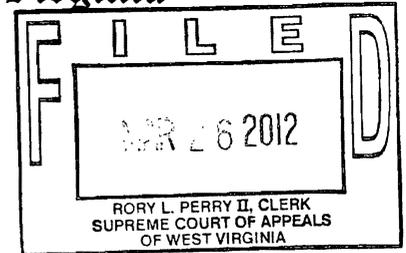


**In the Supreme Court of Appeals of West Virginia**

**Docket No. 11-1752**



**ALCAN ROLLED PRODUCTS-RAVENSWOOD, LLC,**

*Petitioner Below / Petitioner,*

v.

**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 Below / Respondents.*

Appeal from a final order  
of the Circuit Court of  
Jackson County (10-AA-3)

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**PETITIONER'S BRIEF**

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## ASSIGNMENTS OF ERROR

The circuit court erred in:

- ruling that the Tax Department properly trended the property's acquisition cost (the Tax Department's first step in applying the cost approach to valuation), despite a lack of record evidence from the Tax Department that its trend calculations were proper;
- failing to rule that Alcan's expert's trending of the property's acquisition cost was the only trending calculation supported by the hearing record;
- ruling that the Tax Department properly depreciated the property's trended acquisition cost (the Tax Department's second step in applying the cost approach to valuation), despite a lack of record evidence from the Tax Department that its depreciation calculations were proper;
- failing to rule that Alcan's expert's depreciation of the property's trended acquisition cost was the only depreciation calculation supported by the hearing record;
- ruling that the Tax Department properly accounted for obsolescence by deducting only 10% of the property's depreciated value (the Tax Department's third step in applying the cost approach to valuation), despite a lack of record evidence from the Tax Department supporting or explaining the 10% obsolescence reduction;
- failing to rule that Alcan's expert's calculation of the further obsolescence reduction to the property's depreciated value was the only obsolescence calculation supported by the hearing record;
- ruling that the Tax Department's valuation of Alcan's industrial personal property as of July 1, 2009 for tax year 2010 was supported by substantial evidence on the record of the February 16, 2010 hearing before the Board; and
- failing to rule that Alcan's expert evidence was the only record evidence of the value of Alcan's industrial personal property as of July 1, 2009 for tax year 2010 and, thus, was clear and convincing evidence of the property's value.

## STATEMENT OF THE CASE

In this property tax valuation case, the issue is not whether the Property Tax Division of the State Tax Department (the “Tax Department”) acted within its allowed discretion when choosing a method to value the industrial personal property of Alcan Rolled Products—Ravenswood, LLC<sup>1</sup> (“Alcan”).<sup>2</sup> The Tax Department and Alcan both used the cost approach to valuation, so the choice of a valuation method is irrelevant to this dispute. The sole issue is whether the Tax Department, having chosen the cost approach, supported its valuation with substantial evidence in response to Alcan’s expert testimony before the Jackson County Board of Equalization and Review (the “Board”).

At the Board hearing, the Tax Department failed to present evidence supporting its valuation method, and it failed to respond to flaws in its method identified by Alcan’s expert. In contrast, Alcan presented an unrebutted expert valuation. Thus, the Board’s affirmation of the

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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 continues to use the name “Alcan Rolled Products—Ravenswood, LLC” or “Alcan.”

Alcan owns an aluminum manufacturing plant in Ravenswood, Jackson County, West Virginia. Currently, the Alcan plant specializes in plate production. (Certified Transcript of February 16, 2010 Hearing before the Jackson County Board of Equalization and Review 33:1-5, 104:5-9 [hereinafter “BER Hr’g Tr.”]; A.R. 52, 123. (References to the Appendix Record—the contents of which were agreed to by the parties—are set forth as “A.R. \_\_\_” in parallel citations herein.)) Because of severe damage to a key component in the aluminum manufacturing process—the 30-million-pound stretcher—the plant’s production and profitability have been greatly reduced and will remain so until the heads on the 30-million-pound stretcher can be replaced. (*See id.* 33:23-37:8, 55:4-57:12; A.R. 52-56, 74-76.) The plant also experienced additional problems related to the closing of the adjacent Century Aluminum plant. (*See, id.* 39:2-16; A.R. 58.) Whereas the Century plant previously provided molten aluminum, Alcan now must use hard aluminum, creating additional wear and tear on its furnaces. (*Id.*) Alcan presented evidence that it plans to spend more than \$66 million to correct these problems over the next several years. (*Id.* 110:4-14; A.R. 129.)

<sup>2</sup> All property in the State of West Virginia is required to “be assessed annually at its true and actual value . . . .” W. VA. CODE § 11-3-1. The West Virginia State Tax Commissioner (in this brief, the “Tax Department”) is charged with valuing “all industrial property in the state at its fair market value” and then providing the values to county assessors to use in assessing the property. W. VA. CODE § 11-1C-10(c).

Tax Department's valuation was incorrect. And the Circuit Court—which could only rule on the evidence presented to the Board—incorrectly upheld the Board's decision.

**I. Factual Background**

**A. The Tax Department's Valuation of Alcan's Property.**

The Tax Department appraised Alcan's machinery and equipment as of July 1, 2009, for tax year 2010 at \$92,960,786.<sup>3</sup> Cynthia Brown, Senior Appraiser for the Tax Department, Property Tax Division, performed the calculations.<sup>4</sup> In order to determine the value of Alcan's machinery and equipment, Ms. Brown used the purported cost approach that is outlined in Administrative Notice 2010-13.<sup>5</sup>

**B. The Board of Equalization and Review Hearing.**

On February 16, 2010, Alcan appeared before the Board to protest the Tax Department's valuation of its industrial personal property, which had been adopted by the Jackson County Assessor.<sup>6</sup>

**1. Alcan's evidence at the Board hearing.**

Alcan's appraiser, Duff & Phelps, one of the world's largest independent valuation firms, used the cost approach to value Alcan's machinery and equipment. In its

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<sup>3</sup> (BER Hr'g Tr. 9:3-12 & State Ex. 1; A.R. 28 & 164.)

