



ASSESSMENT REVIEW BOARD

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NOTICE OF DECISION NO. 0098 349/11

Canadian Valuation Group Ltd
1200-10665 Jasper Avenue
Edmonton, AB T5J 3S9

The City of Edmonton
Assessment and Taxation Branch
600 Chancery Hall
3 Sir Winston Churchill Square
Edmonton, AB T5J 2C3

This is a decision of the Composite Assessment Review Board (CARB) from a hearing held on November 8, 2011, respecting a complaint for:

Roll Number	Municipal Address	Legal Description	Assessed Value	Assessment Type	Assessment Notice for:
7221963	11145 - 87 Avenue NW	Plan: I23A Block: 166 Lot: 20 – 25	\$24,518,500	Annual New	2011

Before:

Steven Kashuba, Presiding Officer
Francis Ng, Board Member
John Braim, Board Member

Board Officer:

Annet Adetunji

Persons Appearing on behalf of Complainant:

Tom Janzen, Canadian Valuation Group Ltd

Persons Appearing on behalf of Respondent:

James Cumming, Assessor, City of Edmonton
Moreen Skarsen, Assessor, City of Edmonton
Vasili Kim, Assessor, City of Edmonton
Tanya Smith, Barrister & Solicitor, City of Edmonton

PROCEDURAL MATTERS

1. Upon questioning by the Presiding Officer, the parties present indicated no objection to the composition of the Board. In addition, the Board members indicated no bias with respect to this file. Upon the request of both parties, all evidence was received under oath.

BACKGROUND

2. The subject property comprises a hotel, a parkade, a three storey office tower and retail/commercial space located on the main level. This is combined into one property and is located in the Garneau neighbourhood in close proximity to the University of Alberta (U of A). The property is located at 11145 – 87 Avenue NW and the 2011 assessment is \$24,518,500. Of the total building area of 70,510 sq ft, the U of A leases 29,243 sq ft of the office tower.

ISSUE

3. The assessment amounts relating to the hotel, the parkade, the office tower and the commercial space amounts are not the issue. At issue is what percentage of the office tower is tax exempt by virtue of the fact that it is leased to the U of A.

LEGISLATION

Municipal Government Act, RSA 2000, c M-26

S. 362 (1) The following are exempt from taxation under this Division:

- (d) property, other than a student dormitory, used in connection with educational purposes and held by any of the following:*
- (i) the board of governors of a university, technical institute or public college under the Post-secondary Learning Act ;*
 - (ii) the governing body of an educational institution affiliated with a university under the Post-secondary Learning Act .*

S. 467(1) An assessment review board may, with respect to any matter referred to in section 460(5), make a change to an assessment roll or tax roll or decide that no change is required.

S. 467(3) An assessment review board must not alter any assessment that is fair and equitable, taking into consideration

- a) the valuation and other standards set out in the regulations,*
- b) the procedures set out in the regulations, and*
- c) the assessments of similar property or businesses in the same municipality.*

POSITION OF THE COMPLAINANT

4. At the outset of the hearing, the Complainant stated that the total assessment amount was not in dispute, nor were the individual assessment amounts allocated to the respective components of the building.
5. The Complainant stated that “in the past” the Respondent had based the exempt percentage (proportion) on the ratio of leasable area to the total leasable area of the building. The Board was provided with a chart and calculations (Exhibit C-1, page 2) to show the respective gross and leasable areas pertaining to each floor level; the leasable area occupied by the U of A and the ratio or percentage of leasable space relative to the gross building area. The ratios were calculated on a floor by floor basis as well as for the total office tower area. This was also supported by a rent roll effective May 1, 2010 (Exhibit C-1, pages 5 & 6). In summary, the chart shows that the U of A occupied a leasable area of 29,243 sq ft out of a total leasable area of 53,343 sq ft whereas the gross area of the building is 70,510 sq ft. The gross leasable area of the building is 53,343 sq ft which represents only 75.7% of the gross area. The Complainant stated that the difference between the gross area of the building and the total leasable area of the building was due to the fact that it had a common atrium, wide hallways and stairwells and a larger than average mechanical area. The leasable area of the office tower is, in fact, less than the gross area of the building.
6. In addition, the Complainant pointed out that the U of A leases 100% of the second floor space while only receiving 83.9% tax exemption. At the same time the U of A leases 98.2% of the third floor space while only receiving 82.4% tax exemption. However, both floors are used almost entirely by the U of A. The Complainant further argued that if the U of A were the sole tenant of the building it would be totally exempt from taxation. Despite the fact that they were the only tenant on the second floor they were not totally tax exempt for the second floor.
7. In summary, the Complainant argued that the only equitable way to apportion the tax exempt space was; a) to apply the U of A leased area to the total building leasable area or b) to use the concept of “gross up” i.e. apply a proportionate part of the common area to net area leased by the respective tenant. This means to the area leased by the U of A is added a proportionate amount of the common area on each floor and applied as a “grossed up” area to the gross building area. The current method of utilizing the tenant leasable area to the gross building area is not equitable as the common areas are not exempt even though some of the space is used entirely by the U of A which leaves the building owners in the unenviable position of having to pay taxes on the common areas not utilized by anyone other than the U of A. If the previous method and the method recommended by the Complainant were utilized the following exemption allowance percentages would apply:
 - Leasable area/total leasable area = 29,243 sq ft/53,343 sq ft = 54.821%.
 - Gross area leased/total gross area = 38,630 sq ft/70,510 sq ft = 54.787%.
8. In conclusion, the Complainant stated that it mattered not which of the above two methods were used because the percentage of total floor area exempt from taxation would

remain constant. However, if the Respondent's method were used, this would lead to a reduced percentage of floor area exempt from taxation thereby resulting in an incorrect and unfair assessment.

9. As a result the Complainant requested the Board to increase the tax exemption allowance for the subject property from 41.474% to 54.821%.

POSITION OF THE RESPONDENT

10. The Respondent indicated that the City of Edmonton had, adopted a policy of using gross building area as a base for calculating both taxable percentage and exempt percentage. This is as opposed to using the actual leased area over the total leasable area to calculate the exempt percentage. This change was effected as the City found that the reporting of the leasable space by the owners can be subjective and inconsistent. When gross area is utilized as a base this allows the City to calculate the exemption percentages in a fair and equitable manner for all building types. The Respondent also claimed that if some tenants were exempt and some not exempt in the same building, this would have the effect of exempting common areas which are not being used entirely for an exempt purpose. The Respondent stated that the area a tax exempt organization actually occupies (known as the leasable area) is then divided by the total gross area of the building to derive the percentage exemption. This ensures the common areas are not factored into the exemption.
11. In addition, leasable area is only reported for a small percentage of building types; it is not measured consistently, as there are new and old Building Owners and Management Association (BOMA) standards; and not all leasable space is reported; the area of leasable space changes on an annual basis and the amount of leasable space may not be available for owner-occupied space. In concluding the supporting reasons for the current assessment, the Respondent stated that by utilizing a standard methodology to calculate exempt space percentages, there can be no perceived favoritism for any one building type.
12. Finally, the Respondent requested the Board to confirm the exemption percentage of 41.474%.

DECISION

13. It is the decision of the Board to increase the tax exemption portion of the assessment for 2011 from 41.474% to 50.017%.

REASONS FOR THE DECISION

14. Clearly, part of the subject property qualifies for tax exemption under 362 (1) d of the MGA. Both parties agree the area occupied by the U of A is 29,243 sq ft and there is no issue with regard to the assessment amount.

15. After considering the evidence and argument of the Complainant and the Respondent, the conclusion of the Board is that the policy of the City of Edmonton to utilize the leased area over the gross area as a base to calculating the exempt percentage is neither fair nor correct. It is the opinion of the Board that the correct method is to apportion the net leasable area to the gross area and incorporate the proportionate amount of common area to the space occupied by the exempt tenant, in this case the U of A.
16. The Board was persuaded by the argument of the Complainant that the calculation of the exempt area by utilizing the net leasable areas in conjunction with gross building areas as a base was both illogical and inconsistent. The Board finds that different buildings have differing degrees of efficiency in the sense that the subject has an effective leasable area that is only 75.7% of the gross building area whereas the Complainant had indicated, and the Board accepts in principle, that most buildings have usable (leasable) proportions greatly in excess of this (85% to 90% was quoted), especially the newer ones. The Respondent supplied title to the subject property and some of the caveators were apparently tenants of the building back in 1966 - 1967 which indicates that the subject property is older in age and, as such, may be potentially less efficient in terms of the proportion of leasable area relative to the gross building area. Furthermore, the higher leasable ratios for typical buildings were not disputed by the Respondent.
17. The Board was further persuaded by the evidence of the Respondent quoting an excerpt from a Court of Queen's Bench decision wherein, they had included (R-1, pages 28 & 29) Section IV. CALCULATING EXEMPTIONS – TIME & SPACE. Although this dealt initially with tax collection, sub-sections 13 – 15 went on to *direct municipalities to look at both the amount of physical space and the amount of time that the property is used for an exempt purpose. The leading case respecting physical space and amount of time is Ukrainian Youth Unity of General Roman Schuchewych – Chuprynka v Edmonton (City) [1977] A.J. No. 921. In this decision the Alberta Court of Queen's Bench held that the right to an exemption includes the right to a partial exemption where the property is used for exempt purposes part of the time, and the Board made an error of law in denying the entire exemption where the property is used for exempt purposes part of the time. The Court further confirmed that the MGA and regulations thereunder contemplate apportionment.*
18. Furthermore in Section 15 the Court concluded its decision as follows; -
- 20 Section 367 of the Act states “a property may contain one or more parts that are exempt from taxation under this division” Section 368 refers to “**an exempt property or part of an exempt property**” and “a taxable property or **part of a taxable property**”.
 - 21 Regulation 125/95 was promulgated under the Act; it pertains to nonprofit organization tax exemptions. Section 2 of this Regulation states that an “exemption may apply to a) whole of a property or b) **part of a property** that is chiefly used for the purposes that qualify for the exemption”
 - Nothing in the Act, Regulations or logic mandates a mere physical interpretation of the phrases “part of a property” Time of usage may also fall within the phrase, so that the exemption may apply to a property which is entirely used for non-exempt purposes part of the time; see *Royal Canadian Legion Norwood (Alberta) Branch 178 v. Edmonton (City) [1992] 6 W>W>R>265(Alta. Q.B.)* While Justice

Gallant considered predecessor and therefore different legislation in that case than we do in this, his approach to the word "chiefly" is equally applicable to the current phrase "part of a property". He stated at 271: The word "chiefly" means "for the most part". It is slightly ambiguous because it could define the time element or the space element. In the end result, I do not think it matters which of the two elements it defines.

19. The Board accepts that in the case of the subject property both the actual space used by the U of A and the adjoining portions of the gross space are used "chiefly" and "for the most part" by the U of A. It therefore appears logical that the area occupied by the U of A should be entitled to an apportionment of the common area in direct proportion to the area they occupy. This is particularly logical with reference to the leases on the second and third floors. The second storey offices are entirely occupied by the U of A and the third storey offices are 98.2% occupied by the U of A the latter being, in the view of the Board, synonymous with "chiefly" and "for the most part" both physically and time wise.
20. Having established this principle of equity with respect to each floor it is incumbent upon the Board to ascertain the percentage, or proportion, that the U of A occupies relative to each of the floors where it leases space and then apply this same proportion to the main floor area also as the U of A also has to use part(s) of the main floor common area. This may appear cumbersome at first but, once the areas are established, the application of the principle can be incorporated into a "computer model" and dealt with automatically on an annual basis.
21. Having dealt with the equity issue it is therefore necessary to apply this principle to the relevant areas as occupied by the U of A. It is quite apparent that the U of A will be the only user of the common areas of the second floor as there are no other tenants to share the common area with. It follows, therefore, that the common area falls under the description of "solely" used by the only tenant.
22. It is equally apparent that the U of A will "chiefly" be the third floor space user but not entirely, as a small proportion is used by another tenant. The common area must, in this case, be apportioned into the relevant proportions of total leasable space that each tenant occupies, even though the U of A is still "chiefly" the occupant of the second floor.
23. The basement area is only slightly different in that the U of A occupies a relatively small proportion of the total leasable area, namely 1,348 sq ft out of a total leasable area of 11,407 sq ft. To treat other space in the same building in the same equitable manner the common areas of the basement should also be apportioned to each tenant.
24. In calculating the amount of common area to be included in the U of A exempt area it is necessary to also include an apportionment of the main floor area to the U of A as they are also users of this space even though they do not lease any portion of the main floor area. However, since neither party argued the principle of apportionment for the main floor, the Board has elected to omit this calculation as presented in the table which follows.

25. The principles underlying, and the calculation specifics relating to, the subject property are summarized as follows: -

Floor	U of A Leased Area (Sq. Ft.)	Leasable Area (Sq. Ft.)	Gross Area (Sq. Ft.)	Determined Common Area (Sq. Ft.)	Ratio of U of A Leased Area to Total Leasable Area	Apportionment to the U of A of the Common Area (Sq. Ft.)	Determined Area Qualified For Exemption
Basement	1,348	11,407	18,510	7,103	11.82%	839	2,187
Main	0	13,790	18,510	4,720	0%	0	0
Second	14,101	14,101	16,745	2,644	100.00%	2,644	16,745
Third	13,794	14,045	16,745	2,700	98.21%	2,652	16,446
Total	29,243	53,343	70,510	17,167			35,378

26. By applying the total exempt area for the U of A to the gross building area results in the following calculations and percentage exemption, namely;

$$35,387 \text{ sq ft} / 70,510 \text{ sq ft} = 50.017\%$$

27. Finally, the Board concludes that there is nothing in the Act or the Regulations to indicate whether the gross area or the leasable areas are to be used as a base in the calculation of an exemption; however, the Board accepts the Respondent's method of choice of using the gross area as a base providing the respective leasing areas are also grossed up to include an appropriate amount of the common area in the calculation, as noted above.

DISSENTING OPINION AND REASONS

28. There were no dissenting opinions.

Dated this 25th day of November, 2011, at the City of Edmonton, in the Province of Alberta.

Steven Kashuba, Presiding Officer

This decision may be appealed to the Court of Queen's Bench on a question of law or jurisdiction, pursuant to Section 470(1) of the Municipal Government Act, RSA 2000, c M-26.

cc: Gold Bar Investments Ltd