

11-1752

IN THE CIRCUIT COURT OF JACKSON COUNTY, WEST VIRGINIA

ALCAN ROLLED PRODUCTS –  
RAVENSWOOD, LLC,

Petitioner,

vs.

//

CIVIL ACTION NO. 10-AA-3  
(Judge Thomas C. Evans, III)

THE HONORABLE CRAIG A. GRIFFITH,  
West Virginia State Tax Commissioner,

THE HONORABLE BRIAN K. THOMAS,  
Assessor of Jackson County, and

THE COUNTY COMMISSION OF  
JACKSON COUNTY,

Respondents.

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**ORDER DENYING PETITION FOR APPEAL FROM BOARD OF  
EQUALIZATION AND REVIEW DETERMINATION**

Pending is the “Petition for Appeal of County Commission of Jackson County’s Decision Denying Adjustment of Assessed Industrial Property” (the “Petition”), filed by Alcan Rolled Products – Ravenswood, LLC (“Alcan” or “Petitioner”). The Property Tax Division of the W. Va. State Tax Department valued the industrial personal property of Alcan for the 2010 tax year. Alcan objected to the valuations as determined by the Tax Department and protested the valuations at a hearing on February 16, 2010, before the Jackson County Commission sitting as a Board of Equalization and Review. The Board’s Order denied Petitioner’s challenge to the valuation of a portion of the machinery and equipment that is part of its personal property. The within Petition appeals the February 25,

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2010, Order of the County Commission of Jackson County sitting as a Board of Equalization and Review (the "Board").

The court has considered the record adduced before the Board of Equalization and Review, the pleadings, memoranda of law submitted by the parties, and oral argument.

**I. STANDARD OF REVIEW**

The standard of review before this Court is whether the decision of the Board of Equalization and Review was supported by the substantial evidence in the record or whether the decision was arbitrary and capricious. The Supreme Court of Appeals of West Virginia provides that the standard of review in circuit court from a determination of the Board of Equalization and Review is as follows:

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

***In re Tax Commission Assessments Against American Bituminous Power Partners, L.P.***, 250 W. Va. 250 at 254-255, 539 S.E.2d 757 at 761-762 (WV 2000) (some internal citations omitted).

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

**II. STATEMENT OF FACT**

Alcan raised three primary points in its Petition:

- 1) Did the Tax Department properly trend up the acquisition costs for Alcan's industrial machinery in order to calculate replacement cost new ?
- 2) Did the Tax Department properly depreciate Alcan's industrial machinery and equipment for *ad valorem* property tax purposes ?
- 3) Did the Tax Department properly calculate functional obsolescence on Alcan's industrial machinery and equipment for *ad valorem* property tax purposes ?

The facts from the record are set forth below.

1) Selection of Trend Tables

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1. Ms. Cynthia Brown, Senior Appraiser for the Property Tax Division, testified regarding the methodology employed by the Tax Department in valuing Alcan's industrial personal property. See Transcript of Board of Equalization and Review hearing on February 16, 2010, at P. 8. (Hereinafter, "Transcript")

2. According to Ms. Brown's testimony, the Tax Department employed the "cost approach" to value Alcan's industrial personal property. See Transcript at P. 11, Line 7 - 9.

3. Ms. Brown explained that the Tax Department started with the acquisition cost of the machinery and equipment listed on Alcan's *ad valorem* tax return. See Transcript at P. 9, Line 13 - 19 and P. 11, Line 22- P. 12, Line 1.

4. Next, the Tax Department employed a trend table to calculate the replacement cost new for similar equipment in today's market based on the acquisition cost. See Transcript at P. 9, Line 15 - 24.

5. On cross-examination, Ms. Brown explained the general use of the trend tables in greater detail. See Transcript at P. 12, Line 2 - P. 13, Line 18.

6. After calculating the replacement cost new, the Tax Department employed the depreciation tables in order to account for the physical deterioration of the machinery and equipment. See Transcript at P. 9, Lines 13 - 19; see also P. 13, Lines 17 - P. 14, Line 19.

7. Ms. Brown testified that the Tax Department employed the trend and depreciation tables found in the Marshall and Swift Guide. See Transcript at P. 13, Lines 24 - P. 14, Line 19.

8. At the Board of Equalization and Review Hearing, Alcan submitted a valuation report into the record which was prepared by Duff and Phelps, LLC., an appraisal firm. See Petitioner's Exhibit No. 3 (hereinafter "Duff & Phelps Report").

9. Mr. Mark Simzyk, a Director of Duff and Phelps, testified that both Alcan and the Tax Department began with the same acquisition cost for the existing equipment. See Transcript at P. 88, Line 23 - P. 89, Line 1.

10. According to Alcan's valuation report, several sets of indices were researched and analyzed to determine which was most appropriate for use in estimating replacement cost new of an aluminum rolling mill. The Duff & Phelps Report specifically stated :

The indices, which are universally recognized as authoritative in the process industry for valuation purposes, are as follows:

Bureau of Labor and Statistics Producer Price Index ("PPI")  
Marshall & Swift's ("M&S") Marshall Valuation Service Guides  
Cost Indices

Duff and Phelps Report at P. 5

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11. Furthermore, Mr. Mark Simzyk testified that Duff and Phelps utilized the trend tables for Metal Working found in the Marshall and Swift Guide. See Transcript at P. 92, Line 22 - P. 93, Line 22.

12. Mr. Simzyk stated that both the Tax Department and Duff and Phelps utilized trend tables from Marshall and Swift. See Transcript at P. 93, Line 9 - 13.

13. Ms. Brown testified that the Tax Department utilized the North American Industry Classification System (NAICS) as an index<sup>1</sup> to select the proper Marshall and Swift trend and depreciation tables. See Transcript at P. 12, Lines 4 - 9.

14. The Tax Department classified the Alcan plant as being in the aluminum industry or NAICS code 3313. See Transcript at P. 13, Lines 8 - 13.

15. The *Petition For Appeal* filed by Alcan includes a letter from Mr. Jeff Amburgey, Director to the Property Tax Division, dated June 9, 2009, advising the county assessors to utilize the NAICS codes and Marshall and Swift trend and depreciation tables. See *Petition For Appeal* at Exhibit B.

16. A simple review of Exhibit B in the *Petition For Appeal* shows that the Tax Department classified Alcan under the "Primary Metal Manufacturing" using NAICS Code 3313 - "Alumina and Aluminum Production and Processing."

17. Consequently, the Tax Department employed Column 18 from the Trend Table to calculate Replacement Cost New and Column 6 from the Percent Good Table to calculate depreciation; the two tables are set forth in Exhibit B of the *Petition For Appeal*.

18. However, Mr. Simzyk stated that he was unable to determine the trend and depreciation tables utilized by the Tax Department. See Transcript P. 89, Lines 16 - 24.

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<sup>1</sup> Marshall and Swift does not use the NAICS System as an index; the Tax Department developed the Index and has used the NAICS System statewide to insure that all industrial taxpayers within the same industry are valued based on the same trend and depreciation schedules.

19. Mr. Simzyk employed the Metal Working category because it was "... fairly close to what they do over at the aluminum production plant in Ravenswood." See Transcript at P. 91, Lines 8 - 14.

20. Mr. Simzyk classified Alcan within the "Machinery Manufacturing" category under the sub-group of "Metalworking Machinery Manufacturing." See Exhibit B in Petition For Appeal.

21. The industry grouping selected by Mr. Simzyk utilized the same trend and depreciation tables under the Marshall and Swift Guide as used for Industrial Machinery Manufacturing, HVAC and Commercial Refrigeration Equipment Manufacturing, and Other General Purpose Machinery Manufacturing. See Exhibit B in Petition For Appeal.

22. On the other hand, the Tax Department clearly classified Alcan as heavy industry not as "Machinery Manufacturing." The Tax Department utilized the same trend and depreciation tables found in Marshall and Swift for Alcan as should be utilized for Iron and Steel Mills, Steel Product Manufacturing from Purchased Steel, and Foundries. See Exhibit B in Petition For Appeal.

Selection of Depreciation Tables and Calculation of Depreciation

23. Similarly, the Tax Department and Alcan both employed tables to calculate depreciation for the equipment.

24. The Tax Department employed the depreciation table - the "Percent Good Table" - based on the NAICS classification system and utilized Column 6 on the "Percent Good Table"

based upon the machinery and equipment having a lifespan of 15 years. See Exhibit B to *Petition For Appeal in Circuit Court*.

25. A simple comparison between the trend table and percent good tables with the columns designated "Factor" and "Depr" on the Industrial Property Return for Alcan verifies that the Tax Department applied the schedules directly from Marshall and Swift without any modifications. See Exhibit B to *Petition For Appeal in Circuit Court* and Tax Department's Exhibit 1.

26. Ms. Brown testified that the Tax Department depreciated the Alcan machinery and equipment to a floor of 80% depreciated or 20% good. See Transcript at P. 14, Line 20 - P.15, Line 13.

27. The Assessor for Jackson County summarized the philosophy behind employing a floor for depreciation purposes.

Assessor Thomas:

**If I may, it's always been my understanding the last 20 years since I've dealt with this, that what is commonly referred to as a floor is simply because the machinery is still being used in the process of manufacturing a product that has value.** Now we have been in many hearings in the past years, 20 years, and I can remember plainly, and I assume that Commissioner Stephens can remember, one year I believe it was oh, maybe Kaiser, maybe at that time it was Alban Century owned it all, they had scrapped out a foil line. You remember when they wrote, they no longer made aluminum foil down there and they had scrapped all that out, and there was no question, anything that was moth-balled, was no longer used in the manufacturing of a product, whenever they declared it as scrap and declared it as such, it went to five percent. **But until they did that and until they identified the line and identified the specific machinery, it was assumed by the State Tax Department that it was still being used in a process, manufacturing**

**process that that company pursued and it did not drop below 20 percent. No, it did not.**

Transcript at P. 25, Lines 10 - 25, P. 26, Lines 1 - 5 (emphasis added).

28. However, Mr. Simzyk clearly testified that Duff and Phelps "reconfigure[d]" the depreciation schedule for Metalworking Machinery Manufacturing.

29. The net result of the reconfigured depreciation schedule was to reduce the floor on the Marshall and Swift depreciation schedule from 20 percent good to 12 percent good. See Transcript at P. 96, Lines 15 - 18.

30. Mr. Simzyk stated, "... we brought the salvage value down to twelve percent as indicated and it's dictated by the instructions from the Marshall Valuation Guide." See Transcript at P. 98, Lines 1 - 5.

31. As a result, Mr. Simzyk has valued all equipment for years 1993, 1992, 1991, 1990 and prior, at salvage value - 12 percent good or 88 percent depreciated - based upon a "reconfigured" depreciation schedule.

#### Calculation of Functional Obsolescence

32. It is clear from the transcript that the key piece of equipment at the taxpayer's facility is the 30 million pound "stretcher."

33. Mr. Simzyk testified that the 30 million pound "stretcher" was placed in service in the early 1960's. See Transcript at P. 87, Lines 9 - 15.

34. Mr. Hudson, the business manufacturing manager, thought that the stretcher was placed in service in the 1970's. See Transcript at P. 36, Lines 2 - 15.

35. Mr. Mudrinich, counsel for the Tax Department at the Board of Equalization and Review hearing, pointed out that the stretcher which is 40 to 50 years old is included with the equipment which was placed into service in "1990 and prior." See Transcript at P. 46, Line 24-P. 47, Line 5.

36. Mr. Mudrinich stated that the total value of all equipment which was placed into service that long ago has an assessed value of \$ 8.6 million. See Transcript at P. 46, Lines 24 - P. 25, Line 5.

37. Based upon a review of the *ad valorem* property tax return prepared by the Tax Department, **all** machinery and equipment placed into service in 1990 and prior years, is valued at \$ 8,696,762 . See Tax Department's Exhibit 1, at P. 5.

38. Mr. Hudson testified, "Now the effect of the stretcher I would say would be in the probably, I'm just guessing here, probably 10 - 15% range, products we don't make any more." See Transcript at PP. 38, Lines 18 - P. 39, Line 1.

39. Mr. Gaard, the Chief Financial Officer for the Alcan plant, testified that Alcan is in the process of repairing the 30 million pound stretcher and plans to invest more than \$40,000,000 to repair the stretcher. See Transcript at P. 54, Lines 22 - 25.

40. The Tax Department has allowed a deduction of \$10,328,976 in functional obsolescence. See Transcript at P. 10, Line 18-P. 11, Line 1; see also P. 19, Lines 1-9.

41. The deduction for functional obsolescence was the result of a meeting between the executives for Alcan, Alcan's attorneys, and Ms. Brown and Mr. Amburgey of the Tax

Department in December 2009. Ms. Brown testified that the reduction in value of 10% was calculated by Mr. Jeff Amburgey. See Transcript at P.9, Line 13- P. 11, Line 1 .

42. Alcan is requesting a deduction of \$35,357,721; in effect, Alcan is requesting a dollar for dollar reduction in value for all non-exempt machinery and equipment for the capital expenditures to repair, primarily, the 30 million pound "stretcher." See Duff & Phelps Report at Table on p. 11.

43. Counsel for Alcan clearly stated Alcan's position, "The functional obsolescence deduction is actually the cost to repair." Transcript at p. 46, lines 11, 12.

44. Mr. Gaard, the Chief Financial Officer at the Ravenswood plant, testified that it will cost more than \$40,000,000 to fix the 30 million pound stretcher. See Transcript at P. 111, lines 4-19 and Duff & Phelps Report in Table on P. 10.

45. Alcan has approved the capital expenditure of \$40,300,000 for "30M lbs Stretcher- Equipment Integrity." See attached Exhibit A to Proposed Order; See also Duff & Phelps Report at P. 84 - 85 of 157.

46. On cross-examination, Mr. Simzyk confirmed that he deducted the capital investment of \$35,357,721 as functional obsolescence in valuing Alcan's non-exempt industrial personal property. See Transcript at p. 124, lines 1-19.

47. Based upon the original acquisition cost, trending the acquisition cost to calculate replacement cost new, applying the depreciation tables, and deducting functional obsolescence, the Tax Department valued Alcan's industrial personal property at \$92,960,786. See Property Tax Returns in State's Exhibit 1 at PP. 1 and 2; see also Transcript at P.10, line 18; P. 11, line 1.

48. Alcan is not requesting a reduction in value based upon economic obsolescence. See Transcript at P. 49, Line 12 and P. 50, Line 13.

III. ANALYSIS

A primary focus of the State Tax Commissioner is to ensure that county personal property taxes and real property taxes are accurately assessed and collected. Pursuant to *W. Va. Code §11-3-1 et seq.*, all property must be assessed annually at its true and actual value. By statute, the true and actual value is defined as the value which a willing buyer would pay a willing seller in an arm's length transaction. See *W.Va. Code §11-3-1*. The goal is to establish a market value.

The West Virginia Supreme Court of Appeals 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; see also 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

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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).

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 *W. Va. Administrative Procedures, 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 of Appeals further stated in **In re Queen**, at Syllabus Point 4, "[s]ubstantial evidence' requires more than a mere scintilla. It is such relevant evidence that a

reasonable mind might accept as adequate to support a conclusion. If an administrative agency's factual finding is supported by substantial evidence, it is conclusive."

The West Virginia Legislature has approved legislative regulations which the Tax Commissioner must follow in order to determine the true and actual value of industrial real and personal property. See 110 C.S.R. § 1P-1, *et seq.* The legislative regulations specifically list three separate approaches to be used in determining the fair value or the market value of industrial personal property: 1) cost method, 2) income method, and 3) 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.

The first issue raised by Alcan is whether the Tax Department selected the proper trend table in valuing Alcan's machinery and equipment 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.

Ms. Brown 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. 2. Ms. Brown further testified that the Tax Department began with the acquisition costs from the Taxpayer's property tax return, trended the acquisition costs based upon the trend tables found in the Marshall Swift Valuation Service to calculate replacement cost new, then depreciated the replacement cost according to the Marshall Swift depreciation tables. See Finding Nos. 3,4,6 and 7. Alcan has admitted that the Marshall Swift Valuation Service is one of only two authoritative sources for valuation services in the process industry. See Finding Nos. 10.

