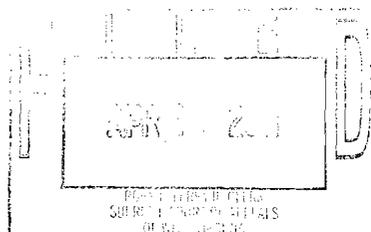


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0590

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



Petitioner, Petitioner below,

v.

**JACKSON COUNTY COMMISSION,
and
CRAIG A. GRIFFITH,
STATE TAX COMMISSIONER OF
WEST VIRGINIA,**

Respondents, Respondents below.

FROM THE CIRCUIT COURT OF JACKSON COUNTY

**TAX DEPARTMENT'S RESPONSE TO
PETITION FOR APPEAL**

I. INTRODUCTION

It is axiomatic that all property in West Virginia must be appraised at its true and actual value. The first question which this Court must address is which of Century Aluminum's two true and actual values is really true and actual. Century Aluminum filed its *ad valorem* property tax return and stated that the true and actual value of the machinery and equipment was \$50,860,998 for the 2010 tax year. The Tax Department employed the cost approach to value and valued Century Aluminum's machinery and equipment at \$ 34,971,956. Century Aluminum protested the Tax Department's valuation before the County Commission sitting as a Board of Equalization and Review and argued that the true and actual value of its machinery and equipment was really only

\$13,875,100. Which true and actual value proffered by Century Aluminum is really the true and actual value for the Machinery and Equipment ?

II. PROCEDURAL HISTORY

The Property Tax Division of the 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. Subsequently, Century Aluminum appealed the Board of Equalization and Review decision to the Circuit Court of Jackson County. Both Century Aluminum and the Tax Department submitted written briefs to the Court. The Honorable Thomas C. Evans, III, heard oral arguments from all parties on September 1, 2010 and requested the parties to submit proposed findings of fact and conclusions of law. The Circuit Court entered an order on November 17, 2010 affirming the *ad valorem* property tax valuations set by the Jackson County Commission sitting as a Board of Equalization and Review and denied Century Aluminum's appeal. On March 17, 2011 Century Aluminum filed a *petition for appeal* with the WV Supreme Court of Appeals.

III. TAX COMMISSIONER'S RESPONSE TO CENTURY ALUMINUM'S ASSIGNMENTS OF ERROR

A. The Tax Department considered functional obsolescence and economic obsolescence in valuing Century Aluminum's Furniture and Fixtures, Computer Equipment, and Inventories. The Circuit Court correctly affirmed the Tax Department's valuation of all categories of assets other than Machinery and Equipment.

B. The Tax Department's mathematical average of the income approach to value and the cost approach to value does not "artificially" limit obsolescence to a 50% reduction in value for Machinery and Equipment. The Circuit Court correctly affirmed the Tax Department's valuation of Machinery and Equipment.

C. The Tax Department properly accounted for physical deterioration, functional obsolescence and economic obsolescence in valuing Century Aluminum's real and personal property. The Circuit Court correctly affirmed the Tax Department's valuations of real and personal property.

D. The Circuit Court of Jackson County was correct to affirm the Tax Department's valuations of Century Aluminum's Ravenswood Plant.

IV. STANDARD OF REVIEW

The standard of review on appeal is well settled. Legal questions before the Supreme Court are subject to *de novo* review. Findings of fact made by a circuit court receive deferential review. *See In re Tax Assessment of Foster Foundation's Woodland Retirement*, 233 W.Va. 14, 672 S.E. 2d 150 (WV 2008) at Syllabus Point 1 ("This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*." Syllabus point 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996).); *see also In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250, 539 S.E.2d 757 (WV 2000) at Syllabus Point 1. Assessments are presumed to be correct and will not be overturned if supported by substantial evidence on the record. *See In re Maple Meadow Mining Company*, 191 W. Va. 519, 446 S.E.2d 912 at Syllabus Point 4 ("An assessment made by a board of review and equalization and approved by the circuit court will not be reversed when supported by substantial evidence unless

plainly wrong.’ Syl. pt. 1, *West Penn Power Co. v. Board of Review and Equalization*, 112 W. Va. 442, 164 S.E.2d 862 (1932).” Syl. pt. 3, *Western Pocahontas Properties Ltd. v. County Commission of Wetzel County*, 189 W. Va. 322, 431 S.E.2d 661 (1993)) (WV 1994).

In short, Century Aluminum must prove by clear and convincing evidence that the tax assessment was wrong and that the decision of the Board of Equalization and Review was not supported adequately by the evidence contained in the record.

V. STATEMENT OF FACTS

Century Aluminum filed its *ad valorem* property tax return on or about October 26, 2009, for the 2010 tax year. *See Order Denying Petition For Appeal* at Finding of Fact 1 entered November 17, 2011 (hereinafter Circuit Court Finding). 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 Circuit Court Finding 2*. 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 Circuit Court Finding 3*.

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 Circuit Court Finding 4.

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 Circuit Court Finding 5.

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. *See Circuit Court Finding 6.*

Valuations of Machinery and Equipment

Ms. Cynthia Brown, Senior Appraiser, in the Property Tax Division, explained how Century Aluminum's industrial personal property was valued. *See Circuit Court Finding 7.* 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 Circuit Court Finding 8.* 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 Circuit Court Finding 9.* Ms. Brown testified that 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 Circuit Court Finding 10.* Originally, the Tax Department valued the Machinery and Equipment at \$69,943,902 under the cost approach to value. *See Circuit Court Finding 11.*

Ms. Brown stated that the Tax Department, subsequently, reduced the value of the Machinery and Equipment by fifty percent. *See Circuit Court Finding 12.* The Tax Department's final appraised value of the Machinery and Equipment for the 2010 tax year is \$34,971,956. *See Circuit Court Finding 13.*

Mr. Jeff Amburgey, Director of the Property Tax Division, also testified concerning the valuation process. *See* Circuit Court Finding 14. 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.

See Circuit Court Finding 15 quoting transcript at P. 18, Lines 7 - P. 19, Line 11.

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* Circuit Court Finding 16.

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* Circuit Court Finding 17. 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* Circuit Court Finding 18. 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* Circuit Court Finding 19.

Century Aluminum calculated a value for the Ravenswood plant under both the cost approach to value and under the income approach to value. *See* Circuit Court Finding 20. Mr. Joseph Kettell of International Appraisal Company performed an income approach to value for the Century Aluminum plant. *See* Circuit Court Finding 21.

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* Circuit Court Finding 22 referencing Appraisal Report at PP. 58 and 59. 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. *See* Circuit Court Finding 23.

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* Circuit Court Finding 24. 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* Circuit Court Finding 25.

Mr. Alexander Hazen also from the International Appraisal Company valued the Ravenswood plant under the cost approach to value. *See* Circuit Court Finding 26. Mr. Hazen considered the income approach to value to be the “...key method of appraising...” the Ravenswood plant. *See* Circuit Court Finding 27.

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* Circuit Court Finding 28. The replacement cost would be \$ 759,000,000. *See* Circuit Court Finding 28 referencing Appraisal Report at P. 85, Table 12.1. Mr. Hazen then reduced the replacement cost new by 63% to account for the physical deterioration of the existing plant. *See* Circuit Court Finding 29. The value of the

plant after deducting for physical deterioration would be \$ 281,163,000. *See* Circuit Court Finding 29 referencing Appraisal Report at P. 85, Table 12.1.

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. Under the revised discounted cash flow analysis, the Ravenswood plant would be valued at \$ 278,712,000. *See* Circuit Court Finding 30. 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* Circuit Court Finding 31 referencing Transcript at P. 143, Line 16 - P. 144, Line 13; *see* also Appraisal Report at PP. 79- 85.

Mr. Hazen concluded that the combined functional and economic obsolescence would be \$264,000,000. *See* Circuit Court Finding 32. Mr. Hazen calculated that functional obsolescence would be \$ 149,900,000 and economic obsolescence would be \$ 114,700,000. *See* Circuit Court Finding 33 referencing Appraisal Report at PP. 79- 80.

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* Circuit Court Finding 34 referencing Appraisal Report at P. 85, Table 12.1. 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* Circuit Court Finding 35.

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.

See Circuit Court Finding 36 quoting Transcript at P. 144, Lines 14 - 24.

Both Mr. Hazen and Mr. Kettell excluded the value of the inventories from their calculations. *See* Circuit Court Finding 37.

Valuations of Inventory

Century Aluminum also challenged the value of the inventories for *ad valorem* tax purposes. *See* Circuit Court Finding 38. 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* Circuit Court Finding 39.

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* Circuit Court Finding 40. Mr. Amburgey testified that the Property Tax Division valued the inventories at the Owner's Value listed on the tax returns. *See*

Circuit Court Finding 41. 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 Circuit Court Finding 42. Mr. Cooksey, from Intax, testified for Century Aluminum and 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. See Circuit Court Finding 43. Both Mr. Cooksey and Mr. Amburgey speculated whether they had communicated clearly at the previous meeting. See Circuit Court Finding 44.

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

	<u>Tax Department</u>	<u>Century Aluminum</u>
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	<u>5,870,075</u>	<u>2,353,137</u>
	\$ 18,281,654	\$ 7,497,756

See Circuit Court Finding 45. Century Aluminum argues that the Tax Department's valuation for the inventories should be reduced by 59% :

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

See Circuit Court Finding 46. Century Aluminum argued that the value of the Inventory should be reduced to \$7,497,756. See Circuit Court Finding 47; see also Century Aluminum's *Petition For Appeal to the Supreme Court* at P. 41 and Petitioner's Exhibit 7 in Attachment A.

Valuations of Furniture & Fixtures and Computer Equipment

Century Aluminum also challenged the valuation of the Furniture and Fixtures and Computer Equipment calculated by the Tax Department. *See* Circuit Court Finding 48; *see also* Century Aluminum's *Petition For Appeal to the Supreme Court* at Assignment of Error A.

The Tax Department valued the Furniture and Fixtures at \$312,687 and the Computer Equipment at \$533,540. *See* Circuit Court Finding 49. 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* Circuit Court Finding 50. Mr. Amburgey testified that the Tax Department does not allow economic or functional obsolescence for Furniture and Fixtures and Computer Equipment. *See* Circuit Court Finding 51.

VI. ARGUMENT

The Tax Department will address the issues raised in the *Petition For Appeal* in the order employed by the Taxpayer in the Argument section of the *Petition For Appeal*. The order followed by the Taxpayer varies from the order listed in the assignments of error.

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 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 (“A taxpayer challenging an assessor's tax assessment must prove by clear and convincing evidence that such tax assessment is erroneous.” Syllabus point 5, in part, *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W. Va. 14, 672 S.E.2d 150 (2008).)

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 the same as a decision under the WV Administrative Procedures Act set forth in W. Va. 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, “‘Substantial 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.

A. The Tax Department did not “artificially” limit obsolescence to a 50% reduction in value for Machinery and Equipment.

Century Aluminum argues that the Tax Department has “artificially” limited the reduction in value for obsolescence to a 50% reduction in value for Century Aluminum’s Machinery and Equipment. *See* Assignment of Error B; *see also* Century Aluminum’s *Petition For Appeal* at PP. 26-31. The first question the Court must address is which of Century Aluminum’s two true and actual values is really the true and actual value for *ad valorem* tax purposes for the 2010 tax year.

The Circuit Court found that Century Aluminum listed the value of its Machinery and Equipment as \$ 50,860,998 as calculated under the cost approach to value on the 2010 *ad valorem* property tax return. *See* Finding 4. Yet, before the Board of Equalization and Review Century Aluminum argued that the true and actual value of its Machinery and Equipment was only \$13,875,100. *See* Circuit Court Order at P. 18, Para. 2; *see also* Petitioner’s Exhibit 7 in Attachment A. The Tax Department valued the Machinery and Equipment below the Owner’s Value listed by Century Aluminum on the *ad valorem* property tax return as filed. *See* Finding of Fact Nos. 4 & 5. Century Aluminum has offered no explanation or theory as to why its “Owner’s value” for Machinery and Equipment listed on the property tax return must be reduced by over seventy-five percent. Century Aluminum has simply ignored its own valuations for Machinery and Equipment on the *ad valorem* property tax returns at issue.

As noted *supra*, the WV 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 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 Aluminum's Petition For Appeal to the Supreme Court* at Assignments of Error A & B.

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 by the Tax Department 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.

Century Aluminum has assumed that the Ravenswood plant will re-open during 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 be understated. Projections are not guarantees.

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.

B. The Tax Department correctly valued the Inventories,
Furniture and Fixtures, and Computer Equipment

Century Aluminum also challenged the value of the Inventories as determined by the Property Tax Division. *See Century Aluminum's Petition For Appeal to the Supreme Court* at PP. 38 & 39. The Tax Department valued the Inventories at the "Owner's Value" listed on the *ad valorem* property tax return filed by Century Aluminum. *See Century Aluminum's Petition For Appeal to the Supreme Court* at P. 38; *see also* Finding 41. Century Aluminum 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 including the inventories.

Century Aluminum also challenged the valuation of the Furniture and Fixtures and Computer Equipment calculated by the Tax Department. *See Century Aluminum's Petition For Appeal to the Supreme Court* at Assignment of Error A. 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.

Functional obsolescence is not really warranted for office furniture and fixtures. Functional obsolescence is defined by the legislative regulations as :

2.3.8. Functional obsolescence. - The loss of value due to factors such as excess capacity, changes in technology, flow of material, seasonal use, part-time use or other like factors. The inability to perform adequately the function for which an item was designed.

110 CSR 110-1P § 2.3.8.

A ten year old desk chair or file cabinet still adequately performs the function for which it was designed. Century Aluminum has offered no explanation regarding how technological changes have rendered a desk chair or file cabinet unable to perform its intended function.

Economic obsolescence is not really warranted for office furniture and fixtures either.

Economic obsolescence is defined by the legislative regulations as :

2.3.5. "Economic obsolescence" means a loss in value of property arising from "Outside Forces" such as changes in use, legislation that restricts or impairs property rights, or changes in supply and demand relationships.

110 CSR 110-1P § 2.3.5.

Century Aluminum has not offered any explanation regarding which outside forces or legislative changes have reduced the value of desk chairs and file cabinets at the Ravenswood plant. The application of functional obsolescence and economic obsolescence to desk chairs and file cabinets is a *non sequitur*.

In addition, more than half of the Furniture and Fixtures was purchased by Century Aluminum in 2008 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.

Furthermore, 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 in Attachment A. 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. Arguing whether Century Aluminum should pay \$ 12,626 in property tax related to desk chairs, filing cabinets, and computer equipment, for the 2010 tax year or a lesser amount is a waste of this Court's time.

VII. CONCLUSION

The Board of Equalization and Review was correct to affirm the Tax Department's valuation of Century Aluminum's industrial personal property under the cost approach to value. The Circuit Court was correct to affirm the decision of the Jackson County Commission sitting as a Board of

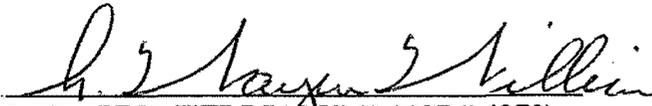
Equalization and Review for the 2010 calendar year. The Supreme Court should refuse the Petition For Appeal and affirm the decision of the Circuit Court of Jackson County.

Respectfully submitted,

WEST VIRGINIA STATE TAX DEPARTMENT,

By Counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

A handwritten signature in cursive script, appearing to read "L. Wayne Williams", is written over a horizontal line.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0590

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

Petitioner, Petitioner below,

v.

JACKSON COUNTY COMMISSION,
and
CRAIG A. GRIFFITH,
STATE TAX COMMISSIONER OF
WEST VIRGINIA,

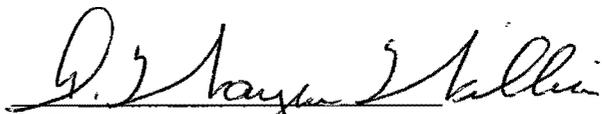
Respondents, Respondents below.

CERTIFICATE OF SERVICE

I, L. Wayne Williams, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing *Tax Department's Response To Petition For Appeal* was served by United States Mail, postage prepaid, this 18th day of April 2011, addressed as follows:

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