

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**BAYER MATERIALSCIENCE, LLC and
BAYER CROPSCIENCE LP,**

Petitioner below, Appellants

v.

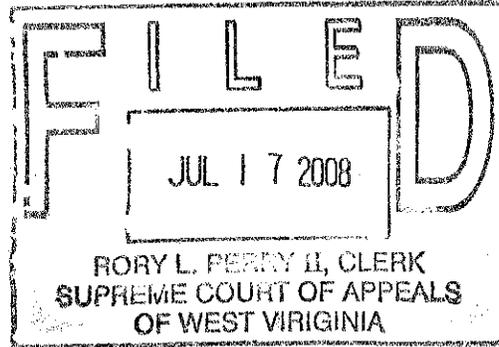
Case Nos: 33378,33880,33881

STATE TAX COMMISSIONER, and

**THE HONORABLE PHYLLIS GATSON,
Assessor of Kanawha County, and**

**THE COUNTY COMMISSION OF
KANAWHA COUNTY, and**

**THE PROSECUTING ATTORNEY OF
KANAWHA COUNTY**



Respondents Below, Appellees.

TAX DEPARTMENT'S RESPONSE OPPOSING PETITION FOR APPEAL

Respectfully submitted,

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TAX DEPARTMENT'S BRIEF OPPOSING APPEAL

I. INTRODUCTION

By statute the Tax Commissioner has the duty to see that the laws concerning the assessment and collection of all taxes are faithfully enforced. One primary focus of the Tax Commissioner is to ensure that county personal property taxes and real property taxes are accurately assessed and collected. Pursuant to W. Va. Code § 11-3-1 *et seq.*, all property must be assessed annually at its true and actual value.

The Tax Commissioner appraised the industrial personal property and real property of Bayer for the tax years at issue. Bayer MaterialScience and Bayer CropScience ¹ have objected to the

¹ Bayer Material Science and Bayer CropScience have pursued separate appeals before the Kanawha County Circuit Court and the West Virginia Supreme Court of Appeals. The four cases have been consolidated on appeal. The Tax Department will simply refer to the two companies as

valuations of industrial personal property for the 2006 tax year and the 2007 tax year. In the 2006 tax year Bayer CropScience also objected to the valuation of real property. Bayer objected to the Tax Commissioner's appraisals. The County Commission sitting as a Board of Equalization and Review conducted hearings in February 2006 and February 2007 as required by statute. The County Commission of Kanawha County sitting as a Board of Equalization and Review affirmed the Tax Commissioner's property valuations.

Bayer appealed the County Commission's decisions upholding the Tax Commissioner's appraisals of industrial real and personal property to the Circuit Court of Kanawha County. The Honorable James C. Stuckey heard the appeal of Bayer CropScience for the 2006 tax year. The Honorable Louis H. Bloom heard the other three appeals. Both circuit court judges affirmed the decisions of the County Commission of Kanawha County sitting as a Board of Equalization and Review in all four cases. Subsequently, Bayer appealed to the West Virginia Supreme Court of Appeals.

II. BACKGROUND

By statute, all property must be assessed at its true and actual value which is further defined as the value which a willing buyer would pay a willing seller in an arm's length transaction. *See* W. Va. Code §11-3-1. The goal is to establish a market value.

The West Virginia Legislature has adopted legislative regulations which the Tax Commissioner must follow in order to determine the market value of industrial real and personal property. *See* 110 C.S.R. § 1P-1 *et seq.* The legislative regulations specifically list three separate approaches to be considered in determining the fair value or the market value of industrial personal

Bayer unless separate treatment is required.

property: cost method, income method, and market method. *See* 110 C.S.R. § 1P- 2.5.3.1. As a general rule, the legislative regulations state that the cost approach will be used most frequently in valuing industrial personal property. *See* 110 C.S.R. §1P-2.3.d.

Generally, the facts are similar for both tax years. In the 2006 Bayer Material Science case, the Tax Commissioner calculated the appraisal value of Bayer's industrial personal property according to the cost method. *See* Judge Bloom's 2006 Final Order, Findings of Fact No. 10. Under the cost approach, replacement value of the property is first calculated, then reduced by three forms of depreciation: physical deterioration, functional obsolescence, and economic obsolescence, in order to approximate market value. *See* Judge Bloom's 2006 Final Order, Findings of Fact No. 11.

Bayer agreed with the values calculated by the Tax Commissioner for replacement value of the property at issue, physical deterioration and functional obsolescence. *See* Judge Bloom's 2006 Final Order, Findings of Fact No. 14. Bayer and the Tax Commissioner disagreed on the method used to calculate economic obsolescence and the appropriate amount of economic obsolescence. *See* Judge Bloom's 2006 Final Order, Findings of Fact No. 15.

In order to determine the amount of economic obsolescence, Bayer employed the cost approach and calculated an inutility factor. During the property tax hearing on February 16, 2006, before the Kanawha County Commission, Mr. Robert Svoboda testified at great length concerning the inutility factor. Mr. Svoboda testified that the Bayer Material Science facility located in South Charleston, West Virginia, should receive a deduction of approximately \$23,000,000 for economic obsolescence as calculated under the cost approach. *See* Judge Bloom's 2006 Final Order, Findings of Fact No. 16 (The Final Order states the amount of the deduction as \$ 21,081,887.)

The Tax Commissioner presented evidence concerning the Tax Department's evaluation of

economic obsolescence. Mr. Jeff Amburgey, Assistant Director of the Property Tax Division, testified and explained the appraisal of the South Charleston facility.

The Tax Commissioner calculated the additional deduction for economic obsolescence using an income method which is commonly employed in appraisals of utility plants. According to Mr. Amburgey's testimony, Bayer was unable to provide income information at the individual plant level. Bayer argued that it could not determine whether the South Charleston plant operated at a profit or a loss. Based upon a review of Bayer's annual report, Mr. Amburgey determined that Bayer did not write down the value of any industrial personal property at the facility for the previous tax year. In addition, Mr. Amburgey reviewed Bayer's corporate net income tax returns and calculated an income amount attributable to the South Charleston facility. *See* Judge Bloom's 2006 Final Order, Findings of Fact No. 17.

The Tax Commissioner employed the cost approach to determine the replacement cost of the South Charleston facility and the appropriate deductions for physical deterioration and functional obsolescence. Bayer has agreed with those three valuations determined by the Tax Commissioner.

Originally, the Tax Commissioner calculated a deduction of \$9,000,000 for economic obsolescence at the South Charleston facility employing the income approach. Prior to the February 2006 hearing, the Tax Commissioner increased the deduction for economic obsolescence to \$11,000,000 based upon additional information provided by the Petitioner. Bayer calculated a deduction of \$23,000,000 for economic obsolescence at the South Charleston facility according to the cost method. The County Commission for Kanawha County affirmed the Tax Commissioner's appraisal which allowed a deduction of \$11,000,000 for economic obsolescence.

