



# REAL ESTATE TAX ASSESSMENTS: AMBUSH BY HEARSAY IS NOT APPROPRIATE

Posted on **June 20, 2016** by **Jim Malone**



Wegmans was recently ambushed in a real estate tax assessment appeal: the trial court resorted to an old appraiser's report to undercut its position and sustain a higher tax assessment. And to make matters worse, it was an appraiser's report that Wegmans had commissioned.

Last week, the Commonwealth Court reversed, serving up a reminder that the rules of evidence apply in tax cases too. [\*Millcreek Twp. Sch. Dist. v. Erie Cty. Bd. of Assessment Appeals\*](#), No. 39 C.D. 2015, 2016 Pa. Commw. LEXIS 260 (Pa. Commw. June 13, 2016).

Wegmans owned two pieces of property in Millcreek Township, Erie County that gave rise to the case. In 2004, the school district filed a tax assessment appeal, but the county board of assessment denied the appeal. 2016 Pa. Commw. LEXIS 260, \*2. The district filed an appeal in the Court of Common Pleas, and Wegmans intervened to argue for a reduction in its property tax assessments. *Id.*

At trial, the parties presented competing expert testimony concerning the value of the two properties over the period from 2005 through 2014.

- The district's expert valued one property, which was on West 23rd Street, in a range between \$9 million in 2005 and \$10 million in 2014, and he testified that the second property, on Peach Street, was worth \$13.5 million in 2005 and \$14 million in 2014. *Id.* at \*3. These valuations rested on the view that the properties were best suited to their current use as grocery stores, and they were based primarily on the income approach to valuation. *Id.*
- In contrast, Wegmans' appraiser testified that the value of the West 23rd Street property fell into a range from \$2.4 million in 2005 to \$2.1 million in 2014; he also opined that the Peach Street property was worth between \$3.6 million in 2005 and \$3.08 million in 2014. *Id.* at \*4. The lower valuations rested, in large measure, on his view that the properties should be converted to a different use, and Wegmans' appraiser focused primarily on a comparable sales approach. *Id.* at \*3-\*4.

The trial court relied upon a prior appraisal that Wegmans had commissioned in 1998 to critique the work

of Wegmans' current appraisal expert. Specifically, the court observed that the current expert's report was less sophisticated and that he had failed to justify the steep drop in value from the prior expert's valuation. *Id.* at \*6.

There was just one problem: the prior expert did not testify. Instead, the school district offered a certified copy of his report from a prior assessment appeal as rebuttal evidence, and the trial court, over Wegmans' objection, admitted the report as a statement of an opposing party under PA. R. EVID. 803(25). *Id.* at \*7-\*8.

The Commonwealth Court reversed. The court commenced its analysis by reviewing *Kirk v. Raymark Industries, Inc.*, 61 F.3d 147 (3d Cir. 1995), in which the Third Circuit rejected a similar effort to use testimony of an expert in another case to undercut testimony presented at trial. *Id.* at \*12. In *Kirk*, the Court of Appeals held that the prior testimony was hearsay, reasoning that an expert witness is not an agent of a party authorized to speak on its behalf. 61 F.3d at 174.

This rationale resonated with the Commonwealth Court, which concluded that the prior appraisal report was not admissible under Rule 803(25). 2016 Pa. Commw. LEXIS 260 at \*13. Moreover, given the fact that the trial court used the prior report to critique the testimony of Wegmans' expert, the Commonwealth Court concluded that the trial court's error was not harmless. *Id.* at \*14.



By: **Jim Malone**

Jim Malone is a tax attorney in Philadelphia. A Principal at Post & Schell, he focuses his practice on federal, state and local tax controversies. [Learn more about Post & Schell's Tax Controversy Practice >>](#)

1

This entry was posted in [Blog](#) and tagged [assessment appeal](#), [hearsay](#), [real estate tax](#), [valuation](#) by [Jim Malone](#). Bookmark the [permalink](#) [<http://taxcontroversyposts.postschell.com/real-estate-tax-assessments-ambush-hearsay-not-appropriate/>].