Both Alcan and the Tax Department began with the same acquisition cost for the existing equipment. See Findings Nos. 3 & 9. Both the Tax Department and Alcan calculated Replacement Cost New based on trend tables found in Marshall and Swift. See Findings Nos. 7 & 12. However, the Tax Department calculated a Replacement Cost New at \$252,965,487 while Alcan calculated a figure of \$240,773,142. See Table, *infra*, P. 17. Since both parties began at the same starting point - the same acquisition costs- the difference in replacement costs new must be based upon the different trend lines employed.

Ms. Brown testified that the Tax Department utilized the North American Industry Classification System (NAICS) as an index to select the proper Marshall and Swift trend and depreciation tables. See Finding No. 12. The Tax Department classified the Alcan plant as being in the aluminum industry or NAICS code 3313. See Finding No. 13. The *Petition For Appeal* filed by Alcan in the Circuit Court includes a letter from Mr. Jeff Amburgey, Director to the Property Tax Division, dated June 9, 2009, advising the county assessors to utilize the NAICS codes and Marshall and Swift trend and depreciation tables. See Finding No. 14. A simple review of Exhibit B in the *Petition For Appeal* shows that the Tax Department classified Alcan under the "Primary Metal Manufacturing" using NAICS Code 3313 - "Alumina and Aluminum Production and Processing." See Finding No. 15. Consequently, Tax employed Column 18 from the Trend Table to calculate Replacement Cost New and Column 6 from the Percent Good Table to calculate depreciation; the two tables are set forth in Exhibit B of the *Petition For Appeal*. See Finding No. 16.

However, Mr. Simzyk stated that he was unable to determine the trend and depreciation tables utilized by the Tax Department. See Finding No. 17. Mr. Simzyk employed the Metal Working category because it was ". . . fairly close to what they do over at the aluminum production plant in Ravenswood." See Finding No. 18. Mr. Simzyk classified Alcan within the "Machinery Manufacturing" category under the sub-group of "Metalworking Machinery Manufacturing." See Finding No. 19. The industry grouping selected by Mr. Simzyk utilized the same trend and depreciation tables under the Marshall and Swift Guide as used for Industrial Machinery Manufacturing, HVAC and Commercial Refrigeration Equipment Manufacturing, and Other General Purpose Machinery Manufacturing. See Finding No. 20. On the other hand, the Tax Department clearly classified Alcan as heavy industry and not as "Machinery Manufacturing." The Tax Department utilized the same trend and depreciation tables found in Marshall and Swift for Alcan as should be utilized for Iron and Steel Mills, Steel Product from Purchase Steel producers, and Foundries.

The difference in Replacement Cost New as calculated by the Tax Department and Alcan is solely attributable to the selection of trend tables. Consequently, the fundamental question becomes what business is Alcan conducting? Is Alcan in the same line of business as an HVAC and Commercial Refrigeration Machinery Manufacturer or is Alcan's business more akin to that of a Foundry or a Steel Mill? Mr. Hudson, the Business Manufacturing Manager at the Alcan plant, also testified at the Board of Equalization and Review Hearing. See Transcript at P. 32. Based upon the testimony of Mr. Hudson, Alcan operates a casting plant. See Transcript at P. 39, Lines 5 - 9. Alcan also operates a blast furnace to melt solid aluminum

ingots. See Transcript at P. 39, Lines 10 - 16. In fact, Commissioner Stephens commented that Alcan "... really is a milling operation[...]..." as opposed to Metal Working.<sup>2</sup> See Transcript at P. 140, Lines 8 - 11. Alcan is engaged in heavy industrial work such as the production of aluminum plate and smelting aluminum ingots. Therefore, the Tax Department's decision to classify Alcan as heavy industry was correct and was not arbitrary and capricious as argued by the Taxpayer.

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Under the law, in this instance, the decision should be affirmed as long as it is not clearly wrong in light of the substantial evidence on the record and is not arbitrary and capricious. See *American Bituminous*, at 254 & 255, 761 & 762 also at Footnote 8; *Webb v. WV Board of Medicine*, 214 W.Va. 95, 569 S.E.2d 225 (WV 2002) at Syllabus Pt. Therefore, the use of the trend tables for "Alumina and Aluminum Production and Processing" by the Tax Department should be affirmed by the Circuit Court.

The second major objection of Alcan before the Circuit Court relates to the selection of depreciation tables and the calculation of depreciation. Similarly, the Tax Department and Alcan both employed tables to calculate depreciation for the equipment. The two parties have calculated different amounts for depreciation for the Ravenswood plant.

	<u>Tax Department</u>	<u>Alcan</u>
Replacement Cost New	\$ 252, 965,487	\$ 240, 773, 142

<sup>2</sup> Commissioner Stephens made this specific observation at the end of the hearing after reviewing the salvage value table provided by Duff and Phelps during the Board of Equalization and Review Hearing.

Replacement Cost New		
Less Physical Deterioration	<u>&lt; 103,289,762 &gt;</u>	<u>&lt; 76,358,377 &gt;</u>
Reduction Allowed (Claimed*) for Physical Deterioration	\$ 149,675,725	\$ 164,414,765*
Additional Depreciation Claimed by Alcan		\$ 14,739,040

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Source : Appraisal Report prepared by Duff & Phelps dated February 12, 2010 at Table on P. 11.

The Tax Department employed the depreciation table - the "Percent Good Table" - based on the NAICS classification system and utilized Column 6 on the "Percent Good Table" based upon the machinery and equipment having a lifespan of 15 years. See Finding No. 23. A simple comparison between the trend table and percent good tables with the columns designated "Factor" and "Depr" on the Industrial Property Return for Alcan verifies that the Tax Department applied the schedules directly from Marshall and Swift without any modifications. See Finding No. 24.

