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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

TAX COMMISSIONER'S RESPONSE BRIEF

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TAX COMMISSIONER'S RESPONSE BRIEF

I.
STATEMENT OF THE CASE

Every tax year stands separately. Consequently, the facts of every year are critical to the valuations approved by the county commissions sitting as boards of equalization and review as well as the courts. The case *sub judice* presents three issues for the Court. First, Alcan questioned the selection of trend tables utilized by the Tax Department in calculating the Replacement Cost New for Alcan's industrial personal property. Specifically, Alcan has only objected to the values calculated by the Property Tax Division for the machinery and equipment. Second, Alcan challenged the selection and the application of depreciation tables utilized by the Tax Department. Alcan depreciated the value of the 30 million pound stretcher--the key piece of industrial equipment--down

to salvage value for *ad valorem* tax purposes even though the stretcher is currently in use. Third, Alcan requested a reduction in value of $ 35,357,721 for functional obsolescence while the Property Tax Division allowed a reduction of $10,328,976 for the 2010 tax year.

Ms. Cynthia Brown, Senior Appraiser for the Property Tax Division, explained 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, Appendix Record 27 (hereinafter A.R. ___). According to Ms. Brown's testimony, the Tax Department employed the cost approach to value Alcan's industrial personal property. *See* A.R. 30. 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* A.R. 28, 30-31. 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* A.R. 28. On cross-examination, Ms. Brown explained the general use of the trend tables in greater detail. *See* A.R. 31-32. 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* A.R. 28, 32-33.

Ms. Brown testified that the Tax Department employed the trend and depreciation tables from the Marshall and Swift Guide. *See* A.R. 32-33. 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). 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

A.R. 207, Duff and Phelps Report.

Furthermore, Mr. Mark Simzyk, a Director of Duff and Phelps, testified that Duff and Phelps utilized the trend tables for Metal Working found in the Marshall and Swift Guide. *See* A.R. 111-112. Mr. Simzyk stated that both the Tax Department and Duff and Phelps utilized trend tables from Marshall and Swift. *See* A.R. 112.

Ms. Brown testified that the Tax Department utilized the North American Industry Classification System (NAICS) as an index[1] to select the proper Marshall and Swift trend and depreciation tables. *See* A.R. 31. The Tax Department classified the Alcan plant as being in the aluminum industry or NAICS code 3313. *See* A.R. 32. 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* A.R. 243-265, *Petition For Appeal* at Exhibit B.[2] A simple

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[1]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.

[2]The Amburgey letter was included in the *Petition For Appeal* filed by Alcan with the Circuit Court of Jackson County. Based upon further review of the Certification by the Jackson County Clerk of the record before the Jackson County Commission sitting as a Board of Equalization and Review, the Amburgey letter **was not** admitted into the record at the Board of Equalization and Review Hearing. *See* A.R 19; *see also Documents In Appendix* attached to Alcan's Supreme Court Brief. The certified record from the Board of Equalization and Review Hearing runs through Page 242 in the Appendix Record while the Amburgey letter is found in Pages 243-265 in the Appendix Record. However, both Mr. Simzyk and Ms. Brown testified about the NAICS index and the trend

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." 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* Testimony of Ms. Brown; A.R. 31; *see* also Trend and Depreciation Tables, A.R. 219, 224.

However, Mr. Simzyk stated that he was unable to determine the trend and depreciation tables utilized by the Tax Department. *See* A.R. 108. 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* A.R. 110. Mr. Simzyk classified Alcan within the "Machinery Manufacturing" category under the sub-group of "Metalworking Machinery Manufacturing." 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* A.R. 243-265, Exhibit B in *Petition For Appeal*. On the other hand, the Tax Department clearly classified Alcan as heavy industry not as "Machinery Manufacturing." The Tax Department utilized the same

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and depreciation tables extensively at the Board of Equalization and Review Hearing. At the Circuit Court, the Tax Department cited frequently to the trend tables and depreciation tables found in the Amburgey letter (A.R. 247, 252, respectively) which were not in the record before the Board of Equalization and Review. The exact same tables **were included** in the record at the February 16, 2010, Hearing and are found in Appendices A & B of the Duff & Phelps Report located in Board of Equalization and Review Hearing Petitioner's Exhibits 4 and 5. *See* A.R. 219, 224, respectively. The trend and depreciation tables are included in the Appendix Record twice; the first time in evidence at the Board of Equalization and Review Hearing and the second time not in evidence. Counsel for the Tax Department apologizes for his mistake.

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.

