

REPRESENTATIVES FOR PETITIONER:

Carla D. Delaney, Meritax, LLC
Kim E. Shelton

REPRESENTATIVES FOR RESPONDENT:

Wayne Township:
Jerry Zuber
Thomas Burtnette

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

In the matter of:

GUARDIAN PROPERTIES OF)	Petition Nos.: 02-074-98-3-4-00863
FORT WAYNE, LLC,)	02-074-99-3-4-00862
)	02-074-00-3-4-00801
Petitioner)	02-074-01-3-4-00860
)	County: Allen
v.)	
)	Township: Wayne
WAYNE TOWNSHIP)	
ASSESSOR,)	Parcel No: 94-3063-0002
)	
Respondent)	Assessment Years: 1998, 1999, 2000, 2001

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

July 22, 2003

FINAL DETERMINATION

The Indiana Board of Tax Review assumed jurisdiction of this matter as the successor entity to the State Board of Tax Commissioners, and the Appeals Division of the State Board of Tax Commissioners. For convenience of reference, each entity is without distinction hereafter referred to as the "Board".

The Board having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issue

1. The issue presented for consideration by the Board was:

Whether an incorrect wall type has been applied to the assessment of the subject structure.

Procedural History

2. Pursuant to Ind. Code § 6-1.1-15-12, Carla D. Delaney with Meritax, LLC, filed Form 133s, Petitions for Correction of an Error, on behalf of Guardian Properties of Fort Wayne, LLC (Petitioner), petitioning the Board to conduct an administrative review of the above petitions. The Form 133s were filed with the Board on November 22, 2002. The final determinations of the Allen County Property Tax Assessment Board of Appeals (PTABOA) were issued November 4, 2002.

Hearing Facts and Other Matters of Record

3. Pursuant to Ind. Code § 6-1.1-15-4 a hearing was held on April 30, 2003 in Fort Wayne, Indiana before Joseph Stanford, the duly designated Administrative Law Judge (ALJ) authorized by the Board under Ind. Code § 6-1.5-5-2.
4. The following persons were present at the hearing:

For the Petitioner:

Carla D. Delaney, Meritax LLC

Kim E. Shelton

For the Respondent:

Kimberly Klerner, Allen County PTABOA
F. John Rogers, Allen County PTABOA Attorney
Jerry Zuber, Wayne Township Assessor
Thomas Burtnette, Wayne Township

5. The following persons were sworn in as witnesses and presented testimony:

For the Petitioner:

Carla D. Delaney
Kim E. Shelton

For the Respondent:

Kimberly Klerner
Jerry Zuber
Thomas Burtnette

6. The following exhibits were presented:

For the Petitioner:

Petitioner's Exhibit 1 – Written summary of Petitioner's contentions
Petitioner's Exhibit 2 – Tax Representative Disclosure Statement

For the Respondent:

Respondent's Exhibit 1 – Subject property record card (PRC)
Respondent's Exhibit 2 – Five (5) exterior photographs of subject structure

7. The following additional items are officially recognized as part of the record of proceedings:

Board Exhibit A – Form 133 petitions and related attachments
Board Exhibit B – Notices of Hearing on Petitions

8. The subject property is a commercial structure located at 3101 Brooklyn Avenue, Fort Wayne, Wayne Township, Allen County.
9. The ALJ did not conduct an on site inspection of the subject property.

Jurisdictional Framework

10. This matter is governed by the provisions of Ind. Code § 6-1.1-15, and all other laws relevant and applicable to appeals initiated under those provisions, including all case law pertaining to property tax assessment or matters of administrative law and process.
11. The Board is authorized to issue this final determination pursuant to Indiana Code § 6-1.1-15-12.

Indiana's Property Tax System

12. The Indiana Constitution requires Indiana to create a uniform, equal, and just system of assessment. See Ind. Const. Article 10, §1.
13. Indiana has established a mass assessment system through statutes and regulations designed to assess property according to what is termed "True Tax Value." See Ind. Code § 6-1.1-31, and 50 Ind. Admin. Code 2.2.
14. True Tax Value does not precisely equate to fair market value. See Ind. Code § 6-1.1-31-6(c).
15. An appeal cannot succeed based solely on the fact that the assessed value does not equal the property's market value. See *State Board of Tax Commissioners v. Town of St. John*, 702 N.E. 2d 1034, 1038 (Ind. 1998)(*Town of St. John V*).

16. The Indiana Supreme Court has said that the Indiana Constitution “does not create a personal, substantive right of uniformity and equality and does not require absolute and precise exactitude as to the uniformity and equality of each individual assessment”, nor does it “mandate the consideration of whatever evidence of property wealth any given taxpayer deems relevant”, but that the proper inquiry in tax appeals is “whether the system prescribed by statute and regulations was properly applied to individual assessments.” See *Town of St. John V*, 702 N.E. 2d at 1039 - 40.
17. Although the Supreme Court in the *St. John* case did declare the cost tables and certain subjective elements of the State’s regulations constitutionally infirm, it went on to make clear that assessment and appeals must continue to be determined under the existing rules until new regulations are in effect.
18. New assessment regulations have been promulgated, but are not effective for assessments established prior to March 1, 2002. See 50 Ind. Admin. Code 2.3.

State Review and Petitioner’s Burden

19. The State does not undertake to reassess property, or to make the case for the petitioner. The State decision is based upon the evidence presented and issues raised during the hearing. See *Whitley Products, Inc. v. State Bd. of Tax Comm’rs*, 704 N.E. 2d 1113 (Ind. Tax 1998).
20. The petitioner must submit ‘probative evidence’ that adequately demonstrates all alleged errors in the assessment. Mere allegations, unsupported by factual evidence, will not be considered sufficient to establish an alleged error. See *Whitley*, 704 N.E. 2d 1113 (Ind. Tax 1998), and *Herb v. State Board of Tax Commissioners*, 656 N.E. 2d 1230 (Ind. Tax 1998). [‘Probative evidence’ is evidence that serves to prove or disprove a fact.]
21. The petitioner has a burden to present more than just ‘de minimis’ evidence in its effort to prove its position. See *Hoogenboom-Nofzinger v. State Board of Tax Commissioners*, 715 N.E. 2d 1018 (Ind. Tax 1999). [‘De minimis’ means only a minimal amount.]

22. The petitioner must sufficiently explain the connection between the evidence and petitioner's assertions in order for it to be considered material to the facts. 'Conclusory statements' are of no value to the State in its evaluation of the evidence. See *Heart City Chrysler v. State Board of Tax Commissioners*, 714 N.E. 2d 329 (Ind. Tax 1999). ['Conclusory statements' are statements, allegations, or assertions that are unsupported by any detailed factual evidence.]
23. Essentially, the petitioner must do two things: (1) prove that the assessment is incorrect; and (2) prove that the specific assessment he seeks, is correct. In addition to demonstrating that the assessment is invalid, the petitioner also bears the burden of presenting sufficient probative evidence to show what assessment is correct. See *State Board of Tax Commissioners v. Indianapolis Racquet Club, Inc.*, 743 N.E.2d 247, 253 (Ind., 2001), and *Blackbird Farms Apartments, LP v. Department of Local Government Finance* 765 N.E.2d 711 (Ind. Tax, 2002).
24. The State will not change the determination of the County Property Tax Assessment Board of Appeals unless the petitioner has established a 'prima facie case' and, by a 'preponderance of the evidence' proven, both the alleged error(s) in the assessment, and specifically what assessment is correct. See *Clark v. State Board of Tax Commissioners*, 694 N.E. 2d 1230 (Ind. Tax 1998), and *North Park Cinemas, Inc. v. State Board of Tax Commissioners*, 689 N.E. 2d 765 (Ind. Tax 1997). [A 'prima facie case' is established when the petitioner has presented enough probative and material (i.e. relevant) evidence for the State (as the fact-finder) to conclude that the petitioner's position is correct. The petitioner has proven his position by a 'preponderance of the evidence' when the petitioner's evidence is sufficiently persuasive to convince the State that it outweighs all evidence, and matters officially noticed in the proceeding, that is contrary to the petitioner's position.]