Ms. Brown testified that the Tax Department depreciated the Alcan machinery and equipment to a floor of 80% depreciated or 20% good. See Finding No. 26. The Assessor for Jackson County summarized the philosophy behind employing a floor for depreciation purposes. As long as a company is utilizing a piece of machinery or equipment in production, the Tax Department will not reduce the value of that piece of equipment below the depreciation floors shown in Marshall Swift to scrap value or salvage value. See Finding No. 26.

However, Mr. Simzyk clearly testified that Duff and Phelps "reconfigure[d]" the depreciation schedule for Metalworking Machinery Manufacturing. The net result of the

reconfigured depreciation schedule was to reduce the floor on the Marshall and Swift depreciation schedule from 20 percent good to 12 percent good. See Finding No. 27. Mr. Simzyk stated, "... we brought the salvage value down to twelve percent as indicated and it's dictated by the instructions from the Marshall Valuation Guide." See Finding No. 28. The net effect is that Mr. Simzyk has valued all equipment for years 1993, 1992, 1991, 1990 and prior, at salvage value - 12 percent good or 88 percent depreciated - based upon a "reconfigured" depreciation schedule. See Finding No. 30.

At the Board of Equalization and Review Hearing, Commissioner Stephens questioned Mr. Simzyk concerning whether salvage value is appropriate for equipment currently being used productively.

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Commissioner Stephens:

I've just got a conclusion. Oh, I do have one question. Define salvage value.

Mr. Simzyk :

Salvage value is in a nutshell what you could use your - - a piece of equipment that you have for spare parts. Meaning you can salvage it for some components, if you will, in other pieces of equipment that you might have.

Commissioner Stephens:

So whenever you have a piece of equipment that is still being used, it's not salvage value and should not be considered as salvage value?

Mr. Simzyk :

Not necessarily. I mean, salvage in the truest sense of the word, that is what salvage is, it means what you can kind of get out of it. You could still operate a piece of equipment - -

Commissioner Stephens:

As junk.

Mr. Simzyk :

You can still operate it, it just doesn't necessarily - - it's not at what it was originally designed to do. It's just kind of dragging along, an old piece of equipment.

Transcript at P. 125, Line 9- P.126, Line 4.

From the evidence, it appears clear that the key piece of equipment is the 30 million pound stretcher at the Alcan plant. See Finding No. 32. Mr. Hudson testified, "Now the effect of the stretcher I would say would be in the probably, I'm just guessing here, probably 10 - 15% range, products we don't make any more." See Finding No. 39. The key piece of equipment in the Alcan plant produces 85% of the products it produced prior to the cracks appearing in the stretcher; the 30 million pound stretcher is not " . . . just kind of dragging along . . . ." Based upon number of products which the stretcher can still produce, the stretcher should not be valued at salvage value on a factual basis.

Furthermore, the 30 million pound stretcher does not meet the general requirement to be classified at salvage value. The glossary for the International Association of Assessing Officers defines salvage value, scrap value, and junk value as:

Salvage Value - The value which badly depreciated improvements, machines, or equipment would have if dismantled and sold in separate parts or pieces; the value of an asset at the end of its economic life. Compare value, scrap.

Scrap Value - The value that the basic, recoverable materials (usually metals) of a physical property would have as junk if it were completely broken up or too badly deteriorated to serve its normal purpose; the value of an asset at the end of its physical life. Compare value, salvage.

Junk Value - Synonymous with the preferred term "scrap value."

International Association of Assessing Officers (IAAO) attached in Exhibit B.

Similarly, Black's Law Dictionary defines salvage value as: "The value of an asset after it has become useless to the owner; the amount expected to be obtained when a fixed asset is disposed of at the end of its useful life." Scrap value appears to be synonymous with salvage value. See *Black's Law Dictionary*, Ninth Edition, at P. 1691.

In the case of **Campbell Soup Company v. Tracy**, 88 Ohio St. 3d 473 at 479, 727 N.E.2d 1259 at 1264, (OH 2000) the Supreme Court of Ohio noted that the Siegel and Shim, *Dictionary of Accounting Terms* (1987) defined salvage value as the "expected price for a fixed asset no longer needed in business operations; also called *Scrap Value*." (emphasis in original). Furthermore, the Internal Revenue Service has defined salvage value for corporate income tax purposes as :

- (c) Salvage. (1) Salvage value is the amount (determined at the time of acquisition) which is estimated will be realizable upon sale or other disposition of an asset when it is no longer useful in the taxpayer's trade or business or in the production of his income and is to be retired from service by the taxpayer. ...

Treasury Regs. § 1.167(a)-1(c).

Mr. Gaard, the Chief Financial Officer for the Alcan plant, testified that Alcan plans to invest more than \$40,000,000 to repair the stretcher. See Finding No. 44. Alcan is not treating the stretcher as a piece of scrap equipment or a piece of equipment destined for the salvage yard. The Tax Department's selection of the depreciation tables is supported by substantial evidence in the record. Furthermore, the Tax Department's decision to keep the depreciation

floor at 20% good as in Marshall Swift was a rational decision and was not arbitrary and capricious since it is currently employed in production.<sup>3</sup>

