

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK**

---

**In Re:**

**ALP Freddy's Limited Partnership,  
d/b/a Freddy's**

**CASE NO. 93-20542**

**DECISION & ORDER**

**Debtor(s).**

---

**BACKGROUND**

On March 12, 1993, the Debtor, ALP Freddy's Limited Partnership, d/b/a Freddy's ("Freddy's"), filed a petition initiating a Chapter 11 case. On March 16, 1995, an Order was entered (the "Confirmation Order") confirming a First Amended Joint Plan of Liquidation (the "Plan").

On February 20, 1996, Freddy's filed a motion, (the "Tax Motion") pursuant to Section 505<sup>1</sup> of the Bankruptcy Code requesting that the Court determine the amount which Freddy's must pay

---

<sup>1</sup> Section 505 provides in pertinent part:

(a)(1) Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

(2) The court may not so determine—

(A) the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title.

to Palm Beach County (the “County”) as an administrative expense for tangible personal property taxes due for calendar year 1994 in connection with certain store fixtures and other personal property owned by Freddy’s and still located at three of its former stores within the County on January 1, 1994,<sup>2</sup> the taxable status date used in determining the existence and value of personal property to be taxed.

The Court’s records indicate that, having determined that it could no longer profitably conduct business in Florida and pursuant to a Motion filed on November 24, 1993 and an Order entered December 16, 1993, Freddy’s sold all of its inventory in its three stores located within the County, as well as the inventory in its other Florida stores, to Nassi Bernstein, a liquidator which then sold the inventory at going-out-of-business sales conducted at the various locations.

The Court’s records also indicate that, having determined that it could not obtain a purchaser for the leases of any of the stores located in the County who might also purchase the furniture, fixtures and equipment and start up a new operation at the store, whether as a discount health and beauty aid operation like Freddy’s, or otherwise, on January 5, 1994 Freddy’s filed a motion pursuant to Section 365 for authority to reject its leases of the West Palm, Boynton Beach and Boca Stores.

The Court’s records further indicate that on February 2, 1994, Freddy’s filed a motion, made returnable on February 9, 1994 (the “Personal Property Sale Motion”) pursuant to Section 363 for

---

<sup>2</sup> The three stores were located at 4366 Okeechobee Boulevard, West Palm Beach, Florida (the “West Palm Store”), 2234 North Congress Avenue, Boynton Beach, Florida, (the “Boynton Beach Store”), and 8140 Glades Road, Boca Raton, Florida, (the “Boca Store”).

authority to sell all of its furniture, fixtures and equipment at various locations, including the three former stores located within the County. On February 9, 1994, the Motion was granted, and on February 23, 1994 an Order was entered authorizing the sale of the property to Bland Enterprises, Inc. for the purchase price of \$17,000.00 per store.

The Tax Motion alleged that: (1) the Court retained jurisdiction under the Plan to determine the amounts due to the County for tangible personal property taxes for the calendar year 1994; (2) in April, 1994, Freddy's filed the required tax returns which indicated that the tangible personal property at its three former stores located within the County had a value on the taxable status date of January 1, 1994 equivalent to the purchase price paid by Bland Enterprises, Inc. in February, 1994; (3) on January 1, 1994, the taxable status date, Freddy's was no longer operating at any of the three stores, having sold all of its inventory to Nassi Bernstein, and had been unable to find new tenants for the locations, even with the help of Melville Corporation, one of its secured creditors, and the various members of the Creditors Committee and its counsel; (4) in the fall of 1994, Freddy's received assessments from the County based upon taxable value totaling \$628,670.00 (\$152,172.00 for the West Palm Store, \$241,535.00 for the Boynton Beach Store, and 234,963.00 for the Boca Store), which Freddy's assumed were based on prior years' tax returns and assessments and an assumption that Freddy's was still operating in 1994 as a going concern; (5) by letter dated December 6, 1994, Freddy's bankruptcy counsel advised the Tax Collector for the County of the facts and circumstances of Freddy's reorganization case, including its cessation of business in Florida and the sale in February, 1994 of its tangible personal property for \$17,000.00 per store, and suggested that Freddy's pay the 1994 taxes due based on an agreed upon assessed value of

\$17,000.00 per store; and (6) the County did not agree to Freddy's payment proposal..