Similarly, in the 2006 Bayer CropScience case, Bayer agreed with the replacement value calculated by the Tax Department, the deduction allowed for physical deterioration and the deduction allowed for functional obsolescence. Bayer CropScience only objected to the deduction allowed for economic obsolescence.

There are a few critical differences between the 2006 *ad valorem* property tax appeals and the 2007 *ad valorem* property tax appeals. For example, Bayer relied upon its own expert witness, Mr. Robert Svboda, who employed an *inutility factor* to calculate Bayer's requested deduction for economic obsolescence in the 2006 tax year. Bayer relied upon a different expert witness, Mr. Gregory Odell, to calculate a requested deduction for economic obsolescence in the 2007 tax year. However, Mr. Odell based his requested deduction on a Scale Method coupled with an Income Method to calculate an *inutility percentage*.

The Tax Department considered the request for the third form of depreciation – a deduction for economic obsolescence – using the income approach to valuation in both tax years. The Tax Department has consistently employed the same approach to valuation for Bayer and all other industrial taxpayers in both the 2006 tax year and the 2007 tax year. However, since Bayer was unable to provide plant specific income information for both Bayer MaterialScience and Bayer CropScience, the Tax Department allocated the income reported by Bayer on its federal income tax returns for the economic obsolescence calculation.

Economic Obsolescence

2006 TYE

	<u>Deduction Requested By Bayer</u>	<u>Deduction Calculated by Tax Department</u>
Bayer CropScience Institute, West Virginia	\$ 36,300,000.00	\$ 0
Bayer MaterialScience South Charleston, West Virginia	\$ 21,081,887.00	\$ 11,000,000.00 - Revised 9,000,000.00 - Original

2007 TYE

	<u>Deduction Requested By Bayer</u>	<u>Deduction Calculated by Tax Department</u>
Bayer CropScience Institute, West Virginia	\$ 30,138,619.00	\$ 0
Bayer MaterialScience South Charleston, West Virginia	\$ 2,263,782.00	\$ 0

Primarily, this case raised the substantive tax question of the proper method to calculate a deduction for economic obsolescence.

III. TAX COMMISSIONER'S RESPONSE TO BAYER'S ASSIGNMENTS OF ERROR

1. Judge Bloom and Judge Stuckey correctly concluded that the county commissions sitting as boards of equalization and review to review property tax appraisals issued by the Tax Commissioner do not deny due process of law to taxpayers.

2. Judge Bloom and Judge Stuckey correctly concluded that the standard of review mandated by statute and applied by the Kanawha County Commission sitting as a Board of Equalization and Review is proper.

3. Judge Bloom and Judge Stuckey correctly concluded that the Tax Commissioner's use of the income method to calculate the additional deduction for economic obsolescence was not an abuse of discretion.

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 *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250, 539 S.E.2d 757 (WV 2000) at Syllabus Point 1. On the other hand, assessments are presumed to be correct and will not be overturned if supported by substantial evidence on the record. See *In re Maple Meadow Mining Company*, 191 W. Va. 519, 446 S.E.2d 912 at Syllabus Point 4 (“‘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)) (WV 1994).

In short, Bayer 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.

V. THE COUNTY COMMISSIONS SITTING AS BOARDS OF EQUALIZATION AND REVIEW DO NOT VIOLATE DUE PROCESS

Bayer has challenged the role of the county commissions sitting as boards of equalization and review in the *ad valorem* property tax system in West Virginia. The *ad valorem* property tax appraisal system for industrial property is composed of many component parts. The Tax Department

conducts an appraisal of industrial real and personal property. The Tax Department provides appraisal values to the county assessors. The county assessors prepare the tax books. Every taxpayer has a right to present his argument concerning the value of the property to the county assessor while the tax books are being prepared. If a taxpayer is not happy with the assessed value of his property, he can present his case to the county commissions sitting as boards of equalization and review. Any taxpayer can appeal the decision of the board of equalization and review to the circuit court or even the Supreme Court of Appeals of West Virginia.

This is the system in West Virginia mandated by the constitution and by statute. County Commissions play a pivotal role in local government.

§ 11. Powers of County Commissions

The county commissions, through their clerks, shall have the custody of all deeds and other papers presented for record in their counties, and the same shall be preserved therein, or otherwise disposed of, as now is, or may be prescribed by law. They **shall also, under such regulations as may be prescribed by law, have the superintendence and administration of the internal police and fiscal affairs of their counties**, including the establishment and regulation of roads, ways, bridges, public landings, ferries and mills, **with authority to lay and disburse the county levies**: Provided, that no license for the sale of intoxicating liquors in any incorporated city, town or village, shall be granted without the consent of the municipal authorities thereof, first had and obtained. Until otherwise prescribed by law, they shall, in all cases of contest, be the judge of the election, qualification and returns of their own members, and of all county and district officers, subject to such regulations, by appeal or otherwise, as may be prescribed by law. Such commissions may exercise such other powers, and perform such other duties, not of a judicial nature, as may be prescribed by law. Such existing tribunals as have been heretofore established by the legislature to act as to police and fiscal matters in lieu of county commissions in certain counties shall remain and continue as now constituted in the counties in which they have been respectively established until otherwise provided by law, and they shall have and exercise the powers which the county commissions have under this article, and, until otherwise provided by

law, such clerk as is mentioned in section twelve of this article shall exercise any powers and discharge any duties, heretofore conferred on, or required of, any such tribunal or the clerk of such tribunal respecting the recording and preservation of deeds and other papers presented for record and such other matters as are prescribed by law to be exercised and discharged by the clerk thereof.

W. Va. Constitution Article 9, Section 11 (emphasis added).

The constitution mandates that the county commissions are responsible for the supervision and administration of the fiscal affairs of their respective counties.

The role of county commissions sitting as boards of equalization and review for property tax assessments is squarely based on the county commissions' obligation to supervise and administer the fiscal affairs of their counties. The West Virginia Constitution places this responsibility with the county commissions. W. Va. Code § 11-3-24 specifically directs county commissions to sit as boards of equalization and review. It is well settled under West Virginia law that fixing the value of property for *ad valorem* tax purposes is, primarily, an executive or administrative function in the tax process and not strictly a judicial function. *See Norfolk & W. Ry. Co., v. Board of Public Works*, 124 W.Va. 562, 21 S.E. 2d 143 at Syllabus Point 3 (WV 1942). The boards of equalization and review do, however, perform a quasi-judicial role in the process.

Petitioner argues that the process mandated by W. Va. Code § 11-3-24 for valuing property for *ad valorem* tax purposes violates due process. Bayer claims to be aggrieved and can only cite a nebulous claim of bias. "The county commission is responsible for the budgetary and financial affairs of the county....In any case, certainly as the amount in controversy increases, so too does the potential impact on the county's fiscal affairs and correspondingly the inherent conflict between the commissioner's inconsistent roles as the overseers of the county finances and as the tribunal for hearing individual appeals." See Petition For Appeal at p.17. The Circuit Court specifically

rejected Bayer's argument that it was denied due process of law. See Judge Bloom's 2006 Final Order, Conclusions of Law No. 4.

