

## IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

BAYER MATERIALSCIENCE, LLC,

Petitioner,

v.

Civil Action No. 06-MISC-93  
The Honorable Louis Bloom2006 JAN 29 PM 2:45  
CATHY S. GATSON, CLERK  
KANAWHA CO. CIRCUIT COURT

THE HONORABLE VIRGIL T. HELTON,  
Acting State Tax Commissioner, and  
THE HONORABLE PHYLLIS GATSON,  
Assessor of Kanawha County, and  
THE COUNTY COMMISSIONER OF  
KANAWHA COUNTY, and  
THE HONORABLE WILLIAM J. CHARNOCK,  
Prosecuting Attorney of Kanawha County

Respondents.

FINAL ORDER

Pending before the Court is the "Petition," which was filed by Bayer MaterialScience, LLC (hereinafter "Petitioner"). Said Petition appeals the orders from the February 23, 2006 regular session of the County Commission of Kanawha County sitting as the Board of Equalization and Review (hereinafter "Board"), which denied Petitioner's challenges to the revised value of Petitioner's industrial property as established by the State Tax Commissioner. The February 23, 2006 Board orders concluded that, (1) Petitioner failed to prove by clear and convincing evidence that the assessments are erroneous and that the Tax Commissioner abused his discretion in considering the economic obsolescence of the subject property, and (2) the agreement by Petitioner to pay Dow Chemical a million dollars per year was within the original service agreement as an acquisition cost, when Petitioner agreed to assume acquisition of the facility, and does not represent additional economic obsolescence. The respondents in this matter

are, Virgil T. Helton, Acting West Virginia State Tax Commissioner (hereinafter "Tax Commissioner"); Phyllis Gatson, Assessor of Kanawha County; The County Commission of Kanawha County; and William J. Charnock, Prosecuting Attorney of Kanawha County. The Petitioner's Petition seeks this Court's review of the February 23, 2006 Board orders, pursuant to *West Virginia Code*, §11-3-24.

After full consideration of the Petition, the briefs filed by the opposing parties, the record, and applicable law, the Court does hereby find that the Petitioner has not established by clear and convincing evidence that the assessments presented by the Tax Commissioner are erroneous and that the Board abused its discretion in affirming the assessments by the Tax Commissioner based on the following findings of fact and conclusions of law.

#### **FINDINGS OF FACT**

1. The Court finds that Petitioner has a statutory right to judicial review before the circuit court pursuant to *West Virginia Code*, §11-3-25 and respondents do not question the timing of the appeal or the jurisdiction of this Court.
2. The Tax Commissioner pursuant to *West Virginia Code*, §11-1C-10, appraised Petitioner's industrial property for tax year 2006 and forwarded the appraisal to the Assessor of Kanawha County.
3. At the February 16, 2006 regular session of the Board, Petitioner contested the valuation of its industrial personal property by the Tax Commissioner. Prior to this meeting the Petitioner provided the Tax Commissioner with additional information and the Tax Commissioner revised his appraisal value of Petitioner's property.

4. By the Board's orders dated February 23, 2006, the Board denied the Petitioner's challenges to the revised value of Petitioner's industrial property established by the Tax Commissioner and upheld the revised value established by the Tax Commissioner.
5. This Court finds that Petitioner raises primarily two issues: (1) whether the proper method was used to calculate a deduction for economic obsolescence; and (2) whether the assessment process under *West Virginia Code*, §11-3-24 violates due process.
6. Pursuant to *West Virginia Code*, §11-3-1, all property must be assessed at its "true and actual value," which is further defined as the value a willing buyer would pay a willing seller in an arm's length transaction, in other words the property's fair market value.
7. Under 110 C.S.R. §1P-2.5.3.1., the Tax Commissioner has three approaches to consider in determining the fair market value of industrial personal property: cost, income, and market.
8. According to the West Virginia State Tax Department Administrative Notice 2006-13, the cost approach is primarily relied on in appraising industrial machinery, equipment, furniture, fixtures, and leasehold improvements, for property tax purposes.
9. Under 110 C.S.R. §1P-2.5.3.2., the cost approach is the most consistently applied approach in valuing industrial personal property.
10. The Tax Commissioner calculated the appraisal value of Petitioner's industrial personal property using the cost approach.
11. Under 110 C.S.R. §1P-2.2.1.1. "Cost Approach," replacement value is first calculated, then reduced by three forms of depreciation: physical deterioration, functional obsolescence, and economic obsolescence to arrive at the fair market value.
12. The Tax Commissioner used the cost approach to calculate the replacement value.

