11-0590

IN THE CIRCUIT COURT OF JACKSON COUNTY, WEST VIRGINIA

CENTURY ALUMINUM OF
WEST VIRGINIA, INC,
a Delaware Corporation,

Petitioner,

vs.

Civil Action No. 10-AA-2
(Judge Thomas C. Evans, III)

JACKSON COUNTY COMMISSION,
et al.,

Respondents.

ORDER DENYING PETITION FOR APPEAL

This matter is an appeal from a decision of the Jackson County Board of Equalization and Review regarding a tax assessment against Century Aluminum of West Virginia, Inc. (hereinafter "Century Aluminum") relating to industrial personal property and real property.

The Property Tax Division of the State Tax Department valued the industrial personal property of Century Aluminum for the 2010 tax year.

Century Aluminum objected to the valuations as determined by the Tax Department and protested the valuations at a hearing of the Jackson County Commission sitting as a Board of Equalization and Review on February 13, 2010.

The Board of Equalization and Review affirmed the Tax Department's valuations and Century Aluminum appealed that decision to this court. Both the Tax Department and Century Aluminum filed written briefs in this matter and oral arguments were heard on September 1, 2010.

I. STANDARD OF REVIEW

The County Commission for Jackson County sitting as a Board of Equalization and Review affirmed the Tax Commissioner's appraisals of industrial personal property and real property. The proper standard of review before this Court is whether the decision of the Board of Equalization and Review was supported by substantial evidence or was arbitrary and capricious. The Supreme Court of Appeals of West Virginia has clearly enunciated the standard of review in circuit court as follows:

> Upon receiving an adverse determination before the county commission, a taxpayer has a statutory right to judicial review before the circuit court. W. Va. Code §11-3-25 (1967). The statute provides little in the way of guidance as to the scope of judicial review, although it does expressly limit review to the record made before the county commission. Given this limitation, we have previously indicated that review before the circuit court is confined to determining whether the challenged property valuation is supported by substantial evidence, ... or otherwise in contravention of any regulation, statute, or constitutional provision, ... As this Court's previous cases suggest, and as we have recognized in other contexts involving taxation, e.g., *Frymier-Halloran v. Paige*, 193 W .Va. 687, 695, 458 S.E.2d 780, 788 (1995), judicial review of a decision of a board of equalization and review regarding a challenged tax-assessment valuation is limited to roughly the same scope permitted under the West Virginia Administrative Procedures Act, W. Va. Code ch. 29A. In such circumstances, a circuit court is primarily discharging an appellate function little different from that undertaken by this Court; consequently, our review of a circuit court's ruling in proceedings under § 11-3-25 is *de novo*. . . .
>
> ***In re Tax Commission Assessments Against American Bituminous Power Partners, L.P.***, 250 W. Va. 250 at 254-255, 539 S.E.2d 757 at 761-762 (WV 2000) (some internal citations omitted).

Furthermore, the standard of review under the W. Va. Administrative Procedures Act is whether the State Tax Department has acted in an arbitrary and capricious manner. ***See Frymier-Halloran v. Paige***, 193 W.Va. 687, 458 S.E.2d 780 at Syllabus Point 3 (The same standard set out in the *State Administrative Procedures Act, W. Va. Code, §29A-1-1, et seq.*, is the standard of review applicable to review of the Tax Commissioner's decisions under *W. Va. Code, § 11-10-10(e)* (1986). Thus, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.) (WV 1995); *see also W. Va. Code §29A-5-4(g)(5) and -4(g)(6).*

II. FINDINGS OF FACT

The Court has reviewed the record from the Board of Equalization and Review hearing, reviewed the briefs filed by the Century Aluminum and the State Tax Department, and heard the oral arguments of all parties in a hearing on September 1, 2010. Century Aluminum has challenged the Tax Department's valuations of Machinery and Equipment, Inventory, Furniture and Fixtures, and Computer Equipment. Based upon this record, the Court makes the following findings of fact.

1. Century Aluminum filed its *ad valorem* property tax return on or about October 26, 2009, for the 2010 tax year. *See* Tax Department's Exhibit 1 at PP. 8 - 11.

2. Century Aluminum provided the acquisition cost and Owner's Value for all machinery and equipment, furniture and fixtures, computer equipment, and inventory on the *ad valorem* tax return. *See* Tax Department's Exhibit 1 at P. 9.

3. Mr. Scott Nord, Shared Services Manager for Century Aluminum, signed the tax return and affirmed that the returns reflected the "*true and actual value*" of all property. *See* Tax Department's Exhibit 1 at P. 11.

4. According to the *ad valorem* tax returns filed by Century Aluminum, the Owner's Values are:

Machinery and Equipment	$ 50,860,998
Furniture and Fixtures	286,681
Computer Equipment	523,759
Inventory	18,281,665

See Tax Department's Exhibit 1 at P. 9.

5. The Tax Department valued Century Aluminum's industrial personal property as follows:

Machinery and Equipment	$ 34,971,956
Furniture and Fixtures	312,687
Computer Equipment	533,540
Inventory	18,281,654

See Tax Department's Exhibit 1 at P. 2 and P. 1 (which lists the individual components included in "supplies").

6. Century Aluminum appeared at the Jackson County Commission sitting as a Board of Equalization and Review on February 13, 2010, in order to protest the valuation.

<u>Valuations of Machinery and Equipment</u>

7. Ms. Cynthia Brown, Senior Appraiser, in the Property Tax Division, explained in her testimony how Century Aluminum's industrial personal property was valued.

8. Based upon a review of the Industrial Property Return prepared by the Property Tax Division, the Tax Department accepted as correct the acquisition costs provided by Century Aluminum for all personal property. *See* Tax Department's Exhibit 1 at P. 2 & P. 9.

9. According to Ms. Brown's testimony, the Property Tax Division calculated the value of Century Aluminum's Machinery and Equipment under the cost approach to value and used information from the Marshall and Swift valuation service as a guide. *See* Transcript at PP. 12 and 13; *see* also P. 14, Lines 11 - 14.

10. According to Ms. Brown, the Tax Department prepared two separate values for the Machinery and Equipment. The Property Tax Division prepared the first valuation based solely upon trending up the acquisition cost then subtracting depreciation. *See* Transcript at P. 11.

11. Originally, the Tax Department valued the Machinery and Equipment at $69,943,902 under the cost approach to value. *See* Tax Department's Exhibit 1 at P. 5.

12. Ms. Brown stated that the Tax Department, subsequently, reduced the value of the Machinery and Equipment by fifty (50%) percent. *See* Transcript at P. 10 and 11.

13. The Tax Department's final appraised value of the Machinery and Equipment for the 2010 tax year is $34,971,956. *See* Tax Department's Exhibit at PP. 1 and 2.

14. Mr. Jeff Amburgey, Director of the Property Tax Division, also testified concerning the valuation process.

15. Mr. Amburgey explained the concept of economic obsolescence and why the Property Tax Division allowed a fifty percent reduction in value of the Machinery and Equipment.

Mudrinich: Q. And we noticed your name on page 2 of the Exhibit - - State's Exhibit 1. Can you explain if economic obsolescence was given to this facility? Correct that. Could you explain what economic obsolescence is briefly?

Amburgey: A. Yes, it's obsolescence, a reduction in value of a facility due to circumstances outside of the facility; for example, if the economy is poor and they can't sell their products and things of that nature, and in this instance the facility is shut down.

Mudrinich: Q. So how did you derive that 50 percent off economic obsolescent on the M & E?

Amburgey: A. That's been basically an administrative maximum, mass appraisal and you've got that, I mean you know, we've got 10, 12, 14 different appraisals - - appraisers state-wide. There have to be constraints maximums and minimums and things of that nature that the appraisers need to operate under and ever since I've been with the Tax Department, 50 percent would be the maximum that we would give to any facility when it was no longer in operation.

In general, I think that probably began because you do an income approach based on the income that the facility is producing and in this case, it would have been zero because there's no production at all. So you've got an income value that is zero and a cost value that is something. If you average them, that 50 percent of the cost and so I quite imagine that's where that came about. We also have similar procedures state-wide with utility valuation.

Transcript at P. 18, Lines 7 - P. 19, Line 11.

16. Mr. Amburgey testified that the value of the Machinery and Equipment was trended up from acquisition cost, depreciated, and then reduced by fifty percent to account for economic obsolescence. *See* Transcript at P. 19, Lines 17 - 23.