Due process of law is a fundamental principle in the American judicial system. The United States Supreme Court has stated that due process requires an analysis of three elements. The courts must consider the private interest that will be affected by state action; the risk that an erroneous deprivation may occur under existing procedures and the value of additional procedural safeguards; and the nature of the government interest at issue including the burden of additional or alternate procedural requirements. See *Mathews v. Eldridge*, 424 US 319 at 335, (1976). A balancing test of the three factors is involved.

Clearly, Bayer has a property interest at risk. Bayer faces the possibility of being forced by the operation of law to pay money in the form of *ad valorem* property taxes to Kanawha County.

Nevertheless, the state - in this case Kanawha County - has a critical interest in the *ad valorem* property tax process. Taxes are the life's blood of government. If the government cannot determine and collect adequate tax revenues, then the government cannot perform the very functions of government and cannot provide the essential services demanded by the public. In the instant case, if Kanawha County cannot collect adequate tax revenues from all sources, then law enforcement efforts may be reduced, public schools may be impaired, and the public welfare may suffer.

Taxes are different from other governmental activities. The assessment process has a long history in our country.

A tax is an exaction by the sovereign, and necessarily the sovereign has an enforceable claim against every one within the taxable class for the amount lawfully due from him. The statute prescribes the rule of taxation. Some machinery must be provided for applying the rule to the facts in each taxpayer's case, in order to ascertain the amount due. The chosen instrumentality for the purpose is an administrative

agency whose action is called an assessment. The assessment may be a valuation of property subject to taxation, which valuation is to be multiplied by the statutory rate to ascertain the amount of tax. Or it may include the calculation and fix the amount of tax payable, and assessments of federal estate and income taxes are of this type. Once the tax is assessed, the taxpayer will owe the sovereign the amount when the date fixed by law for payment arrives. Default in meeting the obligation calls for some procedure whereby payment can be enforced. The statute might remit the government to an action at law wherein the taxpayer could offer such defense as he had. A judgment against him might be collected by the levy of an execution. But taxes are the lifeblood of government, and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic means of collection. The assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt.

In recognition of the fact that erroneous determinations and assessments will inevitably occur, the statutes, in a spirit of fairness, invariably afford the taxpayer an opportunity at some stage to have mistakes rectified. Often an administrative hearing is afforded before the assessment becomes final; or administrative machinery is provided whereby an erroneous collection may be refunded; in some instances both administrative relief and redress by an action against the sovereign in one of its courts are permitted methods of restitution of excessive or illegal exaction. Thus, the usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense, and the burden of proof, normally on the claimant, is shifted to the taxpayer. The assessment supersedes the pleading, proof, and judgment necessary in an action at law, and has the force of such a judgment. The ordinary defendant stands in judgment only after a hearing. The taxpayer often is afforded his hearing after judgment and after payment, and his only redress for unjust administrative action is the right to claim restitution. But these reversals of the normal process of collecting a claim cannot obscure the fact that after all what is being accomplished is the recovery of a just debt owed the sovereign. If that which the sovereign retains was unjustly taken in violation of its own statute, the withholding is wrongful. Restitution is owed the taxpayer.

Bull v. US, 295 US 247 at 259-260 (1935).

The United States Supreme Court has specifically addressed the question of due process in the field of taxation. Over a century ago, the Supreme Court outlined the essential criteria for due process in the tax cases. In *Londoner v. City and County of Denver*, 210 US 373 (1908), Denver assessed taxes against adjacent land owners for the costs of paving streets.

In the assessment, apportionment, and collection of taxes upon property within their jurisdiction, the Constitution of the United States imposes few restrictions upon the states. In the enforcement of such restrictions as the Constitution does impose, this court has regarded substance, and not form. But where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that, at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing.

Londoner, infra, at 385 (emphasis added).

See also *Phillips v. Commissioner of Internal Revenue*, 283 US 589 (1931).

It has long been settled that property tax assessments, historically, are not subject to rigorous due process requirements.

It must be remembered that property assessment proceedings have historically been treated as not being subject to rigorous due process requirements. In *State v. Sponaugle*, 45 W.Va. 415, 423, 32 S.E. 283, 286 (1898), this court, in discussing the constitutionality of our forfeited land procedure, reviewed a number of United States Supreme Court decisions and concluded:

“Justice Harlan cites *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S., 232, (10 Sup.Ct., 533 [33 L.Ed. 892]), holding that: ‘Process of taxation does not require the same kind of notice as in a suit at law, or proceedings to take property under the power of eminent domain. It involves no violation of due process of law, when executed according to customary forms and established usage.’ And Justice

Harlan added: 'This must be so, else the existence of government might be put in peril by delays attendant upon formal judicial proceedings for collection of taxes.' ”

This point was also stated in *Nickey v. Mississippi*, 292 U.S. 393, 396, 54 S.Ct. 743, 744, 78 L.Ed. 1323, 1326 (1933):

“There is no constitutional command that notice of the assessment of a tax, and opportunity to contest it, must be given in advance of the assessment. It is enough that all available defenses may be presented to a competent tribunal before exaction of the tax and before the command of the state to pay it becomes final and irrevocable. *Wells, Fargo & Co. v. Nevada*, 248 U.S. 165, 63 L.Ed. 190, 39 S.Ct. 62; *Bristol v. Washington County*, 177 U.S. 133, 146, 20 S.Ct. 585 [590, 44 L.Ed. 701, 707]; *McMillen v. Anderson*, 95 U.S. 37, 24 L.Ed. 335; *See American Surety Co. v. Baldwin*, 287 U.S. 156, 168, 53 S.Ct. 98 [102, 77 L.Ed. 231, 239], 86 A.L.R. 298.”

In re *Tax Assessments Against Pocahontas Land*, 172 W.Va. 53 at 59-60, 303 S.E.2d 691 at 697-698 (WV 1983).

Finally, if a State requires a taxpayer to pay a tax prior to completing judicial review of the constitutionality of the tax, the State must provide meaningful relief such as a refund or credit in order to comply with the requirement of due process. *See McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida*, 496 US 18 at 32 (1990).

The essential elements of due process in tax cases have not changed very much in over a century. The taxpayer must be provided with notice of the tax assessment, an opportunity for a hearing, an opportunity present his case, an opportunity to challenge the evidence against him, judicial review of the determination, and the opportunity to obtain a refund or credit if he is taxed erroneously and is required to pay the tax prior to its final determination by a court.

Bayer was afforded the opportunity to present its valuation of the property at issue in 2006 and 2007. Bayer was given the opportunity to challenge the Tax Department's valuations in both

years. Bayer cross - examined the Tax Department's expert witness on the valuations for both tax years, Mr. Amburgey of the Property Tax Division, and the other witnesses who testified in 2006. The decision of the Kanawha County Commission sitting as a Board of Equalization and Review for both years has been reviewed, at Bayer's request, by the Circuit Court. The Circuit Courts' decisions are currently before the West Virginia Supreme Court of Appeals. If Bayer prevails on the merits of its case, then Bayer will receive a credit against future tax liabilities.

