be limited to the locale of the subject property and, depending on the nature of the use, it may encompass national and/or international buyers and sellers (see e.g. *Matter of Saratoga Harness Racing v. Williams*, 91 N.Y.2d 639, 646, 674 N.Y.S.2d 263, 697 N.E.2d 164).

In support of its case, petitioner presented the testimony of appraiser Christopher Harland, who concentrated his analysis on the fee simple value of the property, unencumbered by any leases. Harland employed the comparable sales approach and income capitalization approach in arriving at his valuation. He valued the subject property at \$1.0 million to \$1.1 million on *1513 the relevant taxable status dates. The comparable properties he used in his analysis consisted primarily of commercial retail properties located in the same general geographic area. None, however, were currently occupied by national pharmacy

chains nor subject to build-to-suit leases. Indeed, Harland's sales comparables consisted of a Dollar Tree store; a Staples office supply store; a Salvation Army thrift shop; a retail bicycle shop; and a Dollar General store. Although Harland's appraisal recognized that 12 recent sales of retail drugstores had occurred in the region, he concluded that it was "not appropriate to use these sales" and gave them "little weight ... in valuing the subject property."

On the other hand, respondents' expert, Ronald Rubino, testified, and his appraisal concluded, that there is an established national submarket for the sale and purchase of built-to-suit net lease national chain drugstores, which provides an abundance of drugstore comparable sales, both local and regional, for use in the sales comparison approach. Notably, petitioner's expert agreed that there is a wholly separate national net lease drugstore real estate submarket and further acknowledged that his appraisal cited to and relied upon a national "Net Lease Drugstore Market Report." This report is published by The Boulder Group, which describes itself as "a boutique investment real estate service firm specializing in single tenant net lease properties. The firm provides a full range of brokerage, advisory, and financing services nationwide to a substantial and diversified client base, which includes high net worth individuals, developers, REITs, partnerships and institutional investment funds" (The Boulder Group, <http://bouldergrgroup.com/> [accessed June 18, 2015]). Respondents' expert also included a reference to The Boulder Group net lease market report in his appraisal. In other words, there is no serious dispute that the submarket identified and relied upon by respondents' expert exists, and sales and rental data for that submarket are readily available (*see Brooks Drugs, Inc.*, 51 A.D.3d at 1095, 856 N.Y.S.2d 304; *Matter of Eckerd Corp. v. Gilchrist*, 44 A.D.3d 1239, 1240–1241, 843 N.Y.S.2d 871, *lv. denied* 10 N.Y.3d 707, 858 N.Y.S.2d 654, 888 N.E.2d 396). It is noteworthy that petitioner's expert also recognized that the boundaries of the applicable submarket "are not purely physical or geographical" and, "to the extent that the market is the meeting place for buyers and sellers of real estate of a given type, the participants who deal within its confines set the boundaries of the market." Nonetheless, in his appraisal, petitioner's expert disregarded the applicable submarket and relied upon properties that are clearly outside of the **527 well-recognized parameters of the net lease national drugstore submarket.

*1514 On the other hand, in reaching his valuation through the use of the sales comparison approach, respondents' expert identified and used nine commercial properties, eight of which were improved and occupied as national retail drugstore chain locations. Those eight properties were clearly within the recognized parameters of the national net lease drugstore submarket. The average sale price for those comparables was \$4,716,648. Respondents' expert gave the recent sale of the subject property the "most weight" as the "best indicator" of the market value of the subject property. Petitioner's expert considered the 2003 sale of the subject property but "did not put any weight on it."

Petitioner's expert also used the income capitalization method. When using that method, actual rental income is often, as a general rule, the best indicator of value (*see Techniplex III*, 125 A.D.3d at 1413, 3 N.Y.S.3d 521; *Matter of Schoeneck v. City of Syracuse*, 93 A.D.2d 988, 988, 461 N.Y.S.2d 641; *see also Matter of Merrick Holding Corp. v. Board of Assessors of County of Nassau*, 45 N.Y.2d 538, 543, 410 N.Y.S.2d 565, 382 N.E.2d 1341). In reaching a valuation using the income capitalization method, petitioner's expert also rejected the actual contract rent, which he described as "substantially above market." Moreover, petitioner's expert rejected the rents of other net lease national drugstore properties in arriving at his determination of market rent. Instead, petitioner's expert identified "market rent" by using the following properties: a Goodwill Industries store and donation drop-off center, a nonprofit corporation serving community needs; a Petsmart store; an Old Navy clothing retail store; a Family Dollar retail store; and a Volunteers of America store, a nonprofit corporation that serves community needs and operates thrift or resale stores. Petitioner's expert did not use any operating national chain drugstore-occupied properties in his determination of "market rent" and arrived at a market rent of \$8.00 per square foot.

On the other hand, respondents' expert utilized eight rental comparables, seven of which were occupied and used as national chain drugstores. The use of those comparables demonstrated that the adjusted comparable median market rent for similar national chain drugstores was \$33.86 per square foot, which yields a valuation of \$4,130,000 for July 1, 2008, and \$3,760,000 for July 1, 2009.

In light of the foregoing, we conclude that the failure of petitioner's expert to use the recent sale of the subject property as well as readily available comparable sales of national chain drugstore properties in the applicable submarket as evidence of value demonstrates the invalidity of the expert's conclusion *1515 with respect to the sales comparison valuation (*see Matter of Thomas v. Davis*, 96 A.D.3d 1412, 1415, 946 N.Y.S.2d 336, *lv. denied* 21 N.Y.3d 860, 2013 WL 3198190). We further conclude that the use of sales not comparable to the subject and outside of the applicable market should have been rejected by the court as unreliable (*see Matter of Adcor Realty Corp. v. Srogi*, 54 A.D.2d 1096, 1096, 388 N.Y.S.2d 962, *lv. denied* 41

N.Y.2d 806, 396 N.Y.S.2d 1025, 364 N.E.2d 850). Moreover, the failure of petitioner's expert to use the actual rent, negotiated at arm's length and without duress or collusion, as well as the failure to use similar rental comparables from the applicable market as evidence of value, demonstrates the invalidity of the expert's conclusions using the income capitalization method (see *Matter of Conifer Baldwinsville Assoc. v. Town of Van Buren*, 68 N.Y.2d 783, 785, 506 N.Y.S.2d 853, 498 N.E.2d 417; see generally **528 *Techniplex III*, 125 A.D.3d at 1413, 3 N.Y.S.3d 521).

All concur except **SCUDDER**, P.J., who dissents and votes to affirm in the following memorandum:

I respectfully dissent. In my view, the valuation determination made by Supreme Court should be upheld, and I would therefore affirm the order and judgment. While it is well established that "a property valuation by the tax assessor is presumptively valid" (*Matter of FMC Corp. [Peroxygen Chems. Div.] v. Unmack*, 92 N.Y.2d 179, 187, 677 N.Y.S.2d 269, 699 N.E.2d 893), I agree with the majority that petitioner came forward with substantial evidence to rebut the presumption by submitting "a detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser" (*Matter of Niagara Mohawk Power Corp. v. Assessor of Town of Geddes*, 92 N.Y.2d 192, 196, 677 N.Y.S.2d 275, 699 N.E.2d 899; see *Matter of Rite Aid Corp. v. Otis*, 102 A.D.3d 124, 125–126, 954 N.Y.S.2d 666, *lv. denied* 21 N.Y.3d 855, 2013 WL 1876601). Once that presumption of validity is rebutted, "a court must weigh the entire record, including evidence of claimed deficiencies in the assessment, to determine whether petitioner has established by a preponderance of the evidence that its property has been overvalued" (*FMC Corp.*, 92 N.Y.2d at 188, 677 N.Y.S.2d 269, 699 N.E.2d 893; see *Rite Aid Corp.*, 102 A.D.3d at 126, 954 N.Y.S.2d 666).

In tax certiorari proceedings, such as the one at issue on this appeal, the Court of Appeals has specifically held that the Appellate Division "may not set aside a finding of value made at Special Term, unless such finding is based upon [an] erroneous theory of law or [an] erroneous ruling in the admission or exclusion of evidence, or *unless it appears that the court at Special Term has failed to give to conflicting evidence the relative weight which it should have* and thus has arrived at a value which is excessive or inadequate" (*People ex rel. MacCracken v. Miller*, 291 N.Y. 55, 61, 50 N.E.2d 542; see *Matter of Adirondack Mtn. Reserve v. *1516 Board of Assessors of the Town of N. Hudson*, 106 A.D.3d 1232, 1237, 966 N.Y.S.2d 532; *Matter of Universal Packaging v. Assessor of City of Saratoga Springs*, 259 A.D.2d 875, 875, 686 N.Y.S.2d 241; *cf. Matter of Kohl's Ill. Inc. # 691 v. Board of Assessors of the Town of Clifton Park*, 123 A.D.3d 1315, 1317, 999 N.Y.S.2d 250; *Matter of Al Turi Landfill, Inc. v. Town of Goshen*, 93 A.D.3d 786, 791, 941 N.Y.S.2d 177, *lv. denied* 19 N.Y.3d 815, 2012 WL 5258719).

The crux of this appeal as well as the appeals in *Matter of Rite Aid Corp. v. Huseby*, 130 A.D.3d 1518, 11 N.Y.S.3d 889 (2015) and *Matter of Rite Aid Corp. v. Huseby*, 130 A.D.3d 1518, 13 N.Y.S.3d 753 (2015) are the method and manner of valuing first-generation, build-to-suit retail drugstores for tax assessment purposes. Petitioner's expert, Christopher Harland, concluded that the value of the leased fee interest, i.e., the value of the property with the lease, is different from the value of the fee simple interest, i.e., the value of the property itself without any attendant lease. He opted to use the value of the fee simple interest only and thus used retail properties not subject to long-term retail drugstore leases as comparables. The majority concludes that Harland's opinions and valuations are invalid because he used commercial retail properties instead of first-generation build-to-suit pharmacies in his sales comparison and income capitalization analyses. Harland, however, explained his reasons for doing so. As was stated succinctly by the Third Department in a similar appeal in which Harland's valuation **529 method was credited, "[t]he exclusion of national retail drug stores from Harland's analysis was premised upon his designation of those properties as 'build-to-suit,' meaning that they often have above-market leases attributable to premiums being paid to acquire the land, as well as assembly, demolition and construction costs" (*Matter of Eckerd Corp. v. Burin*, 83 A.D.3d 1239, 1242, 920 N.Y.S.2d 824; see *Matter of Eckerd Corp. v. Semon*, 35 A.D.3d 931, 934, 829 N.Y.S.2d 238). Moreover, the testimony at the nonjury trial established that the price of the land before the retail drugstore was built was \$1.59 million, and a similar retail drugstore, the lease of which had expired, had recently sold for only \$1.4 million.

Respondents' expert, Ronald Rubino, gave considerable weight to the 2003 sale of the property for \$4.65 million. At that time, however, the property was subject to a 20-year retail drugstore lease in the amount of \$377,000 per year. In his sales comparison and income capitalization analyses, Rubino relied almost exclusively on first-generation, build-to-suit retail drugstores still subject to lease provisions.