17. On cross-examination Mr. Amburgey testified that in valuing the industrial personal property, the Property Tax Division began with the historical cost for the assets, trended the historical costs up according to the Marshall Swift Valuation Service to determine current cost or replacement cost new, then depreciated the assets according to the "percent good" tables found in Marshall Swift. *See* Transcript at P. 165.

18. On cross-examination, Mr. Amburgey stated that the Tax Department subsequently reduced the depreciated value of the Machinery and Equipment for obsolescence by 50% since the Century Aluminum plant is not currently operating. *See* Transcript at P. 166, Lines 9 - 14

19. Furthermore, Mr. Amburgey stated that the Tax Department would review any additional information provided by Century Aluminum on the issue of obsolescence; however, he had heard nothing at the Board of Equalization and Review hearing which would necessitate a further reduction in value for the Machinery and Equipment based on obsolescence. *See* Transcript at P. 166, Lines 12 - 23.

20. Century Aluminum calculated a value for the Ravenswood plant under both the cost approach to value and under the income approach to value.

21. Mr. Joseph Kettell of International Appraisal Company performed an income approach to value for the Century Aluminum plant. Transcript at P. 98.

22. Mr. Kettell's income approach to value was calculated under a discounted cash flow analysis based on thirteen separate projections including the Ravenswood plant's production forecast for the years 2010 through 2022, the projected price of aluminum on world markets for the years 2010 through 2022, ten components of the costs of goods sold over the next 12 years, and the projected general and administrative expenses for the years 2010 through 2022. *See* Appraisal Report at PP. 58 and 59.

23. Mr. Kettell assumed that the Century Aluminum plant would re-open in year four or during the 2013 calendar year; however, he made no guarantees. If the price of aluminum "skyrockets," the plant may re-open next year. If the price of aluminum stays low, the plant may never re-open. Transcript at P. 101 and 115.

24. Mr. Kettell's income valuation was based on the projected national sales price of aluminum and cost of goods sold projected over the next 15 years and some historical costs of the plant such as labor and other small expenses. The valuation was not based on the historical income of the Ravenswood plant over the past several years. *See* Transcript at P. 119, Lines 19-24.

25. Mr. Kettell valued the Century Aluminum plant at $14,100,000 under the income approach to value based on a discounted cash flow analysis. *See* Transcript at P. 116 and Appraisal Report at PP. 58 and 59.

26. Mr. Alexander Hazen also from the International Appraisal Company valued the Ravenswood plant under the cost approach to value. *See* Transcript at P. 127.

27. Mr. Hazen considered the income approach to value to be the "...key method of appraising..." the Ravenswood plant. *See* Transcript at PP. 95-96.

28. Mr. Hazen began by calculating the cost to build a modern plant with a capacity equivalent to the current capacity of the Ravenswood plant. *See* Transcript at P. 128. The replacement cost would be $ 759,000,000. *See* Appraisal Report at P. 85, Table 12.1.

29. Mr. Hazen then reduced the replacement cost new by 63% to account for the physical deterioration of the existing plant. *See* Transcript at P. 131. The value of the plant after deducting for physical deterioration would be $ 281,163,000. *See* Appraisal Report at P. 85, Table 12.1.

30. Subsequently, Mr. Hazen recalculated the discounted cash flows from Mr. Kettell's income approach to value by substituting different factors such as the reduced amount of labor required in newer plants, the lower labor costs in areas where newer plants are being constructed, better production efficiencies in newer plants, and the lower power costs in areas where newer plants are being constructed. *See* Transcript at P. 143, Line 16-P. 144, Line 13; *see* also Transcript at PP. 142-144. Under the revised discounted cash flow analysis, the Ravenswood plant would be valued at $ 278,712,000.

31. Mr. Hazen subtracted the fair market value of the Ravenswood plant as calculated under the income approach to value performed by Mr. Kettell ($14,100,000) from the revised income approach outlined above ($ 278,712,000 - $14,100,000 = $ 264,612,000) and

concluded that the combined functional and economic obsolescence was $ 264,612,000. *See* Transcript at P. 143, Line 16 - P. 144, Line 13; *see* also Appraisal Report at PP. 79- 85.

32. Mr. Hazen concluded that the combined functional and economic obsolescence would be $ 264,000,000. *See* Transcript at P. 144, Lines 6-13.

33. Mr. Hazen calculated that functional obsolescence would be $ 149,900,000 and economic obsolescence would be $ 114,700,000. Appraisal Report at PP. 79- 80.

34. After calculating the cost to construct a new plant with equivalent capacity, reducing the value for physical deterioration, functional obsolescence and economic obsolescence, Mr. Hazen calculated that the value of the Ravenswood plant under the cost approach to value would be $16,563,000 excluding the land value and the pollution control equipment. *See* Appraisal Report at P. 85, Table 12.1.

35. Finally, Mr. Hazen calculated a weighted average of the valuations under the income approach to value and the cost approach to conclude that the plant should be valued at $ 16,000,000. *See* Transcript at P. 85, Line 21 - P.86, Line 4.

36. Mr. Hazen testified that obsolescence can be calculated several different ways.

> When we're doing a plant like this, there's several ways you can go with an obsolescence analysis. Many appraisers just take an arbitrary percentage and say well, it's this percentage or that percentage but you're really better off trying to work out a number mathematically that can be done. This is what an investor would look at. They wouldn't look at, you know, I'm just going to knock off 6 percent or 20 percent or 80 percent. They're going to say here's my input; here's my cash flow; here's what I can afford to pay for the facility and get the return on investment that I need to have.

Transcript at P. 144, Lines 14 - 24.

37. Both Mr. Hazen and Mr. Kettell excluded the value of the inventories from their calculations. See Transcript at P. 85, Line 21.

Valuations of Inventory

38. Century Aluminum also challenged the value of the inventories for *ad valorem* tax purposes.

39. Counsel for Century Aluminum represented to the Board of Equalization and Review that Century Aluminum did not show any impairment of value on the tax return and did not ask the Property Tax Division to reduce the value of the inventories when the returns were filed. However, Century Aluminum believes the values should be reduced. *See* Transcript at P. 71, Lines 13 - 22.

40. At the Board of Equalization and Review hearing, Mr. Morgan of Century Aluminum testified extensively regarding the state of the inventories and whether they would actually be usable when the plant resumes production. *See* Transcript at PP. 67 -68.

41. Mr. Amburgey testified that the Property Tax Division valued the inventories at the Owner's Value listed on the tax returns. *See* Transcript at P. 171, Lines 6 - P. 172, Line 3.

42. Mr. Amburgey testified that the Property Tax Division operated under the belief that the inventory values on the *ad valorem* tax return had already been reduced to account for obsolescence. *See* Transcript at P. 171, Lines 6 - P. 172, Line 3.

43. Mr. Cooksey, from Intax, testified for Century Aluminum that he met with Mr. Amburgey a few weeks prior to the Board of Equalization and Review hearing. Mr. Cooksey

stated that he informed Mr. Amburgey that only one of the inventories had been reported at a reduced value on the property tax return; the three large inventories had not been written down on the returns. Transcript at P. 173, Lines 1 - 11.

44. Both Mr. Cooksey and Mr. Amburgey speculated whether they had communicated clearly at the previous meeting. *See* Transcript at P. 173, Lines 12 - 24.

45. The values at issue regarding the four elements of Inventories are:

	Tax Department	Century Aluminum
Raw Materials	$ 282,391	$ 282,391
Goods in Process	5,716,828	2,291,705
Parts-Owner's Use	6,412,360	2,570,523
Supplies-Owner's Use	5,870,075	2,353,137
	$ 18, 281,654	$ 7,497,756

See Tax Department's Exhibit 1 at P. 1 and Century's Exhibit No. 7; totals are supplied.

46. The Taxpayer argues that the Tax Department's valuation for the inventories should be reduced by 59% :

$$\frac{\$\ 7,497,756}{\$\ 18,281,654} = 41\%$$

47. Century Aluminum argued that the value of the Inventory to be reduced to $7,497,756. *See* Century Aluminum's Reply Brief at P. 35.

Valuations of Furniture & Fixtures and Computer Equipment

48. Century Aluminum also challenged the valuation of the Furniture and Fixtures and Computer Equipment calculated by the Tax Department. *See* Century Aluminum's Initial Brief at P. 11.

49. The Tax Department valued the Furniture and Fixtures at $ 312,687 and the Computer Equipment at $ 533,540. *See* Tax Department's Exhibit 1 at P. 2 and P. 1

50. The Tax Department valued the Furniture and Fixtures and Computer Equipment at the Owner's Value listed on the *ad valorem* property tax filed by Century Aluminum. *See* Tax Department's Exhibit 1 at P. 9.