<sup>4</sup> (*Id.* 8:14-25; A.R. 27.)

<sup>5</sup> (*Id.* 11:2-9; A.R. 30; Admin. Notice 2010-13 at 1 (Jan. 29, 2010); A.R. 177.) The Tax Department primarily relies on the cost approach, rather than the market or income approaches, to value industrial machinery and equipment. (*See* Admin. Notice 2010-13; A.R. 177-79.) Ms. Brown also characterized the Tax Department's cost approach as the "return method" (BER Hr'g Tr. 8:24-9:2, 9:19-24; A.R. 27-28), because the starting point is the acquisition costs provided by a taxpayer on its annual return. According to Ms. Brown, the cost approach (or the "return method") does not depend on a physical inspection of the property being valued. (*Id.*)

<sup>6</sup> (*See* W. VA. CODE § 11-3-24; *see also* Pet'r Ex. 1 to BER Hr'g Tr., Application for Review of Property Assessment; A.R. 199-201.)

completely supported report, presented to the Board on February 16, 2010,<sup>7</sup> Duff & Phelps determined that a correct application of the cost approach yields a 2009 value for Alcan's machinery and equipment of \$41,000,656.<sup>8</sup>

At the Board hearing, Alcan's expert witness explained the bases for the Duff & Phelps Report. Duff & Phelps director Mark Simzyk testified that the Report is based on (i) the acquisition costs Alcan provided on its tax return to the Tax Department, (ii) Marshall & Swift indices, and (iii) information Duff & Phelps obtained from physical inspection of the Alcan plant and detailed records provided by the plant.<sup>9</sup>

Mr. Simzyk also fully explained Duff & Phelps's cost approach methodology to the Board. He testified that Duff & Phelps first trended Alcan's acquisition costs using indices obtained from Marshall & Swift.<sup>10</sup> Duff & Phelps next applied a deduction "to reflect the physical deterioration in the Subject Assets due to age and wear and tear."<sup>11</sup> Duff & Phelps

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<sup>7</sup> Because of a typographical error, the report presented at the February 16, 2010 hearing carries a January 28, 2009 date on its first page. The correct date of the report, as shown on subsequent pages of the report is February 12, 2010.

<sup>8</sup> Alcan's machinery and equipment purchased between 2000 and 2004 are considered to be Certified Capital Addition Property, which is taxed at a specified lower rate. Neither the Tax Department's nor Duff & Phelps's valuation of the machinery and equipment at issue in this matter includes a valuation of Alcan's Certified Capital Addition Property. Both valuations may be directly compared.

<sup>9</sup> (BER Hr'g Tr. 70:3-13; A.R. 89.) At the Board hearing, Alcan presented additional fact testimony in support of the Report. (*See, e.g.*, BER Hr'g Tr. 40:9-42:16; A.R. 59-61 (testimony of John Hudson, Alcan's business manufacturing manager, regarding factors such as above-normal wear and tear and below-normal utilization of Alcan's machinery and equipment).)

<sup>10</sup> (BER Hr'g Tr. 92:25-93:5; A.R. 111-12; Pet'r Ex. 3 to BER Hr'g Tr., Duff & Phelps Report, at 5-6 [hereinafter "Pet'r Ex. 3"]; A.R. 207-08.) Duff & Phelps used the specific Marshall & Swift (Marshall Valuation Service) index for metal working. (BER Hr'g Tr. 93:9-21; A.R. 112; Marshall Valuation Service Cost Index Table, § 98, p. 8 (January 2010), included in Appendix A to Duff & Phelps Report, Pet'r Ex. 4 to BER Hr'g Tr.; A.R. 218.) Duff & Phelps thus calculated a replacement cost new ("RCN") of \$240,773,142. (*See* Pet'r Ex. 3 at 6; A.R. 208.) The Duff & Phelps RCN figure is approximately \$12.3 million less than the Tax Department's RCN of \$252,965,487. (BER Hr'g Tr. 94:4-9; A.R. 113; Pet'r Ex. 3 at 11; A.R. 213.)

<sup>11</sup> (Pet'r Ex. 3 at 6; A.R. 208; *see also* BER Hr'g Tr. 94:11-98:5; A.R. 113-17.)

based its physical deterioration deduction on the Marshall & Swift depreciation tables.<sup>12</sup> “However, these published tables contain averages that must be adjusted for above-normal or below-normal utilization, wear and tear, and obsolescence.”<sup>13</sup> Accordingly, Duff & Phelps took into account the actual “above-normal physical deterioration of the Subject Assets.”<sup>14</sup> Finally, Duff & Phelps accounted for functional obsolescence based on the cost to cure problems with Alcan’s machinery and equipment.<sup>15</sup> Alcan’s expert testified that he determined a precise reduction for functional obsolescence by calculating the cost to bring Alcan’s machinery and equipment back to the capacity for which it was originally purchased.<sup>16</sup>

In sum, Alcan presented a completely supported, expert valuation to the Board that was not rebutted. Alcan’s valuation was not criticized by the Tax Department’s witness, and Alcan’s expert witness never was asked a cross-examination question that remained unanswered or unexplained.

