BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203 _____ Petitioner: **HOLCIM (US) INC,** v. Respondent: **FREMONT COUNTY BOARD OF EQUALIZATION.**	**Docket No.: 48160**

ORDER

THIS MATTER was heard by the Board of Assessment Appeals on April 13 and 14, 2009, James R. Meurer and Sondra W. Mercier presiding. Petitioner was represented by Alan Poe, Esq. and Robyn A. Kashiwa, Esq. Respondent was represented by Brenda L. Jackson, Esq. Petitioner is protesting the 2007 actual value of the subject property.

PROPERTY DESCRIPTION:

Subject property is described as follows:

Personal property located at 3500 Highway 120, Florence, Colorado (Fremont County Schedule Nos. 71400-P and 71401-P)

The subject includes machinery and equipment owned and operated at a cement manufacturing plant. This includes cement manufacturing equipment, office furniture and equipment, lab equipment, mining equipment, shop equipment, and unlicensed mobile equipment. Schedule 71400P represents original equipment that is still in use, while Schedule 71401P includes only the machinery and equipment added during the most recent construction in 2002 and 2003.

The subject is part of a cement manufacturing facility that was originally built in 1897. The plant was rebuilt in 1947 and again modified in 1974. Following several shut-downs, construction on the most recent plant, identified as "Plant 4" began in 1999, with completion scheduled for spring 2001. Because of structural problems in the preheater precalciner tower, start-up was delayed until 2002 to allow the installation of steel cables for post tension reinforcement. Mr. Jason Morin, plant

manager, testified that the repair allows the tower to function; however, it is not able to support additional weight beyond the current equipment installed in the tower.

Additional problems have been identified since start-up including the delamination of portions of the concrete structure as well as issues with the refractory material lining in the tower. Issues with the refractory material were discovered in 2003, with ongoing maintenance required. The delamination was reportedly discovered in 2005 and repaired in 2007 at a cost of $1 million.

Both parties applied the cost approach in valuing the subject. Both parties based their costs on Petitioner's historical cost of machinery and equipment. Differences in value result primarily from the analysis of depreciation.

Respondent relied on the *Assessor's Reference Library* ("ARL") tables designed for mass appraisal use, which Petitioner contends do not adequately reflect the actual status, use, and condition of the property as of the date of value. Petitioner relied on *Marshall & Swift* depreciation tables to calculate percent good for the cement manufacturing machinery and equipment.

Petitioner contends that structural deficiencies in the preheater precalciner tower prevent Petitioner from curing design flaws in the refractory material. This leads to atypical maintenance costs and downtime. Further, structural deficiencies preclude future expansion of the plant. This results in functional obsolescence and reduced life expectancy for that portion of the subject and must be reflected as a reduction in value.

Petitioner's appraiser, Mr. Dennis Neilson, applied the 20-year economic life to the cement manufacturing machinery and equipment found in the ARL, subsequently applying the percent good factors found in the ARL. Mr. Neilson made two adjustments to reflect the actual condition and use of the cement manufacturing equipment and machinery. Mr. Neilson adjusted percent good based on *Marshall & Swift* depreciation tables and reduced the economic life for the preheater precalciner tower from 20 years to 10 years to reflect the functional issues associated with the tower's design flaws.

Mr. Neilson also adjusted the percent good for the older pieces of equipment and machinery associated with earlier versions of the cement manufacturing plant to just 1% above salvage value shown in *Marshall & Swift.* Petitioner contends that the portions of the earlier plants are ancillary equipment and have little remaining value. Mr. Morin testified that he was unable to even give away parts of the old plant.

Respondent's witness, Ms. Stacey Seifert, testified that the Assessor's valuation was based on information reported to her by Petitioner and that it is not possible to make adjustment without supporting information.

Respondent contends that the equipment and machinery is functioning for the intended use and that atypical or unusual depreciation or obsolescence is not present. Respondent indicates that the fact that approximately 175 pieces of equipment and machinery from the earlier plants are still in use after 35 years contradicts Petitioner's theory that wear and tear in the cement manufacturing industry causes atypical wear and tear on equipment requiring adjustments. Respondent points out

that Mr. Neilson's reduction of life expectancy of the preheater precalciner tower from 20 to 10 years as well as the use of a reduced value floor at 9% good were not supported by documentation, studies, or market information, but rather are arbitrary. Respondent indicates that rather than reduce the life of the entire tower, only that portion affected, the refractory material, should have a reduced life. Respondent indicates the reduction in value should be proportional to the actual loss of production caused by the additional shut-down time, with the actual costs deducted from the replacement cost new less depreciation ("RCNLD") of the refractory material.

Respondent contends that as costs are incurred, they should be reported to the assessor as an expense and taken as a deduction from the RCNLD in the following year.

Finally, Respondent contends that under Section 39-10-114(1)(b), C.R.S. no refund interest is due on reductions in value based on errors made by the taxpayer in completing the personal property schedules.

Petitioner contends that under Section 39-8-109, C.R.S. refund interest is due. Petitioner filed a protest and appeal in accordance with Sections 39-5-122, 39-8-106, 39-8-108, and 39-8-109, C.R.S., which do not contain any provision prohibiting the payment of interest on refunds. Section 39-10-114(1)(b), C.R.S. applies only to refunds arising from a petition for abatement/refund of taxes.

Petitioner presented sufficient probative evidence and testimony to prove that the tax year 2007 valuation of the subject property was incorrect.

The Board finds that the actual status, condition, and use of personal property must be reflected in the actual value assigned to personal property. "Physical, functional, and economic obsolescence shall be considered in determining actual value." Section 39-1-104(12.3)(a)(II), C.R.S. The Board is convinced that structural design flaws in the tower structure create long term incurable functional obsolescence to the preheater precalciner tower. This takes two forms: (1) additional maintenance costs as the refractory material lining cannot be replaced with a more durable liner due to the weight limitations of the tower; and (2) limits to future expansion of the entire manufacturing plant. To reflect the functional obsolescence, Petitioner calculated the value of the preheater precalciner tower using a 10-year life rather than a 20-year life. This resulted in an additional reduction in value of $2,783,102.00 to the preheater precalciner tower (asset 1015804).

Respondent contends that Mr. Neilson's use of a reduced economic life of ten years is unsupported and arbitrary. However, Ms. Seifert acknowledged that sales of cement manufacturing machinery and equipment were virtually non-existent. Consequently, the Board tests the reasonableness of the adjustment based on other factors more typically used in determining an adjustment to value for functional obsolescence.

For example, Mr. Morin indicated that the cost of refractory repairs would be $1 million to $3 million annually. In an income approach, this would result in an equal reduction in net operating income. Taking the low end of the range at $1 million capitalized at a rate range of 8% to 12% results in a value reduction of approximately $8.3 million to $12.5 million. This indicates that an adjustment of under $3 million is reasonable. As analyzed by Petitioner, adjusting the economic life

from 20 years to 10 years is comparable to increasing the effective age of the tower by approximately 6 years. The Board is further convinced that the adjustment is reasonable when compared to the estimated loss in revenue of over $5 million annually that would result from an expected 10 additional days of downtime per year required for maintenance associated with the structural deficiency in the tower. Therefore, the Board agrees with Petitioner's adjustment to preheater precalciner tower using a 10-year life.

Petitioner contends that the subject property receives above average wear and tear and therefore should be depreciated at a faster pace. To reflect this point, Petitioner's appraiser applied the *Marshall & Swift* depreciation tables for fixtures and equipment, which results in a lower percentage good factor and a lower value. Petitioner argues that the percent good factors found in the ARL are based on application of improper methodology, specifically assumptions regarding rate of return as it is applied to the "Iowa curves." In his use of *Marshall & Swift* tables, Petitioner's witness selected a 20-year life expectancy from a range of 16 to 24 years. This is the same life expectancy applied by Respondent. The Board is not convinced that the subject experienced greater wear and tear than other cement plants. The Board is convinced that the Property Tax Administrator ("PTA") made every effort to accurately reflect typical percent good factors for a large variety of personal property. The Board finds Petitioner's reliance on *Marshall & Swift* depreciation tables for the cement manufacturing equipment to be unsupported. Therefore, the Board agrees with Respondent's use of the percent good tables found in Volume 5 of the ARL.

Petitioner argues that by using the ARL tables, values increase in the initial years despite the fact that machinery and equipment are depreciating assets. The Board is convinced by the testimony of Respondent's witness, Mr. Ken Beazer, that this was an "anomaly" attributed to inflation outpacing depreciation in recent years.

The Board is convinced that the remaining value of older pieces of machinery and equipment was minimal. Based on Mr. Morin's testimony that he could not give older equipment away, Petitioner's adjustment to a minimum value of 9%, or just 1% above salvage value as reported by *Marshall and Swift*, is reasonable and allowed within the ARL guidelines.

ARL Volume 5, Chapter 4, page 4.11 indicates that the percent good tables assume "[a]verage condition and usage of typical property" and are generic in nature. They are:

> [D]esigned to be generally useful for the majority of personal property. It is not specific to any particular industry or type of personal property.
>
> The table was designed to account for normal physical depreciation. Use of the table with the appropriate economic life estimate accounts for typical physical depreciation and functional/technological obsolescence for the personal property within the valuation process. Additional functional/technological and/or economic obsolescence may also exist. If documented to exist, additional functional and economic obsolescence must be measured in the marketplace either using the market approach or rent loss methods. In addition, any adjustment to the percent good due to the condition of the subject property must be defensible and documented.
>
> The minimum percent good shown for each of the columns is useful as a guide to residual value. It is not absolute and must be reconciled with value in use

> information at the retail "end user" trade level for similar types of property. If the market information shows that the actual value of personal property is lower than the value developed by using the minimum percent good, the use of the minimum percent good should be rejected in favor of the lower value.

On July 16, 2009, the Board ordered Petitioner to recalculate their requested value for the subject property using the percent good tables found in Volume 5 of the ARL, instead of the *Marshall & Swift* depreciation table to value the cement manufacturing equipment. The Board received Petitioner's Adjusted Calculation of Actual Value on August 14, 2009. On August 31, 2009, Respondent filed a Response to Petitioner's Adjusted Calculation recalculating their indicated value to conform to the Board's July 16, 2009 Order. Petitioner filed a Motion For Leave To File A Reply on September 9, 2009, which was granted by the Board; the Board accepted Petitioner's Reply received on September 9, 2009.

Petitioner is requesting a revised 2007 actual value of $11,661,799.00 for Schedule 71400P and $180,271,337.00 for Schedule 71401P in response to the Board Order dated July 16, 2009.

Respondent assigned an actual value of $18,608,670.00 for Schedule 71400P and $205,552,838.00 for Schedule 71401P for tax year 2007. Respondent is recommending a reduction in value of $12,767,776.00 for Schedule 71400P and $181,324,431.00 for Schedule 71401P in response to the Board Order dated July 16, 2009.

The Board finds Petitioner's revised 2007 actual value included accurate classifications for the subject items of personal property and used supported cost, age and depreciation factors. Petitioner's valuation is in compliance with ARL guidelines and supported by line-by-line calculation.

The Board finds that under Section 39-8-109, C.R.S. taxpayer is due appropriate refund of taxes and delinquent interest together with refund interest. The Colorado Supreme Court reaffirmed that the sections governing the protest procedure and abatement/refund procedure are separate and distinct, specifically addressing whether the interest provisions of Section 39-10-114, C.R.S. applied to protest and appeals pursued under Sections 39-5-122, 39-8-106, 39-8-108, and 39-8-109, C.R.S. *Gates Rubber Co. v. State Bd. of Equalization,* 770 P.2d 1189 (Colo. 1989). Section 39-8-109, C.R.S. specifically states that if the taxpayer prevails in an appeal, the taxpayer "shall forthwith receive the appropriate refund of taxes and delinquent interest thereon, together with refund interest at the same rate as delinquent interest . . . ."

ORDER:

Respondent is ordered to reduce the 2007 actual value of the personal property under Schedule 71400P to $11,661,799.00 and the personal property under Schedule 71401P to $180,271,337.00.

The Fremont County Assessor is directed to change his/her records accordingly.

APPEAL:

If the decision of the Board is against Petitioner, Petitioner may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-five days after the date of the service of the final order entered).

If the decision of the Board is against Respondent, Respondent, upon the recommendation of the Board that it either is a matter of statewide concern or has resulted in a significant decrease in the total valuation of the respondent county, may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-five days after the date of the service of the final order entered).

In addition, if the decision of the Board is against Respondent, Respondent may petition the Court of Appeals for judicial review of alleged procedural errors or errors of law within thirty days of such decision when Respondent alleges procedural errors or errors of law by the Board.

If the Board does not recommend its decision to be a matter of statewide concern or to have resulted in a significant decrease in the total valuation of the respondent county, Respondent may petition the Court of Appeals for judicial review of such questions within thirty days of such decision.

Section 39-8-108(2), C.R.S.

DATED and MAILED this 5th day of November 2009.

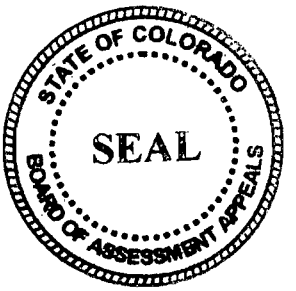
BOARD OF ASSESSMENT APPEALS

James R. Meurer

Sondra W. Mercier

I hereby certify that this is a true and correct copy of the decision of the Board of Assessment Appeals.

Heather Flannery



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