IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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

Petitioner,

v. **CIVIL ACTION NO. 10-AA-2**

JACKSON COUNTY COMMISSION,
sitting as a Board of Review and Equalization and JOE PITTS, DONALD G. STEPHENS and TOMMY NUTTER in their capacity as members of the Jackson County Commission sitting as a Board of Review and Equalization, and CHRISTOPHER G. MORRIS, State Tax Commissioner,

Respondents.

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APPEAL FROM
THE CIRCUIT COURT OF JACKSON COUNTY
JACKSON COUNTY, WEST VIRGINIA

THE HONORABLE THOMAS C. EVANS, III

PETITION FOR APPEAL TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

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

Petitioner,

By Counsel

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I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

Century Aluminum of West Virginia, Inc. ("Petitioner"), a Delaware Corporation, appeals to the West Virginia Supreme Court of Appeals (the "Supreme Court"), from an adverse decision of the Circuit Court of Jackson County ("Circuit Court"), issued November 17, 2010, denying Petitioner's property tax appeal of a decision of the County Commission of Jackson County, Joe Pitts, Donald G. Stephens, and Tommy Nutter, County Commissioners, sitting as a Board of Review and Equalization (the "Board of Review"), not to reduce the State Tax Department's 2010 appraisal of Petitioner's Ravenswood Aluminum Smelter (hereinafter referred to as the "Ravenswood Plant" or "Plant").

In February 2009, operations at the Ravenswood Plant were curtailed. The assessment date ("Assessment Date") for Tax Year 2010 was July 1, 2009. The Plant remains curtailed today and Petitioner has no current plans to restart it. *W. Va. Code* § 11-3-1 and Legislative regulation 110 CSR § 1P-1 *et seq.* require the Tax Department to appraise property at its market value. The regulations further require that in appraising industrial property using the cost approach, that functional and economic obsolescence be considered. For Tax Year 2010, the Property Tax Division of the State Tax Department ("Tax Department"), appraised the Plant at $73,103,740, a value substantially in excess of its fair market value and substantially in excess of the value of the Plant as appraised by International Appraisal Company ("IAC").

The Tax Department never attempted to appraise the Plant at its fair market value, as required by statute. The Tax Department's appraisal was based on formulary mass-appraisal computations, which the Department uses in appraising operating industrial facilities that do not suffer from functional or economic obsolescence. At the hearing before the Board of Review, the Tax Department's representatives testified that the unwritten policy of the Property Tax Division is not to allow deductions for functional or economic obsolescence to any asset category other than machinery and equipment ("M&E"). In its appraisal, the Tax Department did allow a 50% obsolescence adjustment to Petitioner's M&E. However, the Tax Department's representative further testified that another unwritten policy artificially capped the maximum obsolescence adjustment it was willing to allow at 50% of the unimpaired value of such M&E.

The Tax Department's appraisal failed to consider whether the value of Petitioner's assets had been impaired by current economic conditions, which resulted in the curtailment of the Plant, or by functional obsolescence, due to the limitations of the technology available when the Plant was built. It is the Tax Commissioner's duty to ensure that assessment occurs at market value. *Killen v. Logan County Commission*, 170 W.Va. 602, 295 S.E.2d 689 (1982). The true and actual value appraisal required by *W. Va. Code* § 11-3-1, means fair market value – what property would sell for if sold on the open market. *Eastern American Energy Corp. v. Thorn*, 189 W.Va. 75, 428 S.E.2d 56 (1993). Because the Tax Department's policies limited its consideration of obsolescence, its appraisal did not comply with the mandates of *W. Va. Code* § 11-3-1 and the Legislative regulations that require the appraisal of industrial property at fair market value. Because the Tax Department's policies precluded it from adequately considering the effect of functional and economic obsolescence on market value, in the present circumstance that appraisal must be considered defective. The Circuit Court below erred by failing to overturn the decision of the Board of Review to accept an appraisal that was not supported by substantial evidence and plainly wrong. *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W.Va. 14, 672 S.E.2d 150 (2008).

Petitioner had the Ravenswood Plant appraised for Tax Year 2010 by IAC, one of the foremost, certified appraisers of aluminum smelters in the United States. IAC appraised the Plant, in conformity with the Uniform Standards of Professional Appraisal Practice and the Code of Professional Ethics and Standards of Professional Conduct of the American Society of Appraisers and the National Association of Fee Appraisers. IAC's appraisal (the "IAC Appraisal") was based on the highest and best use of the property as an aluminum smelter. IAC appraised the Plant, as of the Assessment Date, at $16,000,000 and presented this appraisal at the hearing before the Board of Review. Given that IAC's appraisal was the only appraisal of Petitioner's property prepared in conformity with the tax law, the Board of Review should have accepted the IAC Appraisal and rejected the Tax Department's appraisal. In addition, at the hearing below Petitioner presented testimony that the market value of inventories remaining at the Plant when operations were curtailed had been impaired as a result of the curtailment of the Plant and were now worth $7,497,000.

The presumption of correctness of the Tax Department's appraisal was clearly overcome by the fact that the Tax Department failed to follow the Legislative regulations and its own Administrative Notice. Absent a valid appraisal by the Tax Department, the evidence of value submitted by Petitioner at the hearing should have been accepted.

Petitioner asserts that the evidence of fair market value of the Plant, which it presented at the hearing below, overcame the presumption that the Tax Department's mechanical appraisal techniques were correct. The Tax Department did not present any evidence at the hearing to refute Petitioner's appraisals. The Circuit Court erred by not reversing the Board of Review's order that the appraisal of Petitioner's Ravenswood Plant for 2010 be set at the values established by the IAC. Petitioner respectfully requests this Court to reverse the decision of the Circuit Court below and remand this case for further proceedings consistent with its opinion.

II. FACTS

1. Petitioner is the owner of the Ravenswood Plant, a primary aluminum smelter, which is located in Jackson County, West Virginia. The Ravenswood Plant and an adjacent rolling mill (currently owned by Alcan Rolled Products – Ravenswood, LLC ("Alcan")) were constructed by Kaiser Aluminum and Chemical Company ("Kaiser") in the mid-1950's. When in production, the

Plant is capable of producing 170,000 tons per year of low profile aluminum ingots or alternatively producing molten metallic aluminum for use at the adjacent rolling mill.

2. As a result of the collapse of the worldwide market for aluminum and functional obsolescence inherent in a plant constructed more than fifty years ago, the Ravenswood Plant curtailed operations in February, 2009. Operations at the Ravenswood Plant remain curtailed as of the date of this Petition and Petitioner's management has no current plans to restart it.

3. Petitioner filed its 2010 industrial business property tax return ("2010 Tax Return") on or about October 26, 2009. The 2010 Tax Return listed the Petitioner's acquisition cost and owner's value ("net book value") for the following assets: Real Estate; M&E; Furniture & Fixtures ("F&F"); Computer Equipment; Inventory – Raw Materials; Inventory – Goods in Process; Inventory – Parts; Inventory – Supplies; Machinery in Process of Installation; Pollution Control Facilities; and Specialized Manufacturing Production Property. *See:* Tax Department Ex. 1 at pp. 8-11.

A. Tax Department 2010 Appraisal

4. For Tax Year 2010, the Tax Department appraised the Ravenswood Plant at $73,103,740, consisting of real estate of $14,908,800 and personal property of $58,194,940. *See*: Tax Department Ex. 1 and 2.

5. The Tax Commissioner's personal property appraisal included the following assets: M&E – $34,971,956; F&F – $312,687; Computer

Equipment – $533,540; Inventory – Raw Materials – $282,391; Inventory – Goods in Process – $5,716,828; Inventory – Parts - $6,412,360; Inventory – Supplies – $5,870,075; Machinery in Process of Installation – $2,610,440; Pollution Control Facilities – $1,471,959; and Specialized Manufacturing Production Property – $12,704. *See:* Tax Department Ex. 1.

6. The methods used by the Tax Department to appraise Petitioner's property rely on essentially mechanical computations that did not consider the fair market value of the property.

7. Cynthia Brown, Senior Appraiser (the Appraiser") with the Tax Department performed the appraisal of the Ravenswood Plant for Tax Year 2010. The Appraiser testified that she used the return method, "where you take their values and use the NAICS Code to depreciate it." *See:* Tr. at p. 9.

8. The computations made by the Appraiser to value Petitioner's M&E, F&F, and computer equipment used the cost information reported by Petitioner on the 2010 Tax Return as a starting point. The Appraiser multiplied the cost of these assets by trend factors and depreciation percentages, obtained from the Marshall Valuation Service, to arrive at the appraised values. *See:* Tr. at pp. 11-14, and Tax Department Ex. 1 at p. 5.

9. The Tax Department did allow a 50% adjustment for economic obsolescence to Petitioner's M&E, because operations at the Plant were curtailed. Other than this adjustment, the Tax Department did not consider either

economic obsolescence or functional obsolescence for any category of property owned by Petitioner. *See:* Tr. at pp. 11-14, and Tax Department Ex. 1 at p. 2.

10. The Tax Department appraised Petitioner's inventories of raw materials, goods in process, parts held for owner's use, and supplies held for owner's use, without any consideration of the fair market value of these assets. The Tax Department simply accepted the acquisition cost of these items as shown on the Petitioner's 2010 Tax Return, as the appraised value of these assets. *See:* Tax Department Ex. 1.

11. The Tax Department appraised Pollution Control Facilities and Specialized Manufacturing Production Property located at the Plant Site, as required by state law. The Appraiser took Petitioner's acquisition cost of these items as shown on the 2010 Tax Return and multiplied that amount by 5%, as provided by *W. Va. Code* §§ 11-6A-3 and 11-6E-3, respectively.

12. The Tax Department appraised the "Site" on which the Ravenswood Plant sits at $14,908,800, consisting of land valued at $2,124,900 and buildings valued at $12,783,900. *See:* Tax Department Ex. 2.

13. Petitioner's representatives met with the Tax Department in January, 2010 to seek further reductions in the 2010 appraisal as a result of the curtailment of operations at the Ravenswood Plant. This meeting resulted in no adjustment to the Tax Department's appraisal.

B. Hearing before the Board of Review

14. On February 9, 2010, Petitioner filed a protest with the Board of Review asserting that the Tax Department had overvalued the Ravenswood Plant and the inventories located at the Site.

15. A hearing on Petitioner's protest was held before the Board of Review on February 13, 2010.

C. Testimony of Tax Department at Board of Review Hearing

16. At the hearing below, Jeff Amburgey Director, Property Tax Division, State Tax Department ("Director") testified as follows with regard to the decision to allow a 50% obsolescence adjustment to Petitioner's M&E:

> Q So how did you derive that 50 percent off economic obsolescence on the M&E?
>
> A <u>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.</u>
>
> 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's 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. If a company isn't -- not making money or they're losing money, the value

> does not go below -- generally speaking, the value does not go below 50 percent of the cost. <u>So administratively we do not go below 50 percent cost and that's what we allowed this facility</u>.
>
> Q To make it clear about what you're talking 50 percent of the cost, cost would be the cost after determined by the actual appraiser. It's going to be cost trended up and then depreciated down based upon the age of the equipment. So you've got original cost?
>
> A That's correct; it's the trended cost. As Cynthia said, <u>we applied that only to the machinery and equipment and not the computers or the inventory as those items so hopefully would be able to be liquidated for their costs not</u> -- and don't deserve a discount of 50 percent in our estimation.

(Emphasis Added). *See:* Tr. at pp. 18-19.

17. The Appraiser and the Director both testified at the hearing that Tax Department policy does not allow any obsolescence to categories of property other than M&E, regardless of the circumstances. *See:* Tr. at pp. 168-170.

18. At the hearing, the Appraiser testified as follows regarding her appraisal for the real property at the Ravenswood Plant:

> Q Can you briefly explain the appraisal method that led you to those values?
>
> A It's the Marshall Swift method where we go through. <u>The computer automatically generates it</u> and there's no, <u>it's the cost</u>.
>
> Q It's the cost?
>
> A Uh-huh (yes).

Q And the cost on the raw land also?

A Yeah.

(Emphasis Added). *See:* Tr. at pp. 12-13.

D. Appraisal of Ravenswood Plant by IAC

19. For the Tax Year, Petitioner contracted with IAC to appraise the Ravenswood Plant, including the Site, the buildings and personal property which made up the Plant. A copy of the report (hereinafter referred to as the "Appraisal Report") prepared by IAC is included in the record as Petitioner's Ex. # 6.

20. IAC, located in Upper Saddle River, New Jersey, is a full-service licensed appraisal organization specializing in the valuation of large industrial properties and process plants. IAC has appraised over two dozen aluminum smelters and alumina refineries, located throughout the United States and the world.

21. IAC performed its appraisal of the Ravenswood Plant, as of the Assessment Date, in conformity with the Uniform Standards of Professional Appraisal Practice. IAC appraised the Ravenswood Plant at fair market value as defined by the Appraisal Institute. The definition of fair market value used by IAC in appraising the Plant is consistent with the meaning of true and actual value set forth in *W. Va. Code* § 11-3-1. In its appraisal, IAC considered all three

generally accepted valuation methodologies including: (a) Income Approach; (b) Cost Approach; and, (c) Sales Comparison (Market) Approach.

22. IAC appraised the Ravenswood Plant at its highest and best use, which is defined as the most profitable use to which a property can be put. IAC determined that, in the case of the Ravenswood Plant, the highest and best use is as an aluminum smelter – the specific use for which the Plant was designed. IAC determined that the maximum value of the Plant would be produced by appraising the Plant on a going-concern basis. The assets appraised by IAC included all rights inherent in the ownership of the buildings, structures, and site improvements together with process equipment and all other taxable tangible assets considered real estate improvements and personal property. The valuation of land, inventories and intangible assets was excluded from the IAC report. *See*: Appraisal Report at pp. 9-10.

23. IAC concluded that, as of the Assessment Date, the fair market value of the Ravenswood Plant, as an operating unit, was $16,000,000.

24. As part of its appraisal, IAC appraised the Ravenswood Plant using the Income Approach. This appraisal was made using a Discounted Cash Flow ("DCF") analysis. The DCF analysis was based on forecasting the income and expenses that the Ravenswood Plant is anticipated to generate from future operations. This information was used to develop a pro forma stream of cash flows attributable to the future operation of the facility. An appropriate risk-adjusted discount rate was then computed and used to determine the present value

of the Ravenswood Plant, based on the projected cash flows, plus the residual value of the Plant at the end of its useful life. *See*: Appraisal Report at pp. 40-59.

25. Joseph Kettell, ASA, supervised IAC's Income Approach appraisal. He based the DCF analysis on thirteen separate projections, including the Plant's production forecast for the years 2010 through 2022, the price of aluminum on world markets for the years 2010 through 2022, the cost of goods sold over the next 12 years, and general and administrative expenses for the years 2010 through 2022. *See:* Appraisal Report at pp. 58 and 59.

26. To develop the revenue and expense projections required for its DCF analysis, IAC analyzed the aluminum industry, both in the United States and worldwide, including the sources of aluminum supply, components of aluminum demand, aluminum prices, and industry outlook. This information was used to project future revenues and when the Plant would restart. For purposes of this appraisal, IAC projected that economic conditions would support restarting the Plant in 2013. *See*: Appraisal Report at pp. 36-39 and 46-47

27. By analyzing the Ravenswood Plant's historical financial performance, industry trends, third-party expert publications and discussions regarding management's estimates of future operating results, IAC was able to develop projections of future Plant operating expenses. *See*: Appraisal Report at pp. 41-46 and 47-52. IAC's calculation of the discount rate used to determine the present value of the Plant is discussed in the Appraisal Report, at pp. 52-57.

28. The results of IAC's Income Approach appraisal of the Ravenswood Plant are summarized in the Appraisal Report, at pp. 57-59. Based on this analysis, IAC concluded that the fair market value of the Plant based on its Income Approach appraisal was $14,100,000.

29. IAC, under the supervision of Mr. Alexander Hazen, ASA, also performed a Cost Approach appraisal of the Ravenswood Plant. IAC's Cost Approach appraisal, included two broad elements – an estimate of the replacement cost-new of the Plant and an analysis of the loss in value due to physical deterioration, functional obsolescence and external obsolescence. *See*: Appraisal Report at p. 60.

30. IAC developed the information needed to make a reliable estimate of the replacement cost-new of the Ravenswood Plant by various means, including:

> (a) an in-depth study of published and non-published cost information of existing and proposed aluminum smelters throughout the world;
>
> (b) physical inspection of some of the newest smelters operating in the United States and Canada;
>
> (c) meetings with engineers, R&D personnel and other experts who are either employed by or consult with major aluminum companies; and
>
> (d) meetings with officials of Petitioner and other major aluminum producers.

IAC concluded that the cost to replace the Ravenswood Plant in today's market was $4,470 per ton of capacity or approximately 760 million dollars. *See*: Appraisal Report at pp. 60-64.

31. IAC provided for the normal physical deterioration of the Ravenswood Plant by physically inspecting the assets, assigning useful lives to each category of assets and assigning appropriate depreciation percentages. IAC determined that an overall Plant, physical depreciation factor of 63% was indicated for the 50+ year old Plant. *See*: Appraisal Report at pp. 64-65.

32. The IAC also considered the loss of value of the Ravenswood Plant as a result of obsolescence, due to improvements in technology developed since the Plant was built (functional obsolescence) and caused by external economic conditions in the market in which the Plant competes (external obsolescence).

33. IAC determined that Ravenswood Plant, suffers from a significant amount of functional obsolescence when compared to equivalent modern smelters. Most significantly, the small size and inefficiency of the reduction cells in the Ravenswood Plant limits production and increases Plant operating costs. Simply stated, larger reduction cells increase the amount of electric current passing through each cell, which directly increases aluminum production. Modern plants have reduction cells that produce four times as much aluminum per cell than the Ravenswood Plant. As a result, modern plants of equivalent capacity are simpler in design than the Ravenswood Plant and less

costly to operate. Other areas of functional obsolescence identified by IAC, including less efficient use of electricity in the smelting process and losses in efficiency due to lack of modern computer control of the smelting process, were discussed in Appraisal Report, at pp 65-74.

34. IAC also analyzed the external economic factors that have reduced the value of both the Ravenswood Plant and all aluminum smelters located throughout the United States. Primarily, these factors include the high cost of electric power and labor in the United States. Today, new aluminum smelters are being constructed exclusively in areas of the world that have low cost power, low cost labor or both (e.g. Africa, Iceland, Canada, China and the Middle East). The IAC Appraisal Report points out that, since 1970 the percentage of worldwide smelting capacity located in the United States, as fallen from 45% to less than 8%. This reduction is a direct result of the high cost of electric power. This percentage is expected to continue to fall.

35. Appraisal Report concluded that:

> [T]he Ravenswood Plant suffers from severe functional and technological obsolescence as well as obsolescence from external causes. The loss of all of the plant's capacity due to outdated technology, the uncertain power situation, and projected industry conditions emphasizes the magnitude of the problem. The causes of obsolescence described in this report would weigh heavily in the mind of a potential purchaser of the subject property. A major price discount would be required to account for these problems as well as the additional risk that goes with investing in a property of this type. Therefore a

> substantial obsolescence penalty will be required to properly reflect the mood of the marketplace.

See: Appraisal Report at p 77.

36. IAC's computations of functional and economic obsolescence are set forth in detail in Appraisal Report, at pp. 77-84. IAC concluded that, for purposes of computing fair market value, the Ravenswood Plant is entitled to $149,900,000 in functional/technological obsolescence and $114,700,000 in External Obsolescence.

37. The results of IAC's Cost Approach appraisal of the Ravenswood Plant are summarized in the Appraisal Report at p. 85. IAC concluded that, on a cost basis, the Plant is worth $20,200,000, consisting of operating assets worth $16,563,000, pollution control equipment of $1,471,959 (appraised at 5% of cost) and land of $2,124,900 (as appraised by Tax Department).