Nevertheless, Bayer argues that it has been denied due process of law by the system of county commissioners sitting as a boards of equalization and review. Bayer argues that the county commissioners cannot wear two different hats. Bayer argues that the county commissions are responsible for the fiscal affairs of the county and the county commissioners are also responsible for determining the true and actual value of real and personal property for *ad valorem* tax purposes. Bayer argues that the two roles necessarily conflict. Bayer argues that the boards of equalization and review will necessarily gravitate toward artificially high property valuations in order to meet the county's financial needs. *See Bayer's Initial Brief at p.18.*

Primarily, Bayer bases its argument on *Tumey v. State of Ohio*, 273 U.S. 510 (1927) and *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972). Both cases arose out of "mayor's courts" in Ohio municipalities. Under the mayor's court system, a mayor was authorized to conduct criminal court hearings, impose fines on criminal defendants, and sentence the defendants to prison until the fines were paid. In *Tumey*, the defendant was found guilty by the town mayor, fined \$100.00 and sentenced to prison until the fine was paid. *Tumey* at 515. The Supreme Court found *Tumey* to be particularly objectionable due to the fact that the mayor received a bounty for every conviction, was paid additional compensation from the criminal fines, and received no additional compensation if the

defendant was acquitted. *Tumey* at 514-515. The Supreme Court concluded that the mayor's pecuniary interest in the case deprived the defendant of due process of law. *Tumey* at 532 and 535.

Similarly, in *Village of Monroeville* a defendant was convicted in mayor's court of a minor traffic offense and fined a total of \$100.00. *Village of Monroeville* at 57. Justice Brennan raised two major concerns to the due process provided by the Monroeville mayor's court.

The Mayor of Monroeville has wide executive powers and is the chief conservator of the peace. He is president of the village council, presides at all meetings, votes in case of a tie, accounts annually to the council respecting village finances, fills vacancies in village offices and has general overall supervision of village affairs. A major part of village income is derived from the fines, forfeitures, costs, and fees imposed by him in his mayor's court. Thus, in 1964 this income contributed \$23,589.50 of total village revenues of \$46,355.38; in 1965 it was \$18,508.95 of \$46,752.60; in 1966 it was \$16,085 of \$43,585.13; in 1967 it was \$20,060.65 of \$53,931.43; and in 1968 it was \$23,439.42 of \$52,995.95. This revenue was of such importance to the village that when legislation threatened its loss, the village retained a management consultant for advice upon the problem. The fines imposed by the mayor's court comprised an average of 42% of the Village's finances over the preceding five years.

Village of Monroeville at 58.

The Supreme Court enunciated the test in *Village of Monroeville*.

Although 'the mere union of the executive power and the judicial power in him cannot be said to violate due process of law,' ...the test is whether the mayor's situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused' *Id.*, at 532, 47 S.Ct., at 444. Plainly that 'possible temptation' may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. This, too, is a 'situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.' *Id.*, at 534, 47 S.Ct., at 445.

Village of Monroeville at 60 (emphasis added)(some internal citations omitted).

Village of Monroeville set forth a clear line in criminal cases. The union of executive and judicial power in one official who is responsible for municipal finances and who has the sole power to convict a criminal defendant in order to collect criminal fines violates due process.

However, *Village of Monroeville* is factually different than the situation before this court. Power is diffused among several county officials in West Virginia. The county commission does have the constitutional responsibility for internal police and fiscal affairs of the county. West Virginia Constitutional Article 9, Section 1, *supra*. The Constitution also authorizes the Legislature to create mayors' courts to enforce municipal ordinances. *See* West Virginia Constitution Article 8, Section 11. However, Bayer presented its valuation case to the Kanawha County Commission sitting as a Board of Equalization and Review not to a mayors' court.

The mayors' court concentrated power in a single individual. The county commissions are composed of three elected officials with staggered terms of office. Consequently, power is shared among three county commissioners and decisions must reflect a consensus of commissioners. *See* West Virginia Constitutional Article 9, Section 10 and W. Va. Code § 7-1-1. Does Bayer argue that one commissioner is inherently biased or all three? Furthermore, the county commissions are subject to supervision and control by the legislature. *Meador v. County Court of McDowell County*, 141 W. Va. 96, 87 S.E.2d 725 at Syll. Pt. 2 (WV 1955). The Legislature can alter the duties and powers of the county commissions simply by amending the W. Va. Code § 7-1-3.

However, the authority to enforce the criminal laws of the State is granted to the prosecuting attorney for each county and not to the county commissions. W. Va. Code § 7-4-1. The prosecuting attorney also is responsible for civil suits affecting his county. *Id.* In addition, the county sheriff is

the official treasurer of every county and responsible for the collection of county taxes. W. Va. Code § 7-5-1.

Contrary to Bayer's argument, the county commission is not, primarily, responsible for creating the county budget. By law the county clerk, the circuit clerk, the joint clerk of the county commission and circuit clerk, the sheriff, the county assessor, and the prosecuting attorney, are responsible for preparing their respective budgets for the fiscal year. *See* W. Va. Code § 7-7-7. Obviously, the county commission will have some interaction with the other seven officials in the budgeting process. However, the role of the county commission is, primarily, to compile the seven budgets prepared by the seven officials listed above. Many people have a hand in creating and spending the county budgets.

In *Monroeville* the mayor, literally, ran the village. Consequently, the mayor in *Monroeville* as "chief conservator of peace" could direct the village police to establish speed traps in order to fund the village. The mayor would then have village funds available, based upon his control over village finances, to ensure his tenure in office. The mayor was only required to account to the village council annually for the village finances. In the case before this Court, the county commissions have no authority to direct the prosecution of criminal cases. Nor can the county commission direct the county sheriff in law enforcement matters. The county commission may express concerns and opinions to the other county officials, but the county commission cannot direct. At best, the county commission may be able to persuade the other elected county officials to follow its lead. In addition, the county assessor and all other county officials involved in the valuation process are supervised by the State Tax Commissioner in the performance of their duties to value industrial property. *See* W.

Va. Code § 11-1-2. Unlike the concentration of power in one official in *Village of Monroeville*, power is dispersed among the several elected county officials in West Virginia.

The facts in a separate case involving Bayer clearly demonstrate that the County Commission of Kanawha County does not direct or control the other elected county officials. The Tax Department requests the Supreme Court take judicial notice of *S.E.R. Prosecuting Attorney of Kanawha County, West Virginia v. Bayer Corporation*, Case No. 33871, Petition No. 072812, (Judge Walker, Kanawha County) (hereinafter, Bayer exoneration case) which is currently pending before the Court.

In August 2003 Bayer submitted a request for exoneration of *ad valorem* property taxes paid to Kanawha County for the tax years 2001, 2002 and 2003. *See* Judge Walker's Final Order at P. 6. Bayer requested tax relief in excess of \$456,000.00. *Id* at P. 7. The Kanawha County Commission granted Bayer's request for exoneration. *Id* at P. 1 & 2. The Prosecuting Attorney of Kanawha County sued in Circuit Court to overturn the decision of the County Commission granting exoneration. *Id* at P. 1. The Assessor of Kanawha County requested leave and was allowed to intervene opposing the County Commission's decision. *Id*.

However, the Bayer exoneration case makes two very important points in the valuation cases presently before the Supreme Court. First, the operation of county government in West Virginia is not monolithic. The Prosecuting Attorney and the County Assessor not only disagreed with the decision of the Kanawha County Commission to reduce Bayer's property tax liability; they filed suit to overturn the decision granting tax relief to Bayer. Clearly, the County Commission does not control the other elected county officials. Consequently, the concentration of executive and judicial power in one official who also controlled the finances in *Village of Monroeville* is not present in the case before the Court today.

Second, Bayer argues that the County Commission's responsibility for county finances causes it to be inherently biased against Bayer at valuation hearings. Nevertheless, Bayer requested exoneration based upon Bayer's own clerical mistakes in reporting its property for *ad valorem* tax purposes. See Judge Walker's Final Order at P. 1. If the County Commission is inherently biased against Bayer due to its constitutional responsibility for county finances, why would the County Commission vote to grant \$456,000.00 in tax relief to Bayer? Why would the County Commission create a rather sizeable hole in its budget in order to correct Bayer's own reporting mistake if the County Commission is inherently biased against Bayer?

Furthermore, the role of county commissions sitting as boards of equalization and review resembles the role of the town mayor in *Dugan v. State of Ohio*, 277 US 61 (1928). The United States Supreme Court decided *Dugan* shortly after its decision in *Tumey, supra*. Both cases involved a mayor's court.

The defendant has duly raised the question of the constitutional impartiality of the mayor to try the case. This is the only issue for our consideration. The objection is based on the ground that for the mayor to act in this case was a violation of the Fourteenth Amendment to the Federal Constitution, in that the mayor occupied in the city government two practically and seriously inconsistent positions, one partisan and the other judicial; that as such mayor he had power under the law to convict persons without a jury of the offense of the possession of intoxicating liquor and punish them by substantial fines, half of which were paid into the city treasury, and as a member of the city commission he had a right to vote on the appropriation and the spending of city funds; and further that, while he received only a fixed salary and did not receive any fees, yet all the fees taxed and collected under his convictions were paid into the city treasury, and were contributions to a general fund out of which his salary as mayor was payable.

Dugan at 62-63.

However, the United States Supreme Court distinguished the role of the mayor in *Dugan* from that in *Tumey*.

No such case is presented at the bar. The mayor of Xenia receives a salary which is not dependent on whether he convicts in any case or not. While it is true that his salary is paid out of a fund to which fines accumulated from his court under all laws contribute, it is a general fund, and he receives a salary in any event, whether he convicts or acquits. There is no reason to infer on any showing that failure to convict in any case or cases would deprive him of or affect his fixed compensation. The mayor has himself as such no executive, but only judicial, duties. His relation under the Xenia charter, as one of five members of the city commission, to the fund contributed to by his fines as judge, or to the executive or financial policy of the city, is remote. We agree with the Supreme Court of Ohio in its view that the principles announced in the *Tumey* Case do not cover this.

Dugan at 65.

The facts in the case before the Supreme Court are closer to *Dugan* than *Tumey*. Executive authority in county government in West Virginia is shared by three county commissioners and seven additional popularly elected county officials. The salary paid to the county commissioners is set by statute and is not dependent on the property valuations. The role of the boards of equalization and review is, primarily, administrative in establishing property valuations; although, they do perform a quasi-judicial function in a some cases. The county commissioners sitting as a board of equalization and review can only influence a relatively small number of property valuations each year under the current system. If a property owner convinces the county assessor that the proposed valuation is too high, then the assessor reduces the value and the board of equalization and review plays no role. Bayer has appealed the *ad valorem* valuations for the years 2006 and 2007 to this Court. However, for the 2005 tax year, Bayer, the Tax Department and the Kanawha County

Assessor, agreed on the valuations. Consequently, the Kanawha County Board of Equalization and Review had no impact on the valuation of Bayer's property in the year 2005.

In addition, the United States Supreme Court has been cautious in applying *Village of Monroeville* in civil cases. In *Aetna Life Insurance Company v. LaVoie*, 475 US 813 (1986), the Supreme Court examined the application of *Village of Monroeville* and *Tumey* in a case decided by the Supreme Court of Alabama. First, the United State Supreme Court declined to decide whether allegations of bias or prejudice alone would be sufficient to require recusal of a judge for due process purposes. *Aetna* at 821. The Supreme Court concluded that a judge's statements reflecting a general frustration with insurance companies were deemed insufficient to violate the requirements of due process.

Second, in *Aetna* Justice Embry of the Alabama Supreme Court refused to recuse himself from a decision involving the Aetna Life Insurance Company, *Aetna* at 814-815, and, eventually, wrote the Alabama Supreme Court's decision. Justice Embry's decision addressed the issue of bad faith litigation in insurance cases. While the *Aetna* case was pending before the Alabama Supreme Court, Justice Embry filed two additional lawsuits against Blue Cross and another insurance company. Subsequently, Justice Embry received a settlement of \$30,000.00 from the lawsuit against Blue Cross. Justice Embry's case against Blue Cross involved numerous issues which were the subject of the decision he authored in the *Aetna* decision. *Aetna* at 824-825. After reviewing *Tumey* and *Village of Monroeville*, the United State Supreme Court concluded that Justice Embry's interest in the *Aetna* decision was "direct, personal, substantial, [and] pecuniary." *Aetna* at 824.

Third, the United States Supreme Court went on to state that although the other Alabama Supreme Court justices who participated in the *Aetna* decision may have also members of a class

action suit along with Justice Embry against Blue Cross, the interests of the other justices in deciding the *Aetna* case were remote. The record in *Aetna* did not reflect that the other justices were aware of their status as members of the class. *Aetna* at 825 - 827. Consequently, the other justices were not required to recuse themselves.

According to *Aetna*, if a judge has a direct, personal, substantial or pecuniary interest in the outcome of a case, then his participation would deny the litigant due process of law. On the other hand, a remote interest in the outcome of a case by a judge does not violate due process. Mere allegations of bias are insufficient to violate the concerns of due process.