In addition to valuing Alcan’s property, the Duff & Phelps Report explained three failings in the Tax Department’s valuation:

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<sup>12</sup> (Pet’r Ex. 3 at 6; A.R. 208; *see also* BER Hr’g Tr. 94:11-98:5; A.R. 113-17.)

<sup>13</sup> (Pet’r Ex. 3 at 6; A.R. 208; *see also* Marshall & Swift Depreciation Table, Pet’r Ex. 5 to BER Hr’g Tr.; A.R. 223.)

<sup>14</sup> (Pet’r Ex. 3 at 6-9; A.R. 208-11; *see also* BER Hr’g Tr. 94:11-98:5; A.R. 113-17.) Duff & Phelps determined RCN less physical deterioration to be \$76,454,571 for Alcan’s machinery and equipment. That amount is approximately \$27 million less than the Tax Department’s value of the machinery and equipment’s RCN less physical deterioration.

<sup>15</sup> (*See* Pet’r Ex. 3 at 9-10; A.R. 211-12.)

<sup>16</sup> (BER Hr’g Tr. 110:1-113:10; A.R. 129-32.) Duff & Phelps took the total present value of planned capital expenditures plant-wide, approximately \$66 million (as documented in Appendices C & D), and allocated that across the specific machinery and equipment being valued. (*See* Pet’r Ex. 3 at 9-10; A.R. 211-12; BER Hr’g Tr. 110:1-113:10; A.R. 129-32.) The deduction for functional obsolescence of the specific machinery and equipment being valued was \$35,357,721. The cost-to-cure method of calculating functional obsolescence comports with the Tax Department definition of “functional obsolescence” as “[t]he inability to perform adequately the function for which an item was designed.” W. VA. CODE ST. R. § 110-1P-2.3.8. In briefing to the Circuit Court, the Tax Department cited no record evidence or any authority for the proposition that cost-to-cure is an incorrect measure of functional obsolescence.

1. The trend factors used by the Tax Department overstate the current cost to replace the machinery and equipment;
2. The depreciation factors used by the Tax Department understate depreciation and fail to account for the actual and excessive wear and tear on the equipment; and
3. The Tax Department's arbitrary 10% functional obsolescence reduction is greatly understated and fails to account for known curable functional obsolescence (*i.e.*, planned capital expenditure), which is needed to return the Alcan plant to profitable production levels.<sup>17</sup>

## 2. The Tax Department's evidence at the Board hearing.

At the Board hearing, Ms. Brown appeared as the only witness for the Tax Department. She testified that the Tax Department's application of the cost approach was a three-step formula:

First, Ms. Brown said she took the acquisition costs of the machinery and equipment and "trended" them according to trend tables to obtain the replacement cost new ("RCN"), which is the cost if the machinery and equipment were to be reproduced in 2009.<sup>18</sup> Ms. Brown, however, did not introduce the trend tables that the Tax Department uses, and moreover, she provided no evidence on the source of the numbers in the tables beyond stating that she believed they were derived from "Marshall & Swift."<sup>19</sup> In short, Ms. Brown provided no actual evidence of the basis for her trend calculation.

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<sup>17</sup> (See Pet'r Ex. 3 at 1; A.R. 203.)

<sup>18</sup> (BER Hr'g Tr. 13:14-21; A.R. 32.)

<sup>19</sup> In Administrative Notice 2010-13, the Tax Department asserts that it uses trend tables developed by the Marshall Valuation Service ("Marshall & Swift") to determine RCN. (Admin. Notice 2010-13 at 3; A.R. 179.) Neither at the Board hearing nor since, however, has the Tax Department ever confirmed that its trend tables actually correlate to any tables published by Marshall & Swift. Alcan's expert appraiser could not determine which Marshall & Swift trend index the Tax Department actually used as a basis for the trend table it used for Alcan. (BER Hr'g Tr. 89:17-24; A.R. 108.) Thus, the Tax Department failed to respond to Alcan's expert's identification of a specific flaw in the Tax Department's methodology. (Cont.)

Second, Ms. Brown reduced the RCN values to account for physical deterioration. She asserted that she applied depreciation factors from a table derived from Marshall & Swift.<sup>20</sup> Again, however, Ms. Brown did not introduce the Tax Department's table or the underlying Marshall & Swift factors into the record.<sup>21</sup> Again, she provided no evidence on the basis for her calculation.

Third, the Tax Department had further reduced the property's value by an unexplained 10% to account for functional obsolescence.<sup>22</sup> At the Board hearing, Ms. Brown testified she was not aware of the basis for that flat 10% reduction beyond that it accounted for "[o]bsolescence." She said the reduction was made after meeting with Alcan in late December 2009.<sup>23</sup> According to Ms. Brown, her Director, Jeff Amburgey, determined that 10% was the correct obsolescence reduction.<sup>24</sup> Mr. Amburgey was not present and did not testify at the

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Furthermore, at the Board hearing, Ms. Brown claimed to have used NAICS codes in order to trend the acquisition cost to RCN. (BER Hr'g Tr. 12:6-23; A.R. 31.) But, that is inconsistent with how Marshall & Swift designs its tables to be used. (*Id.* 116:16-19; A.R. 135.) NAICS codes are used for federal tax depreciation purposes; they do not "have anything to do with establishing an index [for trending]." (*Id.* 117:5-19; A.R. 136.)

<sup>20</sup> (BER Hr'g Tr. 9:15-19, 13:22-14:14; A.R. 28, 32; Admin. Notice 2010-13 at 3; A.R. 179.) The actual condition of Alcan's machinery and equipment was not a factor in how Ms. Brown accounted for physical deterioration. Ms. Brown had toured the Alcan plant in July 2009 and was aware of the actual condition of the machinery and equipment at the plant, but she testified that her knowledge of the condition of the equipment had no effect on how she depreciated the property for physical deterioration. (BER Hr'g Tr. 18:3-12; A.R. 37.)