13. The Tax Commissioner used the cost approach to calculate deductions for both physical deterioration and functional obsolescence.
14. Petitioner does not dispute the values calculated or methods used by the Tax Commissioner for the replacement value, physical deterioration, and functional obsolescence.
15. Petitioner and Tax Commissioner disagree on the method used to calculate economic obsolescence and the appropriate amount of economic obsolescence.
16. Petitioner in determining the amount of economic obsolescence employed a cost approach and calculated an inutility factor. As a result Petitioner's expert, Robert Stanley Svoboda (hereinafter "Mr. Svoboda"), testified that the Bayer Material Science facility located in South Charleston, West Virginia, should receive a deduction of \$21,081,887 for economic obsolescence as calculated under the cost approach using the inutility factor.
17. Jeff Amburgey (hereinafter "Mr. Amburgey"), Assistant Director of the Property Tax Division, calculated the deduction for economic obsolescence using an income method, which is commonly employed in appraising utility plants.<sup>1</sup> This method has been employed for the past three years to determine economic obsolescence and any problems that have arisen as a result, up to this point, have been resolved between the parties.<sup>2</sup> Mr. Amburgey testified that Petitioner was unable to provide income information at the individual plant level.<sup>3</sup> So, Mr. Amburgey, employing the income method, reviewed Petitioner's annual report and determined that Petitioner did not write down the value of any industrial personal

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<sup>1</sup> 2/16/06 Tr. 303.

<sup>2</sup> 2/16/06 Tr. 265.

<sup>3</sup> 2/16/06 Tr. 303.

property at the facility for last tax year.<sup>4</sup> In addition, Mr. Amburgey reviewed Petitioner's State corporate tax returns, since this was the next level up from the plant level from which income could be determined, and calculated an income amount attributable to the South Charleston facility.<sup>5</sup> Mr. Amburgey testified that the Petition is the only taxpayer that the Tax Commissioner has to start with the income tax return.<sup>6</sup> The Tax Commissioner calculated that Petitioner's South Charleston facility should receive a deduction of \$10,861,561 for economic obsolescence using the income method.

18. Mr. Amburgey testified that in valuing industrial facilities cost and income approaches have been combined for other taxpayers.<sup>7</sup>
19. The Court finds that the legislative regulations for the evaluation of industrial real and personal property are silent concerning how to calculate economic obsolescence.
20. The Court finds that the legislative regulations for evaluation of industrial real and personal property are void of any reference to the inutility factor used by Mr. Svoboda.
21. Mr. Svoboda testified that economic obsolescence is best measured by the income approach as stated in his book on page 104.<sup>8</sup>

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<sup>4</sup> 2/16/06 Tr. 287.

<sup>5</sup> 2/16/06 Tr. 273-279.

<sup>6</sup> 2/16/06 Tr. 308.

<sup>7</sup> 2/16/06 Tr. 308.

<sup>8</sup> 2/16/06 Tr. 107-110.

22. Mr. Svoboda's inutility factor determines only a portion of the economic obsolescence, while the income approach would determine all the economic obsolescence.<sup>9</sup>
23. Mr. Svoboda in order to determine all the economic obsolescence through his cost approach to economic obsolescence includes excess operating expenses, which involves an evergreen contract between Petitioner's predecessors and Dow before Petitioner acquired the South Charleston facility.<sup>10</sup>
24. Petitioner asserts that the Board is an inherently biased tribunal and that imposing a "clear and convincing" standard of proof upon a taxpayer before that tribunal amounts to a denial of due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States and Article III, Section 10 of the Constitution of West Virginia.
25. The West Virginia legislature has promulgated *West Virginia Code*, §11-3-24, which mandates that the county commission sit as the board of equalization and review in order to review and equalize the assessments made by the assessor. The Supreme Court of Appeals of West Virginia has long established and continues to hold that the burden of proof is on the tax payer to prove by clear and convincing evidence that the Tax Commissioner's assessment is erroneous under *West Virginia Code*, §11-3-24.

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<sup>9</sup> 2/16/06 Tr. 118-119.

<sup>10</sup> 2/16/06 Tr. 134-135, 141-143. An evergreen contract is one that never ends and in this case is only terminable by Dow and obligates Petitioner to pay for services for which it receives no benefit.