51. Mr. Amburgey testified that the Tax Department does not allow economic or functional obsolescence for Furniture and Fixtures and Computer Equipment. *See* Transcript at PP. 19, Line 22- P. 20, Line 3.

III. CONCLUSIONS OF LAW

The Tax Commissioner has the duty to see that the laws concerning the assessment and collection of all taxes are faithfully enforced. One primary focus of the Tax Commissioner is to ensure that county personal property taxes and real property taxes are accurately assessed and collected. Pursuant to *W. Va. Code §11-3-1 et seq*, all property must be assessed annually at its true and actual value.

By statute, the true and actual value is defined as the value which a willing buyer would pay a willing seller in an arm's length transaction. *See W.Va. Code §11-3-1*. The goal is to establish a market value.

The West Virginia Supreme Court of Appeals has stated that the Tax Commissioner has the discretion to choose the most appropriate methodology to calculate the true and actual value of industrial personal property. ***See American Bituminous, supra,*** at Syllabus Pt. 5 (Title 110, Series 1P of the *West Virginia Code of State Rules* confers upon the State Tax Commissioner discretion in choosing and applying the most accurate method of appraising commercial and industrial properties. The exercise of such discretion will not be disturbed upon judicial review absent a showing of abuse of discretion.) In addition, the valuation of the assessing officer is presumed to be correct under State law. ***See Stone Brooke Limited Partnership, v. Sisinni,*** 224 W.Va. 691, 688 S.E. 2d 300 (WV 2009) at Syllabus Pt. 5 ("As a general rule, there is a presumption that valuations for taxation purposes fixed by an assessor are correct.... The burden is on the taxpayer challenging the assessment to demonstrate by clear and convincing evidence that the tax assessment is erroneous." Syllabus point 2, in part, ***Western Pocahontas Properties, Ltd. v. County Commission of Wetzel County,*** 189 W. Va. 322, 431 S.E.2d 661 (1993).) The Taxpayer is required to prove by clear and convincing evidence that the Tax Department's valuation is wrong. ***See Stone Brooke*** at Syllabus Pt. 6.

As noted in ***American Bituminous, supra,*** a decision of the County Commission sitting as a board of equalization and review is reviewed by the circuit courts on the same basis as a review under the *W. Va. Administrative Procedures Act* set forth in *WV Code §29A-5-4*. In the review of a use tax case under *W. Va. Code §29A-5-4*, the Supreme Court has outlined the task which confronts a taxpayer challenging the Tax Department's assessment of a tax liability.

> "Once a full record is developed, both the circuit court and this Court will review the findings and conclusions of the Tax Commissioner under a clearly erroneous and abuse of discretion standard unless the incorrect legal standard was applied." Syl. pt. 5, Id. As we further explained in syllabus point three of In re Queen, 196 W.Va. 442, 473 S.E.2d 483 (1996), "[t]he 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis."
> *CB & T Operations Company, Inc., v. Tax Commissioner of the State of West Virginia*, 211 W. Va. 198 at 202, 564 S.E.2d 408 at 412 (WV 2001) referencing *Frymier-Halloran, supra.*

The Supreme Court further stated in ***In re Queen***, at Syllabus Point 4, that "'[s]ubstantial evidence' requires more than a mere scintilla. It is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. If an administrative agency's factual finding is supported by substantial evidence, it is conclusive."

The West Virginia Legislature has approved legislative regulations which the Tax Commissioner must follow in order to determine the true and actual value of industrial real and personal property. *See 110 C.S.R. §1P-1, et seq.* The legislative regulations specifically list three separate approaches to be used in determining the fair value or the market value of industrial personal property: cost method, income method, and market method. *See 110 C.S.R. §1P-2.5.3.1.* As a general rule, the legislative regulations state that the cost approach will be used most frequently in valuing industrial personal property such as machinery and equipment. *See 110 C.S.R. §1P-2.5.3.2.* The legislative regulations specifically define the cost approach to value as :

> 2.2.1.1. Cost approach. - To determine fair market value under this approach, replacement cost of the improvements is reduced by the amount of accrued depreciation and added to an estimated land value. In applying the cost approach, the Tax Commissioner will consider three (3) types of depreciation: physical deterioration, functional obsolescence, and economic obsolescence.
>
> *110 C.S.R. §1P-2.2.1.1.*

According to the legislative regulations, the Tax Department must consider three forms of depreciation in determining the value of industrial personal property under the cost approach to value – physical deterioration, functional obsolescence, and economic obsolescence.

As noted, the W. Va. Supreme Court of Appeals recently addressed the valuation of industrial personal property for *ad valorem* tax purposes. The Tax Department has the discretion to select the most appropriate method to determine the value of industrial personal property for *ad valorem* tax purposes and the exercise of that discretion will not be disturbed as long as the Tax Department did not abuse its discretion. ***See American Bituminous, supra.*** The legislative regulations for use in valuing commercial and industrial machinery express a clear preference for using the cost approach to value for industrial equipment. *See* 110 C.S.R. §1P-2.5.3.2. Both Ms. Brown and Mr. Amburgey testified at the Board of Equalization and Review hearing, that the Tax Department valued the industrial personal property based upon the cost approach to value. *See* Finding of Fact No. 9

Based upon the testimony of Mr. Amburgey, the Tax Department began with the acquisition costs for the Machinery and Equipment as listed on the Century Aluminum's *ad valorem* tax return. *See* Finding of Fact No. 16. According to Ms. Brown's testimony, the Tax Department trended up the acquisition costs to determine the replacement cost new of the Machinery and Equipment, then depreciated the value to account for physical deterioration. *See* Finding of Fact Nos. 8 & 9.

Century Aluminum has not challenged the Tax Commissioner's use of the Marshall and Swift trend and depreciation tables by the Tax Department under the cost approach to value. For example, Century Aluminum has not argued that the Tax Department employed the trend and depreciation tables for retail stores as opposed to the trend and depreciation tables for the aluminum industry.

Rather, Century Aluminum argues that the Tax Department has failed to adequately account for functional and economic obsolescence. Century Aluminum argued that the Tax Department's reduction in value by 50 percent for the industrial Machinery and Equipment was artificial and that the Tax Department failed to account for the obsolescence of the Ravenswood plant. *See* Century's Initial Brief at PP. 22 & 23.

Mr. Amburgey explained the Tax Department's rationale of reducing the value of the Taxpayer's Machinery and Equipment by 50 percent to account for obsolescence. *See* Finding of Fact No. 15. As Mr. Amburgey explained, the value of the Ravenswood plant as calculated under the income approach to value will be zero since the plant was not operating on the assessment date and has remained idled to the present time. The value of the Machinery and

Equipment as originally calculated under the cost approach to value was $ 69,943,902 without any consideration of obsolescence. *See* Finding of Fact No. 11. The arithmetic average of $ 69,943,902 and zero equals fifty percent of the value as calculated under the cost approach to value or $34,971,956.

Furthermore, Mr. Amburgey's approach was rather similar to the approach employed by Century Aluminum's expert appraiser, Mr. Hazen. It is clear that Mr. Hazen viewed the difference between the value of the plant as calculated under the discounted cash flow method (income approach) and the replacement cost to construct a plant with equivalent capacity (cost approach) as combined economic and functional obsolescence. *See* Finding of Fact No. 31. At the end of the day, Mr. Hazen employed a weighted average of the discounted cash flow method (income approach) and the replacement cost to construct a plant with equivalent capacity (cost approach) to value the Ravenswood plant at $ 16,000,000. *See* Finding of Fact No. 35. Neither expert witness for Century Aluminum satisfactorily explained how the final plant value was allocated to Machinery and Equipment. Century Aluminum simply allocated the value of $16,000,000 into $ 13,875,100 for Machinery and Equipment and the remainder to the real property for the sake of simplicity. *See* Transcript at P. 182, Lines 15-19.

Century Aluminum has assumed through projections that the Ravenswood plant will not re-open until the 2013 calendar year. *See* Finding No. 23. If the plant were to re-open in 2011 or 2012, then Century's value of $ 16,000,000 would concededly be significantly understated.

While Mr. Hazen expressed a clear preference for calculating obsolescence based upon an analysis of cash flow, he also stated that obsolescence can be calculated many different ways. In fact, Mr. Hazen admitted that many appraisers will apply obsolescence as an arbitrary percentage reduction in value. *See* Finding of Fact No. 36. However, the Tax Department's reduction was not arbitrary and represented the arithmetic average of the two different approaches to value.

Furthermore, the Tax Department valued the Machinery and Equipment below the Owner's Value listed by Century Aluminum on the *ad valorem* property tax return when the return was filed. *See* Finding of Fact Nos. 4 & 5.

Century Aluminum also challenged the value of the Inventory as determined by the Property Tax Division. The Tax Department valued the Inventory at the "Owner's Value" listed on the *ad valorem* property tax return filed by Century Aluminum. The Taxpayer has not argued that the Tax Department changed the values reported on the *ad valorem* tax return; at best, the Taxpayer has argued that it failed to note on the return that the inventories should be reduced in value since the aluminum was solidified in the processing pots. Nevertheless, the Tax Department accepted the Owner's Value as correct and used that Owner's Value in valuing Century Aluminum's industrial personal property.

Century Aluminum also challenged the valuation of the Furniture and Fixtures and Computer Equipment calculated by the Tax Department. *See* Century Aluminum's Initial Brief at P. 11. The Tax Department valued the Furniture and Fixtures at $ 312,687 and the Computer Equipment at $ 533,540. *See* Tax Department's Exhibit 1 at P. 2 and P. 1. The

Tax Department valued the Furniture and Fixtures and Computer Equipment at the Owner's Value listed on the *ad valorem* property tax filed by Century Aluminum. *See* Tax Department's Exhibit 1 at P. 9. Mr. Amburgey testified that the Tax Department does not allow economic or functional obsolescence for Furniture and Fixtures and Computer Equipment. *See* Transcript at PP. 19, Line 22- P. 20, Line 3.

The combined total value for Furniture and Fixtures and the Computer Equipment would be $ 846,227. The assessed value would be 60% of the total value or $ 507,736. Century Aluminum assumed a tax rate of 0.024868 in preparing its appeal to the Board of Equalization and Review. *See* Century Aluminum's Exhibit No. 7. Based upon Century Aluminum's assumed tax rate, the total tax liability for Furniture and Fixtures and the Computer Equipment would be $ 12,626 based upon a value of $ 846,227.

Functional obsolescence is not really warranted for office furniture and fixtures. More than half of the Furniture and Fixtures was purchased by Century Aluminum in 2008 and has been depreciated by 16 % for the 2010 tax year. The Furniture and Fixtures purchased in 2001 have been depreciated down to 24 percent good and those purchased in 1999 and prior have been depreciated down to only 20 percent good. *See* Tax Department's Exhibit 1 at P. 5. A desk chair or a file cabinet still works well even though the desk chair might be 11 years old. If a desk chair or filing cabinet is broken and does not work, then the taxpayer normally buys a new chair and throws away the broken chair. Furthermore, no deduction for obsolescence is warranted for the computer equipment. The Tax Department has already depreciated the computer equipment down to 18 percent good for all computers purchased in 2004 and earlier.

IV. CONCLUSIONS OF LAW

1. The Tax Commissioner is required to see that county personal property taxes and real property taxes are accurately assessed and collected; and that all property is valued at the true and actual value. *See W. Va. Code §11-3-1, et seq.*

2. The West Virginia Legislature has approved legislative regulations which the Tax Commissioner must follow in order to determine the true and actual value of industrial real and personal property. *See 110 C.S.R. §1P-1, et seq.*

3. The legislative regulations specifically list three separate approaches to be used in determining the fair value or the market value of industrial personal property: cost method, income method, and market method. *See 110 C.S.R. §1P- 2.5.3.1.* As a general rule, the legislative regulations state that the cost approach will be used most frequently in valuing industrial personal property such as machinery and equipment. *See 110 C.S.R. §1P-2.5.3.2.*

4. The legislative regulations specifically define the cost approach to value as :

> 2.2.1.1. Cost approach. - To determine fair market value under this approach, replacement cost of the improvements is reduced by the amount of accrued depreciation and added to an estimated land value. In applying the cost approach, the Tax Commissioner will consider three (3) types of depreciation: physical deterioration, functional obsolescence, and economic obsolescence.

110 C.S.R. § 1P-2.2.1.1.

5. According to the legislative regulations, the Tax Department must consider three forms of depreciation in determining the value of industrial personal property under the cost

approach to value – physical deterioration, functional obsolescence, and economic obsolescence.

6. The West Virginia Supreme Court has stated that the Tax Commissioner has the discretion to choose the most appropriate methodology to calculate the true and actual value of industrial personal property. ***See American Bituminous, supra***, at Syllabus Pt. 5 (Title 110, Series 1P of the West Virginia Code of State Rules confers upon the State Tax Commissioner discretion in choosing and applying the most accurate method of appraising commercial and industrial properties. The exercise of such discretion will not be disturbed upon judicial review absent a showing of abuse of discretion.)

7. The testimony of Ms. Brown and Mr. Amburgey demonstrates that the Tax Department accounted for physical deterioration, functional obsolescence, and economic obsolescence, in valuing Century Aluminum's industrial personal property.

8. On cross-examination Mr. Amburgey testified that in valuing the industrial personal property, the Property Tax Division began with the historical cost for the assets, trended the historical costs up according to the Marshall Swift Valuation Service to determine current cost or replacement cost new, then depreciated the assets according to the "percent good" tables found in Marshall Swift. *See* Finding No. 17.

9. Mr. Amburgey testified that the value of the Machinery and Equipment was trended up from acquisition cost, depreciated, and then reduced by fifty percent to account for economic obsolescence. *See* Finding No. 16.

10. Mr. Amburgey testified that reduction in value of fifty percent for obsolescence for the Machinery and Equipment represented the arithmetic average of the value under the income approach to value and the cost approach to value. *See* Finding No. 15.

11. The Tax Department's decision to reduce the value of the Machinery and Equipment by fifty percent to account for obsolescence was neither arbitrary nor capricious. The reduction in value is supported by substantial evidence in the record. ***See In re Queen* and *CB &T Operations, supra.***

12. Based upon the record in this case, the Tax Department valued Century Aluminum's industrial personal property under the "cost" approach to value.

13. The Tax Department's final appraised value of the Machinery and Equipment for the 2010 tax year is $34,971,956 after accounting for physical deterioration, functional obsolescence, and economic obsolescence. *See* Finding No. 13.

According to the *ad valorem* tax returns filed by Century Aluminum, the Taxpayer listed the "Owner's Value" as $ 50,860,998 for the Machinery and Equipment. *See* Finding No. 4.

14. The Tax Department valued the Taxpayer's Machinery and Equipment below the "Owner's Value" listed on the *ad valorem* property tax return.

15. The Tax Department valued the Taxpayer's Inventory at the "Owner's Value" listed on the *ad valorem* property tax return. *See* Finding No. 4 and 45.

16. The Tax Department valued the Taxpayer's Furniture and Fixtures and the Computer Equipment at the "Owner's Value" listed on the *ad valorem* property tax return. *See* Finding No. 4 and 49.

17. The Tax Department has allowed physical deterioration for the Furniture and Fixtures and the Computer Equipment as shown on Tax Department's Exhibit 1. Much of the Furniture and Fixtures and the Computer Equipment was purchased within the prior three years. *See, supra.*

18. The values calculated by the Tax Department for Century Aluminum's industrial personal property are supported by substantial evidence in the record. ***See In re Queen, supra,* and *Stone Brooke, supra,*** at Syllabus Point 2.

19. Century Aluminum bears the burden of demonstrating by clear and convincing evidence that the Tax Department's valuations are wrong. Century Aluminum has failed to carry this burden of proof.

ORDER

Based on the foregoing Findings of Fact, Analysis and Conclusions of Law, it is therefore ORDERED that the true and actual values calculated by the Tax Department for the industrial personal property are affirmed; the values for the 2010 tax year are Machinery and Equipment $34,971,956; Inventory $ 18,281,654; Furniture and Fixtures $ 312,687; and Computer Equipment $ 533,540.

Accordingly, the decision of the Jackson County Commission sitting as a Board of Equalization and Review is affirmed, and the Petition is denied and overruled.

The objections of all parties are noted and preserved for the record.

The Clerk of the Circuit Court is directed to send attested or certified copies of this Order to counsel of record, and to the Assessor, Sheriff and County Commission of Jackson County, West Virginia.

All of which is **ORDERED**, accordingly.

ENTER: November 17, 2010

ENTERED THE 17th DAY OF
Nov 2010
ORDER BOOK 104 . PAGE
202
Keith Bratherton
CLERK CIRCUIT COURT

Thomas C. Evans, III
Thomas C. Evans, III, Chief Judge
Circuit Court of Jackson County
Fifth Judicial Circuit
State of West Virginia

A TRUE COPY, CERTIFIED THIS THE
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