The third area of disagreement between the Tax Department and Alcan revolves around the deduction for "functional obsolescence." The Tax Department has allowed a deduction of \$10,328,976 in functional obsolescence. See Finding No. 40. Alcan is requesting a deduction of \$35,357,721; in effect, Alcan is requesting a dollar for dollar reduction in value the value of all non-exempt machinery and equipment for the capital expenditures to repair, primarily, the 30 million pound stretcher. See Finding No. 42. Counsel for Alcan clearly stated Alcan's position to be that "the functional obsolescence deduction is actually the cost to repair." See Finding No. 43. While Alcan's cost to repair the stretcher is more than \$40,000,000, on cross-examination, Alcan's appraiser confirmed that he deducted the capital investment of \$35,357,721 as functional obsolescence in valuing Alcan's non-exempt industrial personal property. See Finding No. 46. Alcan argues that the entire \$35,357,721 in repair costs should be deducted from Replacement Cost New for *ad valorem* tax purposes. In effect, Alcan wants to decrease the value the machinery and equipment located in the Ravenswood plant by the

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<sup>3</sup> Alcan has approved the capital expenditure of \$ 66,265,500 to repair the 30 million pound stretcher and other equipment located at the Ravenswood plant. See Duff & Phelps Report at PP. 84 - 85 of 157. This Court notes that Alcan's capital expenditure will exceed \$50,000,000 and could possibly be eligible for a statutory valuation rate of 5% (appraised value) and 3% (assessed value) in the 2011 tax year pursuant to WV Code § 11-6F-3; see also 110 CSR 6F § 110-6F-8.3. However, the Court need not address that issue today.

capital expenditure costs to repair the 30 million pound stretch and other equipment. See Duff & Phelps Report at p. 11.

Alcan has equated functional obsolescence with the cost of repairs or the scheduled capital expenditures. However, functional obsolescence is not defined simply as the cost of repairs. The legislative rules regarding the valuation of industrial personal property define functional obsolescence 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. (emphasis added).

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23 P. 4  
110 CSR § 110-1P-2.3.8

Similarly, the International Association of Assessing Officers, or IAAO, defines functional obsolescence as:

"Functional obsolescence. Loss in value of a property resulting from changes in tastes, preferences, technical innovations, or market standards." *Property Appraisal and Assessment Administration*, Joseph K. Eckart, Ph.D., The International Association of Assessing Officers, 1990, at P. 645.

Although the two definitions vary somewhat, neither definition equates functional obsolescence with the cost to repair equipment.

Ms. Brown testified that the Tax Department allowed a deduction of 10 % of the value of all machinery and equipment based upon functional obsolescence. The deduction for functional obsolescence was the result of a meeting between the executives for Alcan and the

Tax Department in December 2009. See Finding No. 41. The Tax Department based the reduction in value for functional obsolescence on the decrease in the number of products the stretcher can produce until it can be repaired.

Alcan argues that the Tax Department failed to introduce evidence that the deduction for functional obsolescence was tied to the circumstances at the plant and that the Tax Department's decision to allow a deduction of 10% of the value of all machinery and equipment at the Ravenswood was "entirely arbitrary." See Alcan's Brief at P. 16, Paragraph 3. However, Commissioner Stephens pointed out the obvious correlation between the Tax Department's deduction of 10 % in functional obsolescence for the value of all machinery and equipment and the decrease in the number of products the 30 million pound stretcher can still produce.

Commissioner Stephens:

I understand, but if I understood John [Hudson] to say, it was because it went from 30,000,000 to 22,000,000, it might be a ten to 15 percent loss of business, which the State is giving you a ten percent. On top of that, your income flow hasn't changed because of your insurance policy - -

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Transcript P. 45, Line 16-21.

As Mr. Hudson, the Plant Manager, testified, due to the cracks in the 30 million pound stretcher, Alcan has reduced the number of products that they can produce by 10 to 15% until the stretcher is repaired. See Finding No. 38. The Tax Department allowed a deduction of 10% across the board for all machinery and equipment located in the Ravenswood plant and not simply the 30 million pound stretcher. As Commissioner Stephens pointed out, Alcan has experienced a 10 to 15 % reduction in the number of products the Ravenswood plant can produce due to cracks in the stretcher and the Tax Department has allowed a deduction of 10%

for all equipment. Relying on the representations of the Alcan executives cannot be called "entirely arbitrary."

On the other hand, Alcan has requested a deduction of approximately \$35,000,000 for the capital expenditure to repair the stretcher and other equipment. Assuming *arguendo*, that the cost to repair actually is the proper measure of functional obsolescence, a reduction in value of \$35,000,000 is not warranted. Mr. Hudson's testimony was clear; almost all of the problems at the Ravenswood plant are the result of the cracks in the 30 million pound stretcher.

Alcan has authorized a capital expenditure of \$66,265,500 to repair and to upgrade the Machinery and Equipment at the Ravenswood Plant. See attached Exhibit A to Proposed Order. Alcan has specifically authorized the expenditure of \$44,300,000 to repair the 30 million pound stretcher. See Finding No. 45. Thus, the cost to repair the structural problems with the stretcher is actually \$44,300,000 and not \$35,000,000 as requested by Alcan. Mr. Mudrinich, counsel for the Tax Department at the Board of Equalization and Review hearing, pointed out that the stretcher, which is 40 to 50 years old, is included with the equipment which was placed into service in 1990 and prior. See Finding No. 35. *The Property Tax Return for Alcan has an assessed value of \$8,696,762 for all equipment placed into service in 1990 and prior. See Finding No. 37.*

It defies common sense to reduce the value of Machinery and Equipment by \$44,300,000 for *ad valorem* tax purposes when the stretcher is only valued at less than \$8,696,762. Assuming *arguendo*, that the cost to repair is the correct measure of the functional obsolescence for the 30 million pound stretcher, the maximum reduction in value could only be

\$8,696,762.<sup>4</sup> Alcan has failed to explain why the Machinery and Equipment other than the 30 million pound stretcher should be reduced by \$35,000,000.