<sup>21</sup> Significantly, although the Tax Department's table is purportedly derived from Marshall & Swift, the Tax Department's table does not contain any of the information from Marshall & Swift about how the tables are to be used. The Marshall & Swift depreciation tables state that they are "general tables . . . furnished primarily for the experienced equipment appraiser who has knowledge of the normal lives and retirement experiences of fixtures and equipment, as a check against his other methods of determination of the total depreciation of equipment." (Marshall & Swift Depreciation Table, Pet'r Ex. 5 to BEK Hr'g Tr., Appx. B; A.R. 223.)

<sup>22</sup> (BER Hr'g Tr. 9:19-24; A.R. 28.)

<sup>23</sup> (*Id.* 9:25-10:13; A.R. 28-29.)

<sup>24</sup> (*Id.* 9:19-24, 19:1-9; A.R. 28, 38.) The actual record exchange is as follows:

Q And then you said the last step was to take off ten percent for functional obsolescence, is that a fair statement?

hearing, so the Tax Department provided no evidence on the actual basis for its obsolescence reduction. The record contains nothing about how or why Mr. Amburgey chose 10% as an obsolescence reduction.

In sum, the Tax Department offered no evidence at the February 16, 2010 Board hearing to support its purported application of the cost approach to value Alcan's industrial personal property.

## II. Procedural Background

Alcan established the only record for this case when it protested the Tax Department's valuation of its industrial personal property before the Board on February 16, 2010.<sup>25</sup>

By February 25, 2010 Order, the Board determined to make no adjustment to the Tax Department's July 1, 2009 valuation of Alcan's industrial personal property for the 2010 tax

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A Yes. Mr. Amburgey did that, yes. It was his decision, yes.

Q So you don't have any more analysis of arriving at that ten percent figure?

A No. You'd have to ask Mr. Amburgey, he actually came up with the percentage.

(*Id.* 19:1-9; A.R. 38.)

<sup>25</sup> Alcan hired Garrett Reporting Services to produce a certified transcript of the hearing. Exhibits introduced at the hearing and provided to the Board are appended to the transcript. The original record of the proceeding was attached to Alcan's Petition as Exhibit A. *See* W. VA. CODE §§ 11-3-25 (1967) and 58-3-4 (1967).

Certain appendices to the Duff & Phelps Report contain Alcan's confidential business information. At the Board hearing, Alcan introduced a paper copy of the Report that omitted the particular appendices containing confidential business information. Alcan requested that it be able to submit the entire Report on disk so that all of the information in the appendices would be available to the Board and the Tax Department, and the entire Report would become part of the record, but Alcan requested that the confidential business information not be publicly available. Ultimately, Alcan provided copies of the entire Report on disk to the Board, counsel for the Tax Department, and the court reporter, so that the entire Report is part of the record of the proceeding. The version of the record of the hearing that was provided with Alcan's Petition to the Jackson County Circuit Court likewise contained a paper copy of the Duff & Phelps Report without the appendices containing confidential business information and a disk containing the entire report. Alcan respectfully requested that the circuit court protect the confidential portions of the complete version of the Report consistent with W. VA. CODE § 11-1A-23, and it respectfully requests that this Court likewise protect the confidential portions of the Report on the disk included with the Appendix Record.

year.<sup>26</sup> Alcan then timely petitioned the Jackson County Circuit Court (the “Circuit Court”) for relief from the Board’s erroneous determination.<sup>27</sup>

After Alcan and the Tax Department submitted written briefs, the parties presented oral argument to Judge Thomas C. Evans, III, on September 1, 2010. Judge Evans then requested proposed orders by October 1, 2010. On November 23, 2010, Judge Evans entered the order proposed by the Tax Department with minor, primarily formatting, changes.<sup>28</sup>

Counsel to Alcan inexplicably did not receive a copy of the Final Order. In mid-July 2011, Alcan’s counsel learned of the entry of the Final Order, and on August 5, 2011, Alcan moved, pursuant to W. VA. R. CIV. P. 60(b), to vacate and re-enter the order because of mistake and/or excusable neglect. By Order entered November 23, 2011, the Jackson County Circuit Court granted Alcan’s motion, and it vacated and re-entered the Final Order.<sup>29</sup> Alcan then timely noticed its appeal to this Court.

### SUMMARY OF ARGUMENT

The applicable statutory scheme for a taxpayer challenge to the Tax Department’s valuation of industrial personal property requires that the only record for review be developed at a hearing before a county commission sitting as a board of equalization and review. This Court’s case law construing that statutory scheme requires that the Tax Department support its valuation (or appraisal) with “substantial evidence” at the board of equalization and review hearing if the taxpayer presents “clear and convincing” evidence, such as through its own expert appraiser, that the Tax Department’s valuation is incorrect. Thus, both a taxpayer and the Tax Department have

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<sup>26</sup> (See Letter to Russell Jessee from the Jackson County Commission (Feb. 25, 2010), attached as part of Ex. A to Alcan’s Petition to the Jackson County Circuit Court; A.R. 242.)

<sup>27</sup> See W. VA. CODE § 11-3-25 (1967).

<sup>28</sup> See Order, Jackson County Civil Action No. 10-AA-3 (Nov. 23, 2010); A.R. 399-430.

<sup>29</sup> See Order, Jackson County Civil Action No. 10-AA-3 (Nov. 23, 2011); A.R. 431-35.

burdens of proof at a board of equalization and review hearing. The Tax Department cannot simply rely on a presumption of correctness in the face of expert testimony from the taxpayer.

At the Board hearing in this case, Alcan entered into evidence a complete written appraisal report supported by the testimony of the expert who prepared it. Alcan's expert evidence not only established a value for its property, but also identified fatal flaws in the Tax Department's valuation. Alcan also presented fact evidence through two fact witnesses. The Tax Department's only witness failed to explain the basis for the Tax Department's valuation on the record. Accordingly, the Tax Department failed to carry its burden at the Board hearing. That left Alcan's expert evidence as the only record evidence of the value of Alcan's industrial personal property.

When the Circuit Court reviewed the record of the Board hearing that contained no evidence supporting the correctness of the Tax Department's valuation, it had nothing on which to base a ruling for the Tax Department. The Tax Department simply had failed to support its valuation in the only forum that mattered. In contrast, Alcan presented precisely the type of expert evidence this Court has said a taxpayer needs to present. The Circuit Court, then, erred as a matter of law in upholding the Tax Department's valuation and rejecting Alcan's expert valuation.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioner requests oral arguments pursuant to Rule 19 because the circumstances of this case and the legal questions thereby presented concern settled law regarding the basis for a circuit court's review of a decision by a board of equalization and review, which must be only on the record of the proceeding before the board.

## ARGUMENT

In a taxpayer challenge case, “a circuit court is primarily discharging an appellate function little different from that undertaken by this Court; consequently, [this Court’s] review of a circuit court’s ruling in proceedings under [W. VA. CODE] § 11-3-25 is *de novo*.”<sup>30</sup>

**I. Alcan’s expert evidence was the only record evidence of the value of Alcan’s industrial personal property, while the Tax Department’s valuation was not supported by substantial evidence on the record.**

**A. The Tax Department was obligated to support its valuation with “substantial evidence” at the Board hearing.**

Alcan’s burden at the Board hearing was to present “clear and convincing evidence” that the Tax Department’s valuation was wrong.<sup>31</sup> Once Alcan did that, “it [was] incumbent upon the [Tax Department] to place some evidence in the record to show why its assessment is correct.”<sup>32</sup> “Pursuant to *In Re Pocahontas Land Co.* . . . , once a taxpayer makes a showing that tax appraisals are erroneous, the Assessor is then bound by law to rebut the taxpayer’s evidence.”<sup>33</sup>

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<sup>30</sup> *In re Tax Assessment Against Am. Bituminous Power Partners, L.P.*, 208 W. Va. 250, 255, 539 S.E.2d 757, 762 (2000). Moreover, this is not a case in which the Tax Department’s discretion on choosing an appraisal methodology has been challenged. In this case, both the Tax Department’s appraiser and Alcan’s expert appraiser stated they used the cost approach. Thus, while “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,” syl. pt. 4, in part, *Stone Brooke Ltd. P’ship v. Sisinni*, 224 W. Va. 691, 688 S.E.2d 300 (2009) (citation omitted), the choice of appraisal method is not at issue in this case. Accordingly, the Tax Department is not entitled to the deference that is accorded to it when it has exercised allowed discretion.

<sup>31</sup> *Stone Brooke*, 224 W. Va. at 701, 688 S.E.2d at 310 (“To overturn the [Tax Department’s] appraisal[] of [Alcan’s industrial property], [Alcan] must prove by clear and convincing evidence that the assessments resulting from such appraisal[] [was] wrong: ‘A taxpayer challenging an assessor’s tax assessment must prove by clear and convincing evidence that such tax assessment is erroneous.’ Syl. pt. 5, in part, [*In re Tax Assessment of*] *Foster Found[ation’s Woodlands Retirement Community]*, 223 W. Va. 14, 672 S.E.2d 150 [(2008)].”).

<sup>32</sup> *In re Tax Assessments Against Pocahontas Land Co.*, 172 W. Va. 53, 61, 303 S.E.2d 691, 699 (1983).

<sup>33</sup> *Mountain Am., LLC v. Huffman*, 224 W. Va. 669, 786 n.23, 687 S.E.2d 768, 785 n.23 (2009). While the Tax Department’s witness actually went first at the Board hearing, she neither provided

In Alcan's appeal of the Board's decision, the Circuit Court's review was limited to the record developed before the Board.<sup>34</sup> The applicable version of W. VA. CODE § 11-3-25 "expressly limit[s] review to the record made before the county commission."<sup>35</sup> "Given this limitation, . . . 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."<sup>36</sup>

In the face of Alcan's expert valuation and criticism presented at the Board hearing, then, the Tax Department had to present "substantial evidence" supporting its valuation and had to explain its methodological flaws as identified by Alcan's expert. Given the statutory requirements for property tax appeals, the Board hearing was the Tax Department's only opportunity to support its valuation. The Tax Department, however, failed to do so.

**B. Alcan presented clear and convincing evidence to the Board of the value of its industrial personal property.**

At the February 16, 2010 Board hearing, Alcan presented to the Board a written appraisal report by Duff & Phelps, including multiple appendices.<sup>37</sup> Alcan supported that written

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substantial evidence at that time nor was recalled to provide additional evidence or to rebut Alcan's evidence.