Bayer's argument of the lack of an unbiased tribunal is little more than an allegation. Bayer cannot point to any acts of bias from this Board of Equalization and Review. The record from the 2006 tax year is typical. Bayer received a full hearing from the Board of Equalization and Review on the issues in Bayer Material Science and the companion case of Bayer Crop Science. The Kanawha County Commission heard every witness presented by Bayer. The County Commission admitted into the record every piece evidence proffered by Bayer. The County Commission asked probing questions of both Mr. Svoboda, Bayer's expert witness, and Mr. Amburgey, the Tax Department's expert witness. The review hearing for the 2006 tax year lasted approximately four and one-half hours. The transcript is 358 pages long. Subsequent to the hearing, Bayer submitted a brief in support of its position. Yet, Bayer can only present a vague charge that the review system employs the county commissions as inherently biased tribunals.

Any interest of the Kanawha Board of Equalization and Review in the valuation of Bayer's property is remote due to the shared functions and authority of county government. The *Village of Monroeville* established a test that requires an analysis of two issues - whether executive power is

concentrated in a single individual and the ability of that individual to control government revenues.

In addition, Bayer has not cited a single case extending the rationale in *Village of Monroeville* to tax cases. Two recent state court decisions support the Tax Department's position. In the case of *Lee Hospital v. Cambria County Board of Assessment*, 162 Pa. Cmwlth. 38, 638 A.2d 344 (PA 1994), the Pennsylvania intermediate appellate court concluded that it did not violate Lee Hospital's due process rights to allow the popularly elected county commissioners to rule on the issue of whether the hospital was tax exempt and to, subsequently, sit on an appellate board reviewing the decision. After a review of *Tumey* and *Village of Monroeville*, the Commonwealth Court concluded that the three county commissioners represented the interests of the public and did not possess a disqualifying interest in the case. *Lee Hospital* at 48-49, 349. In the case of *The Bath Club, Inc., v. Dade County*, 394 So.2d 110 at 112-113 (FL 1981), the Supreme Court of Florida summarily rejected the argument that the property appraisal adjustment board could not provide an unbiased hearing due to the budgetary concerns of county commissioners and school board members who were also members of the appraisal adjustment board.

Recently, the West Virginia Supreme Court addressed the issue of due process in reviewing a tax statute. *See Schmehl v. Helton*, ____ W. Va. ____, 2008 WL 552704 at Syllabus Point 1 (Under the due process protections of the *West Virginia Constitution*, Article III, Section 10, in the absence of statutory or regulatory language setting forth standards for the imposition of personal liability for unpaid and unremitted sales taxes on individual corporate officers pursuant to W. Va. Code, 11-15-17 [1978], such liability may be imposed only when such imposition is in an individual case not arbitrary and capricious or unreasonable, and such imposition is subject to a fundamental fairness test. The burden is on the person seeking to avoid such liability to show with clear and convincing evidence,

giving due deference to the statute's general authorization for the imposition of such liability, that it would be fundamentally unfair and an arbitrary and capricious or unreasonable act to impose such liability.) (WV 2008). Although the syllabus point specifically addressed the question of whether a statute was sufficiently unreasonable or arbitrary to violate the requirements of due process of law, the same requirement of an evidentiary showing should apply in allegations of bias.

The Circuit Court of Appeals for the Seventh Circuit also concluded that general allegations of bias are insufficient to require a judge to disqualify himself. The Court of Appeals reviewed the decision of an Illinois state judge to impose the death penalty in a murder case. In *Del Vecchio v. Illinois Department of Corrections*, 31 F.3d 1363 at 1370-1380 (7th Cir. 1994), the Court of Appeals reviewed *Tumey* and *Monroeville* at length and concluded that a mere allegation that "it looks bad" is insufficient to violate the due process requirements.

Therefore, the Court's cases require that we go beyond generalizations about "possible temptations" in deciding whether Judge Garippo was required to disqualify himself. The question is not whether some possible temptation to be biased exists; instead, the question is, when does a biasing influence require disqualification? Consistent with the common law, we begin in answering this question by presuming "the honesty and integrity of those serving as adjudicators. *Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464; *Dyas v. Lockhart*, 705 F.2d 993, 997 (8th Cir. 1983). Disqualification is required only when the biasing influence is strong enough to overcome that presumption, that is, when the influence is so strong that we may presume actual bias. See *Dyas*, 705 F.2d at 996-97. This occurs in "situations ... in which experience teaches that the possibility of actual bias is too high to be constitutionally tolerable." *Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464. A court must be convinced that a particular influence, "under a realistic appraisal of psychological tendencies and human weakness," poses "such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.*

Del Vecchio at 1375.

See also *Schweiker v. McClure*, 456 U.S. 188, at 195 (specifically, addressing *Village of Monroeville*) (1982). Under West Virginia law judges as well as all public officials are presumed to perform their duties in a fair manner. See *Wright v. Myers*, 215 W.Va. 162, 597 S.E. 2d 295 at Syllabus Point 3 (“The presumption that public officers discharge their duties in a regular and proper manner is a strong presumption compelled first by experience and second by society’s interest in avoiding frivolous litigation over technicalities.” [quoting] Syllabus point 2, *Roe v. M & R Pipeliners, Inc.*, 157 W.Va. 611, 202 S.E.2d 816 (1973)) (WV 2004); see also *Marfork Coal Company v. Callaghan*, 215 W. Va. 735, 601 S.E.2d 55 at Syllabus Point 2 (The use of a member of an administrative body, including the director of the administrative agency, as a hearing officer to take evidence in a proceeding that involves alleged violations of laws subject to the agency’s enforcement does not on its own constitute, or even indicate, a proceeding that lacks the necessary impartiality to meet fundamental due process concerns where such use is specifically authorized by statute.) (WV 2004). As noted, *supra*, W. Va. Code § 11-3-24 specifically directs the county commissions to sit as boards of equalization and review on questions of valuation for *ad valorem* property tax purposes. Similarly, this Court should not ignore the presumption that public officers will discharge their duties in a fair manner based upon a mere allegation of bias which is unsupported by the facts of this case and the Bayer exoneration case.

The United States Supreme Court and the lower federal courts have not drawn a bright line defining bias or prejudice which denies a litigant due process in the circumstances before the Court today. Nevertheless, several principles are readily apparent. Due process cannot be reduced to one definition which fits every possible scenario. In *Aetna* after reviewing *Tumey* and *Village of Monroeville*, the United States Supreme Court declined to rule that unsubstantiated allegations of bias

violate due process. *Aetna* at 822. Instead, the Supreme Court stated that in order to violate due process a judge must have a direct, personal, substantial and pecuniary interest, while a slight pecuniary interest or a speculative interest does not violate due process concerns. *Aetna* at 824 and 826-827. The Court of Appeals for the Seventh Circuit reviewed due process cases at great length and concluded that "... generalizations about 'possible temptations' " are insufficient to violate due process concerns and that the courts must make a "realistic appraisal" of the particular influence. *Del Vecchio* at 1378.

In addition, the United States Supreme Court further explained the issue of a biased tribunal in *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482 (1976). Public school teachers in *Hortonville* engaged in protracted contract negotiations with the local School Board. After negotiating unsuccessfully for over one year, the school teachers went on strike during the academic year. Shortly thereafter, the School Board fired the striking teachers. *Hortonville* at 484-485. The sole issue presented to the Supreme Court was whether the due process clause prohibited the School Board from firing the striking teachers. *Hortonville* at 488. Did the School Board act as an inherently biased tribunal? The Supreme Court reiterated that due process is not a rigid concept. *See Hortonville* at 494. Furthermore, Court ruled that the test spelled out in *Village of Monroeville* and in *Tumey* was not applicable to the local School Board.

Respondents' argument rests in part on doctrines that have no application to this case. They seem to argue that the Board members had some personal or official stake in the decision whether the teachers should be dismissed, comparable to the stake the Court saw in *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), or *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L. Ed.2d 267 (1972); *See also Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L. Ed.2d 488 (1973), and that the Board has manifested some personal bitterness toward the teachers, aroused by teacher criticism of the Board during the strike, *See, E. g., Taylor v. Hayes*, 418 U.S.

488, 94 S.Ct. 2697, 41 L. Ed.2d 897 (1974) ; *Mayberry v. Pennsylvania*, 400 U.S. 455, 91 S.Ct. 499, 27 L. Ed.2d 532 (1971). Even assuming that those cases state the governing standards when the decision maker is a public employer dealing with employees, the teachers did not show, and the Wisconsin courts did not find, that the Board members had the kind of personal or financial stake in the decision that might create a conflict of interest, and there is nothing in the record to support charges of personal animosity.

Hortonville at 491-492 (emphasis added).

Charges of bias require some evidence beyond a mere allegation. Bayer has intimated an official bias by the Kanawha County Commission against a major employer in the Kanawha Valley; yet, Bayer has made no showing of that bias. There is no evidence to support Bayer's conclusions. Most importantly, the actions of the Kanawha County Commission in the exoneration case in granting Bayer \$ 465,000.00 in tax relief rebut any allegations of bias against Bayer.

Furthermore, Bayer argues that its burden of proof is too high. Bayer relies on *Concrete Pipe and Products of California, Inc., v. Construction Laborers Pension Trust For Southern California* 508 US 602 (1993) for the proposition that the taxpayer should only be required to show that the assessment was erroneous by a preponderance of the evidence. In *American Bituminous Power Partners*, the West Virginia Supreme Court stated that the taxpayer can only rebut the presumption that the assessment is correct by clear and convincing evidence. See *American Bituminous* 208 W. Va. 250 at 254, 539 S.E.2d 757 at 761 (WV 2000). Bayer urges the Court to reduce the "heavy burden" which is placed on the taxpayer.

However, *Concrete Pipe* is not controlling for several reasons. First, as argued earlier, taxes are different from other government functions and very different from the function of private employers in ensuring the payment of pension benefits earned under a contract to employees upon retirement. Consequently, the Trustees in *Concrete Pipe* were not performing the purely

governmental function of collecting tax revenue. *Concrete Pipe* fails the third factor of the due process test – the nature of the government interest – outlined in *Mathews v. Eldridge, supra*. Nor has Bayer cited a single tax case adopting the preponderance of the evidence standard based upon the rationale set forth in *Concrete Pipe*.

Second, the United States Supreme Court “assumed” that the Trustees administering the pension plan were biased in violation of the due process clause. All of the Trustees were employers or union representatives who had a substantial interest in maintaining adequate pension funds. In addition, the Trustees in *Concrete Pipe* could face personal liability if the pension funds failed. *See Concrete Pipe* at 617. The county commissioners, as well as all public officers, are presumed under West Virginia law to perform their duties in a fair and even-handed manner.

Third, the Supreme Court described the underlying statute as being muddled, inconsistent and incomprehensible, concerning the withdrawing employer’s burden of proof. The underlying statute subjected the withdrawing employer to three separate standards with regards to the burden of proof - preponderance of the evidence, clearly erroneous, and unreasonable assumptions utilized by the actuary. *Concrete Pipe* at 621. It appears that the Supreme Court may have settled on the preponderance of evidence standard due to the conflicting terms utilized by Congress in the underlying statute.

In view of the strong government interest in collecting tax revenues and the long history supporting the clear and convincing standard which taxpayers must meet, this Court’s statement in *American Bituminous* should prevail.

Furthermore, Bayer objects to the property tax appraisal system mandated by the West Virginia Constitution yet offers no viable alternative.

Regardless of the selected phraseology, due process boils down to one point-the courts must analyze the facts and circumstances of the individual case to determine whether the taxpayer has *received due process of law*. *As the circuit courts concluded below, Bayer has failed to prove its case.*

VI. THE TAX COMMISSIONER'S VALUATION OF INDUSTRIAL PERSONAL PROPERTY WAS PERFORMED ACCORDING TO THE LEGISLATIVE REGULATIONS

The legislative regulations state a general preference for the use of the cost approach in valuing industrial personal property, especially for valuing industrial machinery and equipment. The Tax Commissioner calculated the replacement value of Bayer's personal property according to the cost method. Bayer concurred with the replacement value. The Tax Commissioner calculated deductions for both physical deterioration and functional obsolescence as required by the cost approach. Bayer concurred with the two deductions calculated by the Tax Commissioner.

The Tax Commissioner employed the income method in order to calculate a third deduction for economic obsolescence in both 2006 and 2007. In 2006 Mr. Svoboda, Bayer's expert witness, employed an inutility factor in using the cost method in order to calculate Bayer's requested deduction for economic obsolescence. Upon questioning from Commissioner Carper, Mr. Svoboda testified that the income method was superior to the cost method in calculating economic obsolescence.

Commissioner Carper. Question: Now, let me ask this question. This economic obsolescence, when is it best measured? Remember, I read your book.

Mr. Svoboda. Answer: Well, - - - .

Commissioner Carper. Question: You know, that's a simple question. It comes right out of your book. What's the answer to that.

Mr. Svoboda. Answer: I don't remember exactly what I wrote, but the - - - .

Commissioner Carper. Question: You don't remember exactly what you wrote? Your whole testimony is based upon your book.

Mr. Svoboda. Answer: Sir, I wrote this in 1988.

Commissioner Carper. Question: Well, let me read it to you. Page 104 - - - maybe I'm in the wrong part of the book, because I certainly don't understand. Economic obsolescence is best measure through the use of the income approach. Does that apply to this?

Mr. Svoboda. Answer: If I had income and data available to me, I would look at and consider and perform an evaluation based on income.

Commissioner Carper. Question: And you could have got income data from who, the same people who paid you \$125,000; right? Did you ask for it?

Mr. Svoboda. Answer: Yes, I did. And I testified to that.

Commissioner Carper. Question: Did you ask for it from Bayer?

Mr. Svoboda. Answer: Yes.

Commissioner Carper. Question: Did they give it to you?

Mr. Svoboda. Answer: They do not have that available. They do not keep - - - they do not recognize - - - Bayer operates all of their facilities, all the Crop Science facilities as cost centers.

