

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

JUL 27 1991

L'ENFANT PLAZA PROPERTIES, INC. :	:		
et al.,	:		
	:		
Petitioners	:		
v.	:	Tax Docket Nos.	4474-90
	:		4821-91
	:		
DISTRICT OF COLUMBIA,	:		
	:		
Respondent	:		

OPINION AND ORDER

This matter came before the Court for trial on November 13, 1992. Petitioners, the fee simple owners of real property located at 400 10th Street, S.W., Lot 866 in Square 387 (hereinafter the "subject property") challenged the real property tax assessed against the subject property for tax years 1990 and 1991 pursuant to D.C. Code § 47-820 (1981 ed.). Respondent, the District of Columbia, valued the subject property for tax assessment purposes for tax year 1990 at \$43,723,000 consisting of \$15,108,372 for land and \$28,614,628 for improvements. Petitioners appealed to the Board of Equalization and Review, which sustained the assessment. Petitioners timely paid the tax of \$887,576.90 and timely filed this appeal.

Respondent, the District of Columbia, valued the subject property for tax assessment purposes for tax year 1991 at \$45,522,000 consisting of \$15,108,372 for land and \$30,413,628 for improvements. Petitioners appealed to the Board of Equalization and Review which sustained the assessment. Petitioners timely paid the tax of \$978,723.00 and timely filed this appeal.

The Court exercised jurisdiction over this appeal pursuant to D.C. Code §§ 47-825 and 47-3303 (1981 ed.). Based upon the evidence presented at trial and stipulations of the parties, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The subject property is located at 400 10th Street, S.W., Lot 866, Square 387 in the District of Columbia.

2. Petitioner L'Enfant Plaza Properties, Inc. (hereinafter referred to as "L'Enfant Plaza") is the successor by merger, as of June 30, 1974, to L'Enfant Plaza North, Inc. Both corporations are or were incorporated in and operating in the District of Columbia. The principal office of both corporations is or was P-114, L'Enfant Plaza North, S.W., Washington, D.C. 20024. L'Enfant Plaza is the owner of the improvements and lessee of the subject property, Lot 866 in Square 387, in the District of Columbia, improved by premises known as 400 10th Street, S.W.

3. Petitioner, L'Enfant Plaza Corporation is a corporation organized and existing under the laws of the District of Columbia. L'Enfant Plaza Corporation is the owner of the subject real estate, Lot 866 in Square 387.

4. Petitioners are obligated to pay all real estate taxes assessed against the subject property.

5. Respondent District of Columbia is a municipal corporation, created by the United States Congress, Section 1-101 of the District of Columbia Code.

6. Lot 866 in Square 387 improved by premises 400 10th Street, S.W. Washington, D.C. is also known as the North Building

of the L'Enfant Plaza Complex. The complex built in 1968 consists of three interconnected buildings forming a U around a masonry plaza facing the L'Enfant Promenade and containing a large center fountain and a horseshoe shaped driveway. The building to the east contains a hotel and office facilities. (East Building). The South Building is the twin to the building we are considering. This South Building has been sold although through a sale/leaseback arrangement which prevents its use as a comparable sale. Underground the buildings are connected by means of an open shopping arcade called the Promenade Level with access from each building and the Plaza. Also under the shopping arcade are levels for underground parking facilities with entrances and exits from the Center Building all interconnected. A metro station is located under the plaza with access by way of the Promenade Level. The North Building (Lot 866) and the hotel and office building (East Building) are jointly owned and operated by the petitioners.

Lot 866 has a land area of 51,741 square feet. Its improvements are a commercial structure of nine stories with three below ground levels containing office, retail and storage facilities with a net rentable area of approximately 280,000 square feet of which some 251,000 square feet is appropriate for office use. The structure is free standing and like the other buildings of the complex, monumental in appearance and much more in keeping with the nearby federal buildings, HUD, GSA, the Forestal building and the prominent Smithsonian and art gallery structures on Independence Avenue than it is like the office buildings in the

northwest central commercial area or even in the nearby southwest development.

