

REPRESENTATIVE FOR PETITIONER:

William S. Faulkner, Senior Tax Manager, DuCharme, McMillen & Associates

REPRESENTATIVE FOR RESPONDENT

Henry E. Bennett, Jr., Administrative Assistant, Calumet Township

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

Koppers, Inc.,)	Petition No.: 45-001-05-1-7-00001
)	
Petitioner,)	Personal Property
)	
v.)	
)	County: Lake
Calumet Township Assessor,)	Township: Calumet
)	
Respondent.)	Assessment Year: 2005

Appeal from the Final Determination of the
Lake County Property Tax Assessment Board of Appeals

June 16, 2010

FINAL DETERMINATION

The Indiana Board of Tax Review (Board) has reviewed the facts and evidence presented in this case. The Board now enters its findings of fact and conclusions of law on the following:

ISSUE

1. The issue presented for consideration by the Board is whether the Petitioner is entitled to abnormal obsolescence on its personal property.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROCEDURAL HISTORY

2. Koppers, Inc. (Koppers) timely filed a 2005 business personal property return (Form 103) with the Calumet Township Assessor on June 5, 2005. On its Form 103, Koppers reported an assessed value of \$374,244, which included an adjustment for abnormal obsolescence in the amount of \$430,202.
3. On August 10, 2005, the Calumet Township Assessor issued a Form 113 denying the abnormal obsolescence and increasing the Petitioner's personal property assessment to \$804,450.
4. Pursuant to Indiana Code §6-1.1-15-1, on September 6, 2005, Koppers filed a Form 130 petition to the Lake County Property Tax Assessment Board of Appeals (PTABOA) appealing Calumet Township's action. The Lake County PTABOA held a hearing on the matter on October 25, 2006, and on October 31, 2006, it issued a determination denying the Petitioner's abnormal obsolescence adjustment.
5. Pursuant to Indiana Code § 6-1.1-15-3, Koppers filed a Form 131, Petition for Review of Assessment, on November 28, 2006, petitioning the Board to conduct an administrative review of the above petition.

HEARING FACTS AND OTHER MATTERS OF RECORD

7. Pursuant to Indiana Code § 6-1.1-15-4 and § 6-1.5-4-1, the duly designated Administrative Law Judge (the ALJ), Ellen Yuhan, held a hearing on March 19, 2010, in Crown Point, Indiana.¹

8. The following persons were sworn and presented testimony at the hearing:
For the Petitioner:

William S. Faulkner, Senior Tax Manager, DuCharme,
McMillen & Associates,

For the Respondent:

Henry E. Bennett, Jr., Administrative Assistant, Calumet
Township.²

9. The Petitioner did not submit any exhibits.³

10. The Respondent submitted the following exhibits:
Respondent Exhibit A – Koppers’ 2005 personal property appeal,
Respondent Exhibit B – Calumet Township Assessor’s response to the
2005 appeal,
Respondent Exhibit C – Lake County PTABOA determination,
Respondent Exhibit D – Koppers’ 2005 tax return,
Respondent Exhibit E – 50 IAC 4.2-4-8(d),
Respondent Exhibit F – 50 IAC 4.2-9-3(a) through (e),
Respondent Exhibit G – Department of Local Government Finance memo,
“Abnormal Obsolescence and Personal Property
Assessments”, dated August 21, 2009,

¹ This matter was originally scheduled for hearing on July 10, 2008, but was continued several times by the parties before being heard.

² Tamille Jackson, Deputy Assessor Calumet Township, was also sworn but did not testify.

³ The Petitioner’s representative testified that Koppers’ personal property return and the documentation submitted to the PTABOA were included with the Form 131 petition. Those documents, however, were not attached to the filing. Nor were they offered into evidence by the Petitioner’s representative. *See* 52 IAC 2-7-1(g) (“Materials submitted to or made a part of the record at a PTABOA hearing, department hearing, or other proceeding from which the appeal arises will not be made part of the record of the Board proceeding unless submitted to the Board.”) However, the Respondent provided a copy of the Petitioner’s return in its exhibits.

Respondent Exhibit H – Board determination in *Applied Extrusion Technologies, Inc. v. Vigo County Assessor*, August 17, 2009.

11. The following additional items are officially recognized as part of the record of proceedings and labeled Board Exhibits:
 - Board Exhibit A – The 131 Petition,
 - Board Exhibit B – Notice of Hearing-Reschedule,
 - Board Exhibit C – Hearing sign-in sheet.
12. The subject property is a centrifuge housed at the U.S. Steel facility located at One North Broadway, Gary, Indiana.
13. The ALJ did not conduct an on-site inspection of the subject property.
14. For 2005, the Lake PTABOA assessed the personal property for \$804,450. The Petitioner contends the property should be assessed at \$374,420.

JURISDICTIONAL FRAMEWORK

15. The Indiana Board is charged with conducting an impartial review of all appeals concerning: (1) the assessed valuation of tangible property; (2) property tax deductions; and (3) property tax exemptions; that are made from a determination by an assessing official or a county property tax assessment board of appeals to the Indiana Board under any law. Ind. Code § 6-2.5-4-1(a). All such appeals are conducted under Indiana Code § 6-1.1-15. *See* Ind. Code § 6-1.5-4-1(b); Ind. Code § 6-1.1-15-4.

ADMINISTRATIVE REVIEW AND THE PETITIONER’S BURDEN

16. A Petitioner seeking review of a determination of an assessing official has the burden to establish a prima facie case proving that the current assessment is incorrect, and specifically what the correct assessment would be. *See Meridian*

Towers East & West v. Washington Twp. Assessor, 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); *see also*, *Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230 (Ind. Tax Ct. 1998).

17. In making its case, the taxpayer must explain how each piece of evidence is relevant to the requested assessment. *See Indianapolis Racquet Club, Inc. v. Wash. Twp. Assessor*, 802 N.E.2d 1018, 1022 (Ind. Tax Ct. 2004) (“[I]t is the taxpayer's duty to walk the Indiana Board . . . through every element of the analysis”).
18. Once the Petitioner establishes a prima facie case, the burden shifts to the assessing official to rebut the Petitioner’s evidence. *See American United Life Ins. Co. v. Maley*, 803 N.E.2d 276 (Ind. Tax Ct. 2004). The assessing official must offer evidence that impeaches or rebuts the Petitioner’s evidence. *Id.*; *Meridian Towers*, 805 N.E.2d at 479.

PETITIONER’S CONTENTIONS

19. The Petitioner’s representative, Mr. Faulkner, testified that Koppers installed a centrifuge and entered into a contract with U. S. Steel Gary Works to process a tar by-product of U. S. Steel’s coking activity. *Faulkner testimony*. According to Mr. Faulkner, in 2003, U. S. Steel changed the manner in which it operated its coke batteries, which resulted in a change in the chemical composition of the tar rendering it unusable to Koppers. *Id.* Koppers idled the centrifuge in 2003, and explored the possibility of finding an alternative use for the machinery. *Id.* When Koppers did not discover an alternative use for the centrifuge, it permanently retired the asset in 2006. *Id.*
20. The Petitioner’s representative argues that the centrifuge qualifies for an abnormal obsolescence adjustment. *Faulkner testimony*. According to Mr. Faulkner, 50 IAC 4.2-9-3 states that abnormal obsolescence is a “result of factors over which

the taxpayer has no control and is unanticipated, unexpected, and cannot be reasonably foreseen by a prudent businessman prior to the occurrence. It is of a non-recurring nature and includes unforeseen changes in market values, exceptional technological obsolescence, or destruction by catastrophe.” *Id.* Mr. Faulkner contends that the triggering event was unanticipated, unexpected, and unforeseen because Koppers had never had the experience at any of its other locations. *Id.* Further, although the equipment was not permanently retired in 2005, Mr. Faulkner argues, the Board has granted abnormal obsolescence where the assets were not retired in *Jofco*, *American Eagle Airlines* and *American Airlines*. *Id.*

21. Mr. Faulkner testified that he used common appraisal methods, as shown in the American Society of Appraisers’ VALUING MACHINERY AND EQUIPMENT, 2000, to calculate an inutility penalty for the centrifuge. *Faulkner testimony*. According to Mr. Faulkner, he used the anticipated production of 2.5 million gallons, rather than the actual production level of zero. *Id.* “We came to an inutility penalty of 54.48%, which was applied to \$804,450 to have an abnormal obsolescence adjustment of \$430,202, to get to a revised assessment of \$374,244.” *Id.*

22. Finally, in rebuttal, Mr. Faulkner contends the Board decisions in *Jofco*, *American Eagle Airlines* and *American Airline* decisions are precedent, while the Department of Local Government Finance (DLGF) memorandum on abnormal obsolescence cited by the Respondent is merely opinion. *Faulkner testimony*. According to Mr. Faulkner, the DLGF memorandum gives examples where there is a cost-to-cure, but here, he argues, there is no cost to cure. *Id.* Moreover, the memorandum and the *Applied Extrusion Technologies* decision cited by the Respondent were both issued in 2009 – four years after the Petitioner’s personal property return was filed.⁴ *Id.*

⁴ Although not admitted to practice law, a certified tax representative can practice before the Board, subject to several express limitations. Among other things, a tax representative cannot make a claim regarding the constitutionality of an assessment or engage in any other representation that involves the practice of law. 52 IAC 1-2-1(b)(3) – (4). Here, Mr. Faulkner attempted to interpret and distinguish cases – which is part of

RESPONDENT'S CONTENTIONS

23. The Respondent's witness, Mr. Bennett, testified that abnormal obsolescence means that the property is not just dormant, but damaged, worn out, or some catastrophe has rendered it inoperable and the cost to cure exceeds the market value of the property. *Bennett testimony*. According to Mr. Bennett, 50 IAC 4-2.9-3(b-e) indicates that in order to apply for abnormal obsolescence the equipment in question must be incapable of performing its designed function and not adaptable for an alternate use. *Id.* A reduction in sales or a forced reduction of production is not an appropriate justification for the application of abnormal obsolescence in a personal property return. *Id.* Here, Mr. Bennett argues, because the taxpayer stated that it was planning to keep the equipment for possible future use, abnormal obsolescence does not apply. *Id.*
24. Mr. Bennett further cites to a DLGF memorandum and contends that a taxpayer seeking an obsolescence adjustment must identify the causes of the alleged obsolescence and quantify the amount to be applied to the asset. *Bennett testimony; Respondent Exhibit G*. According to Mr. Bennett, the quantification of obsolescence must be tied to an actual loss in value suffered by the asset. *Id.*
25. Moreover, Mr. Bennett contends, the Indiana Board issued a determination in *Applied Extrusion Technologies v. Vigo County* denying abnormal obsolescence, which he argues offers guidance in this case. *Bennett testimony; Respondent Exhibit H*. In that case, the Petitioner had tied its claim to a more expansive definition of economic obsolescence taken from the American Society of

a lawyer's stock in trade. While Mr. Faulkner did little to analyze the cases he cited, his actions at least walked up to the line demarcating the practice of law and may have crossed over it. *See e.g. Freedom Assoc., LLC v. Hamilton Cty. Ass'r.*, Petition Nos. 29-014-06-1-4-00019 and 29-014-07-1-4-00019 (June 23, 2009); *Ardery v. Perry Twp. Ass'r.*, Petition No. 53-009-06-1-5-00046 (April 6, 2009).

Appraisers. *Id.* That definition was found by the Board to be inconsistent with the requirement to strictly construe the term “abnormal obsolescence” because it added causes for obsolescence such as increased costs of raw materials and increased competition, and failed to mention that the causes must be unanticipated, unexpected, and unforeseen. *Id.*

26. Further, in the *Applied Extrusion Technologies* case, Mr. Bennett contends, the Board determined that, “federal treatment of the obsolescence deduction for federal tax purposes is helpful to clarify the meaning of ‘obsolescence’”. *Bennett testimony; Respondent Exhibit H, citing Don Medow Motors, Inc. v. State Bd. of Tax Comm’rs*, 545 N.E.2d 853 (Ind. Tax Ct. 1989). “Under federal law, obsolescence is the process of becoming obsolete, and obsolete means no longer in use.” *Id.*; citing *Bradley v. Comm’r of Internal Rev.*, 184 R.2d860 (7th Cir. 1950). Obsolescence is intended to apply to property that is worn out, used up, or outmoded more quickly than standard depreciation allows. *Id.*; quoting *Southeastern Bldg. Corp. v. Comm’r of Internal Rev.*, 148 F.2d 879,880 (5th Cir. 1945). The same case indicates that the dictionary definition of obsolescence denotes something no longer in use. *Id.* Thus, Mr. Bennett concludes, the unprofitable nature of a business is not a sufficient basis for allowing obsolescence. *Id.*

ANALYSIS

27. Personal property includes all tangible property “that is (a) held for sale in the ordinary course of business; (b) held, used, or consumed in connection with the production of income; or (c) held as an investment.” 50 IAC 4.2-1-1(h)(6). Indiana’s personal property tax system is a self-assessment system. *See Paul Heuring Motors, Inc. v. State Bd. of Tax Comm’rs*, 620 N.E. 2d 39, 41 (Ind. Tax Ct. 1993). Every person, including any firm, company, partnership, association, corporation, fiduciary, or individual owning, holding, possessing, or controlling personal property with a tax situs within the state on March 1 of any year is

- required to file a personal property tax return on or before May 15 of that year, unless an extension of time to file a return is obtained pursuant. 50 IAC 4.2-2-2.
28. The Petitioner contends it installed the equipment in question, a tar centrifuge, at U. S. Steel to refine a tar by-product. As a result of a change in U. S. Steel's operations, however, the product was rendered unusable by Koppers and resulting in a reduction in operating levels. The equipment was under-utilized in 2002 and 2003 and not used at all in 2004 and 2005. According to the Petitioner's witness, this change in operations was unanticipated, unexpected, and unforeseen because this had never occurred at any of Koppers' other locations.
29. Abnormal obsolescence "occurs as a result of factors over which the taxpayer has no control and is unanticipated, unexpected, and cannot reasonably be foreseen by a prudent businessperson prior to the occurrence." 50 IAC. 4.2-9-3. A taxpayer may claim an adjustment for abnormal obsolescence on its personal property "provided that the taxpayer follows the procedures and meets the requirements regarding an adjustment or abnormal obsolescence contained in 50 IAC 4.2-9." 50 IAC 4.2-10-4(a). Abnormal obsolescence is "strictly construed and limited to a situation where unforeseen changes in market values, exceptional technological obsolescence[, or] where destruction by a catastrophe occurs providing that such events have a direct effect upon the valuation of the property at the tax situs in the state of Indiana." 50 IAC 4.2-10-4(c). To make a case, the Petitioner must show abnormal obsolescence exists and quantify the loss in value it causes. *Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230, 1233 (Ind.Tax Ct. 1998).
30. Here, the Petitioner's claim is not based on catastrophic destruction. Nor did it claim that the centrifuge was antiquated equipment or outdated for its use. In fact, to the contrary, the Petitioner testified that "this has not happened at any of their other locations across the U.S. and *they have multiple locations where this is used.*" *Faulkner testimony (emphasis added)*. Instead the Petitioner relied on the loss of a single contract to support its abnormal obsolescence adjustment.

However, it is the nature of business that customers and suppliers come and go and contracts are gained and lost over time. Therefore, the Board finds that the loss of a single contract or supplier – even if it is a company’s only customer or supplier – will not satisfy the regulatory requirement of “unanticipated, unexpected factors over which the taxpayer has no control.” See 50 IAC 4.2-9-3; See also, *CTS v. Wabash Township Assessor*, Petition No. 79-064-04-1-7-05003 (May 7, 2007). Thus, the Petitioner failed to meet the first prong of the obsolescence test.

31. Had the Petitioner met the first prong of the obsolescence test, it would have still failed to prove its case. Here, the Petitioner presented an inutility penalty formula. However, the Board notes that the Petitioner’s representative wholly failed to explain its calculation. Mr. Faulkner merely referred to the American Society of Appraisers’ VALUING MACHINERY AND EQUIPMENT, 2000, and testified that he determined the inutility factor to be 54.48%. This alone is sufficient to deny the Petitioner relief because “[I]t is the taxpayer's duty to walk the Indiana Board . . . through every element of the analysis”. See *Indianapolis Racquet Club, Inc. v. Wash. Twp. Assessor*, 802 N.E.2d 1018, 1022 (Ind. Tax Ct. 2004). See also *Inland Steel Co. v. State Bd. of Tax Comm'rs*, 739 N.E.2d 201, 220 (Ind. Tax Ct. 2000) (holding that an appraiser's opinion lacked probative value where the appraiser failed to explain what a producer price index was, how it was calculated or that its use as a deflator was a generally accepted appraisal technique).
32. Further, the DLGF has determined that an “inutility penalty” is not a proper way of determining abnormal obsolescence. See *Respondent Exhibit G*. While the Petitioner’s representative contends that the DLGF’s memorandum was issued in August, 2009, and should therefore not apply to a 2005 personal property return, the memo’s reasoning – that inutility factors, when applied to the true tax value derived through Indiana property tax regulations, result in an incorrect double deduction – is sound. 50 IAC 4.2-4-8(b) explains how normal obsolescence is

computed. It states that economic obsolescence is included within the computation for normal obsolescence. *See* 50 IAC 4.2-4-8(b). Inutility factors are used to compute economic obsolescence. *See Orange and Rockland Utilities, Inc. v. Assessor of Town of Haverstraw*, 824 N.Y.S.2d 769 (N.Y.Sup., 2006). Thus, applying an inutility factor to the true tax value derived after accounting for normal obsolescence would result in a double deduction.⁵ Therefore, the Petitioner also failed to satisfy the second prong of the obsolescence test.

33. The Petitioner failed to establish a prima facie case. Where a Petitioner has not supported his claim with probative evidence, the Respondent's duty to support the assessment with substantial evidence is not triggered. *Lacy Diversified Indus. LTD v. Department of Local Government Finance*, 799 N.E.2d 1215, 1221-1222 (Ind. Tax Ct. 2003).

CONCLUSION

34. The Petitioner failed to make a prima facie case. The Board finds for the Respondent. No change is made to the assessment.

The Final Determination of the above captioned matter is issued this by the Indiana Board of Tax Review on the date written above.

⁵ While the Petitioner's representative argues that past Board decisions have allowed inutility factors to be applied in this way, these arguments succeeded largely because they were unsuccessfully rebutted by the Respondent – if the Respondent presented any argument at all. Here the Respondent points specifically to both the standing regulation and valid accounting principles. Further each of the Petitioner's cited cases addressed losses related to the September 11, 2001, terrorist attacks, rather than the simple loss of a supplier or contract. *See e.g. American Airlines, Inc. and American Eagle Airlines, Inc. v. Wayne Township Assessor*, Petition Nos. 49-901-02-1-7-00011 and 49-901-02-1-7-00012 (March 12, 2007) (“The terrorist attacks that occurred on September 11, 2001, were unprecedented. The attacks and the resulting government action stopping all commercial air travel, were not under the Petitioner's control, were of a nonrecurring nature, and could not have been reasonably foreseen by a prudent businessperson. Further, the Petitioners have shown that the terrorist attacks and the related governmental responses have negatively impacted the value of their aircraft in Indiana by decreasing demand and lowering ticket prices. Thus, the Petitioners met the first prong of their burden.”)

Chairman, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

IMPORTANT NOTICE

- Appeal Rights -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5, as amended effective July 1, 2007, by P.L. 219-2007, and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice. The Indiana Tax Court Rules are available on the Internet at

<<http://www.in.gov/judiciary/rules/tax/index.html>>. The Indiana Code is available on the Internet at <<http://www.in.gov/legislative/ic/code>>. P.L. 219-2007 (SEA 287) is available on the Internet at <<http://www.in.gov/legislative/bills/2007/SE/SE0287.1.html>>