38. IAC also considered the Sales Comparison (Market) Approach in its appraisal of the Ravenswood Plant. In this analysis, IAC did discover a 2004 sale of a former Kaiser smelter located in Mead, WA, for $7.4 million. This sale, however, did not meet IAC's criteria for relevant sales because it was anticipated that the site would be converted to an alternate use. The Sales Comparison Approach was abandoned due to lack of meaningful sales. *See*: Appraisal Report at pp. 86-87.

39. IAC reconciled and correlated its separate Income Approach and Cost Approach appraisals of the Ravenswood Plant. IAC concluded that as of the Assessment Date, July 1, 2009, the fair market value of the Plant, was $16 million. Appraisal Report at pp. 87-88.

E. Valuation of Inventories

40. At the hearing below, Mr. William Morgan, a chemical, engineer and technical manager for Century Aluminum testified with regard to the electrochemical process of smelting aluminum and the operation of aluminum smelting plants. Mr. Morgan also testified extensively regarding the impairment of inventory items remaining at the Plant.

41. Mr. Morgan testified that a large portion of the inventory remaining in the Plant at the time operations were curtailed, consisted of goods in process (e.g. pot pad, bath) that were undergoing the smelting process at the time production was curtailed at the Plant. In addition, he testified that many of the other inventory items, (cathode blocks, etc.) were specifically used in the fabrication of anodes and cathodes uniquely configured for use in the Ravenswood Plant. Other portions of the inventory items consisted of the chemical components of the Bath or repair parts unique to the Ravenswood Plant which would only be useful if the Plant restarts, otherwise such items would be sold for scrap. *See*: Tr. at pp. 61-68.

42. Mr. Morgan concluded that given the curtailment of the Ravenswood Plant, the appraised values assigned to inventory were too high and

that, as of the Assessment Date, an impaired value of 40% of Petitioner's cost was a reasonable estimate of the value of inventories remaining at the Plant. *See:* Tr. at pp. 67-68 and Petitioner's Ex. # 7.

43. As of the Assessment Date, the Ravenswood Plant was curtailed and is likely to remain so for a significant period of time. If the Plant remains curtailed, much of the inventory will only have scrap value. Even if the Plant restarts, many of the inventories may no longer be usable or will require remanufacturing in order to make them usable. The impaired value of Petitioner's inventories as of the Assessment Date was $7,497,756 consisting of: Raw Materials – $282,391; Goods in Process – $2,291,705; Parts – $2,570,523; and Supplies – $2,353,137. *See:* Tr. at pp. 60-70 and Petitioner's Ex. # 7.

44. The fair market value of the Ravenswood Plant, plus inventory, and real estate on a basis comparable with the Tax Department's appraisal, is $23,497,756. *See*: Petitioner's Ex. # 7.

45. At the hearing, Petitioner requested the Board of Review to reduce the appraisal on the Ravenswood Plant, including M&E, F&F, Computer Equipment, Pollution Control Facilities, Specialized Manufacturing Production Property, Plant Site and Buildings to $16,000,000. In addition, Petitioner requested the Board of Review to reduce the appraisal of inventories located at the Ravenswood Plant to the impaired market value of those assets as of the Assessment Date of $7,497,756.

46. On February 18, 2010, the Commission sent a letter to Petitioner advising it that it was not making any adjustment to the Tax Department's, 2010 appraisals. The Commission adjourned *sine die* as a Board of Review and Equalization on February 25, 2010. On March 19, 2010, Petitioner appealed the Commission's refusal to reduce the Tax Department's appraisal to the Circuit Court of Jackson County.

47. By order entered November 17, 2010, the Circuit Court of Jackson County denied Century's appeal. It is from that order that this Petition for Appeal is being filed.

III. ASSIGNMENTS OF ERROR

The Circuit Court below committed the following errors in deciding the case below:

A. The Circuit Court erred in holding that the Tax Department's policy of refusing to consider functional obsolescence and economic obsolescence for categories of assets other than M&E resulted in a fair market value appraisal of the Ravenswood Plant, as required by *W. Va. Code* § 11-3-1 and the Legislative regulations governing the valuation of industrial real and personal property.

B. The Circuit Court erred in ruling that the Tax Department's policy of artificially limiting its consideration of obsolescence to a 50% reduction in the case of M&E complied with the requirement that property be valued at fair market value by *W. Va. Code* § 11-3-1 and the applicable industrial real and personal property regulations.

C. The Circuit Court erred in finding that the Tax Department had accounted for physical deterioration, functional obsolescence and economic obsolescence, in valuing Petitioner's industrial real and personal property.

D. The Circuit Court erred in affirming the Board of Review's decision to make no change in the Tax Department's appraisal of the Ravenswood Plant.

IV. LEGAL STANDARDS FOR APPRAISAL OF INDUSTRIAL PROPERTY IN WEST VIRGINIA AND STANDARDS OF REVIEW TO BE APPLIED BY THE COURTS TO APPEALS FROM DECISIONS OF BOARDS OF REVIEW AND EQUALIZATION

A. Statutory, Regulatory and Administrative Framework for Appraising Industrial Personal Property in West Virginia

West Virginia Code § 11-3-1 provides, in pertinent part:

> All property shall be assessed annually as of the first day of July at its true and actual value; that is to say, the price for which such property would sell if voluntarily offered for sale by the owner thereof, upon such terms as such property, the value of which is sought to be ascertained, is usually sold, and not at the price which might be realized if such property were sold at a forced sale, . . .

The West Virginia Supreme Court of Appeals has held that the term true and actual value is the fair market value of the property or the value for which the property would sell if sold on the open market. *See*: *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W. Va. 14, 672 S.E.2d 150 (2008); *Eastern American Energy Corp. v. Thorn*, 189 W. Va. 75, 428

S.E.2d 56 (1993); *Killen v. Logan County Commission*, 170 W. Va. 602, 295 S.E.2d 689 (1982).

Pursuant to *W. Va. Code* § 11-1C-10, the State Tax Commissioner ("Tax Commissioner") is charged with the responsibility of valuing all industrial property in this state. Effective July 26, 1991, the Tax Commissioner promulgated and the Legislature approved regulations governing the "Valuation of Commercial and Industrial Real and Personal Property for *Ad Valorem* Tax Purposes" (the "Regulations"). 110 CSR § 1P-1 *et seq*. One of the purposes of the Regulations was to provide Tax Commissioner with methodologies for appraising industrial plants, including real property, buildings, machinery, equipment, and inventories associated therewith, at fair market value.

The Regulations provide that the Tax Commissioner shall estimate the fair market value of industrial personal property using three approaches to fair value where applicable: the cost approach, the income approach and the market approach. 110 CSR § 1P-2.5.3.1. The Regulations further provide how values obtained from the use of the above valuation approaches are to be correlated:

> Correlation. – Once generated, the various estimates of value will be considered in arriving at the final value estimate. However, of the three (3) approaches to value, the cost approach may be most consistently applied to machinery, equipment, furniture, fixtures, and leasehold improvements because of the availability of data. The market approach is used less frequently, principally due to a lack of meaningful sales. The income approach is not normally used because of the difficulty in estimating future net benefits to be derived except in the case of certain kinds of leased equipment.

110 CSR § 1P-2.5.3.2.

The Regulations specifically define the cost approach to value as follows:

> 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 CSR § 1P-2.2.1.1.

The Regulations further mandate that in appraising industrial property, "three (3) types of depreciation should be considered; physical deterioration, economic obsolescence and functional obsolescence". 110 CSR § 1P-2.5.3.3.

On January 29, 2010, the Tax Commissioner issued Administrative Notice 2010-13 titled: Property Tax – State Tax Commissioner's Statement Concerning Primary Reliance on Cost Approach to Value for Appraisals of Industrial Personal Property (i.e. Machinery, Equipment, Furniture, Fixtures and Leasehold Improvements) pursuant to 110 CSR § 1P-2.5.3.1. Administrative Notice 2010-13 states:

> There are three generally accepted approaches to value that must be considered when estimating market value of property for ad valorem tax purposes. These approaches are cost, market and income approaches. These approaches to value must be considered and should be developed if appropriate, to properly estimate market value in compliance with generally accepted appraisal principles.

The Administrative Notice dismisses use of the Market Approach in appraising industrial personal property, due principally to the lack of sufficient number of meaningful sales to support statistically development of the approach. Similarly, the Administrative Notice dismisses use of the Income Approach in appraising industrial personal property due to the difficulty in estimating future net benefits; except for the valuation of certain kinds of leased equipment. With regard to the Cost Approach, the Administrative Notice states as follows:

> COST APPROACH
>
> The cost approach to value is based upon the assumption that the cost of a property, less depreciation (loss in value), yields a reasonable estimate of market value. Depreciation is a loss in value due to physical deterioration through use, functional obsolescence through design or utility, and economic obsolescence due to outside market forces.
>
> Costs used in the cost approach can be original, acquisition, replacement, or reproduction costs, although often only original or acquisition costs are readily available. Original cost is the cost of acquisition of a property. Reproduction cost is the cost of reproducing an exact replica of a property. Replacement cost is the cost of replacing a property with one of like utility. The cost approach may be most consistently applied to machinery, equipment, furniture, fixtures, and leasehold improvements because of the availability of reliable data such as the original or acquisition cost.
>
> The State Tax Department trends the original or acquisition cost to today's replacement cost and depreciates the replacement cost, based on age and condition, to estimate a property's current market value. This process is recommended by the International Association of Assessing Officers' Standards on the Valuation of Personal Property.

This process is as follows:

Original or Acquisition Cost	X	Trend Factor	=	Today's Replacement or Reproduction Cost	X	Depreciation Factor	=	Current Market Value

The Tax Commissioner uses the *Marshall Valuation Service*, an appraisal guide, as the source of information for the trend and depreciation tables and provides this information to all fifty-five counties as a guide of the appraisal of personal property. The *Marshall Valuation Service* is compiled, published and updated quarterly by Marshall and Swift of Los Angeles, California. The *Marshall Valuation Service* has a circulation of users in all 50 states, plus the District of Columbia, Puerto Rico, Guam and Canada. Users include independent appraisers, insurance companies, savings and loan associations, banks, architects, developers, accountants, assessors and engineers.

Nothing contained in Administrative Notice 2010-13 alters the clear requirements of the *West Virginia Code* and the Regulations that Tax Department appraisals of property be made at fair market value. In addition, the Administrative Notice specifically affirms the requirement that the Tax Department consider functional and economic obsolescence in appraising property by the cost approach.

B. Legal Standards Applicable to Petitioner's Appeal from the Board of Review and Equalization and from the decision of the Circuit Court

In challenging a tax valuation before the Board of Review and Equalization, the burden of proof falls upon the taxpayer to demonstrate through clear and convincing evidence that the tax assessment was erroneous. *See*: *In re Tax Assessment against American Bituminous Power Partners, L.P.*, 208 W.Va. 250, 539 S.E.2d 757 (2000); *In re Maple Meadow Mining Company*, 191 W.Va.

519, 446 S.E.2d 912 (1994). The Ravenswood Plant is an industrial facility which is required to be annually appraised by the Tax Commissioner.

It is a general rule that valuations for *ad valorem* tax purposes fixed by an assessing officer are presumed to be correct. The burden of showing an assessment to be erroneous is on the taxpayer. *In re Tax Assessment against American Bituminous Power Partners, L.P.*, 208 W.Va. 250, 539 S.E.2d 757 (2000). While the provisions of *W. Va. Code* § 11-3-24 do not specify the precise type of evidence that a taxpayer must present to rebut the presumption of correctness of the Tax Commissioner's appraisal, the Court in *Killen v. Logan County Commission*, 170 W.Va. 602, 295 S.E.2d 689 (1982) suggested:

> An objection to any assessment may be sustained only upon presentation of competent evidence such as that equivalent to the testimony of qualified appraisers, that the property has been under or over valued by the Tax Commissioner and wrongly assessed by the Assessor.

Syl. Pt. 8, in part, *Killen v. Logan County Commission*, 170 W.Va. 602, 295 S.E.2d 689 (1982). Once a taxpayer has put sufficient evidence in the record that the Tax Commissioner's assessment is erroneous, it is incumbent upon the taxing authority then to place some evidence in the record to show why the assessment is correct. *In re Tax Assessments against Pocahontas Land Company*, 172 W.Va. 53, 303 S.E.2d 691 (1983).

Judicial review of a decision of a Board of Equalization and Review by the Courts of a challenged tax assessment valuation is limited to roughly the same scope of review permitted under the West Virginia Administrative

Procedures Act, *W. Va. Code Chapter* 29A. *In re Tax Assessment against American Bituminous Power Partners, L.P.*, 208 W.Va. 250, 539 S.E.2d 757 (2000). In reviewing the findings and conclusions of the Board of Review and Equalization, the Courts apply a two-prong deferential standard of review. In reviewing the ultimate disposition and underlying findings of fact, the review before the Court is confined to determining whether the challenged property valuation is supported by substantial evidence. However, with respect to questions of law, such as whether the Assessor followed the requirements of the statutes and/or regulations in appraising the property, the Court must apply a *de novo* standard of review. *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W.Va. 14, 672 S.E.2d 150 (2008).

V. ARGUMENT

A. The Tax Department's Appraisal of the Ravenswood Plant Violated the Requirements of *W. Va. Code* § 11-3-1 and the Legislative Rules for Appraising Industrial Property

West Virginia Code § 11-3-1 requires all property, including industrial property, to be assessed at its true and actual value. 110 CSR § 1P-1 *et seq.* and Administrative Notice 2010-13, set forth the requirements that the Tax Department is required to follow in appraising industrial property. Both the Regulations and the Administrative Notice support the Tax Department's primary reliance on the Cost Approach in appraising industrial facilities. However, both documents also make it clear that the Tax Department's application of the Cost

Approach must produce a reasonable estimate of market value and must consider all three types of depreciation, not just physical deterioration, but also economic and functional obsolescence. *See*: 110 CSR § 1P-2.2.1.1 and 2.5.3.3 and Administrative Notice 2010-13.

In the present case, the record makes it clear that Petitioner's Ravenswood Plant suffers from significant amounts of functional and economic obsolescence. As of the Assessment Date, the Plant was over 50 years old. It was constructed using now obsolete technology that is both inefficient and expensive to operate in today's market. The Plant is located in an area where power costs and labor costs make the Plant more expensive to operate than comparable modern plants located in other areas.

In addition, the economic meltdown that began in the fall of 2008, caused demand for aluminum to contract and the worldwide aluminum price to collapse. In February, 2009, the Ravenswood Plant was curtailed as a result. For Tax Year 2010, IAC appraised the Ravenswood Plant and concluded that the Plant suffered significant amounts of economic and functional obsolescence. Finally, even the Tax Department has accepted that conclusion, as evidenced by its allowance of some obsolescence to the M&E accounts at the Plant.

The methods used by the Tax Department to appraise the Ravenswood Plant for 2010, do not comply with *West Virginia Code § 11-3-1*, the Regulations or Administrative Notice 2010-13. In the present case clear evidence of obsolescence exists, yet the Tax Department's valuation policies do not allow recognition of that obsolescence. At the hearing below, the Director and the Appraiser both affirmed that Tax Department policy is not to allow obsolescence adjustments in its cost-based appraisal of any category of real or personal property at an industrial plant, other than M&E. *See:* Tr. at pp. 18-19, 169-170. Neither the Director nor the Appraiser was able to give any reasonable explanation why this policy had been adopted. These policies are in direct opposition to both the Regulations and the Administrative Notice which explicitly require the consideration of functional and economic obsolescence.

In addition, the formula used by the Tax Department to value M&E, which purports to consider obsolescence, does not meet the requirements of *W. Va. Code* § 11-3-1. The Director testified that Tax Department policy limits the amount of obsolescence which can be applied to such valuation. By definition, a formula that artificially restricts the amount of functional and/or economic obsolescence which is allowable in appraising an asset is not designed, in all cases, to estimate the market value of the asset being appraised.

Petitioner asserts that there is no rational basis for any preconceived limitation on the amount of functional or economic obsolescence that affects an asset being appraised. In reality, for purposes of determining the market value of an asset, the amount of obsolescence affecting an asset can vary from slight to total. To artificially limit the amount of obsolescence that the Appraiser may allow, effectively subverts the statutory mandate that property be appraised at fair market value.

At the hearing, the Director attempted to justify the Tax Department policy by suggesting that the 50% obsolescence limitation was equivalent to appraising a property both by the Cost Approach and by the Income Approach and then averaging or correlating those values. The Director maintained that in cases where a property is not operating and is producing no income, then the average of a Cost Approach appraisal and an Income Approach valuation of $0 would be equivalent to allowing a 50% obsolescence adjustment.

The Director has apparently confused the requirement that the Tax Department consider obsolescence when performing an appraisal using the Cost Approach, (110 CSR § 1P-2.2.1.1) with the requirement that the results of various estimates of value be correlated in arriving at a final value estimate for appraisal purposes. (110 CSR § 1P-2.5.3.2).

The Director's explanation is further undermined by the testimony and exhibits introduced at the hearing below which show that the Tax Department did not perform an Income Approach appraisal of the Plant. The only appraisal prepared by the Tax Department for the 2010 Tax Year utilized the Cost Approach. If there is no Income Approach appraisal, then the provisions governing correlation do not apply. The Tax Department's policies of not considering obsolescence for assets other than M&E and of artificially limiting consideration of obsolescence on M&E to a 50% maximum of the non-impaired Cost Approach value, violate both *W. Va. Code* § 11-3-1 and Regulations, in situations where actual obsolescence would reduce the appraisal to less than the

Tax Department's minimum value. The IAC Appraisal Report indicates that is exactly what has occurred in this case.

Alternatively, even if the Tax Department had completed an income-based appraisal of the Plant and the 50% reduction in the M&E value did result from an averaging of the two appraisals, the Tax Department's appraisal still violates the *Code* and the Regulations. The correlation of two separate appraisals does not relieve the Tax Department of the requirement that it consider obsolescence in its cost-based appraisal before correlating it with an income-based valuation. In cases where property is appraised by two separate methods, the Regulations require that each separate appraisal be performed to independently establish the market value of the asset. In the present case, unless the Tax Department considers obsolescence in its cost-based appraisal before the two appraisals are correlated, the resulting appraisal would still overvalue the assets. Moreover, if the Tax Department had done an income-based valuation of the Plant, this valuation would be required to be correlated with all of the Tax Department's cost-based appraisals, including inventories, land and buildings, and not just with the values in the M&E account. Given these defects, the Tax Department's appraisals cannot be said to estimate the fair market value of the assets being appraised and therefore did not comply with the requirements of *W. Va. Code* § 11-3-1 and the Regulations.

At the hearing below Petitioner introduced an appraisal of the Ravenswood Plant, using both the income method and the cost method, by professional appraisers licensed in West Virginia. The IAC Appraisal Report established, on a *prima facia* basis that, as of the Assessment Date, the fair market value of the Ravenswood Plant, including all M&E, F&F, computer equipment, the Site and Buildings located thereon was $16,000,000. *See*: Petitioner's Ex. # 6.

Once Petitioner produced the Appraisal Report showing that the market value for the Plant was actually less than one-third of the flawed value determined using the Tax Department's appraisal, the presumption that the Tax Department's appraisal is correct was clearly overcome. *In re Tax Assessment against American Bituminous Power Partners, L.P.*, 208 W.Va. 250, 539 S.E.2d 757 (2000). At that point, the burden shifted to the Tax Department, to place some evidence in the record to show why its assessment was correct. *In re Tax Assessments against Pocahontas Land Company*, 172 W.Va. 53, 303 S.E.2d 691 (1983). At the hearing below, the Tax Department failed to introduce any credible evidence in support of a claim its appraisal produced an estimate of the fair market value of the Ravenswood Plant.

B. IAC Appraised the Ravenswood Plant by the Methods Required by the *West Virginia Code*

IAC prepared an appraisal of the Ravenswood Plant, effective as of July 1, 2009, in conformity with Standard One of the Uniform Standards of Professional Appraisal Practice ("USPAP"). The IAC Appraisal was prepared to estimate the fair market value of the Plant as of July 1, 2009, for the purpose of assisting in the establishment of fair and equitable values for property tax assessment purposes for Tax Year 2010. The appraisal was prepared specifically to estimate the market value of the property, as defined by the Appraisal Institute, which definition is consistent with the definition of fair market value as used for West Virginia property tax purposes.

In preparing the Appraisal Report, IAC considered the three generally accepted methods of estimating the market value of industrial property. These approaches are the Cost, Income and Sales Comparison Approaches. As a first step in preparing the appraisal, IAC performed an economic analysis of the worldwide aluminum industry, paying special attention to market forces affecting supply and demand and languishing aluminum prices.

IAC analyzed the production and use of aluminum within the United States and concluded that the aluminum industry within the United States is declining and is expected to continue to contract at a rate of 3.9% annually between 2009 and 2014. IAC determined that from 1999 through 2008, the number of primary domestic aluminum smelting plants decreased from twenty-three to thirteen, of which only nine were operating as of the Assessment Date. IAC projected that in light of the downward production trends, the number of aluminum smelting operations within the United States will continue to decrease, primarily as a result of the high cost of labor and electricity available domestically.

1. IAC Income-Based Appraisal

IAC performed an income-based appraisal of the Ravenswood Plant using the discounted cash flow method. This method of valuation was chosen by

IAC because, as it requires a more diligent review of the industry and company, and provides more accurate results. IAC developed a *pro forma* analysis of the Ravenswood Plant to estimate the available cash flow attributable to the business enterprise. IAC forecast future revenues and expenses based on its detailed analysis of the historical financial performance of the company, industry trends, third-party expert publications, and discussions with company management regarding expectations of future operating results.

A detailed summary of the final IAC discounted cash flow analysis of the Ravenswood Plant is contained on pp. 57-59 of the Appraisal Report. IAC's analysis of the aluminum market, for purposes of its Appraisal Report, projected that the Plant would restart in 2013 and remain operational until the end of its useful life in 2022. The Appraisal Report projected that the start of the Plant in 2013 would require the expenditure of approximately $44,000,000 in initial startup capital cost, based on the discounted cash flow analysis of the future operations of the Plant. Appraisal Report concludes that on a discounted cash flow basis, the present value of the Plant as of the Assessment Date is $14,100,000, exclusive of working capital requirements. Of course, the projections made by IAC in its appraisal cannot be considered to reflect any commitment on behalf of Petitioner's management regarding a future restart of the Plant.

2. Cost-Based Valuation

IAC prepared a replacement cost, less depreciation-based appraisal of the Ravenswood Plant as of the Assessment Date. This appraisal purportedly used the same method that the Tax Department used to value the Plant. However unlike the Tax Department, IAC did consider the effect of economic and functional obsolescence in estimating the fair market value of the Plant. IAC's valuation of the Ravenswood Plant by the Cost Approach consists of two broad elements – First, the establishment of a replacement cost (new) estimate of a state-of-the-art facility of similar capacity. Second, the preparation of a depreciation analysis to quantify the reduction in value of the facility resulting from physical deterioration and functional and economic obsolescence. This analysis was prepared in conformity with all of the mandates of *W. Va. Code* § 11-3-1, the Regulations and Administrative Notice 2010-13.

In order to determine the replacement cost of the Ravenswood facility, IAC used information which it had compiled from years of appraising similar facilities operating in the United States and Canada. Based on numerous meetings with engineers, research and development personnel and other industry experts employed by Petitioner and other independent aluminum producers, IAC developed a replacement cost model based on actual construction experience of experts in the industry. IAC established a replacement cost of $4,470 per metric ton of capacity for the Ravenswood Plant, which resulted in an overall replacement cost (new) for the Plant of approximately $760,000,000.

IAC next determined the amount of physical depreciation to which the assets were subject. A chart summarizing physical depreciation allowable to the Plant is contained on p. 65 of the Appraisal Report. Additionally, IAC considered whether the Plant was entitled to any functional obsolescence (depreciation related to the size, age, design, mechanical and other inadequacies inherent in a plant constructed almost sixty years ago) or economic obsolescence (loss of value resulting from external factors such as general economic conditions; economic conditions specific to the aluminum industry; industrial reorientation; power/energy availability; and governmental factors).

IAC's analysis of the functional and technological deficiencies of the Plant, considered: (1) limitations inherent in the size of each individual reduction cell at the Plant in comparison with modern technology; (2) energy consumption; (3) technological obsolescence of computer controls at the Plant; (4) carbon anode consumption; (5) complexity of the Plant design; and (6) other technological deficiencies. IAC concluded that the inefficiencies associated with the Plant's dated technology, high-energy consumption, lack of computer control and complicated layout resulted in higher operating costs per pound of aluminum produced. IAC's summary of the functional and technological deficiencies of the Ravenswood Plant is set forth on pp. 66-74 of the Report.

IAC also performed an external (economic) obsolescence analysis of the Plant which quantified the effect that external factors, such as the volatility of aluminum prices and labor costs, had on the Plant. In summary, Appraisal Report concluded that:

> "the Ravenswood Plant suffers from severe functional and technological obsolescence as well as obsolescence from external causes. The loss of all of the Plant's capacity due to outdated technology, uncertain power situation and the projected industry conditions emphasized the magnitude of this problem."

Petitioner's Ex. # 6, p. 77.

The IAC Appraisal stated that the obsolescence factors described in their report would weigh heavily on the mind of a potential purchaser of the Plant. As a result, a major price discount would be required to offset these problems, and even given such a discount the risk that goes with investing in a property of this type would be increased. For the above-stated reasons, IAC concluded a substantial obsolescence penalty would be required to reflect the fair market value of the Plant.

IAC's quantitative computations of obsolescence at the Plant are contained on pp. 77-84 of the Appraisal Report, and the results of IAC's replacement cost, less depreciation valuation are summarized on p. 85. After allowances for physical depreciation, functional/technical and external obsolescence, IAC concluded that the Plant was worth $20,200,000 on a cost basis. Because IAC appraised the Plant based on the highest and best use of the Plant as an aluminum smelter, it concluded that all of the assets involved in the operation of the Plant suffered equally because of the obsolescence factors affecting the Plant.

3. Sales Comparison ("Market") Approach to Valuation

The Sales Comparison approach to valuation is the third accepted method of appraising property. As part of its appraisal, IAC attempted to locate comparable sales transactions to use as a basis for establishing a market valuation for the Ravenswood Plant. However, after reviewing sales of similar facilities in the aluminum industry, IAC concluded that sufficient information did not exist to allow a meaningful appraisal of the facility based on comparable sales. This conclusion is the same conclusion that the Tax Department has reached in valuing other industrial property within West Virginia.

