

33880

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BAYER CROP SCIENCE, USA, LP,

Petitioner,

v.

THE HONORABLE VIRGIL T. HELTON,  
ACTING TAX COMMISSIONER, and

THE HONORABLE PHYLLIS GATSON,  
ASSESSOR OF KANAWHA COUNTY, and

THE COUNTY COMMISSION OF KANAWHA  
COUNTY, and

THE HONORABLE WILLIAM J. CHARNOCK,  
PROSECUTING ATTORNEY OF KANAWHA COUNTY,

Respondents,

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*WJ*  
Civil Action No. 06-MISC-94  
Judge James C. Stucky

**ORDER**

Pending before the Court is the "Petition", which was filed by Bayer Crop Science, LP (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 and real 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) Petitioner failed to prove, by clear and convincing evidence, that the valuation for taxation on the subject

real property was erroneous or an abuse of discretion. In addition, the Petitioner asserts that the valuation hearings failed to comport with West Virginia Constitutional requirements of due process. 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 of State Regulations, Title 110, Series 1P, appraised Petitioner's industrial and personal property for tax year 2006 and forwarded the appraisal to the Assessor of Kanawha County.
3. The Tax Commissioner, pursuant to West Virginia Code of State Regulations, Title 110, Series 1P, appraised Petitioner's real property for tax year 2006 and forwarded the appraisal to the Assessor of Kanawha County.

4. At the February 16, 2006 regular session of the Board, Petitioner contested the valuation of its 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.
5. At the February 16, 2006 regular session of the Board, Petitioner contested the valuation of its real property by the Tax Commissioner.
6. 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. In addition, by the Board's orders dated February 23, 2006, the Board denied the Petitioner's challenges to the value of Petitioner's real property established by the Tax Commissioner.
7. The Court finds that Petitioner raises primarily three issues: (1) whether the proper method was used to calculate a deduction for economic obsolescence; and (2) whether Petitioner's real property was correctly appraised; and (3) whether the assessment process under *West Virginia Code*, §11-3-24 violates due process.
8. 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.
9. 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 property: cost, income,

and market.

10. 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.
11. Under 110 C.S.R. §1P-2.5.3.2., the cost approach is the most consistently applied approach in valuing industrial personal property.
12. The Tax Commissioner calculated the appraisal value of Petitioner's industrial personal property using the cost approach.
13. 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.
14. The Tax Commissioner used the cost approach to calculate the replacement value.
15. The Tax Commissioner used the cost approach to calculate deductions for both physical deterioration and functional obsolescence.
16. Petitioner does not dispute the values calculated or methods used by the Tax Commissioner for replacement value, physical deterioration, and functional obsolescence.
17. Petitioner and Tax Commissioner disagree on the method used to calculate economic obsolescence and the appropriate amount of economic obsolescence.
18. Petitioner, in determining the amount of economic obsolescence employed a cost

approach and calculated an inutility factor which was then used to calculate a deduction for economic obsolescence.

19. Jeff Amburgey, Assistant Director of the Property Tax Division, calculated the deduction for economic obsolescence using an income method.
20. Petitioner asserts that the Commission's use of the income method was in contravention of 110 C.S.R. §2.5.3.2.
21. The Court finds that the legislative regulations for the evaluation of industrial real and personal property are silent concerning how to calculate economic obsolescence.
22. The Court finds that the legislative regulations for the evaluation of industrial real and personal property are void of any reference to the inutility factor used by Mr. Svoboda.
23. The Tax Department appraised Petitioner's real property by comparing, on a per acre basis, comparable sales of property in close proximity to Petitioner's property.
24. Petitioner offered its own appraisal of its real property. This appraisal also looked to sales of other properties, but some of the comparable sales were of property in other counties and states.
25. 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.

26. 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.

### STANDARD OF REVIEW

The Supreme Court of Appeals of West Virginia in *In re Tax Assessment Against American Bituminous Power Partner, 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 Commissioner 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. The Board, therefore, 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 assessments of real property by the Tax Department are supported by substantial evidence. The Court concludes that the Kanawha County Commission's affirmation of the Tax Department did not contravene any regulation, statute or constitutional provision.
3. 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

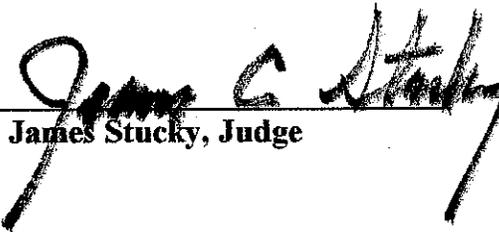
Commission of Kanawha County sitting as the Board of Equalization and Review affirming the State Tax Commissioner's assessments on the real and personal property of Bayer Crop Science, USA, LP are hereby AFFIRMED as the Petitioner was unable to prove that the Board clearly erred or abused its discretion.

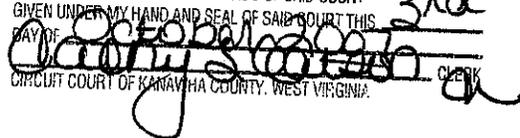
The Court notes the objection and exception of the Petitioner to this ruling.

This is a Final Order.

The Court ORDERS the Circuit Clerk of Kanawha County to strike this matter from the docket and to send a certified copy of this Order to all counsel of record.

ENTERED this 2 day of Oct., 2007.

  
James Stucky, Judge

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 3rd  
DAY OF October 2007  
  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA