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KAWAWHA COUNTY COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**BAYER MaterialScience LLC., and
BAYER CropScience USA, LP,**

Petitioners,

v.

Civil Action No. 07-MISC-105
Civil Action No. 07-MISC-106
The Honorable Louis H. Bloom

**THE HONORABLE VIRGIL T. HELTON,
STATE TAX COMMISSIONER, and
THE HONORABLE PHYLLIS GATSON,
ASSESSOR OF KANAWHA COUNTY, and
THE COUNTY COMMISSION OF KANAWHA COUNTY,**

Respondents.

FINAL ORDER

Pending before the Court is the "Petition", which was filed by Bayer MaterialScience, LLC. Subsequently, the Kanawha County Commission filed a Motion to Consolidate the instant case and the *ad valorem* property tax appeal of *Bayer CropScience USA, LP., v. Helton, et al.*, Civil Action No. 107-MISC-106 pending before the Honorable James Stucky. A hearing was conducted on April 11, 2007 and the two cases were consolidated.¹

Said Petitions appeal the Order from the February 15, 2007 regular session of the County Commission of Kanawha County sitting as the Board of Equalization and Review (hereinafter "Board"), which denied Petitioners' challenges to the values of Petitioners' industrial property as established by the State Tax Commissioner. The February 15, 2007 Board Order concluded that

¹For the sake of brevity, the Court will refer to Bayer MaterialScience and Bayer CropScience collectively as either "Petitioners" or, simply, "Bayer" unless separate treatment of the two corporations is required.

Petitioners 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. The Respondents in this matter are Virgil. T. Helton, West Virginia State Tax Commissioner (hereinafter "Tax Commissioner"); Phyllis Gatson, Assessor of Kanawha County; and The County Commission of Kanawha County. Petitioners seek this Court's review of the February 15, 2007 Board Order, Kanawha County Commission Order 2007-185, pursuant to West Virginia Code § 11-3-24.

After full consideration of the Petitions, the briefs filed by the opposing parties, the record, the oral arguments of August 23, 2007, and applicable law, the Court does hereby find that the Petitioners have 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 Petitioners have 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 Petitioners' industrial property for tax year 2007 and forwarded the appraisals to the Assessor of Kanawha County.
3. At the February 15, 2007 regular session of the Board, Petitioners contested the valuation of their industrial personal property by the Tax Commissioner.

4. At approximately 3:30 p.m. on the day of the Board of Equalization and Review Hearing, the Petitioners provided additional information to the Tax Department.² Petitioners did not include the additional information with their petition for appeal to the Board.³ The Tax Department did not revise the appraisal values of Bayer's industrial property based upon the additional information provided on the day of the hearing. In addition, Petitioners did not provide the plant specific production and capacity data supporting their request for a deduction for economic obsolescence to the Tax Department when they filed the property tax returns.⁴

5. By the Board's Order Number 2007-185, the Board denied the Petitioners' challenges to the value of Petitioners' industrial personal property established by the Tax Commissioner and upheld the values established by the Tax Commissioner.

6. This Court finds that Petitioners raise 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.

7. 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.

8. 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.

² Transcript at PP. 26 & 27.

³ Transcript at P. 27.

⁴ Transcript at PP. 64 & 65.

9. According to the West Virginia State Tax Department Administrative Notice 2007-13, the cost approach is primarily relied on in appraising industrial machinery, equipment, furniture, fixtures, and leasehold improvements, for property tax purposes.

10. Under 110 C.S.R. § 1P-2.5.3.2., the cost approach is the most consistently applied approach in valuing industrial personal property.

11. The Tax Commissioner calculated the appraisal value of Petitioners' industrial personal property using the cost approach.

12. 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.

13. The Tax Commissioner used the cost approach to calculate the replacement value.

14. The Tax Commissioner used the cost approach to calculate deductions for both physical deterioration and functional obsolescence.

15. Petitioners do not dispute the values calculated or methods used by the Tax Commissioner for the replacement value, physical deterioration, and functional obsolescence.

16. Petitioners and Tax Commissioner disagree on the method used to calculate economic obsolescence and whether a deduction for economic obsolescence is warranted.

17. Mr. Greg Odell (hereinafter, "Mr. Odell") testified as an expert witness for Bayer. The Tax Department stipulated to Mr. Odell's qualifications to testify as an expert witness on questions of the valuation of industrial property. The Board recognized his qualifications to testify

as an expert witness.⁵ Mr. Odell testified that the only issue with which Bayer disagreed was the calculation of economic obsolescence.⁶

18. In order to calculate the amount of economic obsolescence, Mr. Odell reviewed production and capacity data for the Bayer CropScience plant in Institute, West Virginia, employed a Scale Factor Model which measures permanent inutility, and an Inutility Model which measures temporary inutility.⁷ According to Mr. Odell's testimony, the Scale Factor produced an economic factor of about 54 percent while the Inutility Model produced an economic factor of about 57 percent. Mr. Odell equally weighted the two models and calculated an economic obsolescence factor of 55 percent for the Bayer CropScience plant at Institute which was applied against the valuation of the machinery and equipment.⁸

19. As a result of his calculations, Mr. Odell testified that the Bayer CropScience facility located in Institute should receive a deduction of \$ 30,138,619.00 for economic obsolescence.⁹

20. Similarly, Mr. Odell testified that he performed essentially the same analysis for Bayer MaterialScience.¹⁰ Mr. Odell calculated that the Bayer MaterialScience facility located in

⁵ Transcript at P. 25.

⁶ Bayer CropScience, Transcript of Board of Equalization and Review Hearing held February 15, 2007 (hereinafter, "Transcript") at P. 31; Bayer MaterialScience, Transcript at P. 45; *see also* Transcript at PP. 54-55.

⁷ Transcript at P. 33.

⁸ Transcript at P. 34; *see also* Bayer's Exhibit 1.

⁹ Transcript at P. 32; *see also* Bayer's Exhibit 1.

¹⁰ Transcript at PP. 43-45.

South Charleston, West Virginia, should receive a deduction of \$ 2,263,782.00 for economic obsolescence.¹¹

21. Mr. Odell further testified that the Scale Factor and the Inutility Model he employed for calculating economic obsolescence were generally recognized methodologies within the field of appraisal.¹² (During his testimony Mr. Odell used the terms "Inutility Model" and "Income Method" interchangeably. *See* Transcript at PP. 34-35 and Bayer Exhibits 1 & 2.) Upon cross-examination, Mr. Odell acknowledged that the specific models he employed to calculate economic obsolescence were developed in-house by his employer, Ryan and Associates. However, Mr. Odell further stated that these models were derived from appraisal models approved by the American Society of Appraisers (hereafter "ASA") and have been addressed in ASA publications.¹³

22. Mr. Jeff Amburgey (hereinafter "Mr. Amburgey"), Assistant Director of the Property Tax Division, testified as an expert witness for the Tax Department.¹⁴ Petitioners did not object to Mr. Amburgey's testimony as an expert witness on any particular issue to which he testified.¹⁵

23. Mr. Amburgey testified that in order to determine whether an industrial taxpayer should receive a deduction for economic obsolescence the Tax Department performs an income valuation which is compared to a cost valuation.¹⁶ Mr. Amburgey testified that when an industrial

¹¹ Transcript at P. 45; *see also* Bayer's Exhibit 2.

¹² Transcript at PP. 34 -35.

¹³ Transcript at PP. 50-52.

¹⁴ Transcript at P. 73.

¹⁵ *See* Transcript, specifically at P. 73; generally at PP 73-115.

¹⁶ Transcript at PP. 76-77.

taxpayer requests a deduction for economic obsolescence, the Tax Department requests certain information including five years of income data, annual reports to stockholders, and financial statements.¹⁷ Generally, the Tax Department bases the calculation for economic obsolescence on plant specific information. ¹⁸ Mr. Amburgey further testified that approximately 10-15 industrial taxpayers request a deduction for economic obsolescence annually.¹⁹ Mr. Amburgey testified that every industrial taxpayer who has requested a deduction for economic obsolescence over the last five years has been able to provide the requisite plant specific income data except Bayer.²⁰

24. Mr. Amburgey further testified that Petitioners were unable to provide income information at the individual plant level.²¹ In order to apply the income method to calculate economic obsolescence, Mr. Amburgey reviewed Petitioners' State corporate income 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 West Virginia facilities.²² Mr. Amburgey admitted that Bayer is the only taxpayer that requests a deduction for economic obsolescence for which the Tax Department must allocate income from a state income tax return to the individual plant.²³

¹⁷ Transcript at PP. 76-77.

¹⁸ Transcript at PP. 78.

¹⁹ Transcript at P. 94.

²⁰ Transcript at PP. 78 & 94.

²¹ Transcript at P. 78.

²² Transcript at PP. 78 and 91-93.

²³ Transcript at PP. 78-79.

25. The Tax Commissioner determined that a deduction for economic obsolescence was not warranted for Bayer CropScience.²⁴ According to Mr. Amburgey's testimony, based upon a review of Bayer CropScience's State income tax returns, the net income per books increased approximately by a factor of eight from 2004 to 2005.²⁵ At the Board Hearing, the parties agreed to characterize the increase in income as significant.²⁶ Furthermore, since the valuation under the income approach exceeded the valuation under the cost approach, no deduction for economic obsolescence was awarded for Bayer CropScience.²⁷

26. Similarly, the valuation under the income approach for Bayer MaterialScience significantly exceeded the cost approach valuation.²⁸ No deduction for economic obsolescence was awarded to Bayer MaterialScience.²⁹

27. Mr. Amburgey testified that the Tax Department considered economic obsolescence but did not award any deduction for it.³⁰

28. On cross-examination, Mr. Amburgey testified that the income technique used by the Tax Department to calculate economic obsolescence is employed to value utility corporations in West Virginia and is similar to a technique used in at least 30 other states to value utility

²⁴ Transcript at P. 79.

