**BEFORE THE STATE BOARD OF EQUALIZATION**

**FOR THE STATE OF WYOMING**

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| IN THE MATTER OF THE APPEAL OF **FRONTIER REFINING INC.** FROM A DECISION BY THE DEPARTMENT OF REVENUE (Audit 9/1/2010-6/30/2011) | ) | Docket No. **2015-42** |
| IN THE MATTER OF THE APPEAL OF **FRONTIER REFINING LLC** FROM A DECISION BY THE DEPARTMENT OF REVENUE (Audit 7/1/2011-6/30/2013) | ) | Docket No. **2015-45** |

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**MAJORITY DECISION**
**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

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## APPEARANCES

John Christian, Ryan, LLC, appeared on behalf of Frontier Refining Inc. and Frontier Refining LLC (Frontier Refining, Frontier or Petitioner).

Karl D. Anderson, Senior Assistant Attorney General, and Leo Caselli, Assistant Attorney General, Wyoming Attorney General's Office, appeared on behalf of the Department of Revenue (Department).

## DIGEST

Frontier Refining sought sales tax refunds for various equipment and material purchases, including purchases of numerous chemicals, catalysts, oils, lubricants and like materials used within its Cheyenne, Wyoming, crude oil Refinery. Frontier claimed the purchased chemicals were tax-exempt because they were used directly in, and consumed or destroyed during, the Refinery's manufacturing processes. Following a sales and use tax audit, the Department granted refunds for many purchases, but denied refunds for chemicals, lubricants and other materials which did not physically contact or become an ingredient within Frontier's manufactured products. *See* Wyo. Stat. Ann. § 39-15-

105(a)(iii)(A) (2009).[1] Frontier appealed the Department's refund denial to the Wyoming State Board of Equalization (State Board).[2]

Upon review and consistent with our decision in *In re Gray Oil Company*, Docket No. 2014-05 (Wyo. State Bd. of Equalization, April 8, 2016) 2016 WL 4432575, the State Board affirms the Department's audit assessment denying refunds for purchased chemicals, lubricants, and other materials which did not physically interact or become an ingredient/component of the manufactured product. For identified chemicals that physically interacted with Frontier's manufactured products, and which were destroyed or consumed thereby, a majority of the Board, Chairman Hardsocg and Vice Chairman Mockler, reverses the Department's denial of the refunds and remands the audit assessment to the Department for action consistent with this Decision and Order.

Board Member Gruver, by separate opinion, concurs in part and dissents in part.

## ISSUE

Frontier generally identified the issue as whether the Department correctly denied it an ingredient/component exemption for various chemicals and lubricants used in its Refinery. Frontier claimed that the Refinery used these materials directly in its manufacturing processes and that they were consumed or destroyed in those processes, qualifying the purchases for an excise tax exemption or refund. (Pet'r's Opening Br. 2).

In pre-hearing pleadings, the Department identified the issues as:

> A. Whether the chemicals and substances at issue are used directly in manufacturing, processing, or compounding, and are consumed or destroyed during that process. (Mixed question of fact and law).
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> B. Whether the chemicals and substances at issue become an ingredient or compound part of the final product that is manufactured, processed, or compounded. (Mixed question of fact and law).

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[1] Frontier requested a refund for taxes paid during portions of 2010 through 2013. Identical exemption language applies for the complementary use tax under Wyo. Stat. Ann. § 39-16-105(a)(iii)(A) (2009) and 39-16-101(a)(xv) (2009). The State Board will refer to the 2009 statutory sales tax exemption as it remained unchanged from 2009 through 2013. For references to general statutory authority, the State Board will refer to current statutes, as there is no difference in those statutes from 2009 to the present.

[2] The State Board consists of Chairman Martin L. Hardsocg, Vice Chairman E. Jayne Mockler, and Board Member David Gruver.

C. Whether the Department's audit based-assessment is correct. (Mixed question of fact and law).

(Dep't Issues of Fact & Law & Ex. Index, p. 1). The Department, in its post-hearing brief, additionally complains Frontier did not provide sufficient information to the Department of Audit and, consequently, "cannot challenge an audit-based assessment when it cannot tie its refunds to anything presented in the audit." (Dep't Br. 16).

Because a new issue arose during the hearing, the Board restates the issues as:

1) Whether Frontier's purchased chemicals[3] were "used directly in" the Refinery's manufacturing processes or "consumed or destroyed during that process," and were therefore exempt from sales taxation pursuant to Wyoming Statutes section 39-15-105(a)(iii)(A) (2009).

2) Whether Frontier's purchase of lubricants, which after use as lubricants were drained from equipment and recycled into Frontier's crude oil feed stock supply for refining into gasoline or diesel fuels, were tax-exempt purchases pursuant to Wyoming Statutes section 39-15-105(a)(iii)(A) (2009)?

3) Whether given the circumstances surrounding the audit and parties' preparation and presentation of this dispute for adjudication, the State Board may consider evidence offered in support of claimed tax-exempt purchases when the information was not previously presented to the Department of Audit?

## JURISDICTION

The State Board shall "review final decisions of the department upon application of any interested person adversely affected," 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), (c)(viii) (2015). A taxpayer must file an 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).

This appeal involves excise tax refund requests by Frontier Refining Inc. for the period from September 1, 2010 through June 30, 2011, and by that company's successor, Frontier Refining LLC, for the period July 1, 2011 through June 30, 2013. On June 10, 2015 and July 2, 2015, the Department issued two audit assessments, final administrative decisions, to Frontier Refining Inc. refunding $83,538.83, and to Frontier Refining LLC refunding $288,360.75. (Exs. 502-503). Frontier Refining Inc. timely appealed the Department's decision to the State Board on July 8, 2015. Frontier Refining LLC timely

[3] The term "chemicals" shall be applied generically and includes all oils, lubricants, catalysts, and other materials at issue in this appeal.

appealed the Department's decision to the State Board on July 29, 2015. The State Board has jurisdiction to consider these consolidated appeals.

## FINDINGS OF FACT

This case originally presented as a dispute over whether Frontier's purchases of chemicals were tax-exempt under Wyoming's statutory "manufacturing ingredient or component" exemption. *See* Wyo. Stat. Ann. § 39-15-105(a)(iii)(A) (2009), *infra* ¶ 53. During the hearing, the Department raised an additional question: whether the State Board should rely on certain evidence because of Frontier's omissions during the audit. Consequently, our factual findings shall include a review of pre-hearing submissions to ensure consideration of all relevant facts and circumstances.

### Parties' Contentions

1. Frontier[4] sought refunds of excise taxes on its purchase of various chemicals used in its Cheyenne Refinery between September 1, 2010, and June 30, 2013. Although the Department refunded substantial taxes to Frontier, Frontier appealed the Department's audit assessments which denied refunds for taxes incurred on purchased chemicals over the audit period. (Notice of Appeal, July 8, 2015, Docket No. 2015-42; Notice of Appeal, July 29, 2015, Docket No. 2015-45). The State Board consolidated the appeals for adjudication.

2. On August 27, 2015, Frontier submitted a Preliminary Statement identifying amount of disputed taxes, the purchased chemicals it claimed were tax-exempt, and the sums to be refunded. (Frontier Prelim. Statement, Aug. 27, 2015).

3. In its responsive Preliminary Statement, the Department asserted it correctly denied Frontier's claimed tax exemptions because the chemicals were not used "directly in manufacturing," nor did those chemicals become part of the manufactured products in accordance with the statutory exemption language, Wyoming Statutes section 39-15-105(a)(III)(A)(2009). (Dep't Prelim. Statement, Aug. 31, 2015). The Department cited no other grounds in support of its refund denials.

4. Several weeks prior to the April 14, 2016 hearing, the parties submitted updated pre-hearing documents, including an "Updated Summary of Contentions," "Issues of Fact and Law and Exhibit Index," and a "Witness List and Summary of Proposed Testimony."

5. Those prehearing submissions showed little change from the parties' preliminary statements. Frontier's primary witness was Vice President & Refinery Manager, Mr.

[4] Frontier existed as two different entities during the audit period in question, as Frontier Refining Inc. and Frontier Refining LLC. Because they are one and the same for the purposes of this matter, we will refer to them collectively as "Frontier."

Michael Achacoso, who was to testify about "the manner in which the chemicals and other items that are the subject of Petitioner's claims were used in the Refinery's operations." (Frontier's Witness List and Summary of Proposed Testimony 1). Frontier amended its witness list three days prior to the hearing, adding that Mr. Robert Whipple, an "Engineer V-Chemical," would testify about the "manner in which the chemicals and other items that are the subject of Petitioner's claims were used in the Refinery's operations." (Frontier Am. Witness List & Summ. of Proposed Test.).

6. Identified in the Department's prehearing submissions, Ms. Kim Lovett, the Department's Excise Tax Division Administrator, and Mr. Bret Fanning, Principal Auditor for the Department of Audit, would testify regarding the audit assessment. (Dep't Witness List & Summ. of Proposed Test.).

7. These prehearing documents offered no hint the Department might assert Frontier failed to cooperate with the Department of Audit, or that Frontier failed to supply adequate information in support of claimed tax exemptions during the audit. The Hearing Officer pre-admitted all documentary evidence,[5] and the Department gave no notice of its claim the Board's consideration of evidence should be limited. (Tr. 4-6).

Frontier's case presentation

8. Frontier refines crude oil into numerous products at its Cheyenne Refinery, including several forms of gasoline, diesel, petroleum, coke, sulfur, slurry oil, asphalt, butane, and a whole range of lighter gases. (Ex. 100; Tr. 19-27, 61).

9. Frontier submitted refund requests to the Department in the form of spreadsheets or "schedules" identifying purchased items claimed to be tax-exempt. (Exs. 101-102; Tr. at 27). The schedules identified the vendor, invoice date, purchase amount, tax paid, refund claimed, and the item purchased. *Id.*

10. According to Frontier engineer Robert Whipple, Frontier purchased and used Chevron HiPerSyn oil, Chevron Ursa, Glygoyle 30, Chevron Regal R&O, Chevron Aries 100, Meropa, ATF Donax, Chevron Tegra Syn, Chevron GST, Vanguard 460, Chevron Cylnd Oil, Quintolubric Fr Fluid, Geotex LA SAE, Synturion 6, Mobilmet 763, and Lubermist Oil as lubricants in engines, gear boxes, rotating equipment, transmissions, and for specific valves in equipment throughout the Refinery. (Tr. 28-32; Ex. 107, pp. 50-53, 55, 58, 60, 65, 67-69; Ex. 110, p. 94). These lubricants protected Refinery equipment with moving/rotating parts, allowing them a longer service life. Without the lubricants, the equipment would quickly seize during operation and become inoperable. (Tr. 33).

[5] Pre-admission of evidence permitted the Board to examine all exhibits before the hearing because no party objected to their admission or the Board's consideration in preparation for the hearing. (Tr. at 6).

11. The lubricants did not physically contact the Refinery's manufactured products and were periodically drained from equipment and replaced with new lubricants when their lubricating effectiveness diminished. Frontier collected the spent lubricants in a 400 gallon tank and eventually recycled them to their crude oil supplies for refining into gasoline and diesel fuel. (Tr. 34-36, 68-70, 80, 85-86).

12. Frontier purchased and used Therminol 66, a heat transfer fluid, in its sulfur recovery and HF acylation facilities. The Therminol did not physically interact with Frontier's manufactured products. (Tr. 36-37, 64; Ex. 103). Frontier recycled used Therminol 66 into its crude oil storage and eventually converted it into gasoline or diesel along with other spent oils and lubricants. *Id.*

13. Frontier purchased and used Shellzone Antifreeze as a coolant and lubricant in facilities throughout the Refinery. Frontier disposed of the coolant after its useful life passed. (Tr. 38-39; Ex. 107, p. 53). The antifreeze material did not enter or contact the production stream, nor was it recycled. (Tr. 70-71).

