BEFORE THE STATE BOARD OF EQUALIZATION

FOR THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF	)	
POWDER RIVER COAL COMPANY	)	Docket No. **2014-08**
(NORTH ANTELOPE ROCHELLE MINE)	)	
FROM A DECISION BY THE	)	
DEPARTMENT OF REVENUE	)	
(Production Audit 2007-2009)	)	

DECISION AND ORDER

APPEARANCES

Walter F. Eggers and Matt J. Micheli, Holland & Hart LLP, appeared on behalf of Powder River Coal Company (PRCC).

Karl D. Anderson, Senior Assistant Attorney General, appeared on behalf of the Wyoming Department of Revenue (Department).

DIGEST

The Department determined that PRCC's receipt of $27 million in contract "buy down" settlement payments contributed to the "sales value" of PRCC's 2009 coal production for mineral tax valuation purposes. Wyo. Stat. Ann. § 39-14-103(b)(vii)(A) (2009). PRCC disagreed asserting the payments were not consideration for coal produced, but were rather for PRCC's agreement to not produce and deliver the tons of coal initially contracted. This appeal presents a mixed factual and legal question as to whether the contract settlement payments reflected the coal's "sales value" and must be included within PRCC's 2009 "proportionate profits" taxable value calculation.

The Wyoming State Board of Equalization (State Board), comprised of Chairman E. Jayne Mockler, Vice Chairman Martin L. Hardsocg, and Board Member Robin Sessions

Cooley,[1] finds the Department incorrectly included the settlement payments in the taxable valuation of PRCC's 2009 coal production.

ISSUES

PRCC identifies the issue as follows:

> The ultimate issue in this case, which presents a pure question of law is whether payment made by a coal purchaser to a coal producer not to extract, sell or deliver coal should be excluded from the consideration and value of the coal produced by the producer?

PRCC's Proposed Findings of Fact, Conclusions of Law and Order 2.

The Department alternatively frames the issues as follows:

a. Whether the Department correctly revalued Powder River's production?

b. Whether the Department correctly included in its pricing schedules the amount booked by Powder River as "Buy-Out" during the 2009 production year?

c. Whether the Department properly included in value all consideration exchanged between Powder River and its purchasers?

Dep't's Resp. Br. 3.

As the parties do not agree upon a precise framing of the issue, the State Board rephrases the question presented: Did the Department properly construe four buy down/buyout settlements and find that the corresponding settlement payments reflected the "sales value of extracted coal" within the proportionate profits taxable valuation methodology under Wyoming Statutes section 39-14-103(b)(vii)(A) (2009)?

[1] Paul Thomas Glause and Steven D. Olmstead were members of the Board at the time of the hearing. Mr. Glause resigned from the Board, effective January 2, 2015. Mr. Olmstead's term expired March 1, 2015. Governor Mead appointed Martin L. Hardsocg and Robin Sessions Cooley to the Board effective March 16, 2015. Mr. Hardsocg and Ms. Cooley reviewed the transcript, exhibits, record and briefing, and participated in the decision in this matter.

JURISDICTION

The State Board shall "review final decisions of the department upon application of any interested person adversely affected," Wyo. Stat. Ann. § 39-11-102.1(c) (2015),[2] and "[h]old hearings after due notice in the manner and form provided in the Wyoming Administrative Procedure Act and its own rules and regulations of practice and procedure." Wyo. Stat. Ann. § 39-11-102.1(c)(viii) (2015). An aggrieved taxpayer must file any appeal with the State Board within thirty (30) days of the Department's final decision. Rules, Wyo. State Bd. of Equalization, ch. 2 § 5(e) (2006).

PRCC timely appealed the Department's December 27, 2013, final decision on January 24, 2014. This Board has jurisdiction.

FINDINGS OF FACT

1. PRCC operates the North Antelope Rochelle Mine (NARM), a surface coal mine located approximately 65 miles south of Gillette, Wyoming. PRCC sells coal production to purchasers under multi-year contractual arrangements generally referred to as "coal supply agreements." (Tr. vol. I, 44-47, 54-57).

2. Among these PRCC customers were four unrelated entities: Ontario Power Generation, Inc. (Ontario), Tennessee Valley Authority (TVA), FirstEnergy Generation Corp. (FirstEnergy), and Allegheny Energy Supply Company, LLC (Allegheny). All four purchasers (collectively "Purchasers") maintained coal supply agreements with PRCC during the 2007-2009 audit period. (Tr. vol. I, 54-55; Confidential Tr. vol. I, 61-86; Jt. Exs. 706-710; Dep't Ex. 512). The Department and PRCC agree, as does the Board, that the coal supply agreements and related transactions were arms-length in nature. (Tr. vol. I, 189, 229-30; vol. II, 335, 339-40).

The "buy down" or "buyout" of Purchasers' purchase obligations

3. In 2008 and 2009, Purchasers advised PRCC that in 2009, for different reasons, they would not accept all contracted coal under their respective coal supply agreements. FirstEnergy, for example, had acquired an interest in a coal mine and sought to use its own coal resource rather than NARM coal. Allegheny installed scrubbers at its energy production facilities and could, consequently, burn a lesser quality coal from locations

[2] The disputed tax year is 2009. We will therefore cite to the 2009 Wyoming statutory code when addressing application of the valuation statutes. For all other statutory applications, we refer to the current statutes, unless it is different from the 2009 statute.

nearer to its plant. (Tr. vol. I, 57; Confidential Tr. vol. I, 80, 85).[3] PRCC's Senior Tax Manager, Mr. Scott Crosier, also cited poor economic conditions as a common reason for the Purchasers' refusal to take all contractually allotted coal in 2009. (Tr. vol. I, 56-57).

4. PRCC resisted its Purchasers' refusals to purchase and receive all coal allotted under their contracts, asserting that Purchasers were in breach of their agreements. PRCC also sought to negotiate more accommodating delivery terms to no avail. (Tr. vol. I, 58-59; Confidential Tr. vol. I, 61-88).

5. PRCC eventually agreed that it would not require Purchasers to purchase some or all contracted tons of NARM coal in 2009 and/or 2010. In exchange, Purchasers agreed to pay PRCC.[4] (Tr. vol. I, 56-59, 134-56; Confidential Tr. vol. I, 61-88).

6. Ontario, in three successive "early termination" agreements, agreed to pay PRCC to reduce its 2009 purchase obligation of 2.75 million tons by 1,501,726.56 tons of coal under coal supply agreement 6962. (Confidential Tr. vol. I, 61-69, 134-38; Confidential Jt. Ex. 706 at 0047-52). The termination agreement's third iteration, dated September 16, 2009, released Ontario from any and all obligations under the identified coal supply agreement once Ontario paid the settlement amount, and Ontario verified receipt of all tons due under the reformed coal supply agreement. (Confidential Jt. Ex. 706 at 0051-52). PRCC's Tax Manager, Mr. Crozier, explained that Ontario paid PRCC compensation "[f]or the nondelivery of coal." (Confidential Tr. vol. I, 70).

7. In a similar, separate agreement, Ontario paid to terminate its obligation to purchase 500,000 tons of coal to be delivered under coal supply agreement 6989. (Confidential Tr. vol. I, 72-74; Tr. vol. I, 141-43; Confidential Jt. Ex. 708 at 0075-76). Ontario agreed, however, to receive 500,000 tons of coal in 2010. *Id.* The early termination agreement settled all other obligations under the coal supply agreement. *Id.*

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[3] Many of the exhibits, including the coal supply agreements and settlement agreements, are confidential taxpayer information. However, PRCC advised that most of those documents were not entirely confidential and that only certain information within the agreements was sensitive, including the settlement amounts. Consistent with the parties' briefing submissions and handling of confidential documents, the State Board frequently quotes non-confidential language from several confidential documents throughout this Decision and Order.

[4] PRCC asserted the confidentiality of amounts each Purchaser paid to settle with PRCC. Accordingly, we will not identify specific settlement amounts.

8. TVA, in support of its refusal to accept coal under a nine year coal supply agreement, claimed that its force majeure[5] and related contract provisions justified a reduction in delivered tons. (Tr. vol. I, 57, 153-56; Confidential Jt. Ex. 709 at 0077-78; Dep't Ex. 813 at 000439). The parties eventually entered into a Contract Supplement to their underlying coal supply agreement (Dep't Confidential Ex. 513 at 000389-772) through which TVA confirmed it would "not meet its full coal purchase obligations under the Contract during Contract Year 2009[,]" and that it would purchase a reduced tonnage. (Confidential Jt. Ex. 709 at 0077-78; Tr. vol. I, 153-56). TVA paid a confidential sum to "completely resolve, settle, and discharge any and all of TVA's debts, obligations, and liabilities and any and all claims or demands by Contractor arising under or relating to the Contract." (Confidential Jt. Ex. 709 at 0077-78). Again, Mr. Crozier characterized the settlement as payment "for them to not have to take delivery of tons." (Confidential Tr. vol. I, 77).

9. Also citing its force majeure contract provision, Allegheny sought to reduce coal deliveries in the last year of its coal supply agreement, which spanned from 2005 through 2009. (Confidential Jt. Ex. 710 at 0079, 0089-90; Confidential Tr. vol. I, 79). Allegheny, Mr. Crozier explained, had installed scrubbers at its electricity generation facilities and, consequently, sought to discontinue purchasing coal from the Powder River Basin. (Confidential Tr. vol. I, 80; Tr. vol. I, 150-51; Jt. Confidential Ex. 710 at 103).

10. PRCC countered that Allegheny's refusal to take coal would constitute a breach of their coal supply agreement. (Tr. vol. I, 80; Confidential Jt. Ex. 710 at 0103-111). The parties eventually settled the matter and Allegheny agreed to pay PRCC for each contracted ton it did not purchase in 2009. PRCC and Allegheny, however, extended the coal supply agreement's term through January 31, 2010, agreeing to transact an additional 30,000 tons. (Confidential Tr. vol. I, 78-81, 150-53; Confidential Jt. Ex. 710 at 0103-04). As with Ontario and TVA, Allegheny paid PRCC "[s]o they did not have to take delivery of the remaining tons that they were committed to under the contract." (Confidential Tr. vol. I, 81-82).

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[5] A "force-majeure clause" is a contract clause "allocating the risk of loss if performance becomes impossible or impracticable, esp. as a result of an event or effect that the parties could not have anticipated or controlled." Black's Law Dictionary, p. 761 (10th ed. 2014). The force majeure clause in the coal supply agreement between Ontario and PRCC, and like provisions permitting adjustment to the terms of their coal supply agreement, offered numerous bases upon which to seek termination of the agreement. (Confidential Jt. Ex. 708 at 0066-68). These included, but were not limited to, war, civil disobedience, government action, fire, strikes, lockouts, and generally any foreseeable or unforeseeable events that may delay, prevent or interrupt delivery of coal. *Id.*

11. The fourth Purchaser, FirstEnergy, purchased coal from PRCC under a long-term coal supply agreement set to end in 2010. (Confidential PPRM Ex. 100; Confidential Jt. Ex. 512 at 000373). Upon FirstEnergy's acquisition of an interest in a Montana coal mine, it sought to reduce its existing coal supply from PRCC. (Confidential Tr. vol. I, 85; Tr. vol. I, 145-46). FirstEnergy asserted force majeure as a basis for terminating its contract. (Confidential PPRM Ex. 100 at 0001). PRCC agreed to reduce FirstEnergy's 2009 purchase obligation. (Confidential PPRM Ex. 100 at 0002; Confidential Tr. vol. I, 83-86; Tr. vol. I, 145-50). As with the other purchasers, PRCC's settlement agreement with FirstEnergy released both parties from any claims related to the coal supply agreement. *Id.*

The Department's classification of $27 million as "sales value of extracted coal" and assessment of additional mineral taxes

12. PRCC received approximately $27 million in 2009 from Allegheny, TVA, Ontario, and FirstEnergy. (Tr. vol. I, 101-07, 114, 160-61; Dep't Ex. 506 at 000174). Within its "functional cost report," a general ledger identifying all transactions involving NARM coal, PRCC categorized the cumulative payments as "Other Revenue . . . Contract Buy-Out." (Tr. vol. I, 98-99, 102-04; vol. II, 333-34; Dep't Ex. 506 at 000174). The functional cost report, according to Mr. Crozier, supplied the revenue and cost data to perform the "proportionate profits" valuation calculation to annually value NARM coal production for severance and ad valorem tax purposes. (Tr. vol. I, 98-99, 102-04); *see* Wyo. Stat. Ann. § 39-14-103(b)(vii) (2009); *infra* ¶ 24.

13. During an audit of PRCC's 2007 through 2009 production years, the revenue entry of $27,789,225.60,[6] termed "Other Revenue" and "Contract Buy-Out," triggered further inquiry from the Department of Audit (DOA). (Tr. vol. I, 112-23, 186-87; vol. II, 283, 286-89; Dep't Ex. 506 at 000174). Investigating this and several other audit issues, the DOA sought documentation in support of the $27 million figure, including all coal supply agreements and other contracts necessary to verify the revenue's origin and purpose. *Id.*

[6] One of the Purchasers, Ontario, was unable to immediately pay at the time of settlement and, consequently, later paid an increased amount to account for the present value at the time of settlement. (Tr. vol. I, 105-06). The $27,789,225.60 reflects the total payments as of the settlement dates.