The number of products the plant can still produce has been reduced by 10 to 15% and the Tax Department has allowed a deduction of 10% for functional obsolescence. The Tax Department allowed a deduction for functional obsolescence based upon the inability of the 30 million pound stretcher to perform adequately the purpose for which it was designed; the 10 to 15 % reduction in the number of products the stretcher can still produce resulted in a 10 % reduction in value for all equipment in functional obsolescence. The Tax Department's decision was not arbitrary and capricious as argued by Alcan.

The Tax Department has allowed a deduction of \$10,328,976 in functional obsolescence. See Finding No. 40. Based upon the original acquisition cost, trending the acquisition cost to calculate replacement cost new, applying the depreciation tables, and deducting functional obsolescence, the Tax Department valued Alcan's industrial personal property at \$92,960,786. See Finding No. 47.

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<sup>4</sup> Of course, should the Court conclude that the proper measure of economic obsolescence is actually the cost to repair, then the Tax Department would allow a deduction of \$ 8,696,762 instead of the allowed deduction of \$ 10,328,976. Consequently, the total value of Alcan's Machinery and Equipment would increase for *ad valorem* tax purposes.

#### IV. CONCLUSIONS OF LAW

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

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

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

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

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

110 C.S.R. § 1P-2.2.1.1.

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

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

7. The testimony of Ms. Brown demonstrates that the Tax Department accounted for physical deterioration and functional obsolescence in valuing Alcan's industrial personal property.

8. According to Ms. Brown's testimony, the Tax Department began with the acquisition cost of Alcan's Machinery and Equipment, trended the cost up to calculate replacement cost new, depreciated the replacement cost new to account for physical deterioration, and, subsequently, reduced the value of all Machinery and Equipment by 10% to account for functional obsolescence. See Findings Nos. 3, 4, 6, 40, and 41.

9. The Tax Department selected the trend and depreciation tables from the Marshall Swift Valuation Service which is generally recognized as authoritative for valuation purposes in the process industry. See Findings Nos. 7 and 10.

10. The Tax Department selected the trend and depreciation tables which are generally applicable to the "Primary Metal Manufacturing" industry with an industry sub-group of "Alumina and Aluminum Production and Processing." See Finding No. 16.

11. The Tax Department did not reduce the value of the Machinery and Equipment below the floor of 20% good as requested by Alcan because the 30 million pound stretcher is being used in production by Alcan. See Finding No. 26 and 27.

12. The Tax Department did not reduce the value of the 30 million pound stretcher to scrap value as requested by Alcan because the 30 million pound stretcher is being used in production by Alcan. See Finding No. 27; *see also, supra* at PP. 23-24.

13. Alcan has not requested a reduction in value based upon economic obsolescence. See Finding No. 48.

14. Based upon the original acquisition cost, trending the acquisition cost to calculate replacement cost new, applying the depreciation tables, and deducting functional obsolescence, the Tax Department valued Alcan's industrial personal property at \$92,960,786 for the Machinery and Equipment only. See Finding No. 47.

15. Based upon the record in this case, the Tax Department valued Alcan's industrial personal property under the cost approach to value.

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

17. Alcan bears the burden of demonstrating by clear and convincing evidence that the Tax Department's valuations are wrong. See *Stone Brooke, supra*, at Syllabus Pt. 6. Alcan has failed to carry its burden of proof.

**ORDER**

Based on the foregoing Findings of Fact, Analysis, and Conclusions of Law, it is therefore ORDERED that the determination of the Jackson County Commission, sitting as a Board of Equalization and Review, is affirmed. The true and actual values calculated by the Tax Department for the industrial personal property are affirmed. The value for the 2010 tax year for the Machinery and Equipment is \$92,960,786.

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

The Clerk of this Court is directed to send a true copies of this Order to all parties of record and to the Assessor of Jackson County, W. Va., as follows:

Honorable Brian Thomas  
Assessor of Jackson County  
Jackson County Courthouse  
Ripley, WV 25271

Russell D. Jessee, Esquire  
Steptoe & Johnson, PLLC  
Post Office Box 1588  
Charleston, West Virginia 25326-1588

Eric J. Holmes, Esquire  
Law Offices of Harris and Holmes, PLLC

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JACKSON COUNTY  
WEST VIRGINIA

115 North Church Street  
Ripley, West Virginia 25271

L. Wayne Williams (Bar 4370)  
Office of the Attorney General  
State Capitol Building 1, Room W-435  
Charleston, West Virginia 25305

STATE OF WEST VIRGINIA  
FIFTH JUDICIAL CIRCUIT

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RECORDED

This is a Final Order. The Clerk shall retire this proceeding from the active docket.

All of which is ORDERED, accordingly.

ENTER: November 23, 2010

*Thomas C. Evans III*

Thomas C. Evans, III, Circuit Judge  
Fifth Judicial Circuit  
State of West Virginia

ENTERED THE 23 DAY OF

Nov. 2010

ORDER BOOK 6 . PAGE

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*Keith YBrotke*  
CLERK CIRCUIT COURT