On March 26, 1996, the County interposed a Response to the Tax Motion, which alleged that: (1) notwithstanding Freddy's tax returns, copies of which were annexed to the Response, the County's Property Appraiser's Office (the "Appraiser") thereafter determined an assessed value which the Assessor believed reflected the "just or fair market value" of Freddy's personal property which was different than the "Debtor's liquidation value"; (2) Freddy's had failed to take the administrative steps available to it to contest the Appraiser's assessment, although the County specifically stated that it was not implying that the assessment would have been changed had there been an administrative challenge; and (3) the applicable assessment standard under Florida law is "just or fair market value", and FLA. STAT. ANN. §193.011 required the Assessor to consider the amount that would be paid for the property "in cash or the immediate equivalent thereof in a transaction at arm's length".

On April 26, 1996 the County filed a Memorandum of Law which asserted that: (1) the Assessor had determined the assessed value by using the cost method approach to valuation; (2) the Assessor had computed an assessment of Freddy's tangible personal property in a manner consistent with all prior years during which Freddy's operated the three former stores within the County; (3) Florida law provides for a specific and uniform system of valuation to insure fair treatment among all taxpayers and this Court should not consider the "fire sale value"; (4) FLA. STAT. ANN. §193.011 provides factors to be considered by an assessor in arriving at just valuation, with the weight to be given to each factor to be determined within the discretion of the Assessor; and (5) for the Court to accept Freddy's proposed value of \$17,000.00 per store would result in unjust enrichment to

Freddy's and its creditors at the expense of the taxpayers of the County.

**DISCUSSION**

**I. Determination of "Just or Fair Market Value"**

Since the tangible personal property tax due from Freddy's to the County for the calendar year 1994 is for a post-petition period and was never finally adjudicated before a judicial or administrative tribunal of competent jurisdiction, this Court has the authority under Section 505(a)(1) to determine the amount of the tax due. The submissions of the parties appear to be in agreement that: (1) if the Court finds that the assessments made by the County correctly reflect the "just or fair market value" of the tangible personal property owned by Freddy's at the West Palm, Boynton Beach and Boca Stores on January 1, 1994, the tax due is \$14,004.03; and (2) if the "just or fair market value" of the tangible personal property in question is \$17,000.00 per location, or \$51,000.00, the tax due is \$1,090.61.

Having reviewed the applicable Florida Statutes, as well as excerpts from the State of Florida Manual of Instructions, Standard Measures Of Value Pertaining To The Assessment Of Tangible Personal Property And Inventory (the "Assessment Manual"), filed with the Court on behalf of the County on April 26, 1996, and based on all of the facts and circumstances presented, I find that the "just or fair market value" of Freddy's tangible personal property at its former West Palm, Boynton Beach and Boca Stores on January 1, 1994 was \$51,000.00. Therefore, that the applicable Florida tangible personal property tax due is \$1,090.61.

On the January 1, 1994 taxable status date, Freddy's had: (1) ceased its operations at the three stores within the County; (2) determined that it could not find purchasers for the stores which might enable it to assume and assign its leases and perhaps obtain from such a purchaser, in connection with the transfer of the lease, a greater purchase price for the tangible personal property at the location than a liquidation value; and (3) determined to move this Court for authority to reject its leases at the three stores, which it did on January 5, 1994. Therefore, on the taxable status date the "just or fair market value" of Freddy's tangible personal property was clearly its liquidation value and not a going concern value. As soon as it could after the going out of business sales authorized by this Court were completed at the three locations in question, Freddy's moved to sell the tangible personal property and received a high bid of \$17,000.00 per store. In connection with this disposition, Freddy's had taken advantage of the considerable expertise of the parties involved in the case to obtain the best possible liquidation value for the property.<sup>3</sup> This Court approved the sales finding that the \$17,000 per store price was the best possible liquidation price that could then be obtained. The property (principally ordinary retail trade fixtures) was thereafter removed from the three stores.

## **II. The Assessment**

Page 2 of the Assessment Manual, in discussing guidelines, states that:

All items of tangible personal property and inventory are to be valued at "just value."

---

<sup>3</sup> Melville Corporation, one of the secured creditors, operates a number of national retail chains. Pepper, Hamilton & Scheetz, the attorneys for the Creditors Committee, are nationally known for their involvement in health and beauty aid and drug store chain bankruptcies.

Synonymous with just value are such terms as Fair Market Value and Full Cash Value which indicate the monetary amount a purchaser, willing but not obligated to buy, would pay to another willing but not obligated to sell. It has also been defined as the highest price estimated in terms of money which a property will bring if exposed for sale in the open market allowing a reasonable time to find a purchaser who buys with knowledge of all the uses to which it is adapted and for which it is capable of being used. In arriving at just value the County Property Appraiser must consider all factors listed in Section 193.011 F.S.

To determine fair market value for ad valorem tax purposes there are three well recognized guides to appraisal; cost approach, comparable sales, and income or economic approach. These three approaches to value incorporate consideration of several combinations of the factors enumerated in Section 193.011.

If reliable and comparable data can be analyzed, the market data or comparable sales approach is generally considered the most reliable method of evaluation. If similar property is commonly bought and sold, the price which it brings is the best test of value.

In order to utilize a comparable sales approach, the County Property Appraiser must first determine whether there exists an active market from which reliable data can be obtained. Having determined the existence of such a market, the County Property Appraiser should value those items of personal property in question with regard to the market price paid for items of personal property of like kind, quality and condition.

The cost approach to value: In the absence of an established market for the item of personal property involved, the process of evaluation must include all factors going to make up its intrinsic value. The cost approach set forth in detail elsewhere in this manual permits the County Property Appraiser to utilize the standard measures of value set forth in Chapter 2 to arrive at a reasonable hypothesis of intrinsic value. Historical cost is first adjusted to determine current market replacement cost. Replacement cost is then adjusted to allow for physical depreciation and economic and functional obsolescence. The resulting evaluation should provide a reasonable estimate of cost which the taxpayer would incur were he to replace an item of personal property with another item of like kind, quality, condition and utility. (citations omitted)

The guideline section of the Assessment Manual also summarizes the factors enumerated in FLA. STAT. ANN. §193.011 as follows:

- (1) The present cash value of the property;
- (2) The highest and best use to which the property can be expected to be put in the immediate future; and the present use of the property;
- (3) The location of said property;
- (4) The quantity or size of said property;
- (5) The cost of said property and the present replacement value of any improvements thereon;
- (6) The condition of said property;
- (7) The income from said property, and
- (8) The net proceeds of the sale of the property, as received by the seller, after deduction of all of the usual and reasonable fees and costs of the sale, including the costs and expenses of financing.

On the facts and circumstances that existed in April, 1994 when the Assessor made his assessment of the Freddy's tangible personal property, consisting primarily of retail trade fixtures at its three former stores within the County, the guidelines in the Assessment Manual warranted and required the use of the comparable sales or market approach, not the cost approach, and the factors listed in FLA. STAT. ANN. §193.011, when reasonably weighted with appropriate discretion, should have resulted in an assessment of \$17,000.00 per store, the "just or fair market value" of the tangible personal property as of the taxable status date, notwithstanding the fact that that value was a liquidation value. Evaluating the factors of: (1) the present value of the property, which is the amount a willing purchaser would pay a willing seller, exclusive of reasonable fees and costs of purchase, in cash or the immediate equivalent thereof in a transaction at arm's length; and (2) the highest and best use to which the property can be expected to be put in the immediate future, and the



present use of the property, the “just or fair market value” of the personal property was its liquidation value as actually received in February, 1994. The present cash value of the personal property was its liquidation value, because the property was not being used in connection with the production of income and would not be used in connection with the production of income in the immediate future. The property was sitting in closed down stores, there was no expectation that it would be used in the immediate future at that location or any other location in connection with the production of income, and the property was thereafter removed from the stores.

It is a matter of common knowledge to anyone involved in commercial law or any assessor, that ordinary retail trade fixtures sell for pennies on the dollar once a retail business is discontinued and the fixtures must be sold to a third party, whether the sale is by public auction or private sale.

Based on the foregoing, I do not believe that the Assessor exercised proper discretion in evaluating the applicable standards and weighing the various facts and factors presented. Although under Florida Law the Assessor’s assessment may be presumptively correct, in this case, the facts and circumstances rebut the presumption of correctness, since the assessment was clearly excessive in comparison to the fair market value.<sup>4</sup>

### **III. Fairness and Equity**

The County has asserted that if Freddy’s tangible personal property is found by this Court to have had a “just or fair market value” equivalent to its liquidation value rather than cost approach

---

<sup>4</sup> To rebut the presumption of correctness, the taxpayer must show the assessment results in a value which exceeds market value or is grossly excessive in comparison to fair market value. See *In re St. Petersburg Harbourview Hotel Corp.*, 176 B.R. 611 (Bankr. M.D.Fla. 1994).

value as determined by the Assessor, the creditors of Freddy's would be unjustly enriched at the expense of the taxpayers of the County. Clearly under the Bankruptcy Code, however, there is a policy of equality of distribution which requires that creditors be treated fairly and receive their fair share of the assets of the estate, no more and no less than their fair share. To allow the taxpayers of the County to receive more than their fair share of the assets of the Freddy's estate would be an unjust enrichment at the expense of the other creditors of Freddy's who will receive less than 100% of their claims and it would not promote this clear policy of the Bankruptcy Code.

In a personal property tax system such as the one presented in this Tax Motion, "just or fair value" may at times be high, since a taxpayer may wish to have its tangible personal property valued to be consistent with its valuation for insurance purposes as well as its valuation for financial reporting purposes, especially for financial reporting to its financial institutions from which it is borrowing funds. When tangible personal property is being used in the production of significant income in an ongoing business which has the need to have consistent valuations for insurance, financial reporting and other reasons, its valuation for tax purposes may be artificially high. However, as correctly pointed out by the County, as long as the standards are uniformly applied to all similarly situated business taxpayers using similar property to produce significant income as going concerns, that value may be acceptable to all parties concerned. However, when a business taxpayer ceases operations and is no longer using the property in the production of significant income, no longer has a need to value the property consistent with other reporting needs and clearly can only realize a liquidation value for it, liquidation value represents the "just or fair market value" of the property. No other business taxpayer in the County paying a higher tax for similar items of

tangible personal property because that taxpayer is a going concern and producing significant income with the use of that personal property, is disadvantaged by the assessment of similar property at a liquidation value when it is held by a business taxpayer which is out of business and not using it in the production of significant income. Any businesses taxpayer would expect that if it were in a similar close-down mode its personal property would be valued at a liquidation value, the value which it would have in its hands when that is all that it can realize for the property in the immediate future. Such a tax system must assign "just or fair market values" consistent with the realities of the use of the property in the normal business cycle. The system must account for and accept the highs and lows of the marketplace.

**CONCLUSION**

Pursuant to Section 505(a)(1), Freddy's shall pay to Palm Beach County, as an administrative expense for the 1994 tangible personal property taxes due from Freddy's, based on an assessment of \$51,000.00, the amount of \$1,090.61.

**IT IS SO ORDERED.**

\_\_\_\_\_/s/\_\_\_\_\_  
**HON. JOHN C. NINFO, II**  
**U.S. BANKRUPTCY JUDGE**

**Dated: June 25, 1996**