Each expert used the sales comparison and income capitalization *1517 methods of valuation, but the fundamental difference in whether to consider the lease in their respective analyses explains their different valuations. Both approaches to valuation have been upheld by the Third Department and, where trial courts have accepted Harland's valuations, the Third Department has generally affirmed (see e.g. *Eckerd Corp.*, 83 A.D.3d at 1242–1243, 920 N.Y.S.2d 824; *Matter of Eckerd Corp. v. Semon*, 44 A.D.3d 1232, 1234, 844 N.Y.S.2d 468; *Eckerd Corp.*, 35 A.D.3d at 934, 829 N.Y.S.2d 238). Where trial courts have rejected Harland's valuations, the Third Department has also generally affirmed (see *Matter of Rite Aid of N.Y. No. 4928 v. Assessor of Town of Colonie*, 58 A.D.3d 963, 966, 870 N.Y.S.2d 642, *lv. denied* 12 N.Y.3d 709, 881 N.Y.S.2d 17, 908 N.E.2d 925; *Matter of Brooks Drugs, Inc. v. Board of Assessors of City of Schenectady*, 51 A.D.3d 1094, 1095–1096, 856 N.Y.S.2d 304, *lv. denied* 11 N.Y.3d 710, 872 N.Y.S.2d 72, 900 N.E.2d 555; *Matter of Eckerd Corp. v. Gilchrist*, 44 A.D.3d 1239, 1240, 843 N.Y.S.2d 871, *lv. denied* 10 N.Y.3d 707, 858 N.Y.S.2d 654, 888 N.E.2d 396). Notably, however, even when a trial court had rejected Harland's valuation, the Third Department wrote that Harland had "articulated a plausible reason for his failure to use the type of comparables adopted by" the respondent's expert and that he had "put forth a persuasive case for [his] ... valuation[]" (*Rite Aid of N.Y. No. 4928*, 58 A.D.3d at 966, 870 N.Y.S.2d 642).

The Third Department has concluded that the decision whether to credit Harland's testimony on the valuation of retail drugstore properties is "a credibility determination that [the Court] decline[s] to disturb" (*id.*; see *Eckerd Corp.*, 83 A.D.3d at 1243, 920 N.Y.S.2d 824; *Eckerd Corp.*, 44 A.D.3d at 1241, 843 N.Y.S.2d 871). The one exception is *Rite Aid Corp.*, 102 A.D.3d 124, 954 N.Y.S.2d 666. In that case, the trial court concluded that, because the recent sale price of the subject property was consistent with the value of the property as determined by respondents' expert, the trial court's "decision to credit the appraisal offered by petitioner was against the weight of the evidence" (*id.* at 127, 954 N.Y.S.2d 666). While that case involved circumstances similar to the circumstances at issue in the instant appeal, I would decline to follow that decision. There, as here, Harland explained his reasoning for rejecting recent sales, i.e., that such sales do not reflect the value of the fee simple interest but, rather, inflated above-market leases. I thus conclude that, if one were to credit Harland's **530 reasoning, a recent sale of the subject property while the lease was still in effect would not affect the valuation of the fee simple interest in the property.

Here, the court agreed with Harland's valuation, concluding that the lease was nothing more than a contract, i.e., "an intangible property right," not subject to taxation under RPTL 300. "Given that Harland provided a plausible reason for not *1518 relying on [the 2003 sale or] data from other national retail pharmacies in the area, [I] cannot say that [the court's] decision to credit Harland's report and testimony over [Rubino's] was against the weight of the evidence" (*Eckerd Corp.*, 35 A.D.3d at 934, 829 N.Y.S.2d 238). I would thus decline to disturb "[t]he court's ultimate finding concerning the value of the property [because it] is within the range of the expert testimony and supported by substantial evidence, and the court adequately explained the basis for its ultimate finding" (*Matter of Markham v. Comstock*, 38 A.D.3d 1262, 1263, 833 N.Y.S.2d 781; see *Universal Packaging*, 259 A.D.2d at 875, 686 N.Y.S.2d 241; cf. *Rite Aid Corp.*, 102 A.D.3d at 126–127, 954 N.Y.S.2d 666).

It is hereby ORDERED that the order and judgment so appealed from is modified on the law by dismissing the petitions challenging the assessments for the 2009/2010 and 2011/2012 tax years and by reducing the assessment for the 2010/2011 tax year to \$3,610,100, and as modified the order and judgment is affirmed without costs.

All Citations

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