<sup>34</sup> W. VA. CODE § 11-3-25 (1967). Section 11-3-25 has been amended for tax years beginning after December 31, 2011, and those amendments, *inter alia*, provide that a circuit court may remand the matter to the county commission for further development of an adequate record in certain circumstances. *See* W. VA. CODE § 11-3-25(c) (2010). The version of the statute that applies to this case, however, contains no exception to the requirement that an appeal to circuit court must be based on the record developed before a county commission sitting as a board of equalization and review. Furthermore, the version of the statute applicable to this case provided that "[i]f, upon the hearing of [a taxpayer's appeal] it is determined that any property has been valued at more than its true and actual value . . . the circuit court shall, by an order entered of record, correct the assessment, and fix the property at its true and actual value." W. VA. CODE § 11-3-25 (1967).

<sup>35</sup> *American Bituminous*, 208 W. Va. at 254, 539 S.E.2d at 761.

<sup>36</sup> *Id.* (footnote and citations omitted). As Judge Evans stated at the beginning of the Circuit Court hearing, "[t]his is a matter to be heard on the transcript and evidence submitted to the Board of Equalization and Review at the hearing on February 16<sup>th</sup>, 2010." (Cir. Ct. Hr'g Tr. at 3; A.R. 342.)

<sup>37</sup> *See generally* Duff & Phelps Report, A.R. 203-41 and disk.

report with expert testimony by Duff & Phelps director Mark Simzyk.<sup>38</sup> The written appraisal report supported by expert testimony is “competent evidence such as that equivalent to the testimony of qualified appraisers, that the property has been under or over valued by the Tax Commissioner and wrongly assessed by the Assessor.”<sup>39</sup> Indeed, the appraisal report and testimony *were* evidence from a qualified appraiser that the Tax Department had greatly overvalued Alcan’s industrial personal property. The Tax Department provided no expert evidence that the Duff & Phelps report was in any way inaccurate or that its methodology was in any way flawed. The Tax Department’s cross-examination of Alcan’s expert revealed no flaws in the expert’s evidence.<sup>40</sup>

Accordingly, Alcan’s expert valuation stands without any unanswered criticism or rebuttal in the only record on which the Circuit Court could base its ruling.

**C. The Tax Department failed to support its valuation with “substantial evidence” at the Board hearing.**

In contrast, the Tax Department failed to admit any evidence that supported its valuation. Rather, the Tax Department’s witness, Ms. Brown, could testify only that she performed calculations based on tables that she did not put into evidence. In other words, Ms. Brown testified that she performed calculations according to a formula, but she could provide no evidence about the origin of the formula. Furthermore and significantly, Ms. Brown was unable to provide evidence supporting the Tax Department’s 10% obsolescence reduction.

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<sup>38</sup> See *supra* at 3-5 (summarizing Alcan’s evidence presented to the Board).

<sup>39</sup> Syl. pt. 8, in part, *Killen v. Logan County Comm’n*, 170 W. Va. 602, 295 S.E.2d 689 (1982).

<sup>40</sup> (See generally BER Hr’g Tr. 116:14-124:21; A.R. 135-43.) The Tax Department’s attorney, Jan Mudrinich, attempted to criticize the report to the Board. (See BER Hr’g Tr. 134:22-137:1; A.R. 153-56.) Mr. Mudrinich, however, was not presenting evidence—that would have to come from a Tax Department *witness*. In any event, Alcan’s expert cogently explained that Mr. Mudrinich was incorrect. (See *id.* 121:1-7; A.R. 140 (Mr. Simzyk explaining that Mr. Mudrinich was improperly mixing valuation concepts); *id.* 138:23-139:12; A.R. 157-58 (Mr. Simzyk explaining that the Tax Department’s argument was “missing the connection point in the []valuation theory issue” regarding the plant being an integrated facility and the consequences of that for the functional obsolescence of all plant equipment).)

Specifically, Ms. Brown testified that she first trended Alcan's acquisition costs according to trend tables purportedly derived from tables published by Marshall & Swift.<sup>41</sup> Alcan's expert, however, testified that he could not match the tables used by the Tax Department to any trend tables actually published by Marshall & Swift.<sup>42</sup> Ms. Brown had no explanation for this. The Tax Department, then, failed to provide any record evidence to support the first of its three calculations in its cost approach formula.

For its second calculation—for depreciation because of physical deterioration, the Tax Department similarly applied a reduction factor based on a table. The Tax Department, however, failed to provide any record evidence that this was a valid method of calculating depreciation because of physical deterioration. At the same time, Alcan's expert testified that the Tax Department's deterioration calculation was invalid.

Ms. Brown had physically inspected the Alcan plant, but she testified that the visit was unnecessary to her appraisal. She testified—contrary to law—that the actual condition of Alcan's machinery and equipment she observed had no effect on her valuation;<sup>43</sup> she simply

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<sup>41</sup> (See BER Hr'g Tr. 11:23-13:21; A.R. 30-32.)

<sup>42</sup> (See BER Hr'g Tr. 89:17-24; A.R. 108 (Alcan's expert testimony that he was unable to determine the basis for the Tax Department's trending table).) The issue, then, was not into which industrial classification Alcan falls, which was a red herring argument raised by the Tax Department. The issue was the source of the data in the Tax Department's trending table, of which the Tax Department presented no evidence whatsoever. See *supra* n.19.

<sup>43</sup> When determining fair market value under the cost approach, the "replacement cost of the [property] is reduced by the amount of accrued depreciation." W. VA. CODE ST. R. § 110-1P-2.2.1.1. In applying the cost approach, the Tax Commissioner "will consider three (3) types of depreciation: physical deterioration, functional obsolescence, and economic obsolescence." *Id.*; see also W. VA. CODE ST. R. § 110-1P-2.5.3.3 ("When physically inspecting commercial and industrial personal property for appraisal, three (3) types of depreciation should be considered: physical deterioration, economic obsolescence and functional obsolescence."). Recent decisions by this Court confirm that the applicable regulations require the Tax Department to correctly depreciate industrial personal property under the cost approach. See, e.g., *Stone Brooke*, 224 W. Va. at 706 n.15, 688 S.E.2d at 315 n.15 (requiring circuit court on remand to "consider whether the Assessor[] correctly applied the cost approach . . . , including considering depreciation through physical deterioration, functional obsolescence, and economic obsolescence as required by W. Va. C.S.R. § 110-1P-2.2.1.1"); *In re Tax Assessment of Foster Found.'s Woodlands Ret. Cmty.*, 223 W. Va. 14, 672 S.E.2d 150 (2008) (stating that to the extent that

applied the Tax Department's tables.<sup>44</sup> Alcan's expert, however, testified that this was a misuse of depreciation (or percent-good) tables.<sup>45</sup> Depreciation tables are not meant to be used as absolutes, but should be adjusted to account for above-normal deterioration (or below-normal deterioration if that is the case).<sup>46</sup> Thus, the Tax Department provided no record evidence of how its depreciation calculation accounted for the actual physical deterioration of the specific machinery and equipment in Alcan's plant, as required by the applicable regulations.

The Tax Department's third, and most serious, failing at the Board hearing was its failure to provide any record evidence supporting its 10% reduction for obsolescence.<sup>47</sup> Nothing in the record reflects how the Tax Department determined the reduction or how the reduction comports with generally accepted appraisal principles.<sup>48</sup> Accordingly, on the record, the Tax Department's 10% obsolescence reduction is entirely arbitrary.

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improvements "have been diminished by depreciation, this factor also is required to be considered in appraising commercial property" and citing W. VA. CODE ST. R. § 110-1P-2.2.1.1).

<sup>44</sup> (BER Hr'g Tr. 18:3-12; A.R. 37.) Indeed, Ms. Brown testified that if two plants sitting side by side had acquired similar equipment at similar costs and at similar times, the valuation of the separate equipment would be identical regardless of whether the equipment had deteriorated differently. (*Id.* 18:13-25; A.R. 37.)

<sup>45</sup> (*See* BER Hr'g Tr. 94:15-98:5; A.R. 113-17.)

<sup>46</sup> (*See* Marshall & Swift Depreciation Table, Pet'r Ex. 5, Appx. B (providing guidance on the proper use of the table); A.R. 223.)

<sup>47</sup> (*See* BER Hr'g Tr. 19:1-9; A.R. 38 (testimony of Ms. Brown that Mr. Amburgey came up with the 10% reduction, and she could not explain its basis.))

<sup>48</sup> In its argument to the Circuit Court, the Tax Department recognized its failure to support its 10% obsolescence reduction on the record. It attempted to provide an after-the-fact justification based on the purported hearing testimony of one of Alcan's witnesses that Alcan's production had decreased 10-15% because of problems with its large stretcher. (Resp. Br. at 15; A.R. 319 (without citation to the record, asserting that the Tax Department "based the reduction in value for functional obsolescence on the decrease in output of the stretcher until it can be repaired"); Cir. Ct. Hr'g Tr. 37:2-8; A.R. 376.) Alcan's witness, however, did not say what the Tax Department purported he said. (*See* Cir. Ct. Hr'g Tr. 37:9-38:18; A.R. 376-77.) Moreover, whatever was the testimony, the Tax Department heard it for the first time on February 16, 2010. Alcan's testimony at the Board hearing could not have been the basis for a 10% reduction the Tax Department made in December 2009. Nonetheless, the Order entered by the Circuit Court, as drafted by the Tax Department, states just that. (Cir. Ct. Order at 25-26; A.R. 423-24 (asserting, incorrectly, that "[r]elying on the representations of the Alcan executives" *at the hearing* "cannot be called 'entirely arbitrary.'"))

At the Board hearing, the Tax Department's counsel agreed that the Tax Department's obsolescence reduction was arbitrary:

I will point out, there's been some talk about our arbitrary granting of 10 percent. *Yeah, that's a figure we came up with. . . .* Basically what I'm saying is the 10 percent adjustment, you can call it arbitrary, but it worked in [Alcan's] favor. It reduced their value 10 percent.<sup>49</sup>

Simply because the reduction inured to Alcan's benefit, however, is not a justification for an arbitrary reduction. Any reduction, of course, inures to a taxpayer's benefit. The statutory scheme, however, requires the Tax Department to put on "substantial evidence," not just state the obvious fact that any reduction benefits the taxpayer.

**D. The Board had no evidence on which to affirm the Tax Department's valuation, and, likewise, the Circuit Court had no evidence to affirm the Board's decision.**

As the foregoing makes clear, the Board heard no evidence from the Tax Department supporting its calculation of the value of Alcan's industrial personal property. On the other hand, Alcan presented the Board with its expert appraiser's written report (supported by multiple appendices) and testimony. The Board, without explanation, nonetheless affirmed the Tax Department's valuation. The Board's affirmation of the Tax Department based on no evidence, then, was incorrect as a matter of law.

On appeal, the Circuit Court also confronted a record that was bereft of any evidence—much less, "substantial evidence"—of the basis for the Tax Department's valuation of Alcan's property. In particular, the record contained no evidence of the basis for the Tax Department's 10% obsolescence reduction. The Tax Department presented nothing to be weighed against Alcan's expert evidence. The only record evidence of the value of Alcan's property was the Duff & Phelps Report and testimony of Duff & Phelps director Mark Simzyk

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<sup>49</sup> (BER Hr'g Tr. 135:24-136:2, 136:24-137:1; A.R. 154-56 (emphasis added).)

presented by Alcan. Because Alcan's evidence was from an expert appraiser and that evidence was not effectively rebutted by cross-examination or any competing expert testimony on the record, Alcan's evidence unquestionably was "clear and convincing" evidence of the value of Alcan's property. Accordingly, Alcan's evidence was the *only* record evidence of the value of Alcan's property.

At the Circuit Court hearing, Judge Evans tended to agree that the law required the court to find for Alcan when Alcan presented the only record evidence.<sup>50</sup> "[B]ut," said Judge Evans, "I don't think people who are triers of fact ever want to go down the road of being bound by an unrebutted expert's opinion, if it conflicts with reason and common sense."<sup>51</sup> The statutory scheme for taxpayer challenges in the applicable version of W. VA. CODE § 11-3-25, however, does not contain such an exception. Section 11-3-25 (1967) nowhere says that a reviewing circuit court may reject unrebutted expert testimony (*i.e.*, unchallenged by effective cross-examination or by a competing expert) based on a judge's concept of "reason and common sense." If Alcan's expert report were somehow flawed—even though it was not—it was incumbent upon the Tax Department to put that on the record. Moreover, Judge Evans later acknowledged that "I don't profess to know the intricacies of appraisal . . ."<sup>52</sup> Thus, Judge Evans admittedly had no basis to find that Alcan's expert report was invalid as contrary to "reason and common sense."<sup>53</sup>

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<sup>50</sup> See Cir. Ct. Hr'g Tr. at 23:20-24:19; A.R. 362-63.

<sup>51</sup> *Id.* at 24:19-23; A.R. 363.

<sup>52</sup> Cir. Ct. Hr'g Tr. at 55:1-3; A.R. 394.

<sup>53</sup> At the Circuit Court hearing, Alcan's counsel pointed out that the Tax Department's argument against the reasonableness of Alcan's functional obsolescence reduction had been answered by Alcan's expert at the Board hearing. (*See* Cir. Ct. Hr'g Tr. at 46:17-48:16, 50:1-52:16; A.R. 385-87, 389-91.) Furthermore, the Tax Department's argument was that Alcan's plantwide deduction for functional obsolescence was not reasonable. The Tax Department's 10% obsolescence reduction, however, also was plantwide. The difference was that Alcan provided record evidence for its reduction while the Tax Department did not. Thus, even if there were a "reason and common sense" exception to review of the

Rather than look for a reason *not* in the record to reject Alcan's expert report, the Circuit Court was to evaluate the Tax Department's expert evidence in light of Alcan's expert evidence. Again, § 11-3-25 (1967) "expressly limit[s] review to the record made before the county commission," so a circuit court's review "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."<sup>54</sup> When the Circuit Court confronted a hearing record without substantial evidence from the Tax Department, the only ruling it could make consistent with the applicable statutory scheme was to uphold Alcan's valuation.

The Circuit Court, then, erred as a matter of law, when it found that the Tax Department's valuation was supported by substantial evidence in the record of the Board hearing.<sup>55</sup> And, the Circuit Court likewise erred as a matter of law when it failed to uphold Alcan's valuation.<sup>56</sup>

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Board hearing record, the Circuit Court no basis to find that the Duff & Phelps report was unreasonable or contrary to common sense.

<sup>54</sup> *American Bituminous*, 208 W. Va. at 254, 539 S.E.2d at 761 (citations omitted).

<sup>55</sup> Specifically with respect to the Tax Department's lack of record evidence, the Circuit Court erred as a matter of law in finding that

1. The record contains evidence that the Tax Department properly trended Alcan's acquisition costs;
2. The record contains evidence that the Tax Department properly accounted for depreciation as a result of the actual, above-normal physical deterioration of Alcan's machinery and equipment; and
3. The record contains evidence of a basis for the Tax Department's 10% overall reduction in value for obsolescence.

(Cir. Ct. Order, Conclusions of Law ¶¶ 7-16; A.R. 427-29.)

<sup>56</sup> Specifically with respect to Alcan's evidence, the Circuit Court erred as a matter of law in failing to find that

1. The only record evidence of properly trending Alcan's acquisition costs was presented by Alcan;
2. The only record evidence of properly accounting for depreciation as a result of the actual, above-normal physical deterioration of Alcan's machinery and equipment was presented by Alcan; and

## CONCLUSION

In this case, the Tax Department failed to support its valuation in the one forum that mattered: the hearing before the Jackson County Board of Equalization and Review. No amount of post-hearing rationalization during Alcan's appeal to the Jackson County Circuit Court could remedy the Tax Department's failure to provide "substantial evidence" of its valuation on the record. Accordingly, the Circuit Court erred as a matter of law in upholding the Tax Department's valuation and rejecting Alcan's valuation of its industrial personal property, which was the only valuation supported on the record.

Accordingly, Petitioner, Alcan Rolled Products-Ravenswood, LLC, respectfully requests that the Court **VACATE** the order of the Circuit Court of Jackson County, and **REMAND** the case with instructions to enter an order correcting the assessment of Petitioner's industrial personal property for the 2010 tax year and fixing the property at its true and actual value of \$41,000,656 as of July 1, 2009, as determined by Alcan's expert appraisal.

Respectfully submitted,  
**ALCAN ROLLED PRODUCTS-  
RAVENSWOOD, LLC,**  
By Counsel



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3. The only record evidence of properly accounting for functional obsolescence was presented by Alcan.

(Cir. Ct. Order, Conclusions of Law ¶ 17; A.R. 429.)

## CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2012, true and accurate copies of the foregoing *Petitioner's Brief* were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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