7. The real estate tax assessments on the subject property have been in constant litigation since tax year 1985. This Court has repeatedly since that year found the property to have been grossly overassessed as follows:

<u>Tax Yr.</u>	<u>Docket No.</u>	<u>Assessment</u>	<u>Court Decision</u>
1985	T3650-85	\$33,585,000	\$20,700,000 (Barnes, J. 9/88)
1986	T3806-86	\$33,585,000	\$23,200,000 (Fauntleroy, J. 8/89)
1987	T3941-87	\$34,082,000	\$24,500,000 (Fauntleroy, J. 8/89)
1988	T4083-88*	\$43,031,000	\$34,840,000 (Doyle, J. 4/92)
1989	T4202-89*	\$43,031,000	\$36,850,000 (Doyle, J. 4/92)

*on appeal.

8. In T3650-85 the Court found the District's 1985 assessment to be invalid ab initio. In T3806-86 and T3941-87 the District conceded that its assessments were invalid. In T4083-88 and T4202-89 the Court held that although the assessor had followed the steps necessary for a valid assessment, the procedures used by the assessor and the resulting assessment were erroneous.

9. From appeal of tax year 1985 through appeal of tax year 1989 a central reason for the Court's reversal and reduction of the assessment was the finding that the use by the assessor of generalized statistical data in formulating operating income and expenses was inappropriate for the particular property's unique and

atypical features and resulted in a material overassessment.

10. The errors found by the Court to cause overassessment and to require reduction and refund are essentially two in number:

1) After considering the income, market and cost approaches to appraisal, the assessor and his experts have selected the income capitalization approach. All have agreed with this. The assessor then has rejected the taxpayer's income/expense data because it was higher than figures found in publications averaging such data for typical office buildings, e.g. BOMA. The assessor and his expert have then used the averages so obtained and data concerning leases in the same age group in calculating the net operating income for the subject property, and from it as capitalized have derived their estimate of market value for real estate tax purposes. For five successive tax years the Court has ruled this procedure erroneous for this particular property, finding that the building is atypical and unique, much more expensive to operate, and not measurable by statistical averages for the usual office building. The Court has found that the proper method for obtaining net operating expenses for L'Enfant Plaza North is to use actual operating expenses. The assessor's methods in these regards were rejected for tax years 1985 through 1989.

2) For the first time in tax year 1988 and again in tax year 1989 through 1990 and 1991 the District expert has charged that revenues from automobile parking areas in Lot 866 should be assigned to the operating revenues of the North Building in the approximate sum of \$500,000.00. The assessor joined in this

approach in tax year 1991. This conclusion ignores the facts that the access to the parking area is through the jointly owned Center Building; that the whole parking enterprise was operated by an independent contractor; and that the revenues for tax purposes were traditionally accounted as income to the Center Building; and that there appeared no justification for double taxation in the premises. The issue was presented squarely to the Court in T4083-88 and T4202-89 for tax years 1988 and 1989 and the Court decided against the position of the District of Columbia.

11. The assessments now before the Court are with the exception of low percentage annual increases, the same as those entered by the District of Columbia for tax year 1988 and 1989.

They are:

Tax year 1990: \$43,723,000

Tax year 1991: \$45,522,000

(Tax year 1988 & 1989: \$43,031,000)

12. In arriving at the latest assessments (for tax year 1990 and 1991) the District of Columbia has repeated the same erroneous procedures set forth above which have caused the Court to reduce assessments for each year since tax year 1985.

13. The District of Columbia has taken the consistent legal position that based on the statutory requirement for annual assessment, prior Superior Court tax decisions are irrelevant and without precedential effect in respect of tax assessments for any subsequent year. Under this rubric an assessment once found improper may be repeated the next year with impunity even though

the circumstances remain without material change. The history of the subject property gives rise to the probability under the District's position that litigation will continue until the taxpayer can no longer afford it.

14. In assessments for tax years 1990 and 1991 there has been no material change from tax year 1989 and the repetition of gross overassessments is erroneous, arbitrary and unlawful and has rendered them invalid.

15. The taxpayer took the position that for tax year 1988 and 1989 the fair market value of the property was \$32,500,000 and \$34,000,000 respectively. The Court in T4083-88 and T4202-89 found the values to be \$34,840,000 and \$36,850,000. Now the taxpayer argues that tax year 1990's value is \$27,700,000 and tax year 1991's value is \$29,900,000. Although the petitioners' expert witness, Ms. Michelle Saad, submitted appraisal reports and testimony in support of these figures she never explained the justification for the marked decrease in value of the subject property since 1989. An analysis of the figures used by the experts in computing the fair market value under the income approach brings to light that the only substantial difference between the petitioner's data from 1988 and 1989 and the current litigation is in capitalization rate. The petitioners' previous expert used a capitalization rate of 11% for tax years 1988 and 1989. Presently the petitioners are urging the Court to adopt a capitalization rate of 11.78% and 11.90% for tax years 1990 and 1991 respectively. Even with adjustments for the .15 increase in

the tax rate this jump in capitalization rate is substantial.

16. Due to the Court's concern over this issue the petitioners were requested to submit a memorandum explaining whether the Court would be justified in reducing the value of this property at this time. What followed was a candid, though not persuasive, explanation. The petitioners have attempted to avoid the effect of the testimony of their previous expert witness, Mr. Ryland Mitchell, who testified before the Court for tax years 1988 and 1989 after the death of their originally retained witness, Mr. Urquhart. Before his death, Mr. Urquhart had prepared appraisal reports for tax years 1988 and 1989 and his values for the property were much closer to Ms. Saad's current values which are now before the Court. The petitioners urge the Court to compare the appraisals Mr. Urquhart prepared before his death with those of Ms. Saad, his partner and successor. This, the petitioners argue, is an irrefutable answer to the Court's question. Petitioners' Memorandum for the Court.

17. The Court finds this answer to be quite refutable. Essentially, the petitioners are asking the Court to ignore the findings of their own previous expert witnesses as well as any independent determinations of value which the Court may have made in reliance on that witness in prior litigation. This Court is not so quick to ignore its own prior decision simply because the petitioners have found a more amenable expert witness. Collateral estoppel cuts both ways. Finding no plausible explanation for the petitioners' new reduced fair market value figures, this Court

holds Ms. Saad's appraisal to be barred by collateral estoppel. In particular, the Court finds that there has been no compelling evidence in support of Ms. Saad's increased capitalization rate which is the source of her reduced fair market value.

18. The Court, finding that no material change has occurred since its decision for tax year 1989 (T4202-89), holds that under the doctrine of collateral estoppel (issue preclusion) the official assessments for tax year 1990 and 1991 are invalid. The Court also holds that petitioners' attempt to reduce the subject property's assessment through testimony of a new expert without material change in circumstances is likewise barred by the doctrine of collateral estoppel.

19. The Court finds that the circumstances and the firm determination of the District to adhere to their position set forth in Finding #13 requires the Court to take the option of cancelling the District's assessments for tax year 1990 and tax year 1991; leaving in place for such years the 1989 assessment found by the Court to be \$36,850,000. The same to remain until the District makes another evaluation in accordance with law.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this appeal pursuant to D.C. Code §§ 47-825 and 47-3303 (1990 Repl.). The Superior Court's review of a tax assessment is de novo. In appealing from assessments of real property for tax purposes, the taxpayer has the

burden of proving that the assessment was incorrect or flawed. Brisker v. District of Columbia, 510 A.2d 1037, 1039 (D.C. 1986). The petitioners are not required to establish the correct value of their property. Id.

