

**No. 11- 0590 - Century Aluminum of West Virginia, Inc.
v. Jackson County Commission, *et al.***

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Ketchum, C.J., dissenting:

I respectfully dissent because the Tax Commissioner did not follow his own appraisal regulations and policies. Specifically, the Commissioner did not: (1) properly consider the element of depreciation called “obsolescence” when valuing Century’s inventory, and (2) arbitrarily placed a 50% cap on obsolescence when valuing Century’s machinery and equipment. As a result, the Commissioner did not arrive at the property’s “true and actual value” as required by *W.Va. Code*, 11-3-1.

The regulations governing the valuation of commercial and industrial real and personal property for *ad valorem* tax purposes are found in CSR § 110-1P-1, *et. seq.* In arriving at fair market value, the Tax Commissioner may use the cost, income, or market appraisal approach in establishing value. However, the cost approach is the preferred approach when valuing machinery, equipment, furniture, *etc.* CSR § 110-1P-2.5.3.2.¹

¹ CSR § 110-1P-2.5.3.2., states, in part, that, of the three approaches to value, “the cost approach may be most consistently applied to machinery, equipment, furniture, fixtures, and leasehold improvements because of the availability of data.”

In using the cost approach, the Commissioner is required to first determine the replacement cost of the item being appraised. The regulations next require that physical depreciation be deducted from replacement costs, as well as, two other types of depreciation called “function obsolescence” and “economic or external obsolescence.” *See*, CSR § 110-1P-2.3.8. (functional obsolescence) and 2.3.5. (economic obsolescence) *See also*, *Tax Department’s Administrative Notice*, 2010-13.

Physical depreciation is caused by use. Its deduction alone will not produce an accurate indication of market value. Tax appraisers must, and are required, to also consider loss in value due to obsolescence factors.

Functional obsolescence relates to inadequacies which render an item obsolete and concerns the inability of the item to satisfactorily perform the function for which the item was designed. This loss of value could be due, for example, to changes in technology.

On the other hand, economic obsolescence is the loss in value of property relating to external or outside forces. Relevant factors include power/energy availability and cost, and government oversight, such as pollution control constraints. The economic conditions specific to the industry constitute an additional factor.

Obsolescence at the Century plant was an important and necessary factor which should have been taken into account in the Tax Commissioner's appraisal of the inventory. The plant was closed and sitting idle due to economic conditions. There may have been no market for the plant's machinery and inventory in the United States.

Nevertheless, contrary to his own regulations, the Tax Commissioner failed to properly consider obsolescence in appraising Century's inventory. As a result, the Commissioner's evaluation was incomplete and arbitrary. Although the Commissioner has discretion in choosing the method of appraising commercial and industrial property, the method chosen must be the "most accurate." Syl. pt. 5, *In re: Tax Assessment Against American Bituminous Power Partners*, 208 W.Va. 250, 539 S.E.2d 757 (2000).

Moreover, the Tax Commissioner was arbitrary in placing a 50% obsolescence cap on the value of machinery and equipment. The machinery and equipment may have been worthless, but the Commissioner did not consider whether it had a 75% or 100% depreciated value due to obsolescence. The 50% cap applied to the machinery and equipment is not appraising; it was just a percentage pulled out of the air. Surely, every piece of Century's machinery and equipment did not depreciate at the same rate due to obsolescence.

The Tax Commissioner should be required to follow his regulations and perform an accurate appraisal. Accordingly, I respectfully dissent.

I am authorized to state that JUSTICE BENJAMIN joins with me in this dissent.