²⁵ Transcript at PP. 80 & 84; 87; and 90-91(testimony based upon review of income tax returns).

²⁶ Transcript at P. 83.

²⁷ Transcript at PP. 98-103; *see also* Bayer's Exhibit 1.

²⁸ Bayer's Exhibit 2.

²⁹ Transcript at P. 79.

³⁰ Transcript at PP. 96-97.

corporations. Further, he stated that it is the accuracy of the technique that is important and not whether the property is used by an industrial corporation or a utility corporation.³¹

29. Upon cross-examination Mr. Odell testified that it is possible to calculate economic obsolescence by employing income techniques within the cost approach to valuation.³² Mr. Odell did not employ the income techniques to calculate economic obsolescence since Bayer did not provide the income data for individual plants required for the calculations. Nor did Bayer engage him to do so.³³

30. At the conclusion of the Board Hearing, Commissioner Carper asked counsel for Bayer whether he had sufficient time to present everything that he wanted to present and whether he was rushed or hurried or otherwise cut-off in presenting his case. Counsel for Bayer stated that he had sufficient opportunity to present his record.³⁴

31. The Court finds that the legislative regulations for the evaluation of industrial real and personal property are silent concerning how to calculate economic obsolescence.

32. The Court finds that the legislative regulations for evaluation of industrial real and personal property are devoid of any reference to the Scale Factor and the Inutility Model employed by Mr. Odell.

33. Petitioners assert 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

³¹ Transcript at PP. 112-114.

³² Transcript at PP. 63-64.

³³ Transcript at P. 64.

³⁴ Transcript at P. 123.

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.

34. 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 taxpayer 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 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 Commissioner are presumed to be correct. Petitioners have failed to meet the burden of showing that the Tax Commissioner's assessments were erroneous by clear and convincing evidence. The Tax Commissioner's use of the income method to calculate

economic obsolescence was well within its discretion and the Tax Commissioner did not abuse his discretion in applying this approach to economic obsolescence. Therefore, the Board did not clearly err or abuse its discretion in finding that Petitioners 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 Petitioners 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 Court concludes that the Tax Commissioner's assessments of Petitioners' property are supported by substantial evidence in the record and by the testimony of the Tax Commissioner's witness. The Court concludes that the Tax Commissioner's assessments of Petitioners' property is not in contravention of any regulation, statute, or constitutional provision.

3. The Court concludes that there is no merit to Petitioners' allegations that they were 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 Petitioners' case.

Accordingly, the Court determines that Order Number 2007-185 of the County Commission of Kanawha County sitting as the Board of Equalization and Review affirming the State Tax Commissioner's assessments on the industrial personal property of Bayer MaterialScience, LLC., and on the industrial personal property of Bayer CropScience, LP., are hereby **AFFIRMED** as the Petitioners were 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:

L. Wayne Williams, Esquire
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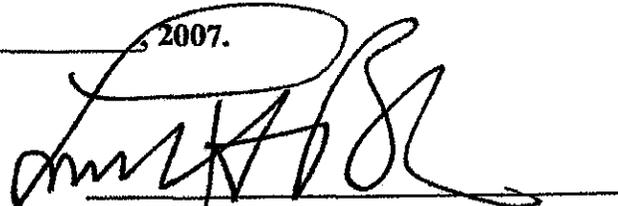
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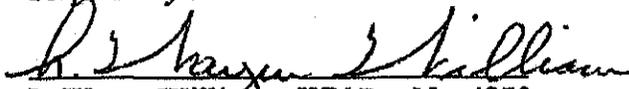
There being nothing further, this matter is hereby **DISMISSED** and **STRICKEN** from the Court's docket.

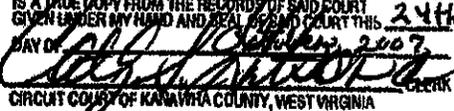
Entered this 23rd day of Oct, 2007.



Louis H. Bloom
Judge of the 13th Judicial Circuit Court
State of West Virginia

Prepared by :


L. Wayne Williams, WV Bar No. 4370
Assistant Attorney General

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY E. 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 24th
DAY OF October, 2007.

CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

10/24/07
Date: _____
Certified copies sent to:
_____ counsel of record
_____ parties
_____ other _____
By: _____
_____ State Auditor, Kan. Cty. Comm.
_____ S. Sluss
_____ A. Ramey
Deputy Circuit Clerk