2. The Court finds that the petitioners have met their burden of proving that the assessments for tax years 1990 and 1991 are incorrect. In assessing the subject property, the District of Columbia's assessor and expert appraisers have ignored this Court's previous rulings for tax years 1985 through 1989 in that net operating income has once again been derived from statistical averages for the usual office building, and revenues from automobile parking areas in Lot 866 have been attributed to the North Building even though these revenues have been traditionally and presently accounted for as income to the Center Building and the only access to this parking area is through the Center Building. Attributing parking revenues to both the North and Center Buildings, and thereby taxing the same income twice, was found to be erroneous by this Court in T4083-88 and T4202-89. Furthermore, the use of statistical averages at the expense of using actual data when assessing the subject property has been held to be erroneous as far back as 1985. See, L'Enfant Plaza Properties, Inc. v. District of Columbia, Tax No. 3650-85 (D.C. Super. Ct. Sept. 20, 1988); L'Enfant Plaza Properties, Inc. v. District of Columbia, Tax No. 3806-86 (D.C. Super. Ct. August 23, 1989); L'Enfant Plaza Properties, Inc. v. District of Columbia, Tax No. 3941-87 (D.C. Super. Ct. August 24, 1989); L'Enfant Plaza

Properties, Inc. v. District of Columbia, Tax Nos. 4083-88, T4202-89 (D.C. Super. Ct. April 17, 1992).

3. The position of the District of Columbia in respect of the premises is summarized in legal memorandum submitted to the Court.

The District believes that the Court's decisions setting assessments for previous tax years, made years after the property was independently assessed for each of those years, using statutory factors required under the code, have no bearing on and should not be considered in reaching decisions on later tax years. To do so introduces considerations in the valuation process that are outside the statutory factors required by the code and would require from assessors and expert appraisers valuing property as of a given valuation date a violation of their duty of independence and practice. Respondent's Memorandum.

4. This position was before the Court of Appeals in District of Columbia v. Burlington, 375 A.2d 1052 (D.C. 1977), and was rejected,

The crucial inquiry concerns the legal effect to be accorded the trial court's modification of the Board's valuation until such time as the District undertakes a genuine reappraisal of the property. All relevant authorities, including prior decisions of this court, the statutory structure, the trial court's rules of procedure, and traditional equitable principles, lead us to conclude that the trial court's valuation must constitute the continuing basis for taxation until there is a superseding valuation which has been made according to law. Id. at 1056.

5. In Brisker v. District of Columbia, 510 A.2d 1037 (D.C. 1986), the Court reaffirmed the option of the trial court to cancel the present assessment; leaving in place the last lawful

assessment. Id. at 1040.

6. The District argues that since the time intervals for appeal make it inevitable that the certification of the tax roll will come before the decision of the Superior Court this protects assessments subsequent to the one challenged even though the challenge may be successful. Changes, however, may be made by court order under D.C. Code § 47-835g and the Court hearing a subsequent challenge may be bound by the doctrine of collateral estoppel (issue preclusion). In this case, based on principles of collateral estoppel, the Court refuses to relitigate the appropriateness of using the above described methods to assess the value of the subject property.

7. Although the doctrine of collateral estoppel has not yet been specifically applied to tax cases in the District of Columbia there is ample federal law upholding such application. The Supreme Court addressed the issue in Commissioner of Internal Revenue v. Sunnen, 68 S.Ct. 715 (1948) and held that issue preclusion had limited application in tax cases. Namely, if relevant facts in the two cases were separable although identical then collateral estoppel would not apply. Id. at 721. However, the Supreme Court has since withdrawn this aspect of Sunnen in its decision in Montana v. United States, 99 S.Ct. 970 (1979). Montana sets forth the following three part test to determine whether issue preclusion should apply in a particular tax case:

1. Are the issues presented in the second litigation in substance the same as those resolved in the first

litigation;

2. Have controlling facts or legal principles significantly changed since the first litigation;

3. Are there other special circumstances warranting an exception to the normal rules of preclusion. Id. at 974-

5.

8. Several Circuits have followed Montana and applied collateral estoppel to tax cases. See, American Medical International v. Secretary of Health, Education and Welfare, 677 F.2d 118 (D.C. Cir. 1981); Starker v. United States, 602 F.2d 1341 (9th Cir. 1979); Disabled American Veterans v. Commissioner of Internal Revenue, 942 F.2d 309 (6th Cir. 1991); ITT Corporation v. United States, 963 F.2d 561 (2nd Cir. 1992). In particular, the Second Circuit explicitly stated in a per curiam opinion that, "Montana indicate[s] that it is appropriate to invoke collateral estoppel here to bar the Commissioner from relitigating with the same taxpayer the precise issue on which the Commissioner has already lost for a prior year." Union Carbide Corporation v. Commissioner of Internal Revenue, 671 F.2d 67 (2nd Cir. 1982). This Court invokes issue preclusion to prevent the District of Columbia from relitigating 1) the appropriateness of using statistical income and expense averages as opposed to actual historical income and expenses when determining the fair market value of the subject property, and 2) the question of whether parking revenue should be attributed to the subject property when it is currently being attributed to the Center Building and is

taxable to the Center Building.

9. Applying the three part Montana test to these issues the Court finds that the issues in the present case are in substance the same as those resolved in the first litigation. Also, no controlling facts or legal principles have significantly changed since the first litigation. The L'Enfant Plaza properties are still viewed as unique real estate which should not be compared to office buildings in the downtown Washington, D.C. business district. Likewise there has been no change in the parking structure which would allow any access to the underground lot from the North Building, nor has there been any reallocation between the North and Center Buildings of parking income and expenses. Finally, the Court finds no other special circumstances which would warrant an exception to the normal rules of preclusion. Montana at 974-5. Accordingly, the Court finds the tax year 1990 and 1991 assessments for the subject property to be invalid because valuation methods previously held to be improper by this Court were employed to arrive at these figures.

10. Montana's test also requires the Court to apply collateral estoppel to bar the testimony in support of a reduced appraisal of the subject property given by the petitioners' expert. The issue in this litigation is in substance the same as the issue resolved in T4083-88 and T4202-89; namely, the fair market value of the subject property. No controlling facts or legal principles have significantly changed since the first litigation. The Court finds that the mere substitution of an expert witness willing to

provide new data without adequate explanation for the resulting change in value of the property, is not a change of fact which bars the application of issue preclusion. Finally, the Court finds no other special circumstances which would warrant an exception to the normal rules of preclusion. Id. at 974-5. Accordingly, the Court finds the petitioners' appraisals for tax year 1990 and 1991 to be barred by the doctrine of collateral estoppel.

11. Once a Court has found both the District of Columbia's assessment and the petitioners' appraisal to be flawed, the last valid appraisal stands. This method was upheld in District of Columbia v. Brisker, at 1040. In this case the last valid appraisal is the one determined by this Court for tax year 1989 in T4202-89. Accordingly, the Court finds the fair market value of the subject property to be \$36,850,000 for tax years 1990 and 1991.

ORDER

Upon the findings of fact and conclusions of law made in the case above and upon the petitions filed herein, and upon the evidence adduced at trial, it is by the Court this 27th day of January, 1993, hereby,

1. ORDERED that the correct assessment for the subject property for tax year 1990 is \$36,850,000 and that the correct assessment for the subject property for tax year 1991 is \$36,850,000; and it is

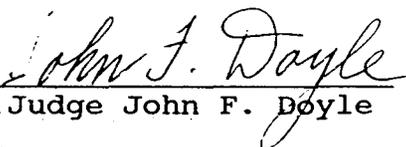
2. FURTHER ORDERED that respondent be and hereby is, directed to modify the assessment record card to reflect the value of \$36,850,000 for tax years 1990 and 1991, and for all subsequent

years until a lawful reassessment has been performed; and it is

2. FURTHER ORDERED that respondent shall refund to petitioners, with interest, the excess taxes which have been unlawfully collected for tax year 1990 and tax year 1991; and it is

3. FURTHER ORDERED that petitioners present a proposed order for refund, with interest from the dates of payment, no later than ten (10) days from the date of this Order.

SO ORDERED.


Judge John F. Doyle

cc:

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