Ms. Brown testified that the Tax Department depreciated the Alcan machinery and equipment to a floor of 80 % depreciated or 20 % good. *See* A.R. 33-34. 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.**

A.R. 44-45 (emphasis added).

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* A.R. 115. 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* A.R. 117.

Both the Tax Department and Alcan employed tables to calculate depreciation for the equipment. The two parties have calculated different amounts for depreciation for the Ravenswood plant.

	Tax Department	Alcan
Replacement Cost New	$ 252, 965,487	$ 240, 773, 142
Replacement Cost New Less Physical Deterioration	< 103,289,762>	< 76,358,377>
Reduction Allowed (Claimed*) for Physical Deterioration	$ 149,675,725	$ 164,414,765 *
Additional Depreciation Claimed by Alcan		$ 14,739, 040

Source : A.R. 213, Appraisal Report prepared by Duff & Phelps dated February 12, 2010.

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. 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* A.R. 164-165, Property Tax Returns in State's Exhibit 1.

Ms. Brown testified that the Tax Department allowed a reduction of 10 % of the value of all machinery and equipment based upon functional obsolescence. *See* A.R. 29, 38. The deduction for functional obsolescence was the result of a meeting between the executives for Alcan and the Tax

Department in December 2009. *See* A.R. 28, 30. Ms. Brown testified that Mr. Jeff Amburgey, the Director for the Property Tax Division, calculated the reduction of $10,328,976 in functional obsolescence based upon the meeting with Alcan officials, the attorneys for Alcan, and a review of the information in the Duff & Phelps Report as provided by Alcan. Mr. Amburgey did not appear at the Board of Equalization and Review hearing to explain how he calculated the reduction in value.

County Commissioner Stephens pointed out the Tax Department's reduction in value for functional obsolescence also reflected the decrease in output of the stretcher until it can be repaired. *See* A.R. 64.

In addition, the Circuit Court found that Alcan did not request a reduction in value for economic obsolescence for the 2010 tax year. *See* A.R. 408; *see* also A.R. 68-69 and 91. The Tax Department entered Exhibit 1 into the record before the Board of equalization and Review. Otherwise, Alcan has accurately reflected the procedural history of this case.

II.

SUMMARY OF ARGUMENT

The Property Tax Division of the West Virginia State Tax Department valued Alcan's industrial personal property of *ad valorem* tax purposes for the 2010 tax year. Ms. Cynthia Brown, Senior Appraiser, performed the valuation. Ms. Brown began with the acquisition cost of the machinery and equipment, trended the acquisition cost to determine the replacement cost new, and depreciated the value to account for the physical deterioration of the equipment. Primarily, Ms. Brown relied on the trend and depreciation schedules utilized by the Tax Department which are based on the tables found in the Marshall Swift Valuation Service. In addition, Ms. Brown conducted a physical inspection of the machinery and equipment located in the Alcan Plant.

Subsequently, the Property Tax Division accounted for physical deterioration through the use of the Marshall Swift depreciation tables. Alcan altered the standard depreciation table and reduced the depreciation levels to 12% good. Alcan decreased the depreciation below normal floor of 20% good and continued the depreciation down to salvage value even though the machinery is still in use and, consequently, does not meet the general definition of salvage value or scrap value.

In December of 2009, Mr. Jeff Amburgey, Director of the Property Tax Division, Ms. Brown, and one additional Property Tax Division employee, met with a delegation of Alcan officials, and their counsel. Alcan provided the appraisal report prepared by Duff & Phelps to the Tax Department for review. Based upon the appraisal report and the December 2009 meeting with the Alcan delegation, Mr. Amburgey allowed a deduction of $10,328,976 for functional obsolescence. Mr. Amburgey did not appear at the Board of Equalization and Review hearing to explain the decision-making process employed in calculating the amount of functional obsolescence. However, the record clearly indicates that the reduction for functional obsolescence was based upon the information contained in the Duff & Phelps report and the meeting with the Alcan delegation.

The Tax Department has considered reductions in the value of Alcan's machinery and equipment for physical deterioration and functional obsolescence as required under the cost approach to value. As noted above, Alcan did not request a reduction in value for economic obsolescence.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Tax Department requests Rule 20 Oral Argument in this case because it involves an issue of fundamental importance regarding the valuation of industrial personal property for *ad valorem* tax purposes. Furthermore, a memorandum decision is not appropriate because Alcan seeks the reversal of the Circuit Court decision. *See* Rev. R.A.P. 21(d).

IV.

STANDARD OF REVIEW

The standard of review on appeal is well-settled. Legal questions before the Supreme Court are subject to *de novo* review. *See* Syl. Pt. 1, *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250, 539 S.E.2d 757 (2000). On the other hand, factual findings made by the Tax Department or any other administrative agency receive deference. *See* Syl. pt. 2, *CB&T Operations Co., Inc. v. Tax Commissioner of State*, 211 W. Va. 198, 564 S.E.2d 408 (2002). Property tax assessments are presumed to be correct and will not be overturned if supported by substantial evidence on the record. *See* Syl. Pt. 4 *In re Maple Meadow Mining Company*, 191 W. Va. 519, 446 S.E.2d 912 (1994) (" 'An assessment made by a board of review and equalization and approved by the circuit court will not be reversed when supported by substantial evidence unless plainly wrong.'" Syl. pt. 1, *West Penn Power Co. v. Board of Review and Equalization*, 112 W. Va. 442, 164 S.E. 862 (1932)." Syl. pt. 3, *Western Pocahontas Properties Ltd. v. County Commission of Wetzel County*, 189 W. Va. 322, 431 S.E.2d 661 (1993)).

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

IV.

ARGUMENT

THE TAX DEPARTMENT PLACED SUBSTANTIAL EVIDENCE IN THE RECORD BEFORE THE JACKSON COUNTY COMMISSION SITTING AS A BOARD OF EQUALIZATION AND REVIEW.

Alcan raises three sub-arguments regarding the evidentiary record before the Jackson County Commission sitting as a Board of Equalization and Review. Actually, the sub-arguments boil down to two fundamental questions regarding the state of evidentiary record. Did the Tax Department support its valuations with substantial evidence before the Board of Equalization and Review ? Did Alcan rebut the Tax Department's case with clear and convincing evidence ? The answer to the first question is yes and the second is no.

1. The Tax Department's selection of trend and depreciation tables is supported by substantial evidence in the record.

The Tax Department placed its appraisal of Alcan's industrial personal property into the record before the Board of Equalization and Review. *See* A.R. 163-198, Tax Department's Exhibit 1 The Tax Department's Exhibit 1 includes the transmittal letter to Alcan for the 2010 tax year; the revised tax return valuing the machinery and equipment at $ 92,960,786; the revised work sheets; the original tax return valuing the machinery and equipment at $ 103,289,762; the original work sheet; additional property information sheet received as a result of the December 21, 2009 meeting

with Alcan representatives and counsel; Administrative Notices 2010-13, 2010-14 and 2010-15; as well as three sets of legislative rules related to the valuation of industrial personal property. Administrative Notice 2010-13 outlines the Tax Department's three approaches to valuation which are mandated by the legislative rules and specifically identifies the Marshall Valuation Service as the source for the trend and depreciation tables to be used in valuing industrial personal property. *See* A.R. 177-79.

Alcan argues that the Tax Department failed to place evidence in the record supporting the valuation of its property and relies on *Pocahontas Land, infra*. *See* Alcan's Supreme Court Brief at P. 11. However, in *Pocahontas Land* this Court ruled :

> It is obvious that where a taxpayer protests his assessment before a board, he bears the burden of demonstrating by clear and convincing evidence that his assessment is erroneous. Once this is done, it is incumbent upon the taxing authority to place some evidence in the record to show why its assessment is correct. **This, of course, can be done by entering the official appraisement of the State Tax Commissioner as we suggested in *Tug Valley*.**

In Re Tax Assessments Against Pocahontas Land Co., 172 W. Va. 53 at 61, 303 S.E.2d 691 at 699 (1983) (emphasis added). In *Tug Valley Recovery Center, Inc., v. Mingo County Commission, etc., et al.*, 164 W. Va. 94 at 109, 261 S.E. 2d 165 at 173 (1979) the Court stated "and [t]hat appraisal is to serve as the basis for determining true and actual value for all assessment purposes." In addition, Alcan's reliance on *Mountain America, LLC., et al., v. Huffman*, 224 W. Va. 669, 687 S.E.2d 768 (2009) is erroneous. The Court affirmed the property valuations at issue based upon the testimony of Assessor Huffman at the Board of Equalization and Review hearing as well as other evidence on the record. *See Mountain America* , *Id.* 224 W. Va. at 676, 687 S.E.2d at 775.

Contrary to Alcan's arguments before the Circuit Court, the burden does not shift from the taxpayer to the Tax Department. *See* A.R. 365. The Court addressed the burden of proof in the case of *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W. Va. 14 at 29, 672 S.E.2d 150 at 165 (2008).

Moreover,

> [a]s a general matter, the burden of proof consists of two components: burden of production and burden of persuasion. The burden of persuasion requires the party upon whom it is placed, to convince the trier of fact ... on a given issue. When a party has the burden of persuasion on an issue, that burden does not shift. The burden of production merely requires a party to present some evidence to rebut evidence proffered by the party having the burden of persuasion. The term burden of production is also used to refer to either party presenting some evidence on a matter.
>
> *Mayhew v. Mayhew,* 205 W. Va. 490, 497 n. 15, 519 S.E.2d 188, 195 n. 15 (1999) (citations omitted). *Cf. id.,* 205 W. Va. at 498 n. 18, 519 S.E.2d at 196 n. 18 ("As a general matter, our cases have permitted the burden of persuasion to shift to the defendant when the defendant alleges an affirmative defense." (citations omitted)).
>
> Thus, as the party seeking relief from the allegedly erroneous tax assessment, the Foundation bears the burden of proving its entitlement to relief. *See Boury,* 156 W. Va. at 52, 190 S.E.2d at 18. To sustain this burden, the Foundation must present clear and convincing evidence. The burden of persuasion rests with the Foundation to prove that its tax assessment was erroneous; it does not lie with the Assessor or the Commission nor does it shift thereto.

In re Tax Assessment of Foster Foundation's Woodlands Retirement Community, 223 W. Va. 14 at 29, 672 S.E.2d 150 at 165 (2008).

The Tax Department met its burden by putting the property tax appraisal into the record. The record includes the Tax Department's Exhibit 1 which contains the assessment that was based

on information provided by Alcan to the Tax Department. However, the Tax Department went far beyond that point and provided testimony by Ms. Cynthia Brown, Senior Appraiser in the Property Tax Division, to explain how she valued the machinery and equipment. As noted above, Ms. Brown testified that she began with the acquisition cost provided by Alcan, trended the values up to calculate Replacement Cost New, and depreciated the values in order to account for physical wear and tear on the machinery as required by the legislative rules. *See* A.R. 28, 30 (direct testimony) and A.R. 30, 33 (cross-examination).

Alcan has objected that Ms. Brown could provide no evidence about the origin of the formula. *See* Alcan's Supreme Court Brief at P. 13. As noted above, Ms. Brown explained in great detail how she calculated the values for Alcan's machinery and equipment. On direct testimony Ms. Brown stated that she based her work upon the cost method contained in Administrative Notice 2010-13. *See* A.R. 30. The formula is set forth as an equation on the second page of the administrative notice. *See* A.R. 178. Furthermore, Ms. Brown verbally explained the formula that she followed in valuing Alcan's machinery and equipment and identified Marshall Swift as the source of the trend and depreciation tables. *See* A.R. 28-30 (direct testimony and cross-examination). In addition, Alcan's expert witness, Mr. Simzyk, testified that both the Tax Department and Duff & Phelps used tables from the Marshall Swift Valuation Service. *See* A.R. 111-112. Ms. Brown testified that she followed the legislative rules in valuing Alcan's industrial personal property. *See* A.R.35 (questioning by Assessor Thomas).[3]

Mr. Simzyk, Alcan's expert witness, challenged the selection of the trend and depreciation tables employed by the Tax Department. Both Alcan and the Tax Department began with the same

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[3]See A.R. 307-308, Tax Department's Circuit Court Brief.

acquisition cost for the existing equipment. See A.R. 107-108. Both the Tax Department and Alcan calculated Replacement Cost New based on trend tables found in Marshall and Swift. However, the Tax Department calculated a Replacement Cost New at $252,965,487 while Alcan calculated a figure of $240,773,142. *See* A.R. 213. Mr. Simzyk stated that both the Tax Department and Duff and Phelps utilized trend tables from Marshall and Swift. *See* A.R. 112. Since both parties began at the same starting point--the same acquisition costs--the difference 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* A.R. 31. The Tax Department classified the Alcan plant as being in the aluminum industry or NAICS code 3313. *See* A.R. 32. 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* A.R 243-265, *Petition For Appeal* at Exhibit B. A 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." 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. See A.R. 31-32. Ms. Brown added that she classified the Alcan plant under the NAICS Code of "3313. It's aluminum, Alcan." *See* A.R. 32. The two tables are set forth in Exhibit

B of the *Petition For Appeal* and Alcan's Exhibits 3 and 4 (Appendices A and B to the Duff & Phelps Report); A.R. 219, 224;[4]

However, Mr. Simzyk, a Director of Duff and Phelps, stated that he was unable to determine the trend and depreciation tables utilized by the Tax Department. *See* A.R. 108. Furthermore, Mr. Mark Simzyk testified that Duff and Phelps utilized the trend tables for Metal Working found in the Marshall and Swift Guide. *See* A.R. 111-112. Finally, 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* A.R. 110. Mr. Simzyk classified Alcan within the "Machinery Manufacturing" category under the sub-group of "Metalworking Machinery Manufacturing." 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* A.R. 243-265, *Exhibit B in Petition For Appeal.* 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 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

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[4]As noted *supra* in Footnote 2, Counsel for the Tax Department cited the Amburgey letter before the Circuit Court as the source of the trend and depreciation tables utilized by Ms. Brown in her valuation. The Amburgey letter was included in the *Petition For Appeal* filed by Alcan at the Circuit Court but was not entered into evidence at the Board of Equalization and Review Hearing. The trend and depreciation tables utilized by Ms. Brown are also found in the Certified record in Appendices A and B, Alcan's Exhibits 4 and 5 from the County Commission hearing. *See* A.R. 219, 224, respectively.

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* A.R. 51. Based upon the testimony of Mr. Hudson, Alcan operates a casting plant. See A.R. 58. Alcan also operates a blast furnace to melt solid aluminum ingots. *Id.* In fact, County Commissioner Stephens commented that Alcan "really is a milling operation[.] . . ." as opposed to Metal Working.[5] See A.R. 159. 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. Consequently, the Property Tax Division applied the correct trend tables in valuing Alcan's machinery and equipment.

In addition, Mr. Simzyk questioned the selection of the depreciation tables employed by the Tax Department. As noted above, Ms. Brown utilized Column 6 from the Percent Good Table to calculate depreciation. See A.R. 31. Ms. Brown testified that the Tax Department depreciated the Alcan machinery and equipment to a floor of 80 % depreciated or 20 % good. *See* A.R. 33-34. The Assessor for Jackson County summarized the philosophy behind employing a floor for depreciation purposes. Assessor Thomas noted that the Tax Department does not reduce the value of machinery and equipment to salvage value as long as the company is using the machinery and equipment in its production operations. Industrial personal property will not be reduced to scrap value until the company actually scraps the machinery and equipment.

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[5]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.

As noted above, Mr. Simzyk reconfigured the depreciation schedule for the appraisal and reduced the depreciation floor to 12 percent good– scrap value. Commissioner Stephens questioned Mr. Simzyk concerning whether salvage value is appropriate for equipment currently being used productively.

> 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.

A.R. 144-145.

It is clear from the transcript that the key piece of equipment is the 30 million pound stretcher at the Alcan plant. 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* A.R. 57-58. The key piece of equipment in the Alcan plant can still manufacture 85% - 90% of

the products that it could manufacture prior to the cracks appearing. The 30 million pound stretcher is not "just kind of dragging along . . . ." Since the 30 million pound stretcher is in use today, the stretcher should not be valued at salvage value on a factual basis.

2. Alcan did not present clear and convincing evidence which would require the Supreme Court to reverse the Circuit Court decision.

The evidentiary record demonstrates 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. The Tax Department compiled an index based upon the North American Industry Classification System (NAICS) which ensures that all facilities within the same industry receive the same treatment for valuation purposes. *See* A.R. 309. All facilities within any given industry will utilize the same trend and depreciation tables under the NAICS Index for *ad valorem* tax purposes. Mr. Simzyk's testimony simply raises the question of whether Alcan is engaged in General Manufacturing or HVAC Equipment Manufacturing or engaged in Alumina and Aluminum Processing. *See* A.R. 310. Commissioner Stephens made the specific observation that Alcan was engaged in a milling operation. *See* A.R. 311.

Furthermore, Mr. Simzyk's testimony only raises a question of whether depreciation should be subject to a floor of 20% as the Tax Department concluded or be reduced to scrap value or 12% as Mr. Simzyk advocates. *See* A.R. 313. Marshall & Swift does allow an appraiser to depreciate an asset below the general floor listed for a particular lifespan. However, Marshall & Swift does not mandate such a reduction. Assessor Thomas argued that the Tax Department will not reduce the value of machinery and equipment to scrap value until the facility removes the equipment from the production. *See* A.R. 313. Clearly, Alcan does not intend to scrap the 30 million pound stretcher or the other equipment located at the Ravenswood Plant. Alcan has authorized capital expenditures

of $35,357,721 to repair the 30 million pound stretcher. *See* A.R. 317-18. None of the equipment placed into service in 1994 and prior qualifies for scrap value or salvage value. Alcan failed to present clear and convincing evidence.

3. The Tax Department's reduction in value for functional obsolescence is supported by substantial evidence.

As noted above, the Tax Department allowed a reduction in value of $ 10,378,926 for all of the machinery and equipment based upon functional obsolescence. Contrary to Alcan's allegations, the Tax Department did not "reverse engineer" a justification for the reduction in value of 10% for functional obsolescence. *See* Alcan's Supreme Court Brief at P. 15, Footnote 48. The record clearly indicates that the reduction was the result of a meeting with Mr. Amburgey, Director of the Property Tax Division, Ms. Brown, one additional Property Tax Division employee, representatives of Alcan, and Alcan's attorneys. The Property Tax Division reviewed the information in the Duff & Phelps Report as provided by Alcan and allowed the reduction in value for functional obsolescence. Mr. Amburgey did not appear or testify at the Board of Equalization and Review Hearing. At the Circuit Court the Tax Department argued that the reduction for functional obsolescence was the result of the meeting between Mr. Amburgey and the Alcan delegation. See A.R. 319, Tax Department's Circuit Court Brief.

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* A.R. 301, Alcan's Circuit Court Brief. Ms. Brown testified that Mr. Amburgey authorized the reduction for functional obsolescence based on the result of the meeting with the Alcan delegation. *See* A.R. 28. In addition, 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 loss of business due to the limitations placed on the 30 million pound stretcher.

> Commissioner Stephens:
> Okay. But really when you come down to it, I mean, I think I understood earlier that on July 1st it's not that the value of that stretcher was zero, it was a reduced value rather than at zero because it still could do 22, 000 pounds.
>
> Mr. Gaard:
> 22,000,000, yeah.
>
> Commissioner Stephens:
> 22,000,000. A little bit off there.
>
> Mr. Jessee:
> And the point that Alcan is making is that their valuation of this property is $41,000,000. Alcan is not asking you to adopt a zero valuation for this property.
>
> 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 - -

A.R. 64.

As Mr. Hudson, the Plant Manager, testified, that 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* A.R. 57. Commissioner Stephens pointed out, Alcan might experience a 10 to 15% reduction in "business" due to cracks in the stretcher and the Tax Department has allowed a deduction of 10% for all equipment. 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. Relying on the representations of the Alcan executives cannot be called "entirely arbitrary."

The Tax Department has allowed a deduction of $10,328,976 in functional obsolescence. Alcan is requesting a deduction of $35,357,721; in effect, Alcan is requesting a dollar for dollar reduction in value of all non-exempt machinery and equipment for the capital expenditures to repair, primarily, the 30 million pound stretch. *See* A.R. 213, Duff & Phelps Report at Table.

Counsel for Alcan clearly stated Alcan's position, "The functional obsolescence deduction is actually the cost to repair." A.R. 65. 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* A.R. 130; and A.R. 212, Duff & Phelps Report in Table. 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* A.R. 143. Alcan argues that the entire $35,357,721in 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 capital expenditure costs to repair the 30 million pound stretch and other equipment. *See* A.R. 213, Duff & Phelps Report. .

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.**

W. Va. Code R. § 110-1P-2.3.8. (emphasis added).

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." *See* A.R. 327, *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.

On the other hand, Alcan has requested a deduction of approximately $ 35,000,000 for the full capital expenditure to repair the stretcher. 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. 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* A.R. 65. 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* A.R. 168, Tax Department's Exhibit 1. The stretcher and all other equipment in the plant has received a deduction for functional obsolescence in the amount of $10,328,976 in functional obsolescence when the 30 million pound stretcher is assessed at less than $ 8.6 million.

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. Functional obsolescence can be determined in several different ways. The taxpayer has chosen to calculate functional obsolescence based upon the capital expenditures necessary to repair the stretcher. The Tax Department allowed a deduction for functional obsolescence based upon Mr. Amburgey's meeting with the Alcan delegation. Mr. Hudson testified that Alcan could no longer produce 10 to 15% of the products due to the cracks in the stretcher. The reduction for functional obsolescence was based on the inability of the 30 million

pound stretcher to perform adequately the purpose for which it was designed. The Tax Department's decision was not arbitrary and capricious as argued by Alcan. The Board of Equalization and Review did not find Mr. Simzyk's testimony that equating functional obsolescence with the cost to cure to be credible in this case.

The Tax Department argued that the cost to cure does not automatically equate to functional obsolescence under the legislative rules. The Tax Department argued to the Board of equalization and review that it defies common sense to reduce the value of machinery and equipment by approximately $35,000,000 when the machinery is only valued at less than $8.6 million. See A.R. 65-66. The Board of Equalization and Review heard the evidence at the February 2009 hearing and rejected the argument that the cost to cure equated with functional obsolescence and affirmed the Tax Department's valuation. The Tax Department argued the same point in the circuit court briefs and at oral arguments before the Circuit Court. *See* A.R. 321, 373-75. Furthermore, Judge Evans rejected the argument that the trier of fact was required to accept opinion testimony if the expert's opinion defied common sense and reason. *See* A.R. 362-63, 366-67. Clearly, the Jackson County Commission sitting as a Board of Equalization and Review concluded that reducing the value of machinery and equipment valued at $ 8.6 million by a reduction of $ 35,000,000 defied common sense.

The West Virginia Supreme Court has stated that judicial review of valuation decisions made by boards of equalization and review receive the same review as decisions made pursuant to the West Virginia Administrative Procedures Act set forth in W. Va. Code § 29A-5-4. 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 In re Assessment Against American Bituminous Power Partners, L.P., 208 W. Va. 250, 254-55, 539 S.E.2d 757, 761-62* also at Footnote

8. *See also* Syl. Pt. 2, *Webb v. W. Va. Board of Medicine*, 212 W. Va. 149, 569 S.E.2d 225 (2002) (The '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." Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996).) Furthermore, the State Tax Commissioner has discretion to choose the most appropriate methodology for valuing property for ad valorem tax purposes. *See American Bituminous*, supra, at Syllabus Point 5.

This very term the Supreme Court affirmed the principle set forth in *American Bituminous, supra,* that the Tax Department must consider the three forms of depreciation– physical deterioration, economic obsolescence, and functional obsolescence– in utilizing the cost approach to value. The Court determined :

> The issue involving functional and economic obsolescence in this case turns on what is meant by the requirement in the West Virginia Code of State Rules § 110-1P2.2.1.1 that the Tax Commissioner's [sic] "will consider" three types of depreciation: physical deterioration, functional obsolescence and economic obsolescence, in utilizing the cost approach to valuation. See ABPP,[*American Bituminous Power Partners*] 208 W. Va. at 257, 539 S.E.2d at 764. The Court has previously held that "[a] cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute." Syl. Pt. 3, Meadows v. Wal–Mart Stores, Inc., 207 W. Va. 203, 530 S.E.2d 676 (1999). Further, [i]t is a well known rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning." State ex rel. Johnson v. Robinson, 162 W. Va. 579, 582, 251 S.E.2d 505, 508 (1979).
>
> This Court must examine the plain wording of the rule that requires the Tax Commissioner to "consider" three types of depreciation: physical deterioration, functional obsolescence and economic obsolescence in utilizing the cost approach. See W. Va. C. S. R. § 110-1P-2.2.1.1. As in ABPP, **the term "'consider' is defined as `to think carefully about, esp[ecially] in order to make a decision; contemplate; reflect on.**" 208 W. Va. at 257, 539 S.E.2d at 764 (quoting Random House Webster 's Unabridged Dictionary 434 (2d

> ed.1998)). **Absent from the legislative rule requiring the Tax Commissioner to consider functional and economic obsolescence is any directive regarding how the Tax Commissioner must go about "considering" economic and functional obsolescence.** See W. Va. C. S. R. § 110-1P-2.2.1.1. **Moreover, West Virginia Code of State Rules § 110-1P-2.2.1.1 does not require the Tax Commissioner to make any adjustment to the valuations made regarding property because of physical deterioration, functional obsolescence and economic obsolescence.** See id.22
>
> **Rather, all that is required of the Tax Commissioner in applying the cost approach to valuation is that the Tax Commissioner will think about or contemplate three types of depreciation**: physical deterioration, functional obsolescence, and economic obsolescence. Id.

Century Aluminum of West Virginia, Inc., v. Jackson County Commission, and Craig A. Griffith, State Tax Commissioner of West Virginia, No. 11-0590 at PP. 21-23, decision filed May 29, 2012 (emphasis added).

In *Century Aluminum* the Court further noted that :

> There was testimony from both Mr. Amburgey and Ms. Brown regarding how they considered functional and economic obsolescence regarding the machinery and equipment, as well as office furniture and fixtures, computer equipment and inventories. Succinctly stated, **<u>there is a lack of substantial evidence to support Century Aluminum's argument that the Tax Department refused to consider functional and economic obsolescence</u>** for categories of assets other than machinery and equipment. **It is apparent that Century Aluminum connotes the word "consider," as used in the rule, with requiring a corresponding reduction in value. Therefore, Century Aluminum maintains that because the Tax Department did not make a downward adjustment for functional and economic obsolescence to other assets, the Tax Department "refused" to consider functional and economic obsolescence. However, West Virginia Code of State Rules § 110-1P-2.2.1.1 does not require a reduction in value for functional or economic obsolescence under the cost approach**. Having reviewed the record before the Court, Century Aluminum has failed to demonstrate by clear and convincing evidence that the Tax Department was wrong in its valuation of Century Aluminum's industrial personal property. See ABPP , 208 W. Va. at 254-55, 539 S.E.2d at 761-62.

Century Aluminum, *supra*, at PP. 23-24.

The Court's decision in *Century Aluminum* applies with equal vigor to Alcan appeal. 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 for functional obsolescence. However, as noted above, Ms. Brown explained that :

> And we also met and gave them– we, meaning Mr. Amburgey and myself, and representatives from Steptoe & Johnson and Alcan had [sic] met in late December and discussed some type of relief at that time. Then Mr. Amburgey came up with a ten percent obsolescence and that's where the $92,000,000 comes in.

A.R. 28. Furthermore, on cross-examination Ms. Brown agreed that Duff & Phelps, the appraisal firm, provided their analysis to the Property Tax Division for review and Alcan representatives explained the problems associated with the plant to the Tax Department at the December 2009 meeting. *See* A.R. 36. The Tax Department argued these very points before the Circuit Court.[6] The record indicates that Alcan met with the Tax Department twice – once in December of 2009 and once earlier in the fall. *See* A.R. 36.

The Tax Department did more than simply think seriously about, contemplate, or reflect on a reduction for functional obsolescence; the Tax Department authorized the reduction. As a result of the December 2009 meeting with Mr. Amburgey, the Tax Department reduced the value of all

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[6] The Tax Department argued in the Circuit Court brief that the reduction in value for functional obsolescence was based on the December 2009 meeting between Mr. Amburgey and the representatives from Alcan. The brief contains the same citations to the hearing transcript as set forth above; although, Ms. Brown's testimony was not specifically quoted in the brief. *See* A.R. 319. The Tax Department stated that reliance on the representations of Alcan officials was not arbitrary. *See* A.R. 319-320. In addition, at the oral argument in Circuit Court, counsel for the Tax Department reiterated the point that the reduction for functional obsolescence was the result of the meeting with Mr. Amburgey in December 2009. *See* A.R. 376.

machinery and equipment by 10% for functional obsolescence.[7] 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.

V.

CONCLUSION

Alcan has failed to demonstrate by clear and convincing evidence that the Tax Department's selection of trend and depreciation tables was clearly wrong or arbitrary and capricious. The Board of Equalization and Review found Ms. Brown's testimony regarding the selection of the tables to be more credible than Mr. Simzyk's testimony. In addition, Ms. Brown's testimony was supported by Administrative Notice 2010-13 and the Marshall Swift tables which Alcan put into the record in the Duff & Phelps Report. Mr. Simzyk admitted that the Tax Department utilized the tables from Marshall Swift. The Tax Department's reduction for functional obsolescence was the result of the meeting in December 2009 with the Alcan delegation and based upon the information provided by Alcan to the Property Tax Division. The Tax Department's valuation is supported by a rational basis. Alcan failed to support its argument by clear and convincing evidence as required by law.

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[7]As noted above, Alcan did not request a reduction for economic obsolescence for the 2010 tax year. *See* A.R. 408; Circuit Court Order at Finding of Fact 41; *see* also A.R. 68-69, 91; Transcript of Board of Equalization and Review Hearing.

The Board of Equalization and Review affirmed the Tax Department's valuation. The Circuit Court found ample evidence in the record to affirm the Board's decision. The Supreme Court should affirm Judge Evans' opinion.

Respectfully submitted,

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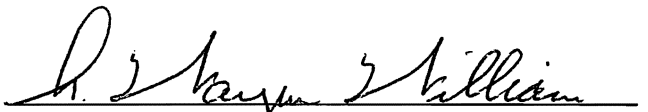

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

CERTIFICATE OF SERVICE

I, L. Wayne Williams, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing *Tax Commissioner's Response Brief* was served upon all parties to this case, by United States Mail, first-class postage prepaid, addressed to their respective counsel, on this the 31st day of May, 2012.

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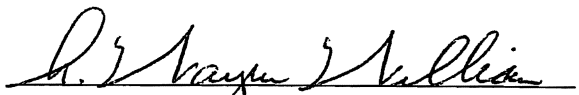

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