**IN THE CIRCUIT COURT OF JACKSON COUNTY, WEST VIRGINIA**

**ALCAN ROLLED PRODUCTS - RAVENSWOOD, LLC,<sup>1</sup>**

**Petitioner,**

**v.**

**Civil Action No. 10-AA-3**

**THE HONORABLE CRAIG A. GRIFFITH,  
Acting West Virginia State Tax Commissioner,**

**THE HONORABLE BRIAN K. THOMAS,  
Assessor of Jackson County, and**

**THE COUNTY COMMISSION OF JACKSON COUNTY,**

**Respondents.**

CLERK OF COURSE  
JACKSON COUNTY  
COURT CLERK  
100 W. MAIN ST.  
MARTINSBURG, WV 25401

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**ORDER**

Pending before the Court is the “Motion Pursuant to Rule 60(b) to Vacate and Re-Enter Order” (the “Motion”), filed by Alcan Rolled Products – Ravenswood, LLC (“Alcan”). The Honorable Craig A. Griffith, Acting West Virginia State Tax Commissioner (the “Tax Commissioner”) has filed a written opposition. On November 7, 2011, the Court heard oral argument on the Motion. Russell D. Jessee of Steptoe & Johnson PLLC appeared for Alcan; Assistant Attorney General L. Wayne Williams appeared for the Tax Commissioner; and Eric J. Holmes of Harris & Holmes, PLLC appeared for Jackson County Assessor Brian K. Thomas and the Jackson County Commission.

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<sup>1</sup> Effective August 1, 2011, Alcan Rolled Products—Ravenswood, LLC changed its name to Constellium Rolled Products Ravenswood, LLC (“Constellium”). For purposes of this litigation, Constellium is continuing to use the name “Alcan Rolled Products—Ravenswood, LLC” or “Alcan.”

Upon consideration of the record before it and the argument of counsel at the November 7, 2011 hearing, the Court is of the opinion that the Motion should be granted. The Court's ruling is further explained as follows:

**FINDINGS OF FACT**

1. On November 23, 2010, the Court entered a Final Order in this matter, which instructs the Clerk to mail it to counsel of record.
2. The Tax Commissioner's counsel received its copy of the Final Order on November 29, 2010.
3. Inexplicably, Alcan's counsel did not receive a copy of the Final Order.
4. In mid-July 2011, Alcan's counsel learned of the entry of the Final Order after a chance discussion with Jeff Amburgey, Director of the Tax Department's Property Tax Division, and on July 20, 2011, Alcan's counsel obtained a copy of the Final Order from the Clerk.
5. On August 5, 2011, Alcan filed the pending Motion.
6. Alcan previously paid the taxes for the tax year at issue based upon the valuation that was upheld in the Final Order.

**CONCLUSIONS OF LAW**

7. West Virginia Rule of Civil Procedure 60(b) provides that  
upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause . . . or (6) any other reason justifying relief from the operation of the judgment.  
W. Va. R. Civ. P. 60(b).
8. It has been noted that, "Rule 60(b)(1) permits relief from a final judgment . . . upon a showing of mistake, inadvertence, surprise, excusable neglect, or unavoidable cause." F.

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Cleckley, R. Davis & L. Palmer, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 3D § 60(b)(1)[2] (2008)(footnotes omitted).

9. With respect to mistake, the commentators have noted, “The kinds of mistakes remediable under Rule 60(b)(1) are litigation mistakes that a party could not have protected against.” *Id.* at n.687 (citations omitted).

10. Here, Alcan could not have prevented the unknown action of an unknown third party which resulted in Alcan’s failure to receive the Order.

11. Alternatively, the commentators have observed, “[e]xcusable neglect encompasses situations in which the failure to comply with a filing deadline is attributable to negligence.” *Id.* at n. 689 (citation omitted).

12. Here, to the extent that Alcan failed to comply with the appeal deadline because its counsel was unaware of entry of final judgment, such failure would be attributable to excusable neglect.

13. No party would be prejudiced by granting this motion. Had Alcan’s counsel timely received notice of the entry of the final order, Alcan would have had the opportunity to appeal the order. Nothing about the passage of time affects the substance of the appeal that Alcan would take. The appeal would address purely legal issues. The only factual record to be considered in property tax assessment disputes, such as this one, is the record developed at the hearing before the County Board of Equalization and Review, which is part of this Court’s record of this case.

14. Moreover, Alcan has paid the taxes for the tax year at issue based upon the valuation upheld by the Final Order in this matter.

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15. Pursuant to W. Va. R. Civ. P. 60(b), Alcan submitted its Motion within one year of the entry of the Final Order and, thus, the Court finds, within a reasonable time, insofar as Alcan promptly submitted its motion upon learning of the entry of the Order.

16. Consequently, under the circumstances of this case, the Court concludes that it is appropriate to re-enter the Final Order in this matter for the purpose of allowing an appeal that was not filed merely because of the absence of receipt of the order from which to appeal.

**WHEREFORE**, having concluded, for the reasons stated above, that the Final Order in this matter should be vacated and re-entered, it is hereby

**ORDERED** that the November 23, 2010 Final Order in this matter be deemed for all purposes vacated and re-entered as of the date shown on this Order.

The objections and exceptions of Respondents are duly noted and preserved.

The Clerk is directed to transmit certified copies of this Order, upon entry, to all counsel of record.

ENTER: 11/23/11



THE HONORABLE THOMAS C. EVANS, III  
JUDGE, CIRCUIT COURT OF JACKSON COUNTY

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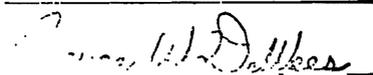
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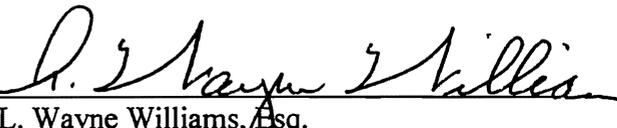


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 Acting West Virginia State Tax Commissioner*

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*Counsel to Respondents The Honorable Brian K. Thomas,  
 Assessor of Jackson County, and the County Commission of  
 Jackson County*

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