FILED
JUN 21 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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)

PETITIONER'S REPLY BRIEF

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STATEMENT OF THE CASE

This is the reply brief in a property tax valuation case in which the sole issue is whether the Property Tax Division of the State Tax Department (the "Tax Department"), having chosen the cost approach to value the industrial personal property of Alcan Rolled Products-Ravenswood, LLC[1] ("Alcan"), supported its valuation with substantial evidence before the Jackson County Board of Equalization and Review (the "Board"). Because the Tax Department failed to present evidence supporting its valuation at the Board hearing, the Board's affirmation of the 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. Nothing in the Tax Department's Response Brief provides any justification for the Tax Department's failure to put substantial evidence of its valuation on the record.

ARGUMENT

I. The Tax Department Has No Record Evidence of Its Functional Obsolescence Reduction.

> *Admittedly, Mr. Amburgey did not testify at the Board of Equalization and Review hearing to explain how he calculated the reduction in value of $10,328,976* [*exactly 10%*] *for functional obsolescence.*
>
> (Tax Comm'r's Resp. Br. at 26.[2])

In this case, the Tax Department put forth no evidence to support its flat 10% reduction for functional obsolescence. No amount of attempted reverse-engineering by the Tax Department can remedy this failure.[3]

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[1] 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."

[2] (*See also id.* at 19 ("Mr. Amburgey did not appear or testify at the Board of Equalization and Review hearing.").)

First, the Tax Department is incorrect that simply providing a timeline—*i.e.*, that stating Purchasing Division Director Amburgey gave a 10% functional obsolescence reduction *after* meeting with Alcan representatives in December 2009 (Tax Comm'r's Resp. Br. at 19, 26)—is "substantial evidence" of the basis for the reduction. Such a timeline provides no information about *how* Mr. Amburgey actually calculated the reduction; it fails to explain if he calculated the reduction at all or just arbitrarily picked a round number. Clearly, the Tax Department did not base its functional obsolescence reduction on any information provided by Alcan. Alcan presented to the Tax Department essentially the same information it presented through expert testimony at the Board hearing, and Alcan's expert appraisal included a much greater functional obsolescence reduction. Alcan did not give any information to the Tax Department that could have formed the basis for a flat 10% functional obsolescence reduction.

Second, there is no connection between (i) the hearing testimony of an Alcan representative that the number of products produced has been reduced by 10 to 15% and (ii) the Tax Department's 10% functional obsolescence reduction. (*See id.* at 20-21.) The Tax Department first heard that factual testimony at the Board hearing, which was necessarily after it determined its 10% functional obsolescence reduction. (*See* Pet'r's Br. at 15 n.48.) So the Tax Department could not possibly have relied on that testimony in calculating its functional obsolescence reduction. Moreover, Alcan's witness testified about only the *number* of "products we don't make any more." (BER Hr'g Tr. 38:20-24; A.R. 57.) The witness was clear that he was

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[3] Contrary to the Tax Department's assertion, it did not "[meet] its burden by putting the property tax appraisal into the record." (*Id.* at 12.) Case law is clear that "once a taxpayer makes a showing that tax appraisals are erroneous, the Assessor is then bound by law to rebut the taxpayer's evidence." *Mountain Am., LLC v. Huffman*, 224 W. Va. 669, 686 n.23, 687 S.E.2d 768, 785 n.23 (2009). In *Mountain America*, the Court found that the taxpayer "did not offer any evidence of the true and actual value of [its] property," and so there was no evidence for the assessor to rebut. *Id.* at 687, 687 S.E.2d at 786. In this case, in contrast, Alcan presented extensive expert evidence of the true and actual value of its property. Thus, the Tax Department was "bound by law to rebut [that] evidence."

not talking about the percentage of reduced revenue. "The revenue may be different. I do not know the answer to that." (*Id.* 49:4-8; A.R. 68.) Thus, the Tax Department can find no support for its functional obsolescence reduction in Alcan's Board hearing testimony.

Third, the bare fact that the Tax Department gave an unexplained reduction for functional obsolescence does not mean that the "Tax Department has complied with the mandates from the legislative rules in applying the cost approach to value since it considered functional obsolescence in valuing Alcan's machinery and equipment." (Tax Comm'r's Resp. Br. at 27; *see id.* at 24-27 (discussing the recent *Century Aluminum* decision).) If that were the case, any time the Tax Department provides any reduction, regardless of the amount, it could be said to have complied with its statutory and regulatory requirements. Without record evidence of the basis for its functional obsolescence reduction, however, the Tax Department has failed to provide "substantial evidence" of how it arrived at the "true and actual value" of Alcan's industrial personal property.

Alcan provided the ***only*** record evidence of the proper reduction for functional obsolescence. Alcan presented a full written report and explanatory expert testimony at the Board hearing. (*See* Pet'r's Br. at 12-13.) Alcan presented precisely the evidence required of a protesting taxpayer. (*See id.* at 12-13 & n.39.) At the hearing, Alcan's expert rebutted the Tax Department's criticism of Alcan's evidence as mistaken. (*See id.* at 13 n.40.[4]) Moreover, the Tax Department's criticism came from its counsel, not an expert witness, and, thus, is not

[4] (*See* BER Hr'g Tr. 121:1-7; A.R. 140 (Alcan's expert explaining that the Tax Department's counsel was improperly mixing valuation concepts); *id.* 138:23-139:12; A.R. 157-58 (Alcan's expert 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).)

evidence.[5] When the Tax Department repeats its mistaken criticism in its Response Brief (at 21-23), that faulty reasoning does not somehow become valid. In this case, the Tax Department provided no record rebuttal of Alcan's evidence.

II. The Tax Department Also Provided No Record Evidence of Calculating Replacement Cost or a Deduction for Physical Deterioration.

> *Ms. Brown testified that she employed Column 18 from the Trend Table to calculate Replacement Cost New and Column 6 from the Percent Good Table to calculate depreciation [for physical deterioration].*
>
> (Tax Comm'r's Resp. Br. at 14.[6])

Testimony by the Tax Department's representative that she "appraised" Alcan's property by applying a formula using factors in tables is not substantial evidence of any appraisal methodology.[7]

Alcan's evidence was that the Tax Department's trend table was not derived from Marshall & Swift, as the Tax Department claimed it was.[8] The Tax Department's sole witness provided no response to this criticism. Alcan's expert utilized Marshall & Switft trend factors, and there is no record evidence of the true source of the Tax Department's trend factors, regardless of how the Tax Department classified Alcan's business. Thus, the Tax Department's

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[5] *See W. Va. Fire & Cas. Co. v. Mathews*, 209 W. Va. 107, 112 n.5, 543 S.E.2d 664, 669 n.5 (2000) (*per curiam*) ("Statements made by lawyers do not constitute evidence in a case.").

[6] (*See also id.* at 4 (same).)

[7] The Tax Department asserts that "[o]n cross examination, Ms. Brown explained the general use of the trend tables in greater detail." (Tax Comm'r's Resp. Br. at 2; *see also id.* at 13 ("Ms. Brown explained in great detail how she calculated the values for Alcan's machinery and equipment.").) The record reflects, however, that the Tax Department's witness was confused about its formulaic process for trending acquisition cost to replacement cost. (*See* BER Hr'g Tr. 12:10-13:3; A.R. 31-32.) When questioned on how the Tax Department classified Alcan's business so as to apply the proper trend factors, Ms. Brown admitted, "I don't know all of what it entails." (BER Hr'g Tr. 13:8-13; A.R. 32.) She just asserted without support that "I know this is the proper one for this account." (*Id.*)

[8] (*See* BER Hr'g Tr. 89:17-24; A.R. 108 (Alcan's expert testified that he was unable to determine the source of the Tax Department's trend table); *see also* Pet'r's Br. at 14.)

inscrutable classification argument (*see* Tax Comm'r's Resp. Br. at 14-16) remains a red herring (*see* Pet'r's Br. at 6-7 n.19, 14 n.42).

And Alcan's evidence was that the Tax Department misused Marshall & Swift's depreciation table by treating the factors as absolutes and not adjusting for actual deterioration.[9] Again, the Tax Department's sole witness had no response to this criticism. The Tax Department failed to explain on the record why it purposefully misuses a depreciation table as part of its formula rather than appraising the actual machinery and equipment at the taxpayer's plant.[10]

In sum, the Tax Department's "evidence" of calculating replacement cost and a deduction for physical deterioration consisted solely of statements that it applied a formula, which its witness could not support in response to Alcan's expert's criticism.[11] Such *ipse dixit* "evidence" is no evidence at all.

CONCLUSION

As Alcan established in its Petitioner's Brief, the Tax Department failed to support its valuation in the one forum that mattered: the hearing before the Jackson County

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[9] (*See* BER Hr'g Tr. 94:15-98:5; A.R. 113-17; *see also* Pet'r's Br. at 14-15.)

[10] It is irrelevant that "Marshall & Swift does not mandate . . . a depreciation reduction [below an arbitrary floor of 20% good]," as the Tax Department contends. (Tax Comm'r's Resp. Br. at 18.) Rather, the relevant issue is that Marshall & Swift's depreciation factors are not meant to be used as absolutes—as the Tax Department incorrectly does—but must be adjusted to account for above-normal deterioration (or below-normal deterioration, if that were the case). The Tax Department failed to account for the actual, above-normal deterioration of the machinery and equipment in Alcan's plant. (*See* Pet'r's Br. at 14-15.)

The Tax Department observes that "Ms. Brown conducted a physical inspection of the machinery and equipment located in the Alcan Plant," as if that bolsters the Tax Department's position. (Tax Comm'r's Resp. Br. at 7.) It does not. Alcan established at the hearing that Ms. Brown's inspection had *absolutely no effect* on her application of the Tax Department's formula. (*See* BER Hr'g Tr. 18:3-25; A.R. 37; *see also* Pet'r's Br. at 14-15 & n.44.)

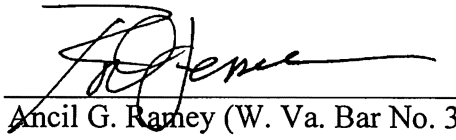
[11] Contrary to the Tax Department's assertion, the "evidentiary record" does not "demonstrate[] a difference of opinion regarding the selection of the trend tables and depreciation tables employed by the Tax Department and the appraisers for Duff & Phelps." (Tax Comm'r's Resp. Br. at 18.) In this case, Alcan's expert presented record evidence, while the Tax Department's witness presented none.

Board of Equalization and Review. In its Response Brief, the Tax Department continues its post-hearing rationalization. But, such post-hearing rationalization does not cure the Tax Department's failure to provide "substantial evidence" of its valuation on the record.

Accordingly, for the reasons stated in its Petitioner's Brief and above, 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.

Respectfully submitted,

ALCAN ROLLED PRODUCTS-RAVENSWOOD, LLC,
By Counsel



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I hereby certify that on June 21, 2012, true and accurate copies of the foregoing *Petitioner's Reply 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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