

<p><b>BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO</b> 1313 Sherman Street, Room 315 Denver, Colorado 80203</p> <hr/> <p>Petitioner:</p> <p><b>SAFEWAY INC.,</b></p> <p>v.</p> <p>Respondent:</p> <p><b>ARAPAHOE COUNTY BOARD OF EQUALIZATION.</b></p>	<p><b>Docket No.: 62506</b></p>
<p><b>ORDER</b></p>	

**THIS MATTER** was heard by the Board of Assessment Appeals on April 7<sup>th</sup> and 8<sup>th</sup>, 2014, James R. Meurer and Amy J. Williams, presiding. Petitioner was represented by Christopher C. Rosas, Esq. Respondent was represented by George Rosenberg, Esq. Petitioner is protesting the 2013 actual value of the subject property.

Subject property is described as follows:

**Personal Property of Safeway Store No. 008  
Located at 7375 East Arapahoe Road, Centennial, CO  
Arapahoe County Schedule No. 25411-03787-009**

The property consists of all of the personal property associated with Safeway Store No. 008; said store being located at 7375 East Arapahoe Road, Centennial, CO. The inventory of personal property is not in dispute and is considered complete and accurate by both Petitioner and Respondent and both parties stipulate to the accuracy of the personal property inventory. The use of the Cost Approach for valuation and the resulting replacement cost new valuation of the subject personal property is also not in dispute. Both Petitioner and Respondent agree on the calculation of replacement cost new. Additionally, deductions for physical and functional obsolescence are not in dispute. Therefore, and based upon opening remarks of both Petitioner and Respondent along with clarifying questions by Board Member Meurer, the only component of valuation at issue is the application of economic obsolescence. It was also agreed that the personal property declaration and Tab A within Petitioner’s Exhibit 1 should remain confidential and, therefore, will be sealed.

Petitioner is requesting a value of \$216,390 for tax year 2013. Respondent assigned a value of \$1,018,789 for tax year 2013.

Mr. Rosas, Attorney for Petitioner, called his first witness, Mr. John R. Ray II, ASA. Mr. Ray testified that he had personally inspected the subject personal property the day prior; therefore, the photographs in his report were photographs of personal property in similar Safeway stores representative of the subject property. He stated that he was asked to appraise the actual value of the personal property as defined in the Personal Property Manual written by the State of Colorado Division of Property Taxation, and that his report complied with USPAP. Mr. Ray summarized his appraisal process as beginning with a complete list of personal property inventory including date of acquisition and original cost. He then looked at national and regional market conditions to understand the economics of the business within which the assets were used. Mr. Ray's analysis of the economic conditions of grocery store personal property concluded that fierce competition exists and that the supply of grocery store personal property assets had increased but demand for these assets had not. Mr. Ray found four grocery store closures regionally, he found it easy to find sales of personal property of grocery stores from one end user to another, Safeway being one of the sellers in the secondary market and summarily found that value in use is affected by the oversupply in the secondary market.

Specific to Mr. Ray's determination of economic obsolescence, he testified that grocery store personal property sales from used equipment dealers, from sale of whole stores and surplus equipment sales from national chains were analyzed. From these sales, an annual percentage depreciation rate was calculated for each sale item based on its age at the time of sale and total depreciation. An average annual depreciation rate was then calculated for the population of sales analyzed. The average annual depreciation rate is the rate, when applied to the entire population, which accurately predicts the total depreciation for the population. The average annual depreciation rate was then compared to the percent good tables in Addendum 4-D of the Personal Property Manual published by the Division of Property Taxation. Mr. Ray stated that the difference between the percent good tables and the average annual depreciation rate he calculated from analysis of the market is attributed to economic obsolescence. He then deducted the derived economic obsolescence percentage as the final step to conclude actual value for the subject personal property.

Under cross examination, Mr. Ray reported that he had not found any grocery stores to have opened or closed in the Denver Metro Area during the relevant time period. He affirmed that he had narrowed the sale of personal property items analyzed to approximately 10,000 transactions from a beginning data set of over 100,000. When asked by Mr. Rosenberg, attorney for Respondent, if the vast majority of sales were from one transaction, he responded affirmatively. His testimony stated that the majority of personal property sales used to calculate the rate of economic obsolescence came from the Winn-Dixie Stores, Inc. to Bi-Lo, LLC sale. Mr. Rosenberg then asked if this transaction was actually a stock purchase, not an asset purchase. While Mr. Ray agreed that the transaction was a stock purchase, he explained that the personal property sale prices from this transaction were not simply an allocation of value but that each item of personal property had to be placed on the books of the acquiring company at Fair Value. That Fair Value being determined through an appraisal of the Winn-Dixie Stores, Inc. personal

property assets at time of sale. Further, when asked by Mr. Rosenberg if the Winn-Dixie to Bi-Lo transaction was a bulk sale, Mr. Ray responded yes.

During re-direct, Mr. Ray was asked if he limited his analysis of the general economic state of grocery stores to the economic indicators on Page Safeway277 of Tab E within Exhibit 1. He responded that he had not, that a good general economy regionally or locally does not prohibit the existence of economic obsolescence; the grocery industry is a national market. Mr. Rosas continued his questions, asking Mr. Ray if Winn-Dixie to Bi-Lo was a bulk sale and acceptable for use as a comparable sale under ARL guidelines, to which Mr. Ray answered yes.

Mr. Rosenberg, on re-cross, asked Mr. Ray to define Fair Value. Mr. Ray responded that the business tangible assets plus intangible property plus goodwill equated to the total purchase price. Mr. Rosenberg further asked where the Winn-Dixie to Bi-Lo sale was reported. Mr. Ray responded that it was reported in the news. Mr. Rosenberg followed up by asking where specifics of the sale prices of each personal property item of this transaction could be acquired. Mr. Ray stated that he was able to get details of this transaction through his personal contacts and that, no, it would not be easy to acquire such data. He also explained that each asset of the Winn-Dixie to Bi-Lo transaction had freight costs, sales tax and installation costs included in the sale price listed. Through a final question from Mr. Rosenberg, Mr. Ray testified that Duff & Phelps prepared the appraisal report of the personal property assets in the Winn-Dixie to Bi-Lo stock purchase.

Respondent attorney, Mr. Rosenberg, called Mr. Michael Krueger with the Colorado Division of Property Taxation, as Respondent's first witness. Mr. Krueger testified that Petitioner's expert, Mr. Ray, had applied the DPT personal property valuation tables correctly and that these tables account for physical and functional depreciation. He confirmed that there was an academic source for the development of the DPT tables identified as the Iowa R3 curve. He stated that the tables are designed to be general and that the tables cannot capture economic obsolescence specific to one or more items of personal property. Under cross examination by Petitioner's attorney, Mr. Rosas, he stated that the Assessor Reference Library does allow for deduction of economic obsolescence. When asked if it was incumbent upon the taxpayer to provide evidence that economic obsolescence exists, his response was unclear.

Mr. David Newcomer was then called as Respondent's second witness. Mr. Newcomer, Personal Property Supervisor for Arapahoe County Assessor's Office, reviewed the photos of the subject personal property contained within Respondent's Exhibit A. He noted that no external changes, such as physical access or zoning changes, were apparent or discovered. He stated that he found the subject personal property to be in above average condition overall, the store having been renovated in 2002 with another mini renovation taking place in 2007. Mr. Newcomer testified that he looked for economic obsolescence but found none in existence.

During cross examination, Attorney Rosas asked Mr. Newcomer how he determined the existence of economic obsolescence. Mr. Newcomer testified he looked for external changes, such as a neighboring property negatively influencing the subject property. Based upon additional questions by Mr. Rosas, Mr. Newcomer stated that the Safeway personal property list was initially supplied in a summary format, but after Safeway appealed, a detailed list was

provided upon request. He further testified that his report did not discuss efforts to find or quantify external obsolescence; it was not necessary to do so since none existed.

Mr. Rosenberg, attorney for Respondent, called a third witness, Mr. Kenneth Beazer, Property Tax Specialist with the Division of Property Taxation. Mr. Beazer testified that he had read Mr. Ray's report identified as Petitioner Exhibit 1 and had heard his testimony. He did not agree with some of his economic lives, he would have broken the personal property into further categories. Mr. Beazer explained that the DPT requires proof and quantification to apply economic obsolescence and gave examples of how it may affect an industry class or specific piece of equipment. Mr. Beazer testified that Mr. Ray's report supports a competitive market, but did not support or reasonably document a grocery market that was out of equilibrium. Further, he reported that Mr. Ray's assertion that national economic data was as applicable as local data was erroneous; greater consideration should be given to regional and local market conditions. Mr. Rosenberg asked Mr. Beazer what Fair Value means. Mr. Beazer stated that Fair Value generally refers to an income tax based value and has little relevance to ad valorem value. Specific to the Winn-Dixie to Bi-Lo sale, Mr. Beazer testified that the ARL directs that a stock sale may not be valid, but with adequate research it may be considered valid, accordingly, per the testimony and documentation reviewed by Mr. Beazer, he considers the Winn-Dixie sale to be an allocated purchase, not an asset purchase. Finally, Mr. Beazer stated that economic obsolescence is not based upon the age of the personal property and, therefore, found Mr. Ray's report confusing since he calculated economic obsolescence based on economic life.

During cross examination, Mr. Beazer testified that economic obsolescence varies from property to property and year to year and, therefore, the appropriate approach is to look at third party studies provided by others relative to economic obsolescence. He reported that one problem with bulk sales is that the details of such transactions are not available. When asked by Mr. Rosas, Mr. Beazer confirmed that it was not the job of the DPT to assess the value of Safeway personal property and that determination of economic obsolescence was correctly made at the assessor level. Mr. Beazer stated that the Winn-Dixie sale, in his understanding, was a stock sale, the assets never moved, but agreed that it was an end-user to end-user sale. Mr. Beazer also agreed that case law binds Colorado Assessors to the ARL. Mr. Rosas asked if assessors have the obligation to determine if economic obsolescence exists. Mr. Beazer responded that the mass appraisal level does not require this analysis. However, when it comes to individual property appraisal more research and analysis is required and assessors should investigate for additional forms of depreciation.

During re-direct, Mr. Rosenberg asked Mr. Beazer if the DPT could force assessors to comply with DPT guidelines. He stated that the DPT could recommend a reappraisal order be issued and that, on rare occasion, the DPT has gone to court to force compliance.

Mr. Ray was then called as a rebuttal witness. Mr. Rosas asked Mr. Ray if Fair Value is synonymous with Market Value. Mr. Ray responded that it was; that the definition of Fair Value, while worded differently than the definition of Market Value, included the same definitional elements including a market exposure period that is typical for that type of property. When asked by Mr. Rosas why the Winn-Dixie sale should be considered good data, he replied

that he trusts the work of Duff & Phelps and that he had no information to suggest it was not an arms-length transaction.

Upon cross examination as a rebuttal witness, Mr. Ray was asked if the sale price of the Winn-Dixie personal property assets were based upon the Duff & Phelps appraisal report. Mr. Ray replied in the affirmative. He further testified that it was a business valuation not an ad valorem valuation.

Petitioner presented insufficient probative evidence and testimony to prove that the tax year 2013 valuation of the subject personal property was incorrect.

Colorado case law requires that “[Petitioner] must prove that the assessor's valuation is incorrect by a preponderance of the evidence. . .” *Bd. of Assessment Appeals v. Sampson*, 105 P.3d 198, 204 (Colo. 2005). While ample evidence and testimony was provided over the two day hearing, at the core of the valuation issue was the condition of the grocery industry economy. Petitioner did not provide sufficient probative evidence to convince the Board that the grocery industry was in disequilibrium which would have, therefore, supported the existence of economic obsolescence. Secondly, the Board was not provided adequate information to conclude that the Winn-Dixie Stores, Inc. to Bi-Lo, LLC sale was an arm’s-length transaction and appropriate for use to the extent considered by Petitioner. Further, the Board found Mr. Beazer’s testimony to be the most credible. The Board agreed with Mr. Beazer that economic obsolescence can exist regardless of the age of the personal property, calling into question Mr. Ray’s methodology for calculating economic obsolescence. Overall, the Board was not persuaded by Mr. Ray’s testimony or methodology, the existence of economic obsolescence was not supported, and Petitioner did not meet its burden of proof.

**ORDER:**

The petition is denied.

**APPEAL:**

If the decision of the Board is against Petitioner, Petitioner may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-nine days after the date of the service of the final order entered).

If the decision of the Board is against Respondent, Respondent, upon the recommendation of the Board that it either is a matter of statewide concern or has resulted in a significant decrease in the total valuation for assessment of the county wherein the property is located, may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provision of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-nine days after the date of the service of the final order entered).

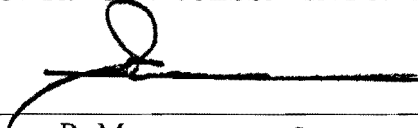
In addition, if the decision of the Board is against Respondent, Respondent may petition the Court of Appeals for judicial review of alleged procedural errors or errors of law when Respondent alleges procedural errors or errors of law by the Board.

If the Board does not recommend its decision to be a matter of statewide concern or to have resulted in a significant decrease in the total valuation for assessment of the county in which the property is located, Respondent may petition the Court of Appeals for judicial review of such questions.

Section 39-10-114.5(2), C.R.S.

**DATED and MAILED** this 20th day of May, 2014.

**BOARD OF ASSESSMENT APPEALS**

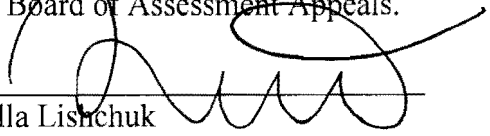
  
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James R. Meurer

  
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Amy J. Williams

I hereby certify that this is a true and correct copy of the decision of the Board of Assessment Appeals.

  
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Milla Lishchuk