14. Frontier purchased and used hydrocarbon-degrading bacteria and ammonia-degrading bacteria to remove hydrocarbons in the Refinery's wastewater, enabling the water's discharge in compliance with environmental guidelines. (Tr. 39-41, 65-66; Ex. 104). The hydrocarbon-degrading bacteria and ammonia-degrading bacteria did not physically contact the production stream, nor were they absorbed as an ingredient of the production stream. *Id.* The bacteria eventually died and was disposed of by third-parties, but some was used to regenerate itself. *Id.*

15. Frontier purchased and used activated carbon, carbon media, coconut shells, and caustic soda for wastewater treatment and odor control. (Tr. 41-43, 67; Ex. 105, p. 43; Ex. 113, p. 110). However, some caustic soda also physically contacted produced oil to assist in the removal of sulfur or in the final treatment of gasoline within Frontier's "SCANfining unit." (Tr. 43-44, 77). The invoices for caustic soda differentiated between the caustic soda used to treat water, versus that used to remove sulfur from the Refinery's products. (Tr. 44, 80-82; Ex. 113, p. 110). Caustic soda was eventually destroyed through its use in the Refinery, at which point it was disposed. (Tr. 44-45).

16. Frontier purchased and used water for numerous purposes, including as a coolant, a heating medium in boilers, for its compressive ability to power turbines, and as steam. Frontier treated the water with different chemicals to soften the water, to prevent scaling within equipment, and to treat before disposal. (Tr. 45-48). It eventually disposed of its water as required by state governmental regulatory agencies. (Tr. 61-62). Frontier did not produce or sell water as a manufactured product. (Tr. 62).

17. Frontier purchased and used Morton Salt within the Refinery to remove moisture ("haze") from produced diesel fuel, during which it became degraded and was consumed. (Tr. 48-49, 71-73, 89-90; Ex. 111).

18. Frontier purchased and used different salt from Tri-State Commodities to soften water for use in boilers. (Tr. 49-50, 71-73; Ex. 112). Salt used to treat water did not physically contact Frontier's production stream. *Id.*

19. Frontier purchased and used calcium chloride anhydrous within the Refinery to remove fluorides from specific facilities. (Tr. 51-52, 79; Ex. 113, p. 117). This chemical did not physically contact Frontier's production stream nor become an ingredient of the product. *Id.*

20. Frontier purchased and used hydrated lime in its acylation unit and KOH system to remove trace catalysts, but this material did not physically contact the production stream or output. (Tr. 50-51; Ex. 113, p. 103). The hydrated lime was consumed through its application and disposed. *Id.* Frontier purchased and used CAL Hydroxide Lime, an alternative form of lime, to remove fluorides from the facilities. Neither did those materials directly contact the production stream. (Tr. 51-52, 73; Ex. 113, p. 117).

21. Frontier purchased and used caustic potash walnut, a briquette made of potassium hydroxide, to remove residual hydrofluoric acid from the plant's propane production. The caustic potash walnut interacted directly with the plant's production stream and was consumed and destroyed through its application. (Tr. 52-53; Ex. 113, p. 112).

22. Frontier purchased and used Alumina Durocel and Alumina Fluorocel to remove moisture and fluorides from "feeds" to the plant's Butamer and Acylation units. (Tr. 53-54; Ex. 113, p. 109). They worked through direct contact with the plant's products and when saturated with water, they were removed and disposed. (Tr. 53-54, 76-77; Ex. 113, p. 109).

23. Frontier purchased and used Diethanolamine in its amine treatment facilities, specifically recovery of sulfur. The chemicals physically contacted the gas streams and attached to H2S (hydrodgen sulfide) so that the H2S could be removed, following which the chemicals were either salvaged or consumed. (Tr. 54-55, 73-74; Ex. 113, p. 104). It did not become an ingredient of Frontier's final petroleum products. (Tr. 74).

24. Similarly, Frontier purchased and used N-Methyldiethanolamine in its amine units, but in particular, its SCOT unit, to remove sulfur. It physically contacted the production stream and was discharged into the atmosphere. (Tr. 55-56, 73-74; Ex. 113, p. 114). It did not become an ingredient of Frontier's final product, but was consumed in the process. (Tr. 74).

25. Frontier purchased and used Methanol and Perchloroethylene, "catalyst promoters," to improve the use of catalysts within its facilities. Frontier applied these directly to the production stream and they became part of the product or were otherwise consumed in the processes. (Tr. 56-57, 74-75; Ex. 113, p. 120).

26. Frontier purchased and used Sodium Hypochlorite, essentially a strong bleach solution, for "biological control in our cooling towers." (Tr. at 57-58, 80; Ex. 113, p. 119). They effectively increased the growth of microbes, to improve the transfer of heat. *Id.* These materials did not physically contact Frontier's production stream, but were destroyed through their use. *Id.*

27. Frontier purchased and used sulfuric acid for PH control in the facility's cooling towers to suppress microbiological growth. (Tr. 58-59; Ex. 113, p. 106). The sulfuric acid did not contact or become part of the production stream. (Tr. 75-76).

28. Mr. Whipple did not assist Frontier in responding to the audit. (Tr. 82-83).

29. Of the purchased chemicals and materials in dispute, Mr. Whipple testified that six categories of chemicals/materials physically contacted the production and were either destroyed or became part of the final product: a portion of caustic soda applied to the production, *supra* ¶ 15, Morton's Salt, *supra* ¶ 17, caustic potash, *supra* ¶ 21, alumina durocel and fluorocel, *supra* ¶ 22, diethanolamine and methyldiethanolamine, *supra* ¶¶ 23-24, and methanol and Perchloroethylene, *supra* ¶ 25.

Department's case presentation

30. The Department referred Frontier's refund requests to the Department of Audit for review and verification. (Tr. 97-98). The Department of Audit engaged audits[6] of Frontier's refund requests on January 17, 2014. (Ex. 505, pp. 5, 22).

31. In support of its refund requests, Frontier presented a "refund schedule," a spreadsheet identifying the purchase transactions claimed to be tax-exempt and requesting refunds of $71,399.35 and $240,290.01. (Exs. 101-102; 504, pp. 5-6; 505, p. 22-23; Tr. 98, 103-05, 109, 111-17, 125-26). The Department of Audit reviewed 100% of the data (primarily purchase invoices), rather than apply a sampling method, through which only a

[6] The refund requests covered the period of September 2010 through June of 2013, during which Frontier existed under different business entities. For that reason, the Department of Audit prepared two audits, one for September of 2010 through June of 2011, during which Frontier Refining, Inc. was the taxpayer, and one for the period of July of 2011 through June of 2013, during which Frontier Refining, LLC, was the owner. (Tr. 95; Exs. 504-505). The Department issued separate audit assessments granting refunds, but also denying refunds, claimed during each period. Frontier separately appealed each audit assessment/refund denial. *See Supra* ¶ 1.

statistically significant sample of the total transactions is reviewed. (Exs. 504, pp. 5-6; 505, p. 22-23; Tr. 107, 111).

32. For many Frontier purchases, the Department of Audit did not dispute they were tax-exempt; the Department determined Frontier was due refunds totaling $83,541.52 and $288,360.75. (Exs. 500, p. 1; 502, p. 2; 503, p. 3; 504, p. 4; Tr. 97-98, 120-22).

33. Department of Audit employee Brett Fanning frequently communicated with several Frontier audit contacts, relying primarily upon a color-coded refund schedule to communicate and distinguish those purchase transactions qualifying for a refund, and those which either did not merit a refund, or for which more information was requested. (Exs. 508-509; Tr. 104-05). Mr. Fanning and the audit contacts communicated back and forth through notations in the "refund schedule" spreadsheet, discussing purchase transactions and the reasons each believed the transactions were or were not exempt from taxation. (Tr. 104-05, 109, 119, 121-24; Exs. 508-509). Mr. Fanning disagreed with or ultimately denied some of Frontier's exemption claims because the transactions either did not qualify for the "manufacturing" exemption as he believed it applied, or because he lacked sufficient information about the role of specific chemicals within the manufacturing process.[7] *Id.* The color-coding denoted the status of the item for which a refund was sought.[8] *Id.*

34. In detailed conversation logs covering the period of January 2014 through July 2015, Mr. Fanning summarized dozens of communications indicating Frontier generally cooperated with the Department of Audit and supplied sufficient information to establish that many of its purchases were tax-exempt. (Exs. 506-507; Tr. 100-02, 122). The conversation logs reveal no intentional withholding of information or resistance to the auditor's requests. *Id.* The written communications between Frontier and the auditor were cordial and reflected no resistance or refusal to supply information. *Id.*

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[7] The dissent, in its supplemental findings of fact, would conclude "The auditors made numerous inquiries regarding the specific uses of the items, explaining preliminary audit findings and providing spreadsheets indicating which items were being rejected for refunds unless additional information regarding their specific uses was provided." (Concurring & Dissenting Op. ¶ 27, Suppl. Finding of Fact f). In context, the "numerous inquiries" were not individual, separate demands for information. Rather, exhibits 508, 508A and 509, 509A served as "working" refund request spreadsheets that Auditor Fanning reviewed, adjusted, and cycled back to his Frontier contacts for further review and response. Frontier, in turn, received the spreadsheets and responded with additional information, along with explanations in the spreadsheets. (Tr. 103-05, 109-10, 117-20, 126-28; Exs. 506-509). While the Department of Audit resolved the vast majority of transactions for or against Frontier based on specific information provided, Frontier offered insufficient information to address six items or classes at chemicals during the audit. The Department of Audit denied refunds for taxes paid on those items.

[8] The reliability of the voluminous refund schedules is somewhat questionable because we have no ability to track them over the period during which the audit field work was performed. The documents are undated and we can only assume that exhibits 508, 508A and 509, 509A are the final iterations of schedules that continuously changed over many months.

35. In a single email to each Frontier entity, the auditor warned early on that "we need a clear description of the invoice or what the item is used for. If not, the item will stay in the audit was [sic] taxable to HollyFrontier. For any items marked as red on the refund schedule, we cannot give back the tax unless additional information is provided." (Tr. 107-09, 130-31; Ex. 506, p. 100; *see also* Ex. 507, p. 125). Frontier and the auditor finally agreed that the audit should be finally processed for transfer to the Department for assessment. (Exs. 506, pp. 100-16; 507, pp. 125-45).

36. The auditor separated purchases into two basic categories, water treatment chemicals and oils/lubricants. (Tr. 98). In the refund schedules,[9] Mr. Fanning noted various reasons for denying tax refunds for specific chemicals, including:

1) "We do not view this as part of the manufacturing process";
2) "We need to know more about what these oils and/or other materials are used for";
3) "We need to know more about these chemicals. We do not view them as part of the manufacturing process";
4) "We need to know more about these chemicals. Please provide additional descriptions";
5) "We view this as a consumable and not consumed by the manufacturing process"; or,
6) "We view these oils as consumables and not part of the manufacturing exemption."

(Exs. 508-509; Tr. 119-20).

37. As the dissent notes, the Department of Audit and Frontier may have presumed the audit process would not be the final opportunity to provide information in support of Frontier's refund requests. (*See* Dissent's Supp. Find. of Fact i; Ex. 506, p. 0095, audit log entry, May 16, 2014: "I (auditor) said there will be time to provide other documents once all documents have been provided."). Taken as a whole, neither the Department of Audit nor Frontier proceeded during the audit as though the audit might close out any opportunity to supply additional documentation. (Exs. 506-507).

38. Asked during the hearing whether Frontier provided "detailed descriptions of – of what the chemicals are used for," Mr. Fanning answered, "For the items remaining in the

[9] The color-coded refund schedule existed in numerous iterations as it was cycled back and forth between Auditor Brett Fanning and the Frontier employees, and each iteration changed as Frontier supplied additional information and Mr. Fanning adjusted the audit findings. (Tr. 103-05, 109-10, 119; Exs. 508-509). The schedule items denoted in yellow were transactions for which an exemption would be allowed, or it was otherwise determined a refund was due. The refund schedule items colored in red denoted a taxable transaction, or indicated additional information was required. *Id.* Exhibits 508A and 509A are not dated and do not tie to a particular email attachment or time frame. (Exs. 508-509).

audit, we did not get extremely detailed descriptions about what they were used for." (Tr. 117-18). Implicit in this response, Frontier offered some, but insufficient, detail about those remaining items. Mr. Whipple's descriptions of how the chemicals were used in the plant would have assisted Mr. Fanning's preparation of the audit. *Id.* The Department of Audit received satisfactory information about the vast majority of items. (Tr. 121-22).

39. The audit findings identified approximately 24 recurring purchases of chemicals, oils, lubricants or like items that did not qualify for a refund because they did not satisfy the manufacturing ingredient exemption. (Tr. 117-18).

40. According to Ms. Kim Lovett, the Department's Excise Tax Division Administrator, Frontier submitted five refund requests, two of which concerned the "manufacturing" or "ingredient component" exemption for purchases. (Tr. 137). The Department referred them to the Department of Audit for verification. (Tr. 138).

41. Ms. Lovett reviewed the audit findings and accepted them without exception. (Tr. 143). The Department issued audit assessment refunds of $83,538.83 to Frontier Refining, Inc. and $288,360.75 to Frontier Refining LLC. (Tr. 143-44; Exs. 102-03).

42. The remaining disputed purchases for which refunds were not issued concerned the manufacturing exemption, Wyoming Statutes section 39-15-105(a)(iii)(A) (2009). (Tr. 145). Applying the manufacturing "ingredient" exemption, she determined that Frontier qualified as a "manufacturer" under the NAICS code because it refined and sold petroleum products. (Tr. 147-48; Ex. 512).

43. The Department interpreted the exemption as applying first to purchased materials that became an ingredient or component of the final manufactured product, and likened it to the "wholesale exemption" in which items purchased for resale are not initially taxed, but are taxed when thereafter sold. (Tr. 149). The exemption also applied to chemicals or catalysts consumed or destroyed when used directly in the manufacturing process. Direct use in the manufacturing process, according to the Department, required physical contact with the product. (Tr. 150-51). The Department's interpretation followed and accepted the State Board's guidance from the *Gray Oil Company* case. (Tr. 151-54); *infra* ¶¶ 59-64.

44. With respect to the lubricants and oils used to maintain equipment, the Department determined they were not used directly in manufacturing and, consequently, those chemical purchases did not qualify for the exemption. (Tr. 152-54). In particular, the lubricants did not physically contact Frontier's production, nor were they chemicals or catalysts consumed or destroyed through direct involvement with manufacturing. *Id.* Ms. Lovett learned for the first time during the hearing that Frontier recycled used lubricants into the production stream. (Tr. 154-55). Frontier's recycling of used lubricants into the production stream, according to the Department, would not qualify them for the ingredient exemption

because they were not purchased for transformation into a petroleum product. (Tr. 155-57).

45. The Department disagreed with Frontier that chemicals necessitated by Department of Environmental Quality guidelines, but which did not enter physically and directly in the manufacturing process, qualified for the exemption. (Tr. 152). Likewise, the Department concluded that chemicals and materials used to treat water served a purpose ancillary to the manufacturing process and did not become part of the final product. (Tr. 157-58). Nor did they qualify as chemicals or catalysts destroyed or consumed in manufacturing. (Tr. 158).

46. Relying on *Gray Oil Company*, the Department continued to reject refunds for purchased chemicals for water treatment, pollution control, or environmental purposes, unless they were demonstrably used physically in manufacturing. (Tr. 158-59).

47. With respect to chemicals which physically contacted the production stream and became part of the final petroleum product, or were directly involved in manufacturing and were destroyed or consumed through the process, the Department did not receive information before the hearing. (Tr. 160-61, 164). With the information presented at hearing, Ms. Lovett suggested the Department would have likely granted refunds of taxes paid for those purchased items had Frontier offered the information before the hearing. (Tr. 164-65).

## CONCLUSIONS OF LAW

A. State Board's review function: applicable presumptions and burdens of proof

48. Frontier appealed pursuant to Wyoming Statutes section 39-11-102.1(c) (2015) and Chapter 2 of the State Board's Rules of Practice and Procedure. The statute provides, in pertinent part, that:

> (c) 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 subsection, under the contested case procedures of the Wyoming Administrative Procedure Act.

Wyo. Stat. Ann. § 39-11-102.1(c) (2015); *see also* Rules, Wyo. State Bd. of Equalization, ch. 2 § 5(e) (2006).

49. Frontier had "the burden of going forward and the ultimate burden of persuasion, which burden shall be met by a preponderance of the evidence." Rules, Wyo. State Bd. of Equalization, ch. 2 § 20 (2006). Further, "[f]or all cases involving a claim for exemption, the Petitioner shall clearly establish the facts supporting an exemption." *Id.* If petitioner submits sufficient evidence to "suggest the Department determination is incorrect, the burden shifts to the Department to defend its action." *Id.* 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)).

50. 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). However, the State Board's role is strictly adjudicatory. " '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)).

51. The State Board's main task in this matter is to interpret various statutory provisions and determine if the Department correctly applied those provisions to the facts. Statutory interpretation is a question of law reviewed de novo. *Powder River Coal Co. v. Wyo. State Bd. of Equalization*, 2002 WY 5, ¶ 6, 38 P.3d 423, 426 (Wyo. 2002).

52. In interpreting statutes, the State Board defers to the statutory interpretation of an agency charged with the administration of those statutes, unless that interpretation is clearly erroneous. *Buehner Block Co., Inc. v. Wyo. Dep't of Revenue*, 2006 WY 90, ¶ 11, 139 P.3d 1150, 1153 (Wyo. 2006).

B. Applicable statutory and regulatory provisions, and other guidelines

53. Wyoming statutes exempts from excise taxation purchases of services or personal property consumed in manufacturing. *See supra* fn. 1; Wyo. Stat. Ann. § 39-15-105(a)(iii)(A) (2009). The Legislature amended that exemption in 2001 to specifically include the purchase of ingredients or components of the manufactured product, and chemicals and catalysts used directly in the manufacturing process, if destroyed or consumed during that process. 2001 Wyo. Sess. Laws 233, Ch 119. Thus, the "manufacturing ingredient" exemption, with the 2001 additions denoted in bold, applied as follows:

(iii) For the purpose of exempting sales of services and tangible personal property **consumed in production**, the following are exempt:

> (A) Sales of tangible personal property to a person engaged in the business of manufacturing, processing or compounding when the tangible personal property purchased becomes an ingredient or component of the tangible personal property manufactured, processed or compounded for sale or use and sales of containers, labels or shipping cases used for the tangible personal property so manufactured, processed or compounded. **This subparagraph shall apply to chemicals and catalysts used directly in manufacturing, processing or compounding which are consumed or destroyed during that process[.]**

2001 Wyo. Sess. Laws 233, Ch. 119; Wyo. Stat. Ann. § 39-15-105(a)(iii)(A) (2009) (emphasis added). *See also*, Rules, Wyo. Dep't of Revenue, ch. 2 § 9(h.)(ii.) (2006); Rules, Wyo. Dep't of Revenue, ch. 2 § 9(h)(ii) (2012).

54. " 'Manufacturing' means the operation of producing a new product, article, substance or commodity different from and having a distinctive nature, character or use from the raw or prepared material[.]" Wyo. Stat. Ann. § 39-15-101(a)(xxi) (2009).

55. By rule, the Department instructs that:

> "Manufacturing" means a transformation or conversion of material or things into a different state or form from that in which they originally existed, and the actual operation incident to changing them into marketable products. The change in form, composition, or character must be a substantial change and it must result in a transformation of the property into a different product having a distinctive name, nature and use.

Rules, Wyo. Dep't of Revenue, ch. 2 § 3(bb.) (2006); Rules, Wyo. Dep't of Revenue, ch. 2 § 3(x) (2012).

56. " 'Tangible personal property' means all personal property that can be seen, weighed, measured, felt or touched, or that is in any other manner perceptible to the senses. 'Tangible personal property' includes electricity, water, gas, steam and prewritten computer software[.]" Wyo. Stat. Ann. § 39-15-101(a)(ix) (2009).

57. When construing exemptions, the Wyoming Supreme Court cautions:

> [E]xemptions are not favored and generally taxation is held to be the rule and exemption the exception, which means there is a presumption against a grant of exemption and in favor of the taxing power. Appeal of Chicago & North

Western Ry. Co., 70 Wyo. 84, 246 P.2d 789, 795 [Wyo. 1952], rehearing denied 70 Wyo. 119, 247 P.2d 660; State Tax Commission v. Graybar Electric Company, Inc., 86 Ariz. 253, 344 P.2d 1008, 1012 [Ariz. 1959]; Cornell College v. Board of Review of Tama County, 248 Iowa 388, 81 N.W.2d 25, 26 [Iowa 1957]. See also 84 C.J.S. Taxation § 225, pp. 431-432.

*State Bd. of Equalization v. Wyo. Auto. Dealers Ass'n*, 395 P.2d 741, 742 (Wyo. 1964).

C. Application of Law

58. We shall separate Frontier's claims into three categories: 1) chemicals which did not physically interact with, or become a part of, the manufactured product during refining; 2) chemicals not purchased to interact or become a part of the manufactured product, but which were recycled and added to the production as a means of disposal or salvage; and 3) six categories of chemicals that physically interacted with Frontier's manufactured products and were destroyed or consumed through that application, *supra* ¶ 29.

*Purchased items which did not physically interact with the manufactured petroleum products*

59. As a starting point, this case is best understood as a companion case to the State Board's Findings of Fact, Conclusions of Law and Order in *In re Gray Oil Company*, Docket No. 2014-05 (Wyo. State Bd. of Equalization, Apr. 1 8, 2016). 2016 WL 4432575.[10] In *Gray Oil* the taxpayer claimed various lubricants and like materials, which it sold to Frontier between 2010 and 2013, were exempt from sales tax in accordance with Wyoming Statutes section 39-15-105(a)(iii)(A) (2009), the "manufacturing ingredient/component" exemption. *Id.* The State Board ruled Gray Oil Company failed to demonstrate the chemicals sold to Frontier qualified for the tax exemption. *Id.*

60. Because Frontier's refund claims concern the same types of chemicals, and because Frontier offers much of the same legal analysis in support of its exemption claims, there is significant overlap between Gray Oil Company's claims and Frontier's refund claims in the present case.[11] Indeed, with a few exceptions, Gray Oil Company presented the same claims, but from a vendor's perspective. *Id.* at ¶¶ 18, 26-62.

[10] The State Board also discussed the "manufacturing ingredient" exemption *In re Pacificorp Inc.*, Docket Nos. 2012-51 & 2013-03, ¶¶ 71-87 (Wyo. State Bd. of Equalization, Jan. 8, 2016), 2016 WL 4432573, but that case primarily concerned whether the taxpayer's generation of electricity was "manufacturing" for purposes of applying the exemption.

[11] Gray Oil Company and Frontier hired the firm Ryan, LLC, to press the tax exemption claims at issue, and the legal arguments in each case are similar.

61. The State Board recognizes and follows the legal doctrine of *stare decisis,* "which requires courts to stand by the decisions set in prior cases." *In re Proceedings to Equalize the Level of Assessment of Cable TV Properties in Big Horn, Hot Springs, Johnson, Park, Sheridan, & Washakie Ctys, Wyo.,* Equalization Order 92-1, (Wyo. State Bd. of Equalization, Aug. 12, 1992), 1992 WL 200902 at * 3. *See also Thunder Basin Coal Co. v. Wyo. State Board of Equalization*, 896 P.2d 1336, 1340 (Wyo. 1995) (State Board properly relied upon its decision in similar case). Although *Gray Oil* is currently on appeal in the Laramie County District Court, we are guided by that decision because of the similar facts and legal claims in the present appeal.

62. As in *Gray Oil,* the parties disagree only upon whether the facts satisfy the ingredient/component exemption language. *See infra* ¶ 63, *Gray Oil,* ¶¶ 35-37. Frontier "contends that the products are exempt because they are chemicals or catalysts used directly in manufacturing, processing or compounding which are consumed or destroyed during that process." (Frontier Br. 3) Citing *State Board of Equalization v. Cheyenne Newspapers, Inc.,* 611 P.2d 805 (Wyo. 1980), Frontier disagrees the term "directly" requires purchased chemicals to physically contact the final product. (Frontier Br. 6). Frontier argues instead that purchased materials are a direct part of manufacturing and qualify for the exemption if they are necessary and essential to the production equipment or operation, regardless of whether there is direct contact with the manufactured product. (Frontier Br. 6). In essence, Frontier construes the last sentence of the exemption language, *supra* ¶ 53, independently from the first so that chemicals and catalysts are used directly and are consumed or destroyed by manufacturing even if not an ingredient or component of the manufactured product.

63. Because our decision in *Gray Oil* answers Frontier's claims concerning purchases of chemicals that do not physically enter or become a part of the manufactured product, or that are not destroyed or consumed through direct, physical entry into the manufacturing process, we restate that analysis here and conclude as follows:

> 33. Our analysis begins with the plain language of the statute. *Supra* ¶¶ 20-23. The ingredient/component exemption statute contains two sentences, each identifying a separate basis for an ingredient/component exemption. The first sentence of Wyoming Statutes section 39-15-105(a)(iii)(A) (2009) unambiguously requires: 1) the sale of tangible personal property to a person engaged in the business of manufacturing, processing or compounding; and 2) the purchased property becomes an ingredient or component of the tangible personal property manufactured, processed, or compounded for sale or use. *Supra* ¶ 26.
>
> 34. The second sentence of the ingredient/component exemption clarifies that "[t]his subparagraph shall apply to chemicals and catalysts" which are used directly in the manufacturing, processing or compounding processes,

and which are also "consumed or destroyed" during the manufacturing, processing or compounding processes. Wyo. Stat. Ann. § 39-15-105(a)(iii)(A) (2009); *supra* ¶ 26.

35. The parties agreed, and the State Board finds, that the Refinery was engaged in manufacturing during this time frame and met this first statutory requirement that tangible personal property, the lubricants, be sold to a person engaged in the business of manufacturing, in this case the Refinery. (Tr. 67); Pet'r's Opening Br. 2; Dep't of Revenue Prehearing Br. 2; *supra* ¶ 33. *See* Wyo. Stat. Ann. §§ 39-15-105(a)(iii)(A) (2009); 39-15-101(a)(xxi) (2009); *supra* ¶¶ 26-28.

36. Further, the parties agreed, and the State Board finds, that the lubricants used in the rotating machinery, although tangible personal property, were neither ingredients nor did they become components of the Refinery's manufactured products, as they did not physically enter into the manufacturing process. *Supra* ¶¶ 10, 29. Thus, the Refinery did not meet the second exemption requirement. *Supra* ¶ 33.

37. Instead, Gray Oil's refund request relied on the second sentence of the ingredient/component exemption, for chemicals used directly in and consumed or destroyed during the manufacturing process. *Supra* ¶ 11, 12, 30-31. Gray Oil argued the lubricants met the requirements of the second sentence because they were chemicals necessary to the continued operation of the rotating machinery, and thus were used directly in the manufacturing process. It further argued that the lubricants eventually broke down and were no longer sufficient to lubricate the machines and, thus, were destroyed or consumed in the process. *Supra* ¶¶ 7, 9.

38. To resolve this matter, the State Board must first interpret the chemical/catalyst sentence "in harmony" with the remainder of the exemption statute. *Supra* ¶ 22. In doing so, the State Board must give effect to the intent of the legislature, looking first to the plain meaning of the language chosen by the legislature, and employ well-accepted rules of statutory construction if that language is ambiguous or capable of varying interpretations. *Powder River Coal Co. v. Wyo. State Bd. of Equalization*, 2002 WY 5, ¶ 6, 38 P.3d 423, 426 (Wyo. 2002); *supra* ¶¶ 20-23.

39. The State Board must initially point out that the exemption only applies to the "sales of services and tangible personal property **consumed in production**[.]" Wyo. Stat. Ann. § 39-15-105(iii) (2009) (emphasis added); *supra* ¶ 26. From there, the relevant sentence continues, "**[t]his subparagraph** shall apply to chemicals and catalysts . . . ." Wyo. Stat. Ann.

§ 39-15-105(a)(iii)(A) (2009) (emphasis added). "This subparagraph" refers to the ingredient/component exemption subparagraph as a whole. "Subparagraphs (divisions of paragraphs) shall be identified by upper case letters in parentheses, as: (A), (B), (C), etc[.]" Wyo. Stat. Ann. § 8-1-105(b)(v) (2015). In other words, subparagraph (A) includes specific requirements for chemicals and catalysts to meet the requirements for an ingredient/component exemption. Construing the sentence in isolation, as Gray Oil proposes, elevates the chemical/catalyst sentence to the status of a separate, stand-alone exemption. The State Board cannot expand or extend the statute in such a manner. *Supra* ¶ 22.

40. The first sentence in subparagraph (A) requires that ingredients/components must physically enter into the manufactured, compounded, or processed product to qualify for the exemption, as ingredients/components are manufactured into the final product. *Supra* ¶ 10. Reading the second sentence in conjunction with the first, the State Board finds that, as a part of the ingredient/component exemption, chemicals and catalysts must also physically and directly enter into the manufactured product, and also be destroyed as part of that process. Wyo. Stat. Ann. § 39-15-105(a)(iii)(A) (2009); *supra* ¶¶ 21-22, 26.

41. The plain and ordinary meaning of the terms used in the second sentence further support this interpretation. Although neither the statute nor Department Rules define "used directly in" or "consumed or destroyed," their dictionary definitions provide some assistance. "In the absence of a statutory definition, this Court infers that the legislature intended no special meaning for the word but, instead, intended that it be given its ordinary meaning—its common dictionary definition." *Craft v. State*, 2012 WY 166, ¶ 14, 291 P.3d 306, 310 (Wyo. 2012). A common meaning of "directly" includes "in immediate physical contact[,]" *Merriam-Webster's Collegiate Dictionary*, 354 (11th ed. 2014), and "without anything coming in between[.]" *Cambridge Dictionaries Online*. http://www.Dictionary.cambridge.org/us/dictionary/English/directly (last visited April 7, 2016). "Consume" or "consumed" is defined as "to do away with completely[.]" *Merriam-Webster's Collegiate Dictionary*, 268 (11th ed. 2014). "Destroy" is defined as "to ruin the structure, organic existence, or condition of." *Merriam-Webster's Collegiate Dictionary*, 339 (11th ed. 2014).

42. Applying the common definitions of "directly," the State Board concludes that because items, including the machinery itself, come between the lubricants and the manufactured products, the lubricants are not "used

directly in" the manufacturing process that transforms a raw material into a different product, state or form. *Supra* ¶¶ 28-29.

43. Nor are the lubricants consumed or destroyed during the manufacturing process. Considering the common meaning of "destroy," *supra* ¶ 41, the lubricants are destroyed for the Refinery's purposes because their viscosity is lessened over a period of time, but their destruction does not result from the actual manufacturing process. Instead, the lubricants gradually degrade as a result of the heat, high RPMs, and the accumulation of contaminants from their use in the machinery. *Supra* ¶¶ 6, 9. The lubricants are not actually destroyed during the manufacturing process, but rather deemed unusable by the Refinery for the purposes of lessening the friction between moving parts in the rotating machinery. Consequently, the State Board finds that although these lubricants are destroyed for the Refinery's purposes, they are not destroyed "during that [manufacturing] process." *Supra* ¶ 26.

*Gray Oil, supra* ¶ 59 at ¶¶ 33-43, 2016 WL 4432575 *7-9.[12]

64. The State Board concludes Frontier's purchase of chemicals and other materials that neither became a physical ingredient of Frontier's manufactured product, nor were destroyed or consumed through direct physical contact with the manufactured petroleum product, were not tax-exempt for the same reasons set forth in *Gray Oil.* These include Frontier's refund claims for lubricants and water treatment chemicals/materials, which Frontier acknowledged did not physically interact with its production. *See supra* ¶¶ 10-27.

*Spent oils and lubricants mixed with crude for refining into gasoline or diesel*

65. In contrast to the facts developed in *Gray Oil, supra* ¶ 59, Frontier presented evidence that most of the lubricants and oils used in equipment, while not initially interacting with the Refinery's production, were eventually recycled in to its crude oil feed stock for refining into gasolines and diesel. *Supra* ¶¶ 11. Frontier's practice of recycling used lubricants into the manufactured product was unknown to the Department at the time of the hearing. (Tr. 154-56).

66. Frontier's recycling of spent lubricants into the manufactured product, according to the Department, did not qualify those purchases as tax-exempt. (Tr. 155-56); *supra* ¶ 44. The Department reasoned the exempt status under Wyoming Statutes section 39-15-

[12] The State Board in *Gray Oil* further supported its application of the manufacturing ingredient/component exemption through legislative history, along with Wyoming Supreme Court decisions interpreting the exemption, dating back to original enactment of Wyoming's sales tax. *In re Gray Oil*, ¶¶ 44-52; *see also* Concurring & Dissenting Op., *infra* at ¶¶ *7-10.*

105(a)(iii)(A) (2009) depended upon the purpose for which the items were purchased at the time of the purchase, and the recycling of those lubricants was a separate transaction. *Id.*

67. The Board finds that Frontier failed to carry its burden with respect to purchased chemicals (lubricants and oils) which, after their useful life, were salvaged and recycled into the crude for refining into gasoline or diesel fuels. First, there is insufficient evidence of the original quantities purchased which thereafter were recycled into gasoline or diesel.

68. Second, the Board agrees with the Department that the manufacturing ingredient exemption presumes an intent to convert tangible property into a distinctly different property. It does not logically include those purchased items that do not qualify vis-à-vis the purpose for which they were purchased, but which are then indiscriminately thrown into the manufacturing process for disposal. *Supra* ¶¶ 10-12. In other words, Frontier's ability to dispose of waste lubricants by adding them to the manufacturing process after they become waste did not somehow qualify their initial purchase as tax-exempt.

69. In support of this conclusion, the Board notes the exemption language presumes a manufacturer's deliberate and original purpose for the purchase must qualify for the exemption, rather than a coincidental or fortuitous opportunity to dispose the spent material by recycling into the manufactured product. The Department's definition of "manufacturing" also supports that intent, directing that "manufacturing" occurs through the "conversion of material or things into a different state or form from that in which they **originally existed**[.]" Rules, Wyo. Dep't of Revenue, ch. 2 § 3(bb.) (2006); Rules, Wyo. Dep't of Revenue, ch. 2 § 3(x) (2012) (emphasis added), *supra* ¶ 55. Because the lubricants in their original state, or by their original purpose, were not purchased or used for "manufacturing" as defined, Frontier's inconsequential recycling of the spent materials was irrelevant under the exemption language by Department rule. *Id.*

*Purchased items that physically impacted Frontier's production and were consumed or destroyed*

70. Frontier presented evidence of six categories of chemicals and materials that physically participated in the manufacturing of petroleum or derivatives thereof. *Supra* ¶ 29. Each item was either consumed or destroyed. *Id.* Thus, Frontier carried its initial burden of demonstrating the Department's refund denial for these purchased items was incorrect. *Supra* ¶¶ 48-49. The burden shifted to the Department to defend its actions. *Id.*

71. At hearing, the Department did not dispute the function or application of these materials within the manufacturing process, implicitly agreeing purchase of these items might have been tax-exempt, but for the timing of Frontier's presentation of evidence. *Supra* ¶ 47.

72. In support of its resistance, the Department directs the Board to *In re Bar S Services, Inc.*, Docket No. 2014-09 (Wyo. State Bd. Equalization, Mar. 31, 2015), 2015 WL 1516662 and the Wyoming Supreme Court's ruling in *Wyoming Department of Revenue v. Qwest Corporation*, 263 P.3d 622 (Wyo. 2011). (Tr. 164-65, 173-77); (Dep't Br. 16). The Department asserts:

> Frontier failed to provide adequate records, despite the auditor's repeat [sic] requests for information. Therefore, it cannot challenge an audit-based assessment when it cannot tie its refund requests to anything presented in the audit. *See Bar S Services, Inc.*, Doc. No. 2014-09, at ¶ 46 (Wyo. St. Bd. Eq., Mar. 31, 2015). To do so would invade the statutory prerogative of the Department to issue assessments based upon statutorily required (and repeatedly requested) information. *See also Wyo. Dep't of Revenue v. Qwest Corp.*, 2011 WY 146, ¶ 30, 263 P.3d 622, 631 (Wyo. 2011).

Dep't Br. 16.

73. While the State Board is sensitive to taxpayers that fail to supply requested information during an audit, *see In re Powder River Coal Company*, Docket No. 2014-08, ¶ 13, fn. 7 (Mar. 7, 2016), 2016 WL 4432576 *17, we must decide whether *Qwest* limits our ability to rely upon evidence submitted in the present case.

74. The Department first raised its "timeliness of explanation" concern in counsel's opening statement at the hearing's commencement.[13] (Tr. 14). The Department did not object to the admission of evidence before or during the contested case proceedings, nor did the Department's pleadings hint the Board's review of evidence should be limited. (Tr. 4-6); *supra* ¶¶ 1-7. The Department did not object when Frontier added Mr. Whipple to its witness list shortly before the hearing, nor did it seek a continuance to discover the nature of his testimony. *Id.* Nor does the present dispute draw easy comparison to the acrimonious audit assessment dispute in *Qwest*, wherein the taxpayer refused to provide information to the Department of Audit, and the overarching dispute was whether the Board should consider information withheld from the Department of Audit. *Infra*, ¶¶ 79-80, 85-86.

75. Evidentiary rulings in administrative proceedings "are within the sound discretion of the agency as the trier of fact; we will set aside an evidentiary determination only if the agency abused its discretion." *In re Greene*, 2009 WY 42, ¶ 9, 204 P.3d 285, 290 (Wyo.

[13] Mr. Anderson stated: "And we have a list of other chemicals. These are new to the department. And, frankly, during the audit process, the auditor has asked repeatedly of the taxpayer to explain exactly what these other chemicals do, how they fall within the overall schematic of the process, the plant itself." (Tr. 14). The Board infers that Mr. Anderson meant that the chemicals were not previously at issue in *Gray Oil*, the companion case. The evidence demonstrated that they were on the list of chemicals at issue during the audits of Frontier. (Exs. 508-509).

2009) (citing *McIntosh v. State ex rel. Wyo. Med. Comm'n*, 2007 WY 108, ¶ 42, 162 P.3d 483, 494 (Wyo. 2007)).

76. The Department arguably waived any objection to the evidence when it did not object to Mr. Whipple's late appearance as a witness and did not object during questioning of Mr. Whipple. *Naibauer v. Bd. of Platte Cty. Comm'rs*, 895 P.2d 445, 448 (Wyo. 1995); *Weber v. Johnston Fuel Liners, Inc.*, 519 P.2d 972, 976 (Wyo. 1974); *see also Title Guar. Co. of Wyo. v. Midland Mortg. Co.*, 451 P.2d 798, 801 (Wyo. 1969) ("[A] failure to object to proffered evidence constitutes a waiver of the defect."); *Gore v. Sherard*, 2002 WY 114, ¶ 18, 50 P.3d 705, 711 (Wyo. 2002) ("Hearsay evidence admitted without objection may be considered and given its natural probative effect.").

77. Still, the Department's failure to formally object to the admission of evidence is likely not dispositive, and the Department repeatedly implied the Board should disregard Mr. Whipple's testimony concerning those six items because the information was not offered during the audit.[14] "Administrative hearings are governed by WAPA, and administrative agencies acting in a judicial or quasi judicial capacity are not bound by the rules of evidence that govern trials by courts or juries." *In re Greene*, 2009 WY 42, ¶ 27, 204 P.3d 285, 294 (Wyo. 2009). Under the Wyoming Administrative Procedure Act, the "irrelevant, immaterial or unduly repetitious evidence shall be excluded" and the Board is to rely upon evidence "relied upon by reasonably prudent men in the conduct of their serious affairs." Wyo. Stat. Ann. § 16-3-108 (2015).

78. Therefore, in the absence of other supervening considerations, the Board's reliance upon Frontier's evidence is a matter of Board discretion. However, as the Department duly notes, *supra* ¶ 72, there are supervening considerations, in particular the Wyoming Supreme Court's decision in *Wyoming Department of Revenue v. Qwest Corporation.*, 2011 WY 146, ¶ 30, 263 P.3d 622, 631 (Wyo. 2011) (*Qwest*).

79. The *Qwest* ruling stands for the proposition that the State Board must review departmental decisions based on information the Department had or had a fair opportunity to obtain in rendering its decision. In that case, the Department of Audit (on behalf of the Department) adamantly demanded the taxpayer (Qwest) supply information in support of its refund claims. Qwest repeatedly responded it could not or would not produce the required information from its computer systems and argued the auditors should be content to estimate Qwest's refund with the information it had. *Id.* at ¶¶ 10-12, 263 P.3d at 624-25. The Department disagreed and denied Qwest's refund claims. The Department challenged the admission of evidence throughout a hearing to adjudicate Qwest's appeals.

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[14] Rather than object to admission of Mr. Whipple's testimony, the Department sought to undermine its relevance through argumentative questions to its witnesses. For example, Mr. Fanning was asked: "Okay, have you heard Mr. Whipple give some – some really nice scientific detailed descriptions today?", to which Mr. Fanning answered, "Yes. Yes, I did." (Tr. 118). Mr. Fanning then testified that Mr. Whipple's explanations would have helped during the audit. *Id.*

Two months *after the hearing* and before the Board ruled, Qwest submitted the specific information it continuously claimed it could not produce during audit or during the hearing, to which the Department objected. *Id.* The State Board admitted the evidence over the Department's objection and ordered the Department to refund Qwest's taxes based on the new information. *Id.* at ¶ 13, 263 P.3d at 625.

80. The Wyoming Supreme Court partially reversed because the State Board allowed "the late produced information to be admitted into evidence in the contested case proceeding," explaining "The SBOE was charged with determining whether the DOR erred by denying Qwest a refund on the grounds that it did not provide the actual sales tax data. It was not charged with determining *de novo,* without any consideration of the state of the record at the time of the assessment decision, whether Qwest was entitled to a refund." *Qwest*, at ¶¶ 24, 27, 263 P.3d at 629-30. The Court further observed, "The cases describing the responsibilities of the DOR and SBOE make clear the SBOE's role is limited to considering the factual record which was available to the DOR/DOA during the assessment process." *Id.* at ¶ 25, 263 P.3d at 629 (citing *Airtouch Comm'n., Inc. v. Dep't of Revenue*, 2003 WY 114, ¶¶ 13, 38-39, 40, 76 P.3d 342, 348, 356-57 (Wyo. 2003)).

81. Accordingly, we conclude that *Qwest* is distinguishable and does not limit our consideration of evidence admitted at hearing without objection under the circumstances of this case.

82. While the audit records indicate Mr. Fanning sought additional detail on some invoiced items, the communications between Mr. Fanning and Frontier's employees who served as audit contacts demonstrated a high level of cooperation and no defiance from the auditee. *Supra* ¶¶ 32-38. The exchange of information between Frontier and the Department of Audit was substantial, so much so that many of Frontier's purchases were deemed tax-exempt and taxes were refunded. *Id.* Unlike *Qwest,* Frontier did not claim it could not provide specific information during an audit or under oath during the hearing, and then supply the precise information sought after the hearing. *Qwest* at ¶¶ 11-13, 263 P.3d at 624-25; *see also In re Qwest Corp,* Docket No. 2007-44, ¶¶ 89-108, 143-55, 198-213, 221-36 (Wyo. St. Bd. of Equalization, Jan. 15, 2009) 2009 WL 156541 *13-15, 20-21, 27-29, 30-32.

83. In one email to each of the Frontier auditees approximately five months before issuing the final audit findings, Mr. Fanning mentioned: "for any items entered into the audit, we need a clear description of the invoice or what the item is used for. If not, the item will stay in the audit as taxable to HollyFrontier. For any items marked as red on the refund schedule, we cannot give back tax unless additional information is provided." (Exs. 506, p. 100; 507, p. 125). Frontier continuously presented substantial information to address most of the items at issue, leaving only six without an adequate explanation. *Supra* ¶¶ 29, 32-38, 47.

84. In his final audit findings, and consistent with his communications with Frontier during the audit, Mr. Fanning described a very cooperative audit experience, citing no difficulty obtaining information. (Exs. 504, pp. 5-6; 505, pp. 22-23). In response to the question at hearing, "did they provide detailed descriptions of – of what the chemicals are used for?" Mr. Fanning answered, "For the items remaining in the audit, we did not get *extremely detailed descriptions* about what they were used for." (Tr. 117-18) (emphasis added). The audit field work concluded with the following emailed communications:

> Kate, per our phone conversation on GE, attached are updated audit findings. I included our Summary of Audit Findings and the Sample Detail. The refund vendors and other sample items were unchanged. Take care, Bret.
>
> . . .
>
> Good morning Bret! We have reviewed all of the files and are in agreement with the state's findings. Please proceed with processing the audit. Should you have any additional questions, please let us know. Thank you, Emilda Santiesteban
>
> . . .
>
> Emilda, Sounds Great! I'll get this audit finalized as soon as possible. Thanks. Bret

(Ex. 506, pp. 114-16; *see also* Ex. 507, pp. 144-45). Frontier apparently did not appreciate the Department could or would challenge new evidence at hearing, another difference from the *Qwest* case which involved a highly contentious audit process. *Qwest*, Docket. No. 2007-44, ¶¶ 76-236, *supra* ¶ 82.

85. *Qwest* requires the Board, when examining evidence, to review the Department's actions and not re-perform the Department's role as the State's taxing authority. Because the Department did not object to admission of Frontier's evidence, and given the highly cooperative and deferential nature of the underlying audit, *Qwest* does not require we disregard Frontier's evidence as the Department suggests. Neither should *Qwest* relieve the parties of their burden to discover before trial, the substance of evidence to be offered, or to timely object to evidence when offered.

86. Under the dissent's application of *Qwest*, the Board lacks discretion to consider evidence not first provided to the Department of Audit upon request, nearly regardless of the circumstances. Concurring & Dissenting Op., *infra* ¶¶ 23-27. While *Qwest* may be read as prohibitively as the dissent opines, the majority opts for a less rigid, pragmatic application—one that acknowledges the facts and procedural peculiarities underpinning the Court's decision in that case.

87. Further, accepting the dissent's view of *Qwest*, the rules of evidence and purpose of the contested case proceeding may no longer apply for information and related claims not provided during the audit. Whether an honest mistake in omitting information or a

negligent failure to supply complete information to the Department of Audit's standard, *Qwest* should not compel the Board to disregard newly revealed evidence in all instances notwithstanding an otherwise cooperative audit process. In sum, the present case does not trigger the same concerns addressed in *Qwest*.

88. Neither is this Board's ruling in *In re Bar S Services, Inc.*, supra ¶ 72, persuasive. In that case, an oil field service company claimed certain purchases were tax-exempt, but offered insufficient evidence that its tax-exempt expenditures were related to the transactions picked up in the audit. The Board held that the taxpayer failed to offer evidence in support of its exemption claim. *Id.* at ¶ 46. Further, the Department in that case raised no argument that the taxpayer failed during the audit to provide requested information--only then to offer the requested information at trial. Rather, the taxpayer confusingly failed to tie its specific tax-exemption claims to the transactions covered by the tax assessment. *Id.*

## CONCLUSION

89. Consistent with our ruling in *Gray Oil*, *supra* ¶ 59, we continue to hold there is a threshold requirement for application of the manufacturing ingredient or component exemption: the purchased item must physically interact with or become an ingredient/component of the manufactured product. Wyo. Stat. Ann. § 39-15-105(a)(iii)(A) (2009), *supra* ¶¶ 53, 59-64. Chemicals and catalysts are "used directly in manufacturing" only if they physically interact with the manufactured item at some point. *Supra* ¶¶ 59-64. Accordingly, the State Board rejects Frontier's claims that purchased chemicals, lubricants and like materials used in its manufacturing facility, but which did not physically interact with Frontier's refined petroleum products or derivatives, were tax-exempt. The Department, through its audit assessment, correctly denied Frontier's claims. *Id.*

90. The State Board disagrees that spent lubricants and oils, disposed of through recycling into Frontier's crude oil supply, thereby became tax-exempt. *Supra* ¶¶ 65-69. Whether or not a purchase is tax-exempt depends upon the original form, purpose, and use of purchased property in the manufacturing process, and Frontier's inconsequential recycling of waste lubricants into its crude oil supply did not render the original purchases tax-exempt. *Id.*

91. Frontier offered sufficient evidence that six purchased chemicals physically interacted with its production stream and were either consumed or destroyed. *Supra* ¶ 29. Frontier carried its burden to demonstrate the Department's audit assessment was incorrect. The Department did not object to admission of Frontier's evidence and conceded that, but for the timeliness of Frontier's exposition, those purchases were probably tax-exempt. *Supra* ¶ 47. Frontier was entitled to a refund of taxes paid on the purchase of those items.

## ORDER

**IT IS, THEREFORE, ORDERED** the Wyoming Department of Revenue's final administrative decision denying Frontier's refund requests is **affirmed** with the exception of the Department's denial of sales tax refunds for the purchases of six chemicals or chemical classes during the audit period: caustic soda physically applied to the manufactured product during refining, Morton's Salt, caustic potash, alumina durocel and fluorocel, diethanolamine and methyldiethanolamine, and methanol and Perchloroethylene;

**IT IS FURTHER ORDERED** that the Wyoming Department of Revenue's final administrative decision denying Frontier's refund requests for the purchases of caustic soda physically applied to the product during manufacturing, Morton's Salt, caustic potash, alumina durocel and fluorocel, diethanolamine and methyldiethanolamine, and methanol and Perchloroethylene, is **reversed**, and the audit assessment is remanded to the Department for the purpose of refunding sales taxes paid on the purchase of those items during the audit period.

**Pursuant to Wyoming Statutes section § 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 3rd day of July, 2017.

**STATE BOARD OF EQUALIZATION**

Martin L. Hardsocg, Chairman

Jayne Mockler, Vice Chairman

**ATTEST:**

Nadia Broome, Executive Assistant

## OPINION CONCURING IN PART AND DISSENTING IN PART

Board Member David Gruver

1. I concur in upholding the Department of Revenue (Department) Order denying a refund for most of the items. For the items subject to remand to the Department, I find that Frontier failed to carry its burden of proving the items purchased were exempt from taxation under the pertinent sales and use tax provisions of Wyoming law, given the record before the Department and the Department of Audit under the applicable standard of review and the Wyoming Supreme Court's holding in *Wyoming Department of Revenue v. Qwest Corporation,* 2011 WY 146, 263 P.3d 622 (Wyo. 2011) (*Qwest*).

*Purchased items which did not physically interact with the manufactured petroleum products*

2. The pertinent facts supporting the interpretation of the manufacturing exemption statute reached by the Board in *In re Gray Oil Company*, Docket No. 2014-05 (Wyo. St. Bd. of Equalization, April 8, 2016), 2016 WL 4332575, are indistinguishable from those presented by this case (setting aside consideration of the recycling aspect). The *Gray Oil* case is currently subject to judicial review. As a matter of equal treatment of taxpayers, until reversed or modified by a court of competent jurisdiction, the Board's Majority Decision appropriately follows the result of *Gray Oil*.[1]

3. But contrary to the Board's decisions in *Gray Oil* and the current case, I find the statute ambiguous. The statute provides in part:

> (iii) For the purpose of exempting sales of services and tangible personal property **consumed in production**, the following are exempt:
>
> > A. Sales of tangible personal property to a person engaged in the business of manufacturing, processing or compounding when the tangible personal property purchased becomes an ingredient or

[1] The Wyoming Supreme Court has held that an administrative agency is bound to follow its own rules. *Fullmer v. Wyo. Emp't Security Comm'n*, 858 P.2d 1122 (Wyo. 1993). A like holding for administrative agency adjudicatory decisions was not found or cited by the parties, although the Department suggested the holding in *Gray Oil* should control and Frontier attempted to distinguish *Gray Oil*. (Pet'r's Br. 7; Dep't Br. 14-15). While the application of "stare decisis" to administrative adjudications is not as clear as might be assumed, *see,* Davis, Administrative Law Treatise, Vol. 4, §§20:9 to 20:11 (1983), as noted in the Board Decision the Wyoming Supreme Court has held it was not error for this Board to treat cases with remarkably similar facts and legal issues in a consistent manner. *Thunder Basin Coal Co. v. Wyo. State Board of Equalization*, 896 P.2d 1336, 1340 (Wyo. 1995).

> component of the tangible personal property manufactured, processed or compounded for sale or use and sales of containers, labels or shipping cases used for the tangible personal property so manufactured, processed or compounded. **This subparagraph shall apply to chemicals and catalysts used directly in manufacturing, processing or compounding which are consumed or destroyed during that process[.]**

Wyo. Stat. Ann. § 39-15-105(a)(iii)(A) (2009) (emphasis added).

4. Relying on the second sentence of the statute, it is not an unreasonable reading to conclude that many of the items at issue constitute: (a) chemicals or catalysts, (b) used directly in "manufacturing" (defined by Wyo. Stat. Ann. § 39-15-101(a)(xxi) (2009) and further by Department rule, generally as producing a new product different than the raw materials); (c) which are destroyed by that process ("destroyed" being defined as "ruining the structure or condition of" as quoted from a dictionary definition in the Board's Decisions, *see* Majority Decision at ¶ 63; *Gray, supra* at ¶ 41).

5. The question is whether the second sentence of the statute stands alone as an imperative declaration that the subparagraph "shall apply" when the criteria of that sentence are met (separate from the requirement of the first sentence of becoming "a component or ingredient" of the manufactured product); or whether the second sentence is intended to give guidance in application of the first sentence. The Board concludes the latter reading is required by the unambiguous language and a reading of the statute as a whole. (Majority Decision at ¶ 63, reiterating the findings in *Gray Oil*). But language is rarely unambiguous, the definition of "destroy" recited in the Board's decision being but one example of multiple meanings of the pertinent words at issue. Regardless of the limitations or viability of the "plain language" test, at least in this case the statute does not appear to be one upon which "reasonable persons are able to agree as to its meaning with consistency and predictability." Thus it requires interpretation.[2]

6. When interpreting statutes, the goal is to give effect to the intent of the legislature. *In re Estate of Coborn*, 2015 Wyo. 89, ¶ 5, 352 P.3d 271, 273 (Wyo. 2015) (quoting *In re Estate of Scherer*, 2014 WY 129, ¶ 5, 336 P.3d 129, 131 (Wyo. 2014)). Legislative history beyond that recited in the Board's Majority Decision and *Gray Oil*, not presented by the parties, but which the Board may take notice of pursuant to Wyoming Statutes section 16-

[2] The Wyoming Supreme Court has held that resort to extrinsic aids to statutory construction, including legislative history, can be appropriate even when statutory language has been found to be unambiguous. For an extended discussion of the propriety of doing so, s*ee, Parker Land & Cattle Co. v. Wyo. Game & Fish Comm'n*, 845 P.2d 1040, 1050-1051 (Wyo. 1993).

3-108(d)(2015),[3] supports the interpretation of the statute in the manner applied in *Gray Oil* and reiterated in the Board's Decision: the two sentences must be read together.

7. The second sentence of section 39-15-105(a)(iii)(A) was inserted by 2001 Wyoming Session Laws 233, Ch. 119 (original House Bill 215). The title of that enactment (and introduced Bill) stated that it was "clarifying the exemption for tangible personal property used in manufacturing[.]" *Id.* That the language being inserted was not intended to expand the exemption, nor to create a new exemption, was made absolutely clear in the recorded floor proceedings on the Bill in both the Wyoming House and Senate. The proponents of the Bill in both bodies stated that the intent of inserting the new language was to maintain

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[3] The application of this provision of the Wyoming Administrative Procedure Act in this context is not completely clear. Wyo. Stat. Ann. §16-3-108(d) (2015) states:

> (d) Notice may be taken of judicially cognizable facts. In addition notice may be taken of technical or scientific facts within the agency's specialized knowledge or of information, data and material included within the agency's files. The parties shall be notified either before or during the hearing or after the hearing but before the agency decision of material facts noticed, and they shall be afforded an opportunity to contest the facts noticed.

An administrative agency may notice "judicially cognizable facts." Judicial notice of "adjudicative facts" is governed by Rule 201 of the Wyoming Rules of Evidence. Judicial notice of "legislative facts" is not governed by those Rules, and in court proceedings judicial notice of legislative facts historically has been routinely taken although the differentiation is not without confusion. *See, Cockerham v. Wyo. Prod. Credit Ass'n*, 743 P.2d 869, 872, fn. 2 (Wyo. 1987). It has long been recognized that judicial notice may be appropriately taken of legislative journals and other public records. *People ex rel. Emerson v. Shawver*, 30 Wyo. 366, 222 P. 11 (1924). *See* 29 Am. Jur.2d *Evidence* § 133 (May, 2017 update). Thus the content of legislative journals appears to be "a judicially cognizable fact" subject to official notice under §16-3-108(d). The procedures and requirements for official notice by an administrative agency of legislative history does not appear to be completely clear under Wyoming law. Official notice of adjudicative facts requires parties to be informed and given an opportunity to respond. *Heiss v. City of Casper Planning & Zoning Comm'n*, 941 P.2d 27, 31 (Wyo. 1997). The requirement of due process of law that an opportunity be afforded to be heard on issues of adjudicative facts does not necessarily encompass any similar hearing on legislative facts. *Walker v. Karpan*, 726 P.2d 82, 86 (Wyo. 1986). " 'Legislative facts are the facts which help the tribunal determine the content of law and of policy and help the tribunal to exercise its judgment or discretion in determining what course of action to take.' " *Foster's Inc. v. City of Laramie*, 718 P2.d 868, 873 (Wyo. 1986), citing *Scarlett v. Town Council, Town of Jackson, Teton Cty.*, 463 P.2d 26, 29 n. 5, quoting 2 Davis, *Administrative Law Treatise* § 15.03 at 353 (1958). At the same time, in *Karpan*, the Supreme Court stated: "The right to a hearing is determined by whether the agency is acting in a legislative or adjudicative capacity." *Karpan, supra,* 726 P.2d at 87. While due process might not require notice and an opportunity to respond, the statute appears to when an agency is acting in an adjudicative capacity, if the fact is a material fact. The legislative history discussed here might be considered in subsequent court review, but as the Board's Majority Decision does not rely upon notice of this legislative fact, any requirement of notice and opportunity to respond is immaterial at this point.

the exemption as it had originally been intended in 1937.[4] Further, in both bodies, reference was made to a joint revenue committee report to the Attorney General explaining the legislative intent underlying the initial enactment of the exemption in 1937. Addressing the language of the original exemption of the 1937 Act, the joint committee stated:

> We, therefore, state that it is the intent and meaning of this Committee that such substances as limestone and sulphur as used in the process of refining sugar and such substances as soda ash and litharge as used in the process of refining oil be exempt from the sales tax.
>
> This exemption is based on the belief that these substances above mentioned, when used to destruction as a chemical or physical catalyst in the manufacture of a taxable commodity, actually enter into the commodity, although they are not recognized in whole or part as being a visible part of the taxable commodity when finally sold.
>
> This exemption is likewise applicable in other industrial activity. But, in no sense whatsoever, does it apply to equipment, tools, plant, or any other material or substance that does not through intent or otherwise become a component part of the taxable article when sold.

1937 Wyo. H. Journal, pp. 623-24 (emphasis added).

8. The committee report noted that the foregoing construction of the language was fully explained to both the full House and Senate, in Committee of the Whole. (*Id.* at 624.) The same can be said of the explanation of 2001 House Bill 215, when the language was "clarified" to ensure that the original intent of the 1937 enactment was fulfilled.

9. The legislative activity noticed here is not simply the expression of understanding by a single legislator which is not a proper source of legislative history. *Indep. Producers Mktg. Corp. v. Cobb*, 721 P.2d 1106, 1108 (Wyo. 1986). Nor is this a case in which opposing parties might each find comments in debate supporting their interpretation of the law, nor a situation in which a court might have trepidation as but a few legislators (or delegates) may have heard or learned of the remarks. *See Powers v. State*, 2014 Wyo. 15,

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[4] The debate of the Wyoming House in Committee of the Whole on 2001 House Bill 215, 2001 Wyo. Sess. Laws 233, Ch. 119, occurred February 2, 2001, at approximately 2:50 through 2:54 of the recording. The Senate Committee of the Whole debate occurred February 16, 2001, at approximately 1:53 through 1:56 of the recording. Both recordings may be found on the Wyoming State Law Library website (House Committee of the Whole at http://pluto.wyo.gov/awweb/main.jsp?flag=browse&smd=2&awdid=29, Senate Committee of the Whole at http://pluto.wyo.gov/awweb/main.jsp?flag=browse&smd=2&awdid=5). The Office of the Secretary of State is the official custodian of the recordings. Wyo. Stat. Ann. § 9-1-302 (2015).

¶ 43, 318 P.3d 300, 316 (Wyo. 2014); *Rasmussen v. Baker*, 7 Wyo. 117, 50 P. 819, 824-25 (1897). The explanation of the 2001 bill was clearly stated to both bodies in the respective committees of the whole. No contrary positions were taken in either body.

10. Amendments to the exemption language created by the 1937 law have been made and subjected to Wyoming Supreme Court review as briefed by the parties and noted in the Board's Majority Decision here and in *Gray Oil*. But no Wyoming Supreme Court case appears to have interpreted the existing provision in light of the 2001 amendment. The legislative history recited here provides clear legislative intent, perhaps not found in the "plain language." In light of that history, it is clear that the second sentence was intended to be a clarification, guidance in the application of the first sentence. When so read, the Board's Majority Decision upholding the rejection of the refund for items which did not become an ingredient or component of the manufactured product, whether identifiable as a separate component or consumed or destroyed by the process, is sound.

*Spent oils and lubricants mixed with crude for refining into gasoline or diesel*

11. The Board's Majority Decision addresses the spent oil and lubricants separately from those which neither "touch" the product nor are consumed by the process, and from those which "touch" the product or are consumed. These items could have been addressed with others not touching the product or consumed in the process, except that evidence at the hearing disclosed the oils and other lubricants were used as feedstock after their initial use. This recycling use was first disclosed to the auditors and the Department at the hearing. (Tr. 154-56, 168-69).

D. The original purpose requirement

12. The majority of the Board upholds the Department's rejection of an exemption for these items, finding:

> [The manufacturing] exemption language presumes a manufacture's deliberate and original purpose for the purchase must qualify for the exemption, rather than a coincidental or fortuitous opportunity to dispose the spent material by recycling into the manufactured product. ... Because the lubricants in their original state, or by their original purpose, were not used for "manufacturing" as defined, Frontier's inconsequential recycling of the spent materials was irrelevant under the exemption language by Department rule.

Board Majority Decision, *supra* ¶ 69.

13. From a policy perspective the result seems sound. The lubricants were purchased at a price which reflects their lubricating use value and that use was determined in *Gray*

*Oil* and in this case not to be within the manufacturing exemption. But the Board's duty is to interpret statutes and rules as written and neither the pertinent statutes nor Department rules state that the manufacturing exemption is confined to an initial or sole purpose or intended use. The manufacturing exemption statute quoted above, *supra* ¶ 3, makes no mention of an "original or intended" purpose. Nor did the Department rule in effect during the pertinent period:

> (ii.) Ingredients or Components. Tangible personal property which is necessarily used or consumed in manufacturing, processing or compounding operations by a person engaged in the operations, shall be exempt from the sales and use tax, if that property becomes an ingredient or component of the final product. This exemption applies to chemical and catalysts used directly in manufacturing, processing or compounding which are consumed or destroyed during that process.

Rules, Wyo. Dep't of Revenue, Ch. 2, § 9(h)(ii) (2006). The rule was amended as of July 24, 2014.

14. While the rule adds "necessarily" used in manufacturing to the statutory language, it still only requires that the property at question become an ingredient or component of the final product, there is no "original purpose," "sole use" or "intent" requirement in the exemption provision of either the statute or rule.

15. The Board's Majority Decision relies on the definition of "manufacturing" to support that conclusion. But neither the statute nor the Department rule contained this original purpose requirement. Wyoming Statutes section 39-15-101(a)(xxxi) (2009) provided:

> (xxi) "Manufacturing" means the operation of producing a new product, article, substance or commodity different from and having a distinctive nature, character or use from the raw or prepared material;

16. The rule provided:

> (bb.) "Manufacturing" means a transformation or conversion of material or things into a different state or form from that in which they originally existed, and the actual operation incident to changing them into marketable products. The change in form, composition, or character must be a substantial change and it must result in a transformation of the property into a different product having a distinctive name, nature and use.

Rules, Wyo. Dep't of Revenue, Ch. 2, § 3(bb) (2006).

17. The rule requires transformation from an original state, but does not require the transformation be the original use of the product. In interpreting and applying statutes, "[w]e must accept statutes as they are written; neither omitting words that are included, nor including words that are omitted." *Cheyenne Newspapers, Inc. v. Bldg. Code Bd. of Appeals, City of Cheyenne*, 2010 WY 2, ¶ 9, 222 P.3d 158, 162 (Wyo. 2010). The testimony of Frontier's witness established that the oils and other lubricants were transformed (after they lost enough of their lubricating quality) and became part of the petroleum to be sold. (Tr. 37, 80, 85).

E. Burden of proof

18. The Board Decision also holds Frontier failed to carry its burden of proof on this issue. Frontier does not contest that the recycling use was presented for the first time at the hearing. (Tr. 154-56, 168-69) In my view, while the testimony satisfied the statutory manufacturing exemption requirements generally, it fell short of carrying Frontier's burdens of proof and persuasion. Those standards are set forth in paragraph 49 of the Board's Majority Decision.

19. The testimony established that one hundred percent of the oils and lubricants that were collected were recycled. (Tr. 80) But the same witness testified that some of the lubricants decomposed and formed gums, varnishes and coke, and some of the recycled material was filtered and reused for heat transfer purposes. (Tr. 34-37). He testified that the Refinery workers "will try" to collect everything they can; there might be incidental spillage. (Tr. 83) When asked whether there were any exceptions to collecting all lubricating oils, the witness stated "No. Pretty much all our lubricating oils we collect, and ... process them back as – into the crude unit." (Tr. 85). Recognizing that this recycled use was not presented in the *Gray Oil* case, the Board questioned whether some of the lubricants were so contaminated that they were otherwise disposed of. The witness testified "to my knowledge, we always recaptured those and reclaimed them." In sum, while Frontier established that likely most of the oils and lubricants found their way into the feedstock stream, the testimony failed to account for all of the oil and lubricants, and failed to account for the timing of the secondary use. Further, there appeared to be no method for the Department to determine exactly what portion of the oil and lubricants were not recycled. This supports paragraph 67 of the Board's Majority Decision.

20. Regardless of that determination, Frontier acknowledged that the record before the auditors and the Department of Revenue was devoid of this "feedstock" use. (Tr. 168-69) Under *Qwest*, as discussed below, the Board cannot consider information as to this secondary use, presented for the first time at the hearing. Without this secondary use, the oils and lubricants do not "touch" the product and are not consumed in the process, thus following the holding in *Gray Oil* the Board must affirm the denial of the exemption for oils and lubricants.

*Purchased items that physically impacted Frontier's production*

21. The Board Majority Decision finds Frontier carried its burden of demonstrating the audit and assessment were incorrect in not allowing exemptions for a number of items which "touch" the product or are consumed in the process. Bd. Majority Decision, *supra* ¶ 91. In my view the holding in *Qwest* precludes the Board's consideration of information presented for the first time at the hearing which was not available to the auditors or Department. Without that information Frontier failed to carry its burden of proof.

22. There is no dispute that the hearing produced detailed explanations of the use of items by Frontier which had not been presented during the audit or to the Department. In regard to the recycling use, Frontier's counsel acknowledged that he first learned of the use in preparation for the hearing. (Tr. 169). In response to Board questions noting the auditors were asking for additional information which might well have resulted in additional items being exempted, Frontier's counsel acknowledged that it would have been "ideal" for their sole witness to have been present for the tour of the plant with the auditor and Department representative. He was not Frontier's previously designated witness and was not present for the tour. Counsel was not present for the tour. (Tr. 171) Nor does it appear in the record that any of the three were involved in responding to repeated requests from the auditors for detailed explanations regarding the uses of the denied items prior to the finalization of the audit and final administrative action by the Department. Frontier explained the failure by noting that the "process" does not end until the record closes in an administrative proceeding and perhaps not until the refund claim has been taken "all through court." (Tr. 171-72).

23. In light of these admissions and state of the record, the question before the Board is application of the *Qwest* opinion. The Board's Majority Decision states that the failure of the Department to formally object to the admission of the evidence is not likely dispositive. Bd. Majority Decision, *supra* ¶ 77. It distinguishes *Qwest* on the basis of the cordiality of the audit and cooperation by Frontier, concluding that "given the highly cooperative and deferential nature of the underlying audit, *Qwest* does not require we disregard Frontier's evidence as the Department suggests." Bd. Majority Decision, *supra* ¶ 85.

24. There is some concern regarding the application of *Qwest*. The differences in the cases are stated in the Board's Majority Decision, but regardless of those differences, the Court in *Qwest* did not couch its statements regarding the Board's reliance on information not before the Department of Audit or the Department of Revenue in uncertain or

contingent terms. Under *Qwest* the Board is constrained **to consider the record existing at the time of the audit and assessment.**[5] *Qwest,* ¶ 30, 263 P.3d at 631-32.

25. No doubt application of *Qwest* would be clearer had the Department objected to the introduction of evidence by Frontier. It is somewhat understandable, however, why the Department failed to object and instead argued that the Board should not consider information not provided to the auditors or the Department. (Tr. 165; Dep't's Br. 16; Dep't's Proposed Findings 31). The Court in *Qwest* drew a fine distinction between the consideration of information requested in an audit and not provided to the auditors or Department, and information available to the auditors, which was rejected for some purposes, used for other purposes by the auditors, and subsequently relied upon by the taxpayer's expert witness at the contested case hearing. The former could not be considered by the Board, as the Board would denigrate "the entire assessment and audit process" by not restricting "its decision to the record existing at the time of the audit and assessment." *Qwest,* ¶¶ 27, 30, 263 P.3d at 630-32. The latter could be relied upon by the Board, there being nothing wrong with a taxpayer using expertise to analyze information available during the audit and reaching conclusions about the issues at a contested case hearing. *Qwest,* ¶29, 263 P.3d at 631.

26. Here Frontier's witness provided additional information not presented to the auditors or the Department, despite repeated requests for details regarding the use of items which remained non-exempt. The information was admittedly available within the Frontier organization. The only evidence in the record which suggests any cause for not presenting available details was produced on cross examination. It consisted of Frontier's witness not knowing of the hearing until the week before and that the details "would have been a little more difficult to explain." (Tr. 82-83). As in *Qwest*, it seems unlikely that Frontier could have established good cause for not providing the information to the auditors or the Department. *Qwest,* ¶ 27, fn. 6, 263 P.3d at 631. Perhaps Frontier might have relied upon a statement of the auditor that there "will be time to provide other documents once all documents have been provided." (See citation in suggested finding of fact "i" *infra*). Regardless, Frontier made no effort at the hearing to establish good cause for not providing the information during the audit. Reading into *Qwest* a standard for considering fact

[5] In view of the discussion above and the Board's Decision regarding stare decisis, mention should be made of the Board's Order in *In re Range Telephone Cooperative. Inc.*, Docket No. 2014-14, (Wyo. State Bd. of Equalization, Sept. 23, 2015) 2015 WL 5793069, in which the Board concluded that a contract material to the disposition of the case could be considered when provided at the hearing before the Board in light of an objection to consideration by the Department of Revenue based on *Qwest*. The distinguishing facts are that in *Range* the Department knew of the contract's existence but did not request the same. In the present case, like *Qwest,* numerous attempts were made to gather the pertinent detailed information. In *Range* the Department offered no evidence at the hearing that the taxpayer refused to make the contracts available upon request. *Range*, at ¶ 31, 2015 WL 57993069 *6. In *Qwest,* and the present case, evidence of the taxpayer's refusal or at least failure to make the pertinent evidence available upon request was presented at the hearing.

information not presented to the auditors and Department, based upon cordiality or cooperation between the taxpayer and auditors is not a proper application of the good cause standard, nor appropriate allotment of a timely burden of proof. The standard is not supported by the Court's language in *Qwest* and places the Board on the most slippery of slopes in future application of *Qwest*.

27. In light of the record properly considered by the Board, Frontier failed to carry its burden before the Department of establishing the items were exempted from sales tax and failed to carry its burden before the Board of establishing the action of the Department in denying the exemptions was arbitrary, capricious or otherwise not in accordance with law. I would supplement the Board's findings of fact and conclusions of law with the following in order to perhaps facilitate judicial review of the Board's Majority Decision.

**FINDINGS OF FACT:**

a. Frontier's refund request was a letter which identified reasons for the requested refunds and included a spreadsheet and a CD. The letter was not introduced in the hearing before the Board, but the spreadsheet was "similar" to materials presented in the hearing. (Tr. 138).

b. The refund request did not contain great detail on the use of the items for which refunds were sought. (Tr. 138).

c. The spreadsheets of items for which Frontier was seeking refunds introduced by Frontier at the hearing before the Board, likewise failed to describe the use of the items. (Tr. 27, Exs. 101, 102).

d. The Department of Revenue referred the refund requests to the Department of Audit in part due to the lack of a detailed explanation by Frontier in its refund requests. (Tr. 138).

e. Invoices provided by Frontier and reviewed by the auditors did not indicate use of the items, (see examples reviewed at the hearing). (Tr. 106, 111, Exs. 510-511).

f. The auditors made numerous inquiries regarding the specific uses of the items, explaining preliminary audit findings and providing spreadsheets indicating which items were being rejected for refunds unless additional information regarding their specific uses was provided. (Tr. 103, 108-09, Exs. 508-509)[6]. "In this

[6] Exhibits 508 and 509 were introduced at the hearing. Larger color versions were substituted by the Department at the request of the Board with agreement of Frontier as 508A and 509A. (Tr. 192-93).

(preliminary findings) stage we wanted detailed descriptions about how items where (sic) used at the Refinery." (Ex. 504, p. 6).

g. Questions about unapproved refund requests from Frontier's schedule were discussed at length during the entire audit process. (Ex. 505, p. 23). The DOA audit log is replete with examples of requests for additional information and that the DOA allowed additional refund requests after receiving additional information. (*See, e.g.*, Ex. 506, pp. 95, 98, audit log entry number 2 on May 13, 2014, entries on June 30, 2014 and March 10, 2015, second entry on April 30, 2015; Ex. 507, pp. 132-34, emails from May 12 through May 26, 2015; pp. 100-103, emails of January 20, and January 29, 2015; p. 108, email March 9, 2015; p. 109, email April 20, 2015; p. 111, email April 24, 2015).

h. Frontier requested and received extensions in order to provide additional information requested by the DOA. (Tr. 119; Ex. 506, pp. 103-05, 128, 136-37).

i. It is not clear that in light of *Qwest*, the ability of Frontier to provide additional information regarding the use of an item after the audit was clearly understood by the auditors or conveyed to Frontier by the auditors. (*See e.g.*, Ex. 506, p. 95, audit log entry, second entry May 16, 2014 : "I (auditor) said there will be time to provide other documents once all documents have been provided." p. 0098, audit log entry on March 10, 2015: "Both sides discussed their viewpoints and we mainly agreed to disagree. Mainly (sic) of the issues will be decided via an appeal process."

j. The effect of failing to provide additional information concerning the detailed use of an item, in that the item would remain taxable for purposes of the audit findings was clearly conveyed to Frontier by the auditors. (Tr. 103-10, 119; Ex. 506, p. 100, email of January 20, 2015; Ex. 507, p. 125, email of February 17, 2015).

k. For the first audit period, Frontier stated it was in agreement with the State's findings. (Ex. 506, p. 115, email of May 4, 2015).

l. For the second audit period, Frontier stated it was in agreement with sending the preliminary audit for processing as a final audit. (Ex. 507, p. 145, email of June 5, 2015).

m. Frontier's sole witness was an engineer who had been employed by Frontier for over twenty-three years. (Tr. 17).

n. Frontier's witness had not been made aware of the audit until the week before the hearing. (Tr. 82). His detailed explanation of the use of the various items would have been "a little more difficult to explain" in writing. (Tr. 83).

o. Frontier provided additional details of the use of some of the items for which refunds were denied during the audit process but did not provide the level of detailed explanation provided at the hearing. The level of detail provided prior to the final audit findings in some instances described the use of the items beyond simply asserting they were used directly in manufacturing, e.g., diethanolanine, "specifically used in the sulfur plant;" acetone, "specifically used in the test lab." (Tr. 118, 120; Exs. 508, 508A, p. 317).

p. Even the most detailed of Frontier's described uses of the items for which a refund was denied failed to identify whether an item claimed as "consumed" or "used directly in the manufacturing process" was a catalyst or became a component of the manufactured product. By way of example, while Frontier's witness testified that perchloroethylene was a catalyst promoter which touched and became part of the product sold and was consumed or destroyed during the manufacturing process, the explanation disclosed in the spreadsheet stated only that it was a chemical directly used in manufacturing, specifically used in the alky butamer. (Tr. 56-57, 74-75; Exs. 508, 508A, p. 318).

q. The auditors had not received detailed descriptions for items denied and the type of descriptions provided in the Frontier witness' testimony "would have definitely helped" the auditors. (Tr. 118, 120).[7]

r. If the Department had heard the specific uses of some of the chemicals provided at the hearing, the Department would have granted some of the refunds on catalysts. (Tr. 165). But the Department still maintained the items should not be exempted because the additional explanation was not before the Department when it issued its order. (Tr. 165).

s. Evidence of Frontier's recycling of used lubricants as feedstock was presented for the first time to the auditors and Department at the hearing. (Tr. 140). Frontier's counsel acknowledged that the recycling component was brought to the Board for the first time at the hearing and had not been presented in an earlier case regarding the same Refinery's use of lubricants. Frontier's explanation of the use of oils and lubricants was limited to consumables used to lubricate machinery

[7] There was some explanation of the dual uses of salt reflected in the audit logs, but, like other descriptions of uses noted above, it is not sufficient to conclude that Frontier carried its burden of establishing the Department was incorrect in refusing the exemption for salt. (Ex. 506, ROA p. 0098, audit log entry of December 23, 2014).

throughout the audit and at least through the filing of Petitioner's preliminary statement. (Tr. 168; Exs. 508, 508A, p. 317, Exs. 509, 509A, p. 69; Pet'r's Prelim. Statement, p. 3).

t. The Department's counsel failed to object to the introduction of additional evidence regarding the use of the items which had not been presented to the auditors. The Department's counsel wished to preserve the legal issue, despite the lack of objection. (Tr. 176-77).

u. Frontier's counsel acknowledged it was Frontier's burden to gather and present the evidence in the best possible way to each decision maker at every stage of the process and that was not done. (Tr. 173).

v. The testimony of Frontier's witness concerning the detailed explanation of uses of the items was not known to Frontier's counsel until preparing for the case. (Tr. 168-69, 173).

## CONCLUSIONS OF LAW

w. In reviewing this appeal the Board's role is limited to considering the factual record which was available to the Department of Revenue and Department of Audit during the assessment process, in the absence of good cause shown by the taxpayer as to why the information was not presented to the Departments. *Wyoming Department of Revenue v. Qwest Corp.*, 211 WY 146, ¶¶ 25, 30, 263 P.2d 622, 629-30, 631-632 (Wyo. 2011).

x. Failure to provide information known to a taxpayer at the time of an audit due to communication problems within the taxpayer's organization is not good cause for failing to produce the information to the Department of Audit and Department of Revenue, and, lacking good cause for the failure, the Board is precluded from admitting the evidence at the hearing, or subsequent to the hearing. *Qwest*, ¶ 27 fn. 6, 263 P.3d at 631, fn. 6.

y. Wyo. Stat. Ann. §39-11-109(b)(iv)(2015), the primary portion of which was in existence at the time of all the transactions in question, is not applicable to this sales tax appeal. [8]

z. In light of the record properly considered by the Board, Frontier failed to carry its burden before the Department of establishing the contested items were exempt from sales tax and failed to carry its burden before the Board of establishing the action of the Department in denying the exemptions was arbitrary, capricious or otherwise not in accordance with law.

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[8] Beyond the items discussed in *Qwest* there is also the matter of Wyoming Statutes section 39-11-109(b)(iv). The law created by 2009 Wyoming Session Laws 119, Ch. 48, provided:

> (iv) In any appeal to the board authorized by this section, the taxpayer may present any credible evidence, including expert opinion testimony, to rebut the presumption in favor of a valuation asserted by the department.

A second sentence was added to the provision by 2011 Wyoming Session. Laws 368, Ch. 127, stating: "The board shall make specific findings and conclusions as to the evidence presented."

Substantially the same language was inserted in the ad valorem tax chapter for appeals to county boards of equalization of assessments made by county assessors, by the same enactments. (See, Wyo. Stat. Ann. § 39-13-109(b)(vi)). Both enactments, the first effective February 26, 2009, the latter on March 2, 2011, carried titles indicating they were limited to property taxation: "Property Tax-Appeals 2" (originally 2009 House Bill 221), and Property taxation – appeals (originally 2011 House Bill 254). The titles of both bills stated that they were: "An Act relating to property taxation." Yet, some of the language within the provision governing appeals to the State Board suggests that the provision applies to more than property tax appeals, in that it speaks to any appeal from any final administrative decision of the Department of Revenue. Furthermore, the provision appears in the chapter of title 39 dealing with administration generally. Although the initial language was enacted more than two years prior to the decision in *Qwest*, it was enacted well after the tax years at issue in *Qwest*, and the Court in *Qwest* made no mention of the law. This provision was not addressed in the brief of either party, even though the initial language was enacted before the tax periods in question, and the briefs addressed application of *Qwest*. Given the legislative history, the language of the provision addressing "the presumption in favor of a valuation asserted by the department," and the failure of the Wyoming Supreme Court to reference this law in the *Qwest* case, the provision appears to be inapplicable to a sales tax case. The effect of the 2009 law on property tax appeals, in light of *Qwest*, will likely be addressed in an appropriate case.

**Dated this** 3rd day of July, 2017.

**STATE BOARD OF EQUALIZTION**

David Gruver, Board Member

**ATTEST:**

Nadia Broome, Executive Assistant

## CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of July, 2017, I served the foregoing **MAJORITY FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION** and **OPINION CONCURING IN PART AND DISSENTING IN PART** 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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