## STANDARD OF REVIEW

The Supreme Court of Appeals of West Virginia in *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W.Va. 250, 539 S.E.2d 757 (2000) has set forth the standard of review for this Court to review decisions of the Board as follows:

Upon receiving an adverse determination before the county commission, a taxpayer has a statutory right to judicial review before the circuit court. W.Va. Code § 11-3-25 (1967). The statute provides little in the way of guidance as to the scope of judicial review, although it does expressly limit review to the record made before the county commission. Given this limitation, we have previously indicated that review before the circuit court is confined to determining whether the challenged property valuation is supported by substantial evidence, or otherwise in contravention of any regulation, statute, or constitutional provision[.] . . . [J]udicial review of a decision of a board of equalization and review regarding a challenged tax-assessment valuation is limited to roughly the same scope permitted under the West Virginia Administrative Procedures Act, W.Va. Code ch. 29A. *Id.* at 254, 761. (internal citations and footnotes omitted)

The standard of review pursuant to *West Virginia Code* § 29A-5-4(g) is as follows:

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

“It is a general rule that valuations for taxation purposes fixed by an assessing officer are presumed to be correct. The burden of showing an assessment to be erroneous is, of course, upon the taxpayer, and proof of such fact must be clear.” Syl. pt. 7, *In re Tax Assessments Against Pocahontas Land Co.*, 172 W.Va. 53, 303 S.E.2d 691 (1983).

“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.” Syl. pt. 5, *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W.Va. 250, 539 S.E.2d 757 (2000).

#### CONCLUSIONS OF LAW

1. The assessments by the Tax Commission are presumed to be correct. Petitioner has failed to meet its burden of showing that the Tax Commissioner’s assessment was erroneous by clear and convincing evidence. The Tax Commissioners use of the income method to calculate economic obsolescence was well within its discretion and the Tax Commissioner did not abuse its discretion in applying this approach to economic obsolescence. Therefore, the Board did not clearly err or abuse its discretion in finding that Petitioner failed to prove by clear and convincing evidence that the assessments are erroneous. The Board did not clearly err or abuse its discretion in finding that Petitioner

failed to prove by clear and convincing evidence and that the Tax Commissioner abused his discretion in considering the economic obsolescence of the subject property.

2. The Board did not clearly err or abuse its discretion in finding that the evergreen contract between Petitioner and Dow was within the original service agreement, which Petitioner agreed to assume in its acquisition of the South Charleston facility. Therefore, the payments made under this contract do not represent additional economic obsolescence and should not be included in the calculation of economic obsolescence.
3. The Court concludes that the Tax Commissioner's assessment of Petitioner's property is supported by substantial evidence in the record and by the testimony of the Tax Commissioner's witnesses. The Court concludes that the Tax Commissioner's assessment of Petitioner's property is not in contravention of any regulation, statute, or constitutional provision.
4. The Court concludes that there is no merit to Petitioner's allegations that it was denied due process. The legislatively mandated system to equalize and review the assessments is set forth in *West Virginia Code*, §11-3-24, and the Board properly followed the statutes and properly applied the burden of proof to Petitioner's case.

Accordingly, the Court determines that the February 23, 2006 orders of the County Commission of Kanawha County sitting as the Board of Equalization and Review affirming the State Tax Commissioner assessments on the real and personal property of Bayer CropScience, LP and on the personal property of Bayer MaterialScience, LLC are hereby **AFFIRMED** as the Petitioner was unable to prove that the Board clearly erred or abused its discretion. The

objection of any party to the entry of this Order is hereby noted and preserved. The Clerk is

**DIRECTED** to send a certified copy of this order to the following persons:

**Darrel V. McGraw, Jr.**  
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**L. Wayne Williams**  
Assistant Attorney General  
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**Herschel H. Rose III**  
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**West Virginia State Auditor's Office**  
State Capitol Complex  
Building 1, Room W-100  
Charleston, WV 25305

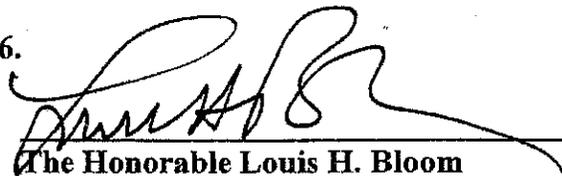
**Kanawha County Commission**  
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**Kanawha County Assessor**  
409 Virginia Street East  
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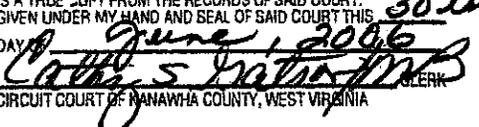
There being nothing further, this matter is hereby **DISMISSED** and **STRICKEN** from the Court's docket.

ENTERED: This 25 day of June, 2006.

  
The Honorable Louis H. Bloom  
13<sup>th</sup> Judicial Circuit Court  
State of West Virginia

6/30/06  
Date: \_\_\_\_\_  
Certified copies sent to:  
\_\_\_\_\_ source of record  
\_\_\_\_\_ parties  
\_\_\_\_\_ other (please indicate)  
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\_\_\_\_\_ hand delivery  
\_\_\_\_\_ interdepartmental  
Other directives accomplished:  
  
Clerk

DVM, gwl, LWW / HHR / WVS AO  
WSC / KCA / KCC 10

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 30<sup>th</sup>  
DAY June, 2006  
  
Clerk  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA