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**IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA**

STATE OF NORTH DAKOTA

American Crystal Sugar Company,)	
)	Supreme Court No.: 20050343
Applicant, Appellee and Cross-Appellant,)	Dist. Ct. No.:49-05-C-00030
)	
v.)	
)	
Trail County Board of Commissioners,)	
)	
Appellant and Cross-Appellee.)	

**REPLY BRIEF OF APPELLEE/CROSS-APPELLANT
AMERICAN CRYSTAL SUGAR COMPANY**

**APPEAL FROM THE
TRAILL COUNTY BOARD OF COMMISSIONERS' DECISION
TO DENY ABATEMENT OF TAXES**

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LAW AND ARGUMENT

I. The Board's decision to retain the assessment formula is arbitrary and unreasonable.

From the outset, this has truly been a curious process. Neither Traill County nor the Board have ever provided a meaningful response to any of the evidence or arguments submitted by ACSC. The Board has now submitted its final brief on appeal. Not one word is devoted to the manifest flaws in the assessment formula, or to the due process concerns created by its own conduct in this matter. To the extent that the record is discussed, that discussion is distorted. In short, the Board proceeds as it has always done - as if it is free to reach any decision it chooses, to simply ignore any realities that stand in the way of that result, and to offer pretext by way of justification.

a. The belated rationale offered by the Board was and still is insubstantial.

The Board begins its reply by simply quoting its own written decision. In its principal brief, ACSC detailed the shortcomings in the various rationales belatedly offered by that document.¹ Arguments that failed to resonate when first made do not improve through repetition. As nothing new has been said, no further reply is warranted.

b. This case hinges on the legal competency of the assessment formula, not credibility determinations.

The Board goes on to argue that ACSC "relies exclusively" on the valuation opinions of John Coates, and the credibility of those opinions is suspect. The first part of this argument ignores all of the other evidence and testimony in the record, and the second part does badly

¹ This written decision was adopted by the Board some days after it had voted, without any discussion or deliberation, to deny each of ACSC's abatement applications. Tr. (01/25//05), pp. 7-10.

distort that record. Before these concerns are discussed, however, a more basic consideration should be stressed.

At a typical abatement hearing, competent valuation evidence is presented by both sides. In such a case the relative credibility of the opposing opinions is usually the decisive issue. See, e.g., Dakota Northwestern Assoc. Ltd. P'ship v. Burleigh County, 2000 N.D. 164, 616 N.W.2d 349. This, however, is not such a case. ACSC does not merely challenge the credibility of the county's valuation. The problem is much more fundamental. It involves basic competency. As a matter of law, an approach to assessment that "is unsupported and insubstantial" renders any decision to affirm that valuation "arbitrary and unreasonable." Nat'l Sun Indus., Inc. v. Ransom County, 474 N.W.2d 502, 508 (N.D. 1991).

The formula used by Traill County to assess the subject property was unsupported and insubstantial when it was first established, and that was a long time ago. Even more significant is the subsequent failure to adjust this formula to reflect any of the dramatic changes that have occurred in the relevant marketplace, in the economic environment in which the factory operates, and in the physical condition and maintenance of that property. This is where the focus must be placed, and the Board's continued failure to even address these realities is telling indeed.

c. The criticisms directed against ACSC's appraiser are distorted and unfair.

Although ACSC maintains that credibility is not the decisive issue, the unfair comments in the Board's reply brief should not go unchallenged.

It is certainly true that Coates' valuation opinions did become more refined and supported over time. His bottom line conclusions changed in the process. This was largely due to the exhaustive market analysis that Coates conducted after the initial abatement applications were

filed, but before the final appraisal report was completed. Tr., pp. 96-99. However, outcomes should be based on the best evidence presented at the hearing, not the preliminary opinions of one of the experts.

The assertion that Coates “changed his numbers one month before completing the appraisal because ACSC attorneys told him to” (App., p. 42) is clearly based on an exchange between Coates and Chairman Eblen that occurred during the second day of the hearing. Coates was present at the equalization meeting where representatives of ACSC first approached the Board about the need to reduce the assessed value of the Hillsboro factory. The preliminary work papers presented at that time included the beet freezers, extract tanks and conditioning bins on the list of taxable assets. Tr., pp. 270-71. When confronted by commissioner Eblen with this apparent discrepancy, Coates explained that shortly before his appraisal was completed he was advised by counsel that, as a matter of law, ACSC would be challenging the classification of these items. Accordingly, Coates was told that he should follow a consistent approach. Id. at 271. Although the reclassification of this property does certainly affect the overall valuation, an appraisal expert does not lose his independence or credibility because he follows the direction of counsel on a legal issue. Both the Board’s decision and its reply brief distort Coates’ testimony by omitting this explanation, and by thereby taking it out of context.

The same is true of the testimony attributed to Alan Lerness. By way of explanation and elaboration, Lerness was the second, highly qualified valuation expert who testified on behalf of ACSC at the abatement hearing. Lerness was hired by ACSC to review both the Coates’ appraisal and the county’s approach to assessment. There is a standardized format for conducting review appraisals. The review considers both substance and style. In terms of style,

Lerness did say that the extensive information contained in Coates' report is not presented in an easy to follow manner. Id. at 236-37. What the Board fails to mention are Lerness' substantive opinions.

The ultimate opinion reached by Lerness is that the valuation reflected in the county's assessment is not reliable or based on acceptable appraisal practices, whereas the valuation reflected in Coates' appraisal report in both respects is. Id. at 347-48. In particular, Lerness noted that there was simply no basis for the depreciation allowances used by the assessment formula. Tr., pp. 331, 334, 344. Lerness also commented at length about the reliability problems that are inherent whenever asset lists are used in an attempt to trend acquisition costs over an extended period of time. Id. at 229, 346-47. Therefore, it is true that Lerness was critical of Coates' report from a stylistic standpoint, but his substantive comments are far more important.

Any confusion regarding Coate's testimony that the Hillsboro factory is worth \$22,968,000 lies with the Board.² Based on the sales approach, Coates' appraisal report does conclude that all of the improvements (real and personal) at the site had this value, assuming the land value is excluded. Appr. Rpt., p. 34. That is exactly what he said at the hearing. Tr., p. 164. For assessment purposes, however, the value of the personal property must be excluded and the value of the land included. That result, of course, is a much different and smaller number. Id.

² The correct amount is actually \$22,960,000. The transcript reports the amount as \$22,000,968. Tr., p. 154. It is impossible to know if these discrepancies are attributable to an error in the transcription, or an error in the calculations performed at the hearing. In any event, it is not significant.

- d. **There is no reasonable justification for categorically rejecting the best available evidence.**

Turning to the extensive market data, the Board begins by again simply repeating without elaboration its original and flawed rationale-- the sales method is invalid because some of the sales were compelled. It then takes a different tack, suggesting there was insufficient data from which to do a sales analysis. Nothing could be further from the truth.

Considering the limited number of comparable properties, there is a remarkable wealth of timely market data. To repeat, in 2002, fourteen sugar beet refineries were sold in six separate transactions. Id. at 145. Twelve of those plants were operating at the time of the sale. At the time, there were only twenty-six operating plants in the entire country. Id. at 61. Therefore, the comparable sale transactions provide an "enormous amount of data relative to the universe of potential properties." Id. at 281, ll. 13-15.

Coates did place little reliance on the three transactions that yielded the lowest prices on a per unit basis. Each of those sale transactions involved a single factory, and two involved the factories that were not operating at the time of sale. However, it is simply wrong for the Board to suggest that Coates based his market approach to valuation "on a single sale in the state of Michigan." Reply Brief, p. 4.

First, the Michigan transaction involved the sale of four operating factories, not one. Furthermore, although Coates did conclude that the Michigan transaction "set the upper limit value", he also relied on data from the sales of seven other factories in Montana, Wyoming, Nebraska and Colorado. Tr., p. 283. Again, any confusion lies with the Board. At the hearing, Coates did comment extensively on the adjustments that were necessary to account for differences in the comparable properties. Id. at 283-88. He also tried to explain to the Board

why the Michigan factories were the most valuable. *Id.* Based on the transcript it is not clear that the commissioners understood, but it is clear that Coates considered data from the sale of eleven factories, not one.³

II. The extract tanks, conditioning bins and deep freezers are all integral parts of the manufacturing process and should be classified as personal property.

Turning to the classification issues, the Board begins by arguing that ACSC misstates this court's prior rulings, and that any reliance on Pennsylvania law is misplaced. ACSC disagrees, but also realizes that further debate is pointless. The prior holdings are clear. The role Pennsylvania law played in shaping those rulings is equally clear.

Otherwise the Board simply repeats the same argument contained in its principal brief regarding the conditioning silos. It provides no argument regarding the proper classification of the extract tanks and beet freezers, and no response to the analysis is provided by ACSC.

In short, the Board continues to ignore critical distinctions. Any storage function should be deemed incidental and consequential as long as the equipment is a "necessary and integral" part of the overall manufacturing process. U.S. Steel Corp. v. Bd. of Assessment, 223 A.2d 92, 96 (Pa. 1966). Only storage structures that are "not necessary and integral parts of the manufacturing process"; that are "separate and apart" from the processing equipment; and "which benefit the land generally and which may serve various users of the land" can properly be regarded as taxable. Ladish Malting Co. v. Stutsman County, 351 N.W.2d 712, 722 (N.D. 1984), quoting In re Borough of Aliquippa, 175 A.2d 856, 861-62 (Pa. 1961).

³ If it becomes necessary to reopen the record, there will be additional data to present from three subsequent sales, one in Michigan and two in California. These sales add even more support for Coates' opinions regarding market value.

CONCLUSION

The Board's reply brief epitomizes the positions it has taken throughout these proceedings. It reaches conclusions that have no support, and ignores all the compelling evidence to the contrary. The Board's decision should be reversed, and it should be given clear instructions regarding the evidence and considerations that properly control.

Dated this 26th day of January, 2006.

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CERTIFICATION OF COMPLIANCE

The Appellee American Crystal Sugar Company hereby certifies, by and through its undersigned counsel, that the Brief of Appellee contains 1,922 words (including footnotes). This brief is done in WordPerfect 11, Times New Roman 12 format.

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