4. Summary and Correlation

The Appraisal Report concluded that the Plant had a fair market value of $14.1 Million on an income basis and a fair market value of $20.2 Million on a replacement cost basis. Once IAC completed its analysis of the fair market value of the Plant using both cost and income methods, IAC correlated those approaches to value. IAC reasoned that a potential purchaser of the Ravenswood Plant would give a great deal of weight to the income that the Plant could produce and therefore gave greater weight to the income valuation in correlating the final value of the Plant. Based on its investigation of all pertinent factors having a bearing on the valuation of the facility for assessment purposes, it was IAC's opinion that the fair market value of the subject property for assessment purposes as of July 1, 2009, was $16 Million. The IAC Appraisal of the Plant complied in all respects with *W. Va. Code* § 11-3-1 and the Regulations and should have been used to appraise the Plant for the Tax Year.

C. Testimony at the Hearing Below Established Impairment of Goods and Process, Parts, and Supplies Inventories at the Ravenswood Plant

The Tax Department appraised raw materials, goods and process, parts and supplies inventories reported on Petitioner's 2010 Industrial Property Return at Petitioner's acquisition costs of $18,281,654. At the hearing below, the Tax Department's representatives testified that it was Tax Department's policy not to make obsolescence calculations with regard to assets other than M&E and accordingly, no impairment was recognized with regard to Petitioner's inventories as a result of the closing of the Plant.

Mr. William Morgan, a chemical, engineer and technical manager for Century Aluminum testified in detail at the hearing below regarding the electrochemical process of smelting aluminum and the operation of aluminum smelting plants. Mr. Morgan also testified specifically with regard to the impairment of inventory items that remained in the Plant at the time it was curtailed. Mr. Morgan testified that many of the items of inventory would only have value if the Plant restarts, and otherwise would be sold for scrap.

Upon reviewing Petitioner's Ex. # 7, Mr. Morgan concluded that with the Ravenswood Plant curtailed, the appraised values assigned to inventory were too high and that, as of the Assessment Date, an impaired value of 40% of cost was a reasonable estimate of the value of inventories remaining at the Plant. *See:* Tr. at pp. 67-68.

Based: (1) on the unrebutted testimony of Mr. Morgan; (2) the fact that the facility is curtailed and may remain curtailed for a significant period of time; and (3) that even if the Plant restarts, many of the inventories may no longer be usable or will require remanufacturing in order to make them usable, Petitioner asserts that the decision of the Board of Review below was plainly wrong and unsupported by the record. Petitioner asserts that the Circuit Court erred by not reversing the decision of the Board of Review and by rejecting the fair market value of Petitioner's inventories at their impaired value set forth on Petitioner's Ex. # 7.

VI. SUMMARY AND PRAYER FOR RELIEF

The instant case is an aberration, because it involves an industrial appraisal of a facility that is operationally curtailed and also subject to substantial obsolescence due to its antiquated technology and external market forces. At some point, unless the Plant restarts, it will no longer be accurately characterized as industrial property. For Tax Year 2010, the Tax Department appraised the Ravenswood Plant, using its mechanical approach to valuation, as if the Plant were any other operating industrial plant.

The evidence introduced at the hearing below established that the Ravenswood Plant has a significant impairment as a result of functional and economic obsolescence. The Tax Department's policy of not considering obsolescence in its valuation produced an appraisal of the Plant far in excess of the fair market value of the property. The Tax Department's appraisal of the Ravenswood Plant did not meet the requirement of *W. Va. Code* § 11-3-1 that all property be appraised at its true and actual value. The Tax Department's appraisal also did not comply with the requirements of 110 CSR § 1P-1 *et seq.* or Administrative Notice 2010-13, both of which require the Tax Department to consider economic and functional obsolescence when making a cost-based appraisal.

Petitioner had the Ravenswood Plant appraised by professional appraisers with vast national and international experience in valuing industrial plants in the aluminum industry. In contrast with the valuation of the Tax Department, Petitioner presented an appraisal of the Plant prepared in conformity with the Uniform Standards of Professional Appraisal Practice, the *West Virginia Code* and the Regulations. The IAC Appraisal concluded that the fair market value of the Plant was $16,000,000. No evidence was introduced at the hearing below calling the accuracy of the IAC Appraisal into question. At the hearing, Petitioner also presented testimony of a chemical engineer familiar with the Plant regarding the impairment on the value of inventories at the Plant who concluded that the value of Petitioner's inventories was also impaired and that a reasonable value for such inventories was approximately $7,497,756.

As a result of the evidence introduced at the hearing, Petitioner was able to show that the Tax Department's appraisal was erroneous and not prepared in conformity with the law. Evidence was also introduced showing that the IAC Appraisal both rebutted the presumption of the correctness that the Tax Department's appraisal established a value for the Plant prepared in conformity with the tax law.

The Board of Review below was under a duty to ensure the appraisal of the Plant was made pursuant to the requirements of *W. Va.* Code § 11-3-1 and 110 CSR § 1P-1 *et seq.* The Board of Review did not fulfill its duty. The Board of Review plainly erred by affirming the Tax Department appraisal of the Plant and by not reducing the appraised value of Petitioner's property as set forth on Petitioner's Ex. # 7 to $25,243,606.

The question of whether the Tax Department prepared its appraisal in compliance with *W. Va. Code* § 11-3-1, the Regulations and Administrative Notice 2010-13 is a question of law subject to *de novo* review by the Circuit Court. The Circuit Court erred by failing to find that the Tax Department's appraisal was erroneous and that the IAC Appraisal was the only appraisal prepared in conformity with the law. The Circuit Court further erred in failing to reverse the erroneous decision of the Board of Review. Petitioner respectfully requests the Supreme Court to reverse the decision of the Circuit Court below and remand this case back to the Circuit Court with instructions to set a value for the Plant, for the Tax Year based on the IAC Appraisal and testimony regarding the valuation of inventory at the hearing and not on the flawed appraisal of the Tax Department.

Respectfully submitted,

CENTURY ALUMINUM OF
WEST VIRGINIA, INC.

Petitioner,

By Counsel

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CERTIFICATE OF SERVICE

I, John A. Mairs, counsel for Petitioner, Century Aluminum of West Virginia, Inc., do hereby certify that a true copy of the foregoing *Petition for Appeal to the West Virginia Supreme Court of Appeals* was duly served upon:

Eric J. Holmes
Law Offices of Harris and Holmes, PLLC
115 North Church Street
Ripley, West Virginia 25271
Counsel to The County Commission of Jackson County, sitting as a Board of Review and Equalization, Joe Pitts, Donald G. Stephens and Tommy Nutter in their capacity as members of the Jackson County Commission sitting as a Board of Review and Equalization

Charli Fulton
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Counsel to the Honorable Craig A. Griffith, West Virginia State Tax Commissioner

by depositing said copy in the United States mail with first-class postage prepaid on this 17th day of March, 2011.

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