Commissioner Carper. Question: By their choice, of course. They're a private company. They can do that or not do that.

Mr. Svoboda. Answer: Right.

Commissioner Carper. Question: But I've read your book. You say this is the best way to use this, yet they don't have the information or won't give it to you. And so you're not using the best method; correct? And if I'm wrong, just straighten me out. Am I wrong?

Mr. Svoboda. Answer: To quantify economic obsolescence, you're correct. You are correct.

Transcript, Kanawha County Commissioner Hearing for Bayer Crop Science and Bayer Material Science on February 16, 2006 at PP. 107-110.

Mr. Svoboda testified that the income method employed by the Tax Commissioner in calculating economic obsolescence is superior to the inutility method employed by Bayer. *See* Judge Bloom's 2006 Final Order, Findings of Fact No. 21. The Tax Commissioner had the obligation to determine the true and actual value of all real and personal property for property tax purposes. An appraisal can only approximate value. In order to determine the true and actual value of property, the Tax Commissioner must employ the best methodology possible and the most accurate information available. The Tax Commissioner did just that.

Similarly, in the 2007 Board of Equalization and Review hearing, Mr. Odell, Bayer's expert witness, employed a proprietary method to calculate a deduction for economic obsolescence and not the income method employed by the Tax Department. Bayer was unable to provide plant specific income for the Institute Plant and the South Charleston Plant. However, Bayer could provide all of the plant specific information required by Mr. Odell to calculate a deduction for economic obsolescence based on utilizing a Scale Method coupled with an Income Method to calculate an *inutility percentage*.

The legislative regulations for the valuation of industrial real and personal property are silent concerning how to calculate economic obsolescence. *See* Judge Bloom's 2006 Final Order, Findings of Fact No. 19. The legislative regulations do not state that economic obsolescence should be calculated according to the income method as advanced by the Tax Commissioner. Nor do the legislative regulations state that economic obsolescence should be calculated according to an inutility factor or cost approach as advocated by Bayer. *See* Judge Bloom's 2006 Final Order, Findings of Fact No. 20. The legislative regulations simply do not state how to calculate economic obsolescence.

While all appraisals share many common elements, every appraisal is unique. One size does not fit all. The Tax Commissioner must adapt to the specific circumstances of each industrial property.

In *American Bituminous Power Partners* the Supreme Court of Appeals for West Virginia has previously determined that the Tax Commissioner must be able to use his discretion in selecting among the three different methods of valuing property.

When the regulation in question is read as a whole, it becomes clear that the Tax Commissioner has considerable discretion in choosing the applicable method of valuing a particular property. The regulation directs that

‘ [w]hen possible, the most accurate form of appraisal should be used, but because of the difficulty in obtaining necessary data from the taxpayer, or due to the lack of comparable commercial and/or industrial properties, choice between the alternative appraisal methods may be limited.’

110 W. Va.C.S.R. § 1P-2.2.2 (emphasis added). This provision obviously gives the Tax Commissioner discretion in choosing the most reliable technique for appraising a particular property, and specifically contemplates situations such as exist here, where the data are insufficient to employ one or more of the designated valuation methods. Moreover, with respect to personal property, the regulation makes clear that the cost approach is most appropriate where, as in this case, the valuation involves machinery and equipment:

‘[O]f the three (3) 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. The market approach is used less frequently, principally due to a lack of meaningful sales. The income approach is not normally used because of the difficulty in estimating future net benefits to be derived except in the case of certain kinds of leased equipment.’

110 W. Va.C.S.R. § 1P-2.5.3.2. The Commissioner has consistently reiterated this pronouncement on several occasions. See Tax Department Administrative Notice 99-12 (Jan. 29, 1999) (noting that "the [income] approach has limited use in the appraisal of industrial machinery, equipment, furniture, fixtures, and leasehold

improvements because of the difficulty in establishing future net benefits"); Tax Department Administrative Notice 95-13 (Jan. 30, 1995) (same).

Based upon our broad reading of the regulation, we hold that Title 110, Series 1P of the West Virginia Code of State Rules **confers upon the State Tax Commissioner discretion in choosing and applying the most accurate method of appraising commercial and industrial properties. The exercise of such discretion will not be disturbed upon judicial review absent a showing of abuse of discretion.** Because the circuit court in this case interpreted the regulation at issue as expressly mandating that the Tax Commissioner utilize a particular method of valuation, we conclude that the lower court committed reversible error.

In re Tax Assessment Against American Bituminous Power Partners, L.P., 208 W. Va. 257-258, 539 S.E.2d 764 -765 (emphasis added).

The rationale is obvious. Industrial property comes in all shapes, sizes and varieties. One size does not fit all. The Tax Commission needs discretion in order to adapt the three approaches to value to fit a myriad of situations. See Judge Bloom's Final Order, Conclusions of Law Nos. 1 & 3.

The legislative regulations do not specify how to calculate a deduction for economic obsolescence. Even Bayer's own expert witness testified in 2006 that the income method utilized by the Tax Commissioner was the superior method by which to calculate economic obsolescence *supra*. Furthermore, Bayer's expert witness in 2007 employed a different methodology than Mr. Svoda, the previous year's expert witness, to calculate Bayer's requested deduction for economic obsolescence. In the absence of a specified method in the legislative regulations, the Tax Commissioner did not abuse his discretion by calculating the additional deduction for economic obsolescence according to the income method.

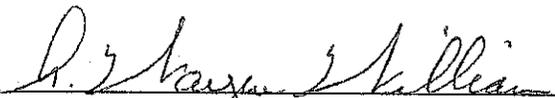
VII. CONCLUSION

The assessment and collection of taxes are essential to the existence of government. Due process in tax cases simply requires a notice of the assessed tax, an opportunity to present your case,

an opportunity for judicial review and the opportunity to obtain a refund or credit for erroneously collected tax. Bayer received due process at every stage of the proceedings. The Tax Department did not abuse its discretion by employing the income method to review Bayer's requests for economic obsolescence. The Circuit court decision should be confirmed.

**Respectfully submitted,
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**BAYER MATERIALSCIENCE, LLC and
BAYER CROPSCIENCE LP,**

Petitioner below, Appellants

v.

Case Nos: 33378,33880,33881

STATE TAX COMMISSIONER, and

**THE HONORABLE PHYLLIS GATSON,
Assessor of Kanawha County, and**

**THE COUNTY COMMISSION OF
KANAWHA COUNTY, and**

**THE PROSECUTING ATTORNEY OF
KANAWHA COUNTY**

Respondents Below, Appellees.

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 Department's Response Opposing Petition for Appeal*" was served via United States Mail, postage prepaid, this 17th day of July, 2008, addressed as follows:

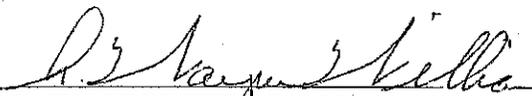
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