The Department of Audit received a single coal supply agreement during the audit process, and the remaining source documents before the contested case hearing.[7]

14. Upon conferring with the DOA and reviewing documentation, Department valuation manager, Matthew Sachse, determined that PRCC's receipt of $27 million in 2009 was additional consideration for sale of the 2009 NARM coal and, thus, should have been reported as part of the coal production's "sales value" for taxable valuation purposes. (Tr. vol. I, 186-87, 190-96, 204-20; Tr. vol. II, 291-98); *see* Wyo. Stat. Ann. § 39-14-103(a)(vii)(A) (2009); *infra* ¶ 24. With this decision, PRCC's receipt of $27 million would be taxed within the proportionate profits valuation methodology; PRCC's taxable value for severance and ad valorem tax purposes would substantially increase. (Dep't Ex. 504).

15. Through an audit assessment, the Department revalued PRCC's 2009 NARM coal production to include, among other adjustments, a sales value reflecting the additional $27

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[7] At the hearing, the Department complained of PRCC's failure to adequately respond to the Department of Audit's requests for all coal supply agreements necessary to audit the $27 million in payments related to the NARM 2009 production. (Tr. vol. I, 178-86, 235-38; Tr. vol. II, 283-93). PRCC explained its policy of not directly releasing coal supply agreements and that access was indirectly available through the Office of Natural Resources Revenue (ONRR)(formerly the Mineral Management Service), a unit of the United States Department of Interior responsible for enforcing federal royalty obligations. (Tr. vol. I, 109-13, 130-32, 162-63). The Department, albeit after completing the audit and during the appeal process, eventually obtained all contracts at issue in this dispute. (Tr. vol. I, 183-86, 235-39; Tr. vol. II, 299-302). Although the Department's frustration with PRCC was warranted, neither party directly tied PRCC's omissions to claims for relief. Without objection, the parties agreed to admit into evidence contracts acquired after the audit.

Still, we note that a taxpayer's refusal to comply with departmental or DOA requests for tax information may prevent that taxpayer from thereafter admitting withheld information into evidence during the adjudicative process, or from using late-produced information to full effect. *See Wyo. Dep't of Revenue v. Qwest Corp.*, 2011 WY 146, ¶¶ 11-12, 27-30, 263 P.3d 622, 625-31 (Wyo. 2011) (taxpayer's intentional withholding of information from tax audit was improperly admitted into evidence); *RT Commc'ns, Inc. v. State Bd. of Equalization for State of Wyo.*, 11 P.3d 915, 927 (Wyo. 2000) (taxpayer will not be heard to complain that department failed to consider information that taxpayer failed to supply upon request); *Airtouch Commc'ns, Inc. v. Dep't of Revenue*, 2003 WY 114, ¶ 39, 76 P.3d 342, 357 (Wyo. 2003) (Department cannot be faulted for taxpayer's failure to provide requested information); *Wyo. Dep't of Revenue v. Guthrie*, 2005 WY 79, ¶ 36, 115 P.3d 1086, 1098 (Wyo. 2005) (taxpayer responsible for its failure to supply information used to report taxable value, even if held by other parties). In Wyoming's "self-reporting" tax system, taxpayers are required to supply tax information to allow verification of tax liabilities. *See* Wyo. Stat. Ann. §§ 39-14-102(b), (f); 39-14-107; 39-14-108 (2015).

million received from Ontario, Allegheny, TVA, and FirstEnergy. (Dep't Ex. 504 at 000031-34). Adopting the DOA's finding, the Department summarized its reason for assessing PRCC additional taxable value:

> For production year 2009, the "Functional Cost Detail Report" identified an account as "Contract Buy-out". This account contained $27,789,225.60 in revenue that Powder River did not include in its severance and gross products reporting. The Department requested the contract support for this account and its balance several times; however, Powder River refused to supply the appropriate contracts. The Department continued to research this issue and located a single contract that seemed to relate to the account in question. After reviewing both the single available contract as well as the invoices, it appeared that, in spite of the use of the term "Buy-Out", sales of coal between the parties to this transaction are ongoing. As such, the revenue associated with this transaction has been included in Powder River's sales value in proportion to the ongoing sales between the parties.

(Tr. vol. I, 171-72; Dep't Exs. 503 at 000027, 504; Jt. Exs. 700, 701 at 0007). For PRCC's 2009 production, the Department assessed additional taxable value of $17,411,174, and severance tax of $1,218,782.18, plus interest. (Dep't Ex. 504 at 000033).

16. PRCC timely appealed several aspects of the Department's audit assessment, including classification of the $27 million as part of the "sales value" of PRCC's 2009 NARM coal production: "The DOR's and DOA's attempt to increase the value of PRCC's coal production from NARM in production year 2009 based on payments that did not relate to coal produced and sold is inconsistent with statutes and regulations governing Wyoming's production taxes." PRCC's Notice of Appeal 3; (*see also* Tr. vol. I, 163-68).

17. By the hearing, the parties had resolved all audit issues except for the Department's inclusion of $27 million as part of the NARM coal production's 2009 sales value. (Tr. vol. I, 53); Stip. Updated Summ. of Uncontroverted Facts.

CONCLUSIONS OF LAW

A. Burdens of proof and State Board's review function

18. PRCC filed an appeal in this matter pursuant to Wyoming Statutes section 39-14-109(b) (2015) and Chapter 2 of the State Board's Rules of Practice and Procedure (2006). The statute provides, in pertinent part, that:

(iv) The state board of equalization shall perform the duties specified in article 15, section 10 of the Wyoming constitution and shall hear appeals from county boards of equalization and review final decisions of the department [of revenue] upon application of any interested person adversely affected, including boards of county commissioners for the purposes of this paragraph, under the contested case procedures of the Wyoming Administrative Procedure Act.

Wyo. Stat. Ann. § 39-14-109(b)(iv) (2015).

19. In resolving taxpayer appeals from mineral tax assessment decisions, the Wyoming Supreme Court has instructed:

> The Department's valuations for state-assessed property are presumed valid, accurate, and correct. *Chicago, Burlington & Quincy R.R. Co. v. Bruch,* 400 P.2d 494, 498-99 (Wyo. 1965). This presumption can only be overcome by credible evidence to the contrary. *Id.* In the absence of evidence to the contrary, we presume that the officials charged with establishing value exercised honest judgment in accordance with the applicable rules, regulations, and other directives that have passed public scrutiny, either through legislative enactment or agency rule-making, or both. *Id.*
>
> The petitioner has the initial burden to present sufficient credible evidence to overcome that presumption, and a mere difference of opinion as to value is not sufficient. *Teton Valley Ranch v. State Board of Equalization,* 735 P.2d 107, 113 (Wyo. 1987); *Chicago, Burlington & Quincy R.R.,* 400 P.2d at 499. If the petitioner successfully overcomes the presumption, then the Board is required to equally weigh the evidence of all parties and measure it against the appropriate burden of proof. *Basin,* 970 P.2d at 851. Once the presumption is successfully overcome, the burden of going forward shifts to the Department to defend its valuation. *Id.* The petitioner, however, by challenging the valuation, bears the ultimate burden of persuasion to prove by a preponderance of the evidence that the valuation was not derived in accordance with the required constitutional and statutory requirements for valuing state-assessed property. *Id.*

Amoco Prod. Co. v. Dep't of Revenue, 2004 WY 89, ¶¶ 7-8, 94 P.3d 430, 435-46 (Wyo. 2004); *see also* Rules, Wyo. State. Bd. of Equalization, ch. 2 § 20 (2006). "A preponderance of the evidence is "proof which leads the trier of fact to find that the existence of the contested fact is more probable than its non-existence." *Kenyon v. State, ex rel., Wyo. Workers' Safety & Comp. Div.*, 2011 WY 14, ¶ 22, 247 P.3d 845, 851 (Wyo.

2011) (quoting *Judd v. State ex rel. Wyo. Workers' Safety & Comp. Div.*, 2010 WY 85, ¶ 31, 233 P.3d 956, 968 (Wyo. 2010)).

20. As the adjudicating body, the State Board "[d]ecide[s] all questions that may arise with reference to the construction of any statute affecting the assessment, levy and collection of taxes, in accordance with the rules, regulations, orders and instructions prescribed by the department[.]" Wyo. Stat. Ann. § 39-11-102.1(c)(iv) (2015). The Wyoming Supreme Court explained:

> It is only by either approving the determination of the Department, or by disapproving the determination and remanding the matter to the Department, that the issues brought before the Board for review can be resolved successfully without invading the statutory prerogatives of the Department.

Amoco Prod. Co. v. Dep't of Revenue, 2004 WY 89, ¶ 22, 94 P.3d 430, 440 (Wyo. 2004) (quoting *Amoco Prod. Co. v. Wyo. State Bd. of Equalization*, 12 P.3d 668, 674 (Wyo. 2000)).

21. The State Board's main task is to interpret various statutory and regulatory provisions and determine if the parties have correctly applied those provisions given the facts and circumstances established by evidence in the record. *Powder River Coal Co. v. Wyo. State Bd. of Equalization*, 2002 WY 5, ¶ 6, 38 P.3d 423, 426 (Wyo. 2002).

22. "An agency's interpretation of statutory language which the agency normally implements is entitled to deference, unless clearly erroneous." *Buehner Block Co., Inc. v. Wyo. Dep't of Revenue*, 2006 WY 90, ¶ 11, 139 P.3d 1150, 1153-54 (Wyo. 2006) (citations omitted).

B. Identifying the "sales value of extracted coal" within the "proportionate profits" method of valuation for tax purposes

23. The parties agree that the "proportionate profits" valuation method applies to PRCC's 2009 NARM coal production because PRCC sold its coal "away from the mouth of the mine pursuant to a bona fide arms-length sale[.]" Wyo. Stat. Ann. § 39-14-103(b)(vii) (2009); (Tr. vol. I, 187; PRCC's Reply Br. 4).

24. The present dispute centers on the first step in the "proportionate profits" calculation—identifying the "sales value of extracted coal." Wyo. Stat. Ann. § 39-14-103(b)(vii)(A) (2009); (Tr. vol. I, 190-91). The parties dispute whether PRCC should have included the buy down/buyout settlement payments as part of its 2009 production's "sales

value." *Id.* The bolded statutory language below illustrates the importance of this determination:

> (b) Basis of Tax (valuation). The following shall apply:
>
> . . .
>
> (vii) For coal sold away from the mouth of the mine pursuant to a bona fide arms-length sale, the department shall calculate the **fair market value** of coal by multiplying the **sales value of extracted coal**, less transportation to market provided by a third party to the extent included in **sales value**, all royalties, ad valorem production taxes, severances taxes, black lung excise taxes and abandoned mine lands fees, by the ratio of direct mining costs to total direct costs. Nonexempt royalties, ad valorem production taxes, severance taxes, black lung excise taxes and abandoned mine lands fees shall then be added to determine **fair market value**. For purposes of this paragraph:
>
> (A) **The sales value of extracted coal shall be the selling price pursuant to an arms-length contract.** To the extent **not included in the selling price pursuant to an arms-length contract**, and to the extent that the following **represent partial consideration for the value of the coal, sales value shall include** the value per ton attributable to the extracted coal for **any consideration provided to the seller** in the form of heat content adjustments, price escalations or de-escalations, expense reimbursements, capital, facilities or equipment, services for mining, handling, processing or transporting the coal at or near the mine site, **or any payment received for the current or past sale of extracted coal, by or on behalf of the purchaser**. **Sales value per ton** shall include consideration provided for the deferral of extraction and sale in the taxable period in which the purchaser receives credit for the payment as a result of subsequent extraction and sale of the deferred production[.]

Wyo. Stat. Ann. § 39-14-103(b)(vii)(A) (2009) (emphasis added).

25. In applying statutes, the Wyoming Supreme Court recently said:

> [O]ur primary consideration is to determine the legislature's intent. All statutes must be construed *in pari materia* and, in ascertaining the meaning of a given law, all statutes relating to the same subject or having the same general purpose must be considered and construed in harmony. Statutory construction is a question of law, so our standard of review is de novo. We

> endeavor to interpret statutes in accordance with the legislature's intent. We begin by making an inquiry respecting the ordinary and obvious meaning of the words employed according to their arrangement and connection. We construe the statute as a whole, giving effect to every word, clause, and sentence, and we construe all parts of the statute *in pari materia.* When a statute is sufficiently clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of statutory construction. Moreover, we must not give a statute a meaning that will nullify its operation if it is susceptible of another interpretation.
>
> Moreover, we will not enlarge, stretch, expand, or extend a statute to matters that do not fall within its express provisions.
>
> Only if we determine the language of a statute is ambiguous will we proceed to the next step, which involves applying general principles of statutory construction to the language of the statute in order to construe any ambiguous language to accurately reflect the intent of the legislature. If this Court determines that the language of the statute is not ambiguous, there is no room for further construction. We will apply the language of the statute using its ordinary and obvious meaning.
>
> Whether a statute is ambiguous is a question of law. A statute is unambiguous if reasonable persons are able to agree as to its meaning with consistency and predictability, while a statute is ambiguous if it is vague or uncertain and subject to varying interpretations.

Travelocity.com LP v. Wyo. Dep't of Revenue, 2014 WY 43, ¶ 20, 329 P.3d 131, 139 (Wyo. 2014) (quoting *Redco Constr. v. Profile Props., LLC,* 2012 WY 24, ¶ 26, 271 P.3d 408, 415-16 (2012)).

26. Wyoming Statutes section 39-14-103(b)(vii)(A) (2009) does not, on its face, specify that buy down or buyout payments necessarily reflect the "sales value of extracted coal." The legislature's omission is understandable: there are a myriad of possible reasons that purchasers may seek relief from quantity-based obligations. *See supra* ¶¶ 3-11. In discerning legislative intent, we consider the "statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and . . . place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose." *Jackson State Bank v. Homar*, 837 P.2d 1081, 1086 (Wyo. 1992) (quoting *City of Laramie v. Facer,* 814 P.2d 268, 270 n.4 (Wyo. 1991)).

27. Coal supply agreements, like other complex contracts defining the rights of mineral producers, purchasers, processors, and transporters, are neither uniform nor static in operation. Parties to such agreements wisely anticipate numerous contingencies and allow that a wide range of future events may justify modification or termination. Generous *force majeure* provisions are commonplace. So, the legislature supplied a host of broad guidelines, empowering the Department to examine these and other transactions on a case-by-case basis. Wyo. Stat. Ann. § 39-14-103(b)(vii)(A) (2009). Accordingly, a buy down or buyout may or may not qualify as consideration reflecting the sales value of extracted coal—each transaction must be examined on its own merits.[8]

28. Wyoming Statutes section 39-14-103(b)(vii)(A) (2009) is not ambiguous, nor have the parties argued such. *Supra* ¶ 24. The legislature broadly characterized the "sales value of extracted coal" as the "selling price pursuant to an arms-length contract," but allowed that other forms of consideration could reflect partial sales value. Wyo. Stat. Ann. § 39-14-103(b)(vii)(A) (2009). The legislature thus directed that "to the extent that the following represent partial consideration for the value of the coal, sales value shall include the value per ton **attributable to the extracted coal** for **any consideration provided to the seller** in the form of . . . or any payment received for the current or past sale of extracted coal, by or on behalf of the purchaser." *Id.* (emphasis added); *supra* ¶ 24.

29. Accordingly, we agree with the Department's view that the statute must be read liberally and that virtually any type of consideration, whether a cash payment, forbearance, property conveyance or exchange, performance of a service, debt forgiveness, or any other bargained-for consideration, may contribute to the "sales value of extracted coal." Wyo. Stat. Ann. § 39-14-103(b)(vii)(A) (2009). Moreover, this liberal interpretation is wholly consistent with the legislature's open-ended enumeration of transactions that **may** add to the "sales value of extracted coal[.]" *Id.; supra* ¶ 24.

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[8] Courts have applied such logic when determining whether royalties are owed on similar payments between purchaser and mineral producer:

> If the settlement proceeds constitute payment for gas actually produced and sold, it is immaterial that the leases do not explicitly provide for the payment of royalties on settlement proceeds. . . . The central question in this case, therefore, is whether the settlement consideration paid . . . constitutes payment, at least in part, for the gas actually produced and sold or whether it constitutes payment for something other than the production and sale of gas.

Watts v. Atlantic Richfield Co., 115 F.3d 785, 791 (10th Cir. 1997).

30. Still, the State Board concludes that PRCC offered sufficient credible evidence and authority to overcome the presumption that the Department correctly included the $27 million as part of the 2009 NARM coal production's "sales value." *See* Rules, Wyo. State Bd. of Equalization, ch. 2 § 20 (2006); *supra* ¶ 19. PRCC carried its initial burden because: 1) the statutes do not expressly classify or suggest that "buy down" or "buyout" settlement payments constitute the "sales value of extracted coal"; and, 2) the settlement agreements at issue neither express nor imply an intent that the buy down/buyout payments were made for past coal production. Wyo. Stat. Ann. § 39-14-103(b)(vii)(A) (2009); *supra* ¶¶ 3-11. Nor has the Department directed the State Board to contract settlement language or other evidence indicating otherwise. Rather, the Department offers several nuanced theories that buy down payments are inherently or implicitly paid for past production as retroactive price adjustments, theories that we investigate in greater detail below. *Infra* ¶¶ 36-63.

C. "Buy down" and "buyout" agreements

31. As "buy down" and "buyout" agreements are not mentioned in Wyoming's mineral tax statutes or rules, it is helpful to first understand their use and role within the mineral production industry. "Buy downs" and "buyouts" are often associated with mineral "take-or-pay" sale arrangements, contractual purchase agreements in which purchasers agree to purchase a minimum quantity of minerals over a contract term, i.e. to purchase x units per month over a multiple year period. Pursuant to a "take-or-pay" mineral purchase agreement, if the purchaser fails to "take" allotted mineral production in a given period, the purchaser agrees to pay the producer a sum for the quantity not taken. William H. White, *The Right to Recover Royalties on Natural Gas Take-or-Pay Settlements*, 41 Okla. L. Rev. 663 (1988); *see also State v. Pennzoil Co.*, 752 P.2d 975, 977-78 (Wyo. 1988) (State asserted lease royalties due on payments when lessee's purchaser failed to take mineral production and paid lessee under take-or-pay contract.).

32. A purchaser of minerals "buys down" a purchase obligation by negotiating "a reduced price term, an extension of the delivery terms, a reduction in the minimum or total quantity to be purchased, or some combination of these elements." 8 Howard R. Williams & Charles J. Meyers, *Manual of Oil and Gas Terms* 113 (15th ed. 2012) (quoting Cyril A. Fox, *Rights of a Lessor in Payments Received by Producer from "Buydowns" or "Buyouts" of Long-Term Contracts*, 10 East. Min. L. Inst. 1-1, 1-4 (1989)).

33. Courts have discussed buyouts and buy downs in various litigation scenarios. For example, in *Cities and Villages of Bangor, Barron, Cadott, Cornell, Medford, Rice Lake, Spooner, Trempealeau, Westby, and Whitehall, Wisconsin v. Federal Energy Regulatory Commission*, 922 F.2d 861, 863-64 (D.C. 1991), the court addressed whether a utility could pass the cost of a buy down to its customers as a rate increase. The court noted the Federal

Energy Regulatory Commission's observation that, "A utility with a typical array of coal supply contracts may have to make minimum take [or pay] payments '. . . as it continually reevaluates its fuel needs.'" *Id.* at 864 (quoting *N. States Power Co.*, 48 F.E.R.C. ¶ 61012 at p. 61086, 1989 WL 261902 (1989)). "A contract buyout or buydown, in contrast, is a 'one-time,' 'extraordinary' decision that fundamentally alters an existing fuel supply arrangement." *Id.*

34. Whether buy down/buyout payments are royalty-bearing has been hotly contested. *See* Carol A. Crocca, Annotation, *Oil and gas: rights of royalty owners to take-or-pay settlements*, 57 A.L.R.5th 753 (1998). Indeed, the Department in the instant case refers this Board to a "Dear Payor" letter from the United States Department of the Interior, Mineral Management Service (MMS), dated 1993, which established a framework for resolving whether the federal government would collect royalties on contract buy downs and buyouts. (Dep't Ex. 514). The letter informs that "lessees and other payors are required to pay royalties on contract settlement payments to the extent payments are attributable to mineral's [sic] produced from the lease." (Dep't Ex. 514 at 773); *see infra* ¶¶ 44-49.

35. As the facts of this dispute illustrate, a purchaser's desire to buy down or buyout a purchase obligation may arise for different reasons. *See supra* ¶¶ 3-11. Correspondingly, a purchaser's ability to negotiate an early termination (buyout) or a reduced obligation (buy down) under a contract will depend heavily upon the originally negotiated contract terms and reason for seeking a buy down or buyout. In this case, the Department did not question whether the settlements were justified. *Infra* ¶ 54. The evidence indicates that PRCC, in exchange for specified settlement payments, excused the Purchasers from their obligations to purchase specified tons of coal in 2009. *Supra* ¶¶ 3-11. The settlements resulted in eventual termination of the underlying coal supply agreements. *Id.*

D. The Department's claim that PRCC received $27 million as payment for coal production

36. The parties agree the statutory phrase "sales value of extracted coal" applies only to coal actually severed. (Tr. vol. I, 193-94, 233); PRCC's Opening Br.; Dep't's Resp. Br. 15-16, 19-20.

37. PRCC contends it did not receive the buy down/buyout payments for delivered coal, but instead for its agreement to release Purchasers from their obligations to buy and receive coal yet to be produced. (Tr. vol. I, 125); PRCC's Opening Br. 9, 16; PRCC's Reply Br. 7. PRCC emphasizes that the non-produced coal remained in the ground and would be taxed upon its eventual extraction and sale. (Tr. vol. I, 99-101); PRCC's Opening Br. 2. PRCC argued the settlement payments were, consequently, not "partial consideration for

the value of the coal" or "consideration provided to the seller . . . for the current or past sale of extracted coal, by or on behalf of [a] purchaser." Wyo. Stat. Ann. § 39-14-103(b)(vii)(A) (2009); PRCC's Opening Br.

38. By contrast, the Department's position is more nuanced, requiring that the State Board infer PRCC's basic contractual intent that all payments are, in some manner of speaking, necessarily exchanged for the coal produced under a contract, whether or not the contracts specify as much. In essence, the Department argues that we find constructive intent, which the Department underpins through two theories: its "ongoing/continuing relationship" theory and its "tiered pricing" theory. *Infra* ¶¶ 39-63. We now describe these theories, align them with the Department's statutory applications, and address each in turn.

i. Department's "ongoing/continuous relationship" analysis

39. The Department first directs our attention to the phrase "bona fide arm's-length sale," a benchmark concept in coal valuation. Wyo. Stat. Ann. §§ 39-14-101(a)(ii), 39-14-103(b) (2009); (Tr. vol. I, 189-90, 228-30); Dep't's Resp. Br. 18-19. That term is defined as "a transaction in cash or **terms equivalent to cash** for specified property rights after reasonable exposure in a competitive market between a willing, well informed and prudent buyer and seller with adverse economic interests and assuming neither party is acting under undue compulsion or duress[.]" Wyo. Stat. Ann. § 39-14-101(a)(ii) (2009) (emphasis added).

40. The Department emphasizes that the phrase, "terms equivalent to cash," allows that "sales value" includes not only money received, but also less tangible or regular forms of consideration. (Tr. vol. I, 189-90, 228-30); Dep't's Resp. Br. 18-19; *see e.g. EOG Res., Inc. v. Dep't of Revenue*, 2004 WY 35, ¶¶ 19-21, 86 P.3d 1280, 1285-86 (Wyo. 2004) (Department properly examined complex financing transaction to identify all consideration exchanged for Wyoming natural gas production for tax purposes. The Department referred to prices received for other linked gas production in other states to determine consideration for gas within transaction).

41. The Department further cautions against blindly accepting contract terminology or the stated consideration, and it favors a substance-over-form evaluation of taxpayer activities and contractual intent. (Tr. vol. I, 194-95); Dep't's Resp. Br. 20. *See State v. Davis Oil Co.*, 728 P.2d 1107, 1109-11 (Wyo. 1986) (Contract wellhead transfer of natural gas did not dictate that sale occurred at wellhead for royalty purposes; rather, royalty was due on true price realized upon market sale of sweet gas after processing and transportation.).

42. The Department's core statutory argument is that the legislature, in Wyoming Statutes section 39-14-103(b)(vii)(A) (2009), broadly anticipates a host of other possible contributors to "sales value." (Tr. vol. I, 191-92, 195, 228-34); *supra* ¶ 24. In particular, it argues the catch-all phrase "or any payment received for the current or past sale of extracted coal, by or on behalf of the purchaser," requires inclusion of the $27 million as part of the severed NARM coal's "sales value." Wyo. Stat. Ann. § 39-14-103(b)(vii)(A) (2009); (Tr. vol. I, 191-92, 195); Dep't's Resp. Br. 19.

43. To explain how PRCC's receipt of $27 million qualifies as "any payment received for the current or past sale of extracted coal," the Department first argues that the ongoing and continuous nature of the contractual relationships between PRCC and its Purchasers indicate that the $27 million was consideration for all past production. (Tr. vol. I, 185-86; 196-97, 200-20; vol. II, 268-75). Accordingly, inasmuch as the settlement payments did not terminate PRCC's relationships, they were attributable to all tons produced as part of their ongoing, continuous obligations. (Tr. vol. I, 200-19). Referring to one of the termination agreements, Mr. Sachse explained, "Well, I believe just on its surface, there was a lot of other things going on in the contract besides that, but I do not agree that it was for the sole purpose of not producing coal. It's for the ongoing contract." (Tr. vol. I, 215-16).

44. The Department, in support of its "ongoing/continuing relationship" premise, offered two evidentiary sources. First, there is a direct parallel between the Department's "ongoing/continuing relationship" analysis and the Mineral Management Service's historic position that buy downs/buyouts may be royalty-bearing revenues. Indeed, Mr. Sachse testified that the Department uses the MMS's treatment of buy downs/buyouts for royalty purposes as a guideline. (Tr. vol. I, 175-78; vol. II, 274-75).

45. The Department further cited an MMS "Dear Payor" letter issued to producers for the purposes of valuing federal mineral royalties. (Dep't Ex. 514; Tr. vol. I, 175-77; vol. II, 274-75). Acknowledging that the federal policy guidance did not bear directly on severance or ad valorem tax valuation applications, the Department noted that for federal royalty purposes, buy downs and buyouts can be included in the valuation of minerals. (Tr. vol. I, 175-77).

46. Mr. Sachse explained the Department's differing treatment of buydowns versus buyouts. In Mr. Sachse's words, "[t]he ongoing relationship makes the whole payment subject to severance tax." (Confidential Tr. vol. II, 253). Conversely, the Department does not classify consideration paid to buyout (terminate) a coal supply agreement, as part of a mineral's sales value. (Confidential Tr. vol. II, 255; Tr. vol. II, 271-72).

47. Second, the Department relied upon Mr. Sachse's general experience and opinion to support the Department's position. We will take each in turn.

48. As for MMS's historic classification of buy downs or buyouts for federal royalty purposes, the Department's reliance is understandable, but ultimately misplaced under the facts of this case. Upon close examination, the MMS's position set out in its May 1993 "Dear Payor" letter, shares common ground with the statute at issue in this case, Wyoming Statutes section 39-14-103(b)(vii)(A) (2009); *supra* ¶ 24; (Dep't Ex. 514). Like the applicable Wyoming Statutes, the MMS does not direct that all buy downs and buyouts automatically qualify; rather, settlement payments are royalty-bearing if they are "specifically attributable" to a given production volume. (Dep't Ex. 514 at 000773). MMS guidelines specified that buy down payments of future natural gas prices were allocable to future volumes **as they were produced.** (Dep't Ex. 514 at 000777).

49. Similarly, specified and unspecified forms of consideration under Wyoming Statutes section 39-14-103(b)(vii)(A) (2009) may reflect the "sales value of extracted coal" **if reasonably attributable to produced tons**. In either case, there must exist a discernible connection between the consideration received and the mineral quantity produced and delivered. *See also Watts v. Atlantic Richfield Co.*, 115 F.3d 785, 791-93 (10th Cir. 1997) (discussing requirement that settlement payments be attributable to actual mineral production when determining whether such payments are royalty bearing).[9]

50. Aside from the MMS royalty guidance, the Department also relied upon Mr. Sachse's experience in this area. The Department relied on him to explain why the buy down payments constituted "sales value of extracted coal" under the facts of this case. "In the absence of evidence to the contrary, we presume that the officials charged with establishing value exercised honest judgment in accordance with the applicable rules, regulations, and other directives that have passed public scrutiny, either through legislative enactment or agency rule making or both." *Amoco Prod. Co.*, at ¶ 7, 94 P.3d at 435 (quoting *Chicago, Burlington & Quincy R.R. Co. v. Bruch*, 400 P.2d 494, 499 (Wyo. 1965)). Although Department officials are well-equipped to interpret and apply Wyoming's tax statutes and may carry the Department's burden at trial through well-informed statutory, regulatory, and contractual interpretations, the Department failed to meet its burden to defend its action in this instance. *Supra* ¶ 19.

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[9] For a more in-depth discussion of the "ongoing relationship" dynamic, a factor discussed in royalty cases, see Stephon Joseph Capron, *Oil and Gas: Watts v. Atlantic Richfield Co.: Lessor's Distant Beacon of Hope – Will Oklahoma See It?*, 52 Okla. L. Rev. 145, 152-60 (1999).

51. The "ongoing/continuing relationship" dynamic may, as the Department contends, exist and justify implying an intent not expressed in contract. The Board agrees with the Department that a taxpayer's business relationships may include something more, or different, than what is stated in written contracts. *Supra* ¶¶ 42-43; *see e.g. Travelocity.com LP*, ¶¶ 37-39, 329 P.3d at 142-43 (Department properly questioned contractual terminology and public representations in light of evidence that taxpayers altered contracts and mischaracterized business activities to fortify defense in nationwide tax litigations); *but cf. BP America Prod. Co. v. Dep't of Revenue, State of Wyo.*, 2005 WY 60, 112 P.3d 596 (Wyo. 2005) (Despite objection, producers could not deny, and were subject to, clear processing agreement terms applicable among each other, which established "comparable" processing deductions for natural gas tax valuation purposes.). However, the Department offered insufficient evidence to sustain its broad claim that the buy down payments in this case were anything other than specific payments to obtain relief from **future purchase obligations.**

52. Considering the entire record, we find little persuasive evidence that the continuing or ongoing nature of the contractual relationships undermined, altered, or was contrary to the clear settlement terms between the parties. The Department identified no specific contractual language or evidence to support its contention that PRCC, on any level, actually viewed the settlement payments as consideration for past production. Neither did any witness with specific knowledge of PRCC's contractual intent agree that PRCC received all or any part of the $27 million for present or past coal production. (Tr. vol. II, 334-39). The Department's evidence consisted entirely of the MMS royalty determination guidance and an inference that any contract payment under a coal supply agreement, regardless of the actual contract language, is necessarily exchanged for produced coal. *Supra* ¶¶ 44-48; Dep't's Resp. Br. 17-21.

53. Addressing a similar argument, the Wyoming Supreme Court cautioned against using context to imply an otherwise unwritten contractual intent:

> [t]he purpose of examining the context within which the contract was drawn, however, is limited to ascertaining the intent of the parties at the time the agreement was made. The context cannot be invoked to contradict the clear meaning of the language used, and those extraneous circumstances do not justify a court in proceeding "to insert therein a provision other than or different from that which the language used clearly indicates, and thereby, in effect, make a contract for the parties."

Pennzoil Co., 752 P.2d at 978 (quoting *Snow v. Duxstad*, 147 P. 174, 184 (Wyo. 1915)). In *Pennzoil*, the Court disagreed with the State of Wyoming's interpretation of clear and

unambiguous mineral lease language to justify imposition of royalties on take-or-pay penalty payments received by the mineral lessee. *Id.* Thus, although the lessee received payment from its purchaser under the terms of their take-or-pay purchase agreement, the payments did not trigger royalty obligations to the State because the payments were not for minerals produced. *Id.*

54. Moreover, in the present action the Department did not directly question the integrity or purpose of the settlement agreements and represented that:

> Now, we're not here to debate whether those agreements are nefarious or illegitimate. We're sure they're not. They probably make absolutely perfect sense between Peabody and its purchasers. In fact, we're not even here to guess at what the motivations of the parties were. That, to the department is irrelevant. What we do look at is that [sic] whether there was money exchanged between the parties and that's how we came to our conclusion.

(Tr. vol. I, 38). We likewise accept the unambiguous language and terms of the settlement agreements and construe the contracting parties' intent consistent therewith.

55. Thus, while this Board agrees that contracting parties may, through actions, dealings, or through other manifestations inconsistent with written contractual intent, implicitly alter the meanings of written contracts, we are guided in this case by the clear and unambiguous buy down/buyout settlement agreements entered between PRCC and its Purchasers. The Department's "ongoing/continuing relationship" analysis lacked the evidentiary force necessary to sustain its burden to demonstrate that PRCC's receipt of $27 million constituted "partial consideration for the value of the coal." Wyo. Stat. Ann. § 39-14-103(b)(vii)(A) (2009); *supra* ¶¶ 19, 24.

56. Finally, the State Board finds no basis upon which to distinguish buy downs from buyouts. Either may qualify as consideration reflecting additional sales value if the payment is attributable to mineral production. *See supra* ¶¶ 24, 27, 48-52.

ii. Department's "price tiering" analysis

57. The Department next argues that PRCC's settlement negotiations with the Purchasers were driven by "price-tiering" considerations and, consequently, PRCC's receipt of $27 million was essentially a retroactive adjustment to the price paid for produced coal. Mr. Sachse explained:

Q. Okay. In your experience in reviewing not only these contracts, but other coal supply contracts, have you seen price tiering done at the onset of contracts?

A. Yes, very common.

Q. And can you kind of explain what that is?

A. Actually, I love the analogy of apples. It's, as we all know, if you were to go buy one apple, it would cost you X, $2, but if you were to buy a greater quantity, you would be charged less on a per unit basis, and the higher the quantity you would – the higher the quantity you would purchase, the less the value would be on a per unit basis. So in this instance, economically speaking, the only thing that's really happening is that Peabody is recouping the value had the original volume been what it turned out to be.

I mean, that's – in the bushels analogy, the recouping of those monies for the one bushel versus the two is nothing more than the difference in price between two bushels and one had you bought more, had you entered into a long-term contract economically speaking.

. . .

Q. Okay. And is this potentially just a tiering process that's done at the back end of the transaction as opposed to the front end of the transaction?

A. That's a very distinct possibility, yes.

Q. And does that play into your analysis as to the relationship between the fees that were paid, the termination fees, and the actual production in 2009?

A. It does.

Q. And how so?

A. Because basically, they're getting a bonus at the end for the production that they had through the year. Actually through the entire contract period.

(Tr. vol. I, 219-20; *see* Tr. vol. II, 275-77).

58. Accordingly, the Department argues PRCC received $27 million as a retroactive price adjustment for tons it delivered to the Purchasers in 2009. (Tr. vol. I, 232; vol. II, 275-77). The Department explained: "By agreeing to reduce the previously contracted tons, Powder River was willing to accept additional fees from the purchasers. [sic] Thereby altering the total amount of consideration which Powder River was willing to accept for the coal it actually delivered." Dep't's Resp. Br. 15-16.

59. Upon questioning, PRCC's lone witness lacked specific knowledge of whether price determinations were based upon "price tiering," and he was unfamiliar with how coal supply agreement prices were negotiated. (Tr. vol. I, 127-29, 143-44).

60. The Department added that PRCC could have allocated the additional $27 million to past production years and adjusted each year accordingly, but did not. The Department applied the entire $27 million to PRCC's 2009 production because PRCC did so within its books. (Tr. vol. I, 129-30; Confidential Tr. vol. II, 263-64; Tr. vol. II, 333-34).

61. PRCC countered that the Department's revaluation effectively increased the price of Purchasers' coal for tax purposes. The effective price of Ontario-delivered coal, PRCC argued, increased nearly two-thirds for tax purposes. (Tr. vol. I, 101, 163-66; Confidential Tr. vol. II, 261-64). PRCC complains that the Department's imputed price is far in excess of fair market value. (Tr. vol. I, 261-64; vol. II, 335-37); PRCC's Opening Br. 10.

62. The Department's "price tiering" analysis, while certainly a possible influence in how coal supply transactions are structured, is not sufficiently tied to the transactions at issue in this case. (Tr. vol. I, 127-29). Here again, from its wealth of experience, the Department offers a common sense explanation of factors that may or may not have been at play in any given business scenario. While the Board would not be surprised if "price tiering" motivations infused PRCC's settlement negotiations in the abstract, the Department offered only theory and conjecture to support its position. It offered no direct or indirect evidence that the settlement payments were, in effect, a retroactive price adjustment applied to all past coal production. Moreover, PRCC explicitly denied such intent. (Tr. vol. II, 337-38).

63. The evidence demonstrated that PRCC received $27 million to settle claims against its Purchasers for their failures to purchase future coal quantities. Once the burden of proof shifted to the Department, it failed to counter with sufficient evidence that PRCC received the settlement payments for extracted coal as required under Wyoming Statutes section 39-14-103(b)(vii)(A) (2009). *Supra* ¶ 19.

iii. *In the Matter of the Appeal of Kerr McGee Coal Co.*

64. PRCC also argues this Board has effectively ruled on whether coal supply agreement buy down or buyout payments are part of the coal's sales value, citing an earlier tax appeal entitled *In re Kerr McGee Coal Co.*, Docket No. 92-283, 1994 WL 76633 (Wyo. State Bd. of Equalization, March 9, 1994). (PPRM Ex. 101 at 0008-0031); PRCC Opening Br. 4-5; PRCC Reply Br. 4. That case presented different facts, but a similar issue. In *Kerr McGee*, the coal producer received settlement compensation to terminate coal purchase obligations for coal produced from a particular mine and entered a separate agreement with purchaser to purchase coal from a separate mine. Referring to the settlement payment received, the Department imputed additional sales value to the coal produced under the continuing agreement. The Department classified the settlement payment as consideration implicitly paid for a discounted price for coal produced under the separate agreement. *Id.*

65. The State Board found, with little explanation, that "[t]he compensation associated with the option to avoid Cajun's [purchaser's] obligations to take deliveries from Clovis Point constitutes contract termination payments, not consideration associated with coal production. Failure to includes [sic] such contract termination payments in the reporting of sales price was not an error in violation of the law." *Kerr McGee* at 9, ¶ 11; (PPRM Ex. 101 at 0016).

66. Because the statutes in effect during that dispute were different than the proportionate profits methodology applied in the present dispute, and because the Board in that matter offered little insight to how the underlying transactions were conceived, we decline to find *Kerr McGee Coal Co.* dispositive or even compelling. However, one point from that decision resonates in our deliberation here. The State Board found the termination payments were not "consideration associated with coal production." *Id.* Similarly, we find that buy down or buyout payments, if they are to reflect the "sales value of extracted coal" per Wyoming Statutes section 39-14-103(b)(vii)(A) (2009), must discernibly tie to present or past coal production. *Supra* ¶¶ 27-28, 48-56, 62-63.

67. Wyoming Statutes section 39-14-103(b)(vii)(A) (2009) dictates that "sales value" includes only those forms of consideration that are in some manner exchanged for produced coal. The State Board rejects the Department's policy view that contract settlement payments, whether a buy down or buyout, are necessarily received for past-produced coal.

CONCLUSION

68. PRCC established, by a preponderance of the evidence, that Purchasers' settlement payments were not consideration for present or past coal production under Wyoming Statutes section 39-14-103(b)(vii)(A) (2009). *Supra* ¶¶ 19, 24. The Department's mineral tax audit assessment, to the extent it included the settlement payments within the taxable valuation formula as "sales value," is reversed.

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ORDER

IT IS THEREFORE HEREBY ORDERED the Department of Revenue's audit assessment dated December 27, 2013, to the extent the Department included the buy down/buyout settlement payments in the valuation of PRCC's 2009 taxable valuation as "sales value," thereby increasing PRCC's 2009 taxable value for severance and ad valorem tax purposes, is **reversed**, and the audit assessment is **remanded** to the Department for revision consistent with this **Decision and Order**.

Pursuant to Wyo. Stat. Ann. § 16-3-114 and Rule 12, Wyoming Rules of Appellate Procedure, any person aggrieved or adversely affected in fact by this decision may seek judicial review in the appropriate district court by filing a petition for review within 30 days of the date of this decision.

Dated this 7th day of March, 2016.

STATE BOARD OF EQUALIZATION

E. Jayne Mockler, Chairman

Martin L. Hardsocg, Vice-Chairman

Robin Sessions Cooley, Board Member

ATTEST:

Jessica M. Brown, Executive Assistant

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of March, 2016, I served the foregoing **DECISION AND ORDER** by placing a true and correct copy thereof in the United States Mail, postage prepaid, and properly addressed to the following:

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