Discussion of Issue

Whether an incorrect wall type has been applied to the assessment of the subject structure.

25. The Petitioner contends the assessment of the subject structure is incorrect because Wall Type 1 pricing should be used instead of the more expensive Wall Type 2 pricing.
26. The Respondent contends Wall Type 2 pricing is correct, and further contends that the issue of wall type requires subjective judgment on the part of the assessor, which means the alleged error, is not correctable via a Form 133 petition.
27. The statutes or applicable rules governing this issue are:

Indiana Code 6-1.1-15-12 Tax duplicates; correction of errors; reasons

Sec. 12 (a) Subject to limitations contained in subsections (c) and (d), a county auditor shall correct errors which are discovered in the tax duplicate for any one (1) or more of the following reasons:

- (1) The description of the real property was in error.
- (2) The assessment was against the wrong person.
- (3) Taxes on the same property were charged more than one (2) time in the same year.
- (4) There was a mathematical error in computing the taxes or penalties on the taxes.
- (5) There was an error in carrying delinquent taxes forward from one (1) tax duplicate to another.
- (6) The taxes, as a matter of law, were illegal.
- (7) There was a mathematical error in computing the assessment.
- (8) Through an error of omission by any state or county officer the taxpayer was not given credit for an exemption or deduction permitted by law.

Form 133 Petition

Errors that can be corrected using this form: Ind. Code 6-1.1-15-12 limits the use of this form. This form may only be used to correct the following types of errors:

- The taxes are illegal as a matter of law
- There is a math error in the assessment
- Through an error of omission by any state or county officer the taxpayer was not given credit for an exemption or deduction permitted by law

50 IAC 2.2-10-6(a)(8)

“**Wall Type**” represents the exterior wall construction material. Base rates for each use type are given for two (2) exterior wall types with the exception of parking garages, for which there are three (3). The wall types are denoted by the following codes:

(A) Code “1” denotes concrete block, stucco, tile, wood, aluminum, metal siding, or equal.

(B) Code “2” denotes brick, stone, concrete, or equal.

(C) Code “3” applies only to open parking garages and denotes metal, concrete, or masonry guardwalls three (3) feet to four (4) feet high.

28. Evidence and testimony considered particularly relevant to this determination include the following:
- a. The subject building is comprised of prefabricated, tilt-up concrete wall panels. *Petitioner’s Exhibit 1, Delaney testimony and Zuber testimony.*
 - b. Form 133 petitions are only used to correct mathematical errors. *Klerner testimony.*
 - c. Discussions with the manufacturer of the Petitioner’s tilt-up walls stated that there is little difference in cost between tilt-up walls and reinforced concrete walls. *Zuber testimony.*

Analysis of the ISSUE

29. For the assessment years under review, the Petitioner filed Form 133s, Petition for Correction of an Error. Though the Petitioner requests a change in the wall type, the underlying issue in each of these appeals is whether a Form 133 can be used to make

such a determination. Therefore, the Board must first address whether a Form 133 is the proper vehicle for this type of an appeal.

30. Ind. Code § 6-1.1-15-12(a) describes the type of errors correctable via the Form 133 petition. The Indiana Tax Court has described these errors as “first, those errors involving the incorrect use of numbers in determining the assessment; and second, to those errors which can be corrected accurately, with precision, and with rigorous exactness.” *Hatcher v. State Board of Tax Commissioners*, 561 N.E. 2d 852, 854 (Ind. Tax 1990). These errors are further described as “those that can be corrected without resort to subjective judgment. *Id* at 857. Thus, in these appeals the Petitioner must be able to show, with probative evidence, that the error it alleges is an objective error, and not a subjective error. *Id* at 855.
31. At the hearing, the Petitioner submitted a photograph of the subject building, a range of costs for Type 1 and Type 2 exterior walls, as well as a range of costs for tilt-up walls from the *Marshall Valuation Service* cost manual. The Petitioner also submitted an advertisement from a manufacturer of tilt-up walls that claims tilt-up walls are of lower cost than “alternative concrete systems” (Petitioner’s Exhibit 1). However, the Petitioner did not submit any evidence of the actual cost of the concrete tilt-up wall applied to the subject structure. Nor did the Petitioner submit any comparison of the cost of concrete tilt-up walls to the cost of those types of walls found under either the Wall Type 1 or Wall Type 2 designations.
32. The Respondent correctly argues that a Form 133 petition is to be used only to correct mathematical and other objective issues in the assessment. The Petitioner’s contention that the choice of wall type is made by an “objective determination” (See Petitioner’s Exhibits 1 at 2) is incorrect.
33. In addition, Mr. Zuber, the Wayne Township Assessor, testified that he spoke with a representative of the company that manufactured the Petitioner’s tilt-up walls, and was told that there is little difference between the cost of the Petitioner’s walls and reinforced concrete walls.

34. The Petitioner’s evidence is insufficient to show that the error it seeks for correction is an objective error. In fact, the Petitioner’s evidence appears to prove the opposite. The Petitioner correctly states that tilt-up walls are “not directly referenced in the Indiana Real Property Assessment Manual, Rule 10.” (Petitioner’s Exhibit 1). In the cases at bar, the assessor used objective judgment only to verify the existence of the tilt-up walls through visual inspection. *See Hatcher* 561 N.E. 2d at 857. However, the assessor had to use subjective judgment to evaluate whether the design and quality of the tilt-up walls were best described by either Wall Type 1 or Wall Type 2. *See Bender v. State Board of Tax Commissioners*, 676 N.E. 2d 1113, 1115 (Ind. Tax 1997). The use of subjectivity is magnified in these cases, where the types of walls in question are “not directly referenced in the Indiana Real Property Assessment Manual.”
35. Because the issue raised by the Petitioner involves a judgment that cannot be challenged on a Form 133 petition, its appeals must be denied¹.
36. A Form 133 petition is available only for those errors that can be corrected without resort to subjective judgment. *Reams v. State Board of Tax Commissioners*, 620 N.E. 2d 758 (Ind. Tax 1993).
37. For all the reasons set forth above, the Form 133 petitions filed on behalf of the Petitioner for the tax years 1998, 1999, 2000, and 2001 are hereby denied. The determination of the PTABOA in this matter is sustained.

Summary of Final Determination

Determination of the ISSUE - *Whether an incorrect wall type has been applied to the assessment of the subject structure.*

¹ Even if a petitioner could challenge subjective issues in a Form 133 petition, for the reasons discussed herein, the Petitioner did not meet its burden of proof that there is error in the assessment. A range of costs of tilt-up walls from *Marshall Valuation Service* does not constitute probative evidence of the actual cost of the tilt-up walls in question, and therefore cannot prove that the subject tilt-up walls are best described by Type 1 instead of Type 2.

38. The selection of wall type requires subjective judgment on the part of the assessor. Such a determination does not qualify for review on a Form 133 petition. No changes in the assessments are made as a result of this issue.

This Final Determination of the above captioned matter is issued this by the Indiana Board of Tax Review on the date first written above.

Chairman, Indiana Board of Tax Review

IMPORTANT NOTICE

- APPEAL RIGHTS -

You may petition for judicial review of this final determination pursuant to the provisions of Indiana Code § 6-1.1-15-5. The action shall be taken to the Indiana Tax Court under Indiana Code § 4-21.5-5. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice.