

BEFORE THE STATE BOARD OF EQUALIZATION
FOR THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF)
SOLVAY CHEMICALS, INC.)
FROM A DECISION BY THE)
DEPARTMENT OF REVENUE)
(Tax Audit Production Years 2013-2015))

Docket No. 2019-20

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

APPEARANCES

Walter F. Eggers, III, Holland & Hart, appeared on behalf of Taxpayer, Solvay Chemicals, Inc. (Solvay).

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

DIGEST

[¶ 1] Solvay appeals the Department's audit assessment of its 2013-15 trona ore production in Sweetwater County, which Solvay processed into soda ash and sold either in bulk, or in bags. The appeal raises one point of contention: Solvay claims a deduction for its cost of bagging soda ash and challenges the Department's valuation which denies that deduction. The Department determined that the statutory valuation method allowed no separate deduction beyond the prescribed 67.5% "industry factor" allowance. *See* Wyo. Stat. Ann. § 39-14-303(b)(ii) (2019), *infra* ¶ 11. Solvay insists that a separate provision in the valuation statute, subsection (b)(iv), allows the deduction. *Id.*

[¶ 2] The Wyoming State Board of Equalization, Chairman David L. Delicath, Vice Chairman E. Jayne Mockler, and Board Member Martin L. Hardsocg, received evidence through its expedited appeal process, considered the parties' briefs, and heard oral arguments. Finding no error, the State board **affirms** the Department's determination that Solvay's bagging expenses are not separately deductible under Wyoming Statutes section 39-14-303(b)(iv) (2019), *infra* ¶ 11. At the parties' request, the State Board **remands** the assessment to allow the Department to implement other agreed upon corrections.

ISSUES

[¶ 3] Solvay identifies a single issue for consideration: “Did the Departments misinterpret and misapply Wyoming’s trona/soda ash tax valuation statute, Wyo. Stat. § 39-14-303(b)?” (Solvay Br. 7).

[¶ 4] The Department identifies no issue in its brief, but sets out two issues of law in its Preliminary Statement:

- a) Did the Department correctly value Solvay’s mineral production in accordance with the trona taxation statutes? [Mixed question of fact/law].
- b) Is Solvay entitled to receive an additional tax deduction, beyond the statutorily set “industry factor,” because it bagged some of its soda ash? [Mixed question of fact/law].

(Dep’t Prelim. Statement 3).

JURISDICTION

[¶ 5] The State Board shall “review final decisions of the department upon application of any interested person adversely affected.” Wyo. Stat. Ann. § 39-11-102.1(c) (2019). An aggrieved taxpayer may file an appeal with the State Board within 30 days after the Department’s final decision. Rules, Wyo. State Bd. of Equalization, ch. 2 § 5(e) (2006). The Department issued an audit assessment on April 29, 2019. (Notice of Appeal, Attach.). Solvay appealed 30 days later. (Notice of Appeal). Accordingly, we have jurisdiction.

FINDINGS OF FACT

[¶ 6] The parties agree upon all relevant facts. The parties stipulate, in part, that:

Background:

1. Solvay produces trona ore (trona) from its underground mine in Sweetwater County.
2. Solvay excavates and moves the trona from great depths to the surface, then processes [the] mineral in its processing plant.
3. In the plant, Solvay processes the trona into soda ash, as well as sodium bicarbonate and sodium sulfite.

4. During this production process, Solvay incurs a number of processing costs.

5. Solvay sells approximately 2.1 million tons of soda ash per year, along with other components processed from the trona.

6. Substantially all soda ash sales occur after the trona production process is complete and are arm's-length transactions. All such sales are made f.o.b. (free on board)¹ at the processing plant.

7. Solvay sells and delivers soda ash to customers in bulk deliveries by rail or truck, or in packaged quantities between 50 to 2,000 pounds.

Bulk Soda Ash Sales

8. Bulk sales of soda ash occur at Solvay's load-out facilities where the unpackaged soda ash is loaded into rail cars or trucks. As with the processing, Solvay incurs costs associated with the loading of the bulk soda ash for eventual delivery to customers.

9. These bulk sales constitute the vast majority of the volume of Solvay's soda ash transactions.

Packaged Soda Ash Sales

10. Solvay also sells soda ash in different sized bags as packaged sales.

11. Solvay's packaged soda ash sales comprised less than 1% of its total soda ash production during the years at issue.

12. Solvay uses equipment to place the soda ash into bags. The packaged soda ash is then loaded onto pallets. The pallets are thereafter transported by either truck or rail to customers.

13. Solvay incurs costs related to the process of packaging and

¹ "Free on board," abbreviated as "f.o.b.," is a commercial term indicating that the "seller will deliver subject matter contracted for, on certain conveyance, without expense to buyer ... means generally that the seller assumes all responsibilities and costs up to the point of delivery, including insurance, transportation, etc." *Free on board*, Black's Law Dictionary (6th Ed. 1990).

loading the pallets of soda ash bags.

14. Regardless of how Solvay delivers soda ash to its customers, the soda ash is physically and chemically the same regardless of whether it delivered in bulk or packaged form.

15. Because Solvay incurred additional costs to package and deliver packaged soda ash, it charged its customers more for packaged soda ash than for soda ash delivered in bulk.

(Parties' Stipulation, Jt. Mot. to Submit Case to Expedited Docket, and Request for Oral Argument).

[¶ 7] The Wyoming Department of Audit audited Solvay's 2013-15 trona production and submitted its findings to the Department. Accepting those audit findings, the Department assessed additional taxable value and assessed severance taxes and interest totaling \$419,609.56. The Department increased Solvay's taxable value for ad valorem tax purposes by \$8,228,030.00. (Parties' Stipulation, Jt. Mot. to Submit Case to Expedited Docket, and Request for Oral Argument, ¶ 38).

[¶ 8] The disputed audit findings and assessment arise from the Department's determination that Solvay, when it calculated its taxable values over the audit period, incorrectly claimed an additional deduction for bagging expenses pursuant to Wyoming Statutes section 39-14-202(b)(iv) (2019), *infra* ¶ 11.

CONCLUSIONS OF LAW

A. State Board's review function

[¶ 9] When requested by an adversely affected party, we “[d]ecide 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 instruction prescribed by the department.” Wyo. Stat. Ann. § 39-11-102.1(c)(iv) (2019). We review the parties' statutory interpretations de novo. *Town of Pine Bluffs v. Eisele*, 2017 WY 117, ¶ 9, 403 P.3d 126, 128 (Wyo. 2017) (*quoting Bates v. Chicago Lumber Co. of Omaha*, 2016 WY 58, ¶ 27, 375 P.3d 732, 739 (Wyo. 2016)).

B. Applicable statutory law

[¶ 10] “There is levied a severance tax on the value of the gross product for the privilege of severing or extracting trona[.]” Wyo. Stat. Ann. § 39-14-303(a)(i) (2019).

[¶ 11] Trona production is valued as follows:

Wyo. Stat. Ann. § 39-14-302(c) (2019): provides:

(c) Except as otherwise provided, in the event the product as defined in W.S. 39-14-303(b)(iv) is not sold at the mouth of the mine by bona fide arms-length sale, or if the product of the mine is used without sale, the department shall determine the fair market value by application of recognized appraisal techniques.

Wyo. Stat. Ann. § 39-14-303(b) (2019)² provides:

(b) Basis of tax (valuation). The following shall apply:

(i) Trona shall be valued for taxation as provided in this section;

(ii) The department shall calculate the value of trona ore for severance and ad valorem tax purposes by using the individual producer's fair market value of soda ash f.o.b. plant multiplied by the industry factor divided by the individual producer's trona to soda ash ratio less exempt royalties. The industry factor shall be thirty-two and five-tenths percent (32.5%);

(iii) The value of the gross product shall be the fair market value of the product at the mouth of the mine where produced, after the mining or production process is completed;

(iv) Except as otherwise provided, the mining or production process is deemed completed when the mineral product reaches the mouth of the mine. In no event shall the value of the mineral product include any processing functions or operations regardless of where the processing is performed;

(v) Except as otherwise provided, if the product as defined in paragraph (iv) of this subsection is sold at the mouth of the mine, the fair market value shall be deemed to be the price established by bona fide arms-length sale;

(vi) When the taxpayer and department jointly agree that the application of the methods listed in paragraphs (i) through (v) of this subsection does not produce a representative fair market value for the product, a mutually acceptable alternative method may be applied. Not later than October 1 of each year, the department shall report to the joint minerals, business and economic development interim committee and the joint revenue interim committee on any action taken under this paragraph.

² The Legislature added subsection (b)(vi) in 2012, and that provision became effective upon enactment in March of that year. 2012 Wyo. Sess. Laws 50.

C. Analysis

[¶ 12] As the parties acknowledge, we previously addressed the question presented, which we restate to begin our analysis: besides the 67.5% deduction allowed through application of the “industry factor” valuation in accordance with subsection (b)(ii), may Solvay separately and additionally deduct bagging expenses pursuant to subsection (b)(iv)? (Parties’ Stipulation, Jt. Mot. to Submit Case to Expedited Docket, and Request for Oral Argument, ¶¶ 17-25); *In re Solvay Chems., Inc.*, 2017 WL 4786437, Docket No. 2016-28 (Wyo. State Bd. of Equalization, Oct. 10, 2017) (hereafter *Solvay I*). In our decision resolving that earlier appeal, we held that Solvay was not entitled to an additional bagging deduction. *Solvay I* at *14-18, ¶¶ 49-63. The Wyoming Supreme Court, however, reversed our decision on unrelated procedural grounds. The Court did not address the valuation dispute in any respect. *See Solvay Chems., Inc. v. Dep’t of Revenue*, 2018 WY 124, 430 P.3d 295 (Wyo. 2018) (Boomgarden, J., and Davis, C.J., dissenting).

i. Is section 39-14-303(b) (2019) ambiguous?

[¶ 13] As in the earlier Solvay appeal, we shall consider whether subsection 303(b) is ambiguous. “A statute is unambiguous if reasonable persons are able to agree as to its meaning with consistency and predictability, while a statute is ambiguous if it is vague or uncertain and subject to varying interpretations.” *Travelocity.com LP v. Wyo. Dep’t of Revenue*, 2014 WY 43, ¶ 20, 329 P.3d 131, 139 (Wyo. 2014) (quoting *Redco Const. v. Profile Props., LLC*, 2012 WY 24, ¶ 26, 271 P.3d 408, 415-16 (Wyo. 2012)).

[¶ 14] Our concern remains that the Legislature identified multiple valuation methods in subsection 303(b), not just a single valuation method as Solvay seemingly contends. The answer to this question impacts ultimate resolution of the deduction dispute because, if subsection 303(b) requires different valuation methods depending upon the taxpayer’s handling and sale of trona and/or its byproducts, certain provisions within subsection 303(b) interrelate and apply differently, or not at all. *Solvay I* at *11, ¶¶ 34-35. In *Solvay I* we explained:

34. Upon careful examination of Wyoming Statutes sections 39-14-301(a)(vii) and 39-14-303(b) (2009), the functional interplay between paragraph (b)(ii) and the balance of subsection (b) is unclear. *Supra* ¶¶ 21-22. Because Solvay processed its trona into soda ash, the parties agree paragraph (b)(ii) directed the Department to calculate Solvay’s taxable value by applying a 32.5% industry factor to value the soda ash production, f.o.b. plant, among other adjustments. Wyo. Stat. Ann. § 39-14-303(b)(ii) (2009), *supra* ¶ 21. The question then was whether other subsection (b) provisions,

in particular paragraph (b)(iv), applied to the valuation of Solvay's production under paragraph (b)(ii)?

35. Both interpretations are conceivable. Assuming the Department and Solvay's initial interpretation was correct, we would necessarily interpret paragraph (b)(iv) as qualifying or supplementing the paragraph (b)(ii) "industry factor" valuation method. In the alternative interpretation, paragraph (b)(iv) stands as a separate valuation directive, not applicable for trona valued in accordance with paragraph (b)(ii).

36. Given these possible interpretations, the State Board concludes Wyoming Statutes section 39-14-303(b) (2009), when considered in light of other pertinent 2009 trona valuation provisions, is ambiguous.

Solvay I at *11, ¶¶ 34-36.

[¶ 15] Solvay formally asserts that subsection 303(b), *supra* ¶ 11, is unambiguous, but concedes that its interpretation of 303(b)(iv) does not easily reconcile with the balance of the statutory valuation guidelines listed.³ Indeed, Solvay offers no direct analysis in support of that conclusion, consistently retreating to its overarching argument that the Department's interpretation renders the last sentence of subsection 303(b)(iv) meaningless. (Solvay Br. 13-15).

[¶ 16] We again conclude that subsection 303(b) is ambiguous⁴, and will follow the Wyoming Supreme Court's guidance to discern the legislative intent underlying Wyoming Statutes section 39-14-303(b) (2019):

[I]n ascertaining the legislative intent in enacting a statute * * * the court * * * must look to the mischief the act was intended to cure, the historical setting

³ Solvay's Counsel recognized that the subsection 303(b) language defied easy interpretation, stating: "I'm beginning to understand the Board's holding in 2017 that this statute is ambiguous, because they're arguing – that (b)(ii) only applies to soda ash, but it starts with the Department shall calculate the value of trona ore for severance and ad valorem purposes." (Oral Argument, Tr. at 38).

⁴ This Board held that Wyoming Statutes section 39-14-303(b)(ii) (2010), identical to the statutes applicable in the present case, was clear and unambiguous. *In re Matter of FMC Wyo. Corp.*, Docket No. 2011-30, ¶ 56, 2013 WL 2467819 (Wyo. St. Bd. of Equalization, March 19, 2013). This Board drew an identical conclusion in *In re Matter of FMC Wyo. Corp.*, Docket Nos. 2012-52, 2012-53, ¶ 38, 2014 WL 5426152 (Wyo. St. Bd. of Equalization, June 23, 2014). Inasmuch as the parties in that case and the present case reasonably disagree on how to reconcile the five paragraph valuation provisions under subsection (b), in particular (b)(ii) and (b)(iv), the State Board's conclusion was incorrect and subsection (b) was, and is, ambiguous.

surrounding its enactment, the public policy of the state, the conditions of the law and all other prior and contemporaneous facts and circumstances that would enable the court intelligently to determine the intention of the lawmaking body.

Parker Land & Cattle Co. v. Wyo. Game & Fish Comm'n, 845 P.2d 1040, 1044 (Wyo. 1993) (quoting *Carter v. Thompson Realty Co.*, 58 Wyo. 279, 291, 131 P.2d 297, 299 (Wyo. 1942)). Further, “where the legislature, by subsequent amendment or legislation in the same act or on the same subject, enacts language which clarifies previously ambiguous language, the subsequent language gives meaning to the previously ambiguous expression.” *Moncrief v. Wyo. State Bd. of Equalization*, 856 P.2d 440, 444-45 (Wyo. 1993).

ii. Application of statutory interpretation principles

[¶ 17] To resolve the ambiguity in *Solvay I*, we first reviewed the history of the mineral tax statutes enacted to value trona production. We also drew parallels with other similar mineral valuation methodologies, such as the “proportionate profits” method applied to coal, oil, and natural gas. *Solvay I* at *12-14, ¶¶ 38-48. Because this history offers considerable insight to the trona industry’s, Department’s, and Legislature’s collective thinking, it is worth restating and re-emphasizing here:⁵

ii. History of the trona tax valuation statutes and regulations

38. In 1985, Wyoming valued solid minerals at the mine or mining claim after production of the mineral was complete. The “point of valuation” was generally identified as the point where any mineral product was removed from the “pit, shaft, mine or well, and prior to any beneficiation [beneficiation] or further processing [was] placed in storage prior to transportation to market[.]” Wyo. Stat. Ann. § 39-2-202(b) (Michie 1977, 1985). For minerals sold at the statutory point of valuation, arms-length sales prices established the product’s taxable value. The Department was to apply recognized appraisal techniques for production sold away from the point of value, or used without sale. Wyo. Stat. Ann. § 39-2-202(c), (d) (Michie 1977, 1985).

39. The Legislature in 1989 enacted a separate process to determine the taxable valuation of most trona production. 1989 Wyo. Sess. Laws 284-85.

⁵ The original footnotes, because they offer helpful historical context, are included, but are renumbered within the numerical footnote sequence of this decision and are double-indented.

Specifically, the taxable valuation of trona would thereafter depend upon a newly conceived “industry factor” component applied to value trona’s main byproduct, soda ash:

(a) Based upon the information received or procured pursuant to W.S. 39-2-201(b) or (c) **and except as provided in subparagraph (g) of this section**, the board shall annually value the gross product for the preceding calendar year, in appropriate unit measures of all mines and mining claims from which valuable deposits are produced

. . . .

(g) The department shall calculate the value of trona ore for severance and ad valorem tax purposes by using the individual producer’s fair cash market value of soda ash f.o.b. plant multiplied by the industry factor divided by the individual producer’s trona to soda ash ratio less exempt royalties. The industry factor shall be calculated by the department using a combination of the reported production for the two (2) previous calendar years by dividing the composite trona value per ton of soda ash by the composite soda ash sales price.

Wyo. Stat. Ann. § 39-2-202(a), (g) (Michie 1977, 1989 Cumulative Suppl.) (emphasis added); *see* 1989 Wyo. Sess. Laws 284-85.

40. In simple terms, the industry factor was, and remains, an industry-wide, cost-driven ratio applied to account for processing/transportation expenses incurred after the point of valuation.⁶ Every trona producer (all of which likely processed their trona ore into soda ash), received a deduction inverse to the industry factor (example: factor of 30% generates a deduction of 70%). By rule, the Department gathered industry information to calculate the industry factor ratio, recalculating the industry factor every two years.⁷ Rules, Wyo. Dep’t of Revenue, ch. 6 § 9a (1995).

⁶ Whether the industry factor captures only processing, and the scope of those activities, is a key point of contention. Solvay argue[d] “The industry factor supported by the FMC representative and other industry members was intended to apply to and determine the value of the soda ash before additional processing such as packaging. As such, the packaging costs must be deducted under Wyo. Stat. § 39-14-303(b)(iv).” (Solvay Resp. to State Board’s Notice of Intent to Take Notice of Legislative Facts 6).

⁷ Wyoming’s predominant intent to value and tax mineral production on a production cost basis predates the valuation statutes discussed. *See e.g.* Wyo. Stat. Ann. § 39-224(b) (Michie 1957, 1975 Cumulative Suppl.) (“The mining or production process is deemed

41. The industry factor applied as a ratio of production costs to total costs; again, the inverse representing the percentage deduction for processing and transportation expenses—expenses incurred after completion of the production process, i.e. the point of valuation. *Supra* ¶¶ 20-22. As a ratio deduction applied against the producer’s sales revenue, the deduction was not a dollar-for-dollar deduction for actual costs incurred, but a proxy deduction percentage representing industry wide costs incurred. *Id.*

42. The Legislature enacted a similar method of deducting postproduction costs to value other minerals. In the “proportionate profits” valuation method applied to certain oil, gas and coal production, the “direct cost ratio” operates similarly to the industry factor for trona. Although conceptually similar, the direct cost ratio was not, and is not, calculated as an industry-wide ratio, but on an individual producer basis. *See* enactment of the “proportionate profits” valuation method for valuing coal, Wyo. Stat. Ann. § 39-2-209(d) (Michie 1977, 1990), and oil/natural gas, Wyo. Stat. Ann. § § 39-2-208(d)(iv) (Michie 1977, 1990); (Tr. 142-45).⁸

43. Through application of either the direct cost ratio (for oil, gas or coal) or the industry factor (for trona processed into soda ash), the Legislature sought to tax the mineral’s value immediately at the cessation of production activities by crediting against sales revenue the cost of production activities and excluding revenue generated through the incurrence of post-production processing or transportation expenses.⁹ Pivotal in applying either was and is

completed when the mine product is removed from the pit, shaft, mine or well, and prior to any additional beneficiation [sic] or further processing is placed in bins, tanks, tipples, silos, stock-piles or other storage prior to transportation to market[.]”). Correspondingly, the State Tax Commission, as the Department’s governing body in 1989, required that appraisal techniques account for value generated through post-production processing and transportation expenses, and that such value be deducted from the revenue when determining taxable value. *See* Rules, State Tax Commission, ch. XXI § 10 (1989). This approach remains fundamental to Wyoming’s taxation of minerals, including trona. *See* Wyo. Stat. Ann. § 39-14-303(b)(iv) (2015) (“In no event shall the value of the mineral product include any processing functions or operations regardless of where the processing is performed[.]”); *see also infra* ¶¶ 52-53.

⁸ The proportionate profits valuation methodology currently applies to coal under Wyoming Statutes section 39-14-103(b)(vii)(A) (2015), and oil/natural gas under Wyoming statutes section 39-14-203(b)(vi)(D) (2015).

⁹ For discussions of the proportionate profits method, *see Powder River Coal Co. v. Wyo. State Bd. of Equalization*, 2002 WY 5, ¶¶ 7-10, 38 P.3d 423, 426-27 (Wyo. 2002) (describing proportionate profits method’s function and purpose); *Wyodak Res. Dev. Corp. v. Wyo. Dep’t of Revenue*, 2017 WY 6, ¶¶ 19-22, 387 P.3d 725, 731 (Wyo. 2017) (same).

the concept of a “point of valuation,” the physical location at which the production process ends and post-production begins. *See Williams Prod. RMT Cop. v. State Dep’t of Revenue*, 2005 WY 28, ¶¶ 9-10, 107 P.3d 179, 183-84 (Wyo. 2005) (explaining significance of point of valuation in Wyoming’s taxation of mineral production).

44. In 1998, the Legislature recodified the entire Wyoming tax code. 1998 Wyo. Sess. Laws 30-313. The Legislature recodified the trona tax imposition and valuation statute under Wyoming Statutes subsection 39-14-303(b) (1998), retaining the industry factor, along with several universal mineral valuation guidelines. *Compare* Wyo. Stat. Ann. § 39-14-303(b) (1998) *with* Wyo. Stat. Ann. §§ 39-14-103 (1998) (coal); 39-14-203(b) (1998) (oil and gas); 39-14-403(b) (1998) (bentonite); 39-14-503(b) (1998) (uranium); and 39-14-603(b) (1998) (sand and gravel); *see also infra* ¶ 53. Significantly, the Legislature specified that in undertaking the recodification, it intended *no substantive change* to prior law. 1998 Wyo. Sess. Laws 312. In a belt and double suspenders approach the Legislature enumerated nearly all items which might conceivably be affected, introducing the list of items not affected, with the phrase “including, but not limited to.” The non-exhaustive list of items not affected included the imposition of taxes and tax rates. *Id.*

45. In 2003, the Legislature amended the manner of establishing the industry factor that had existed since 1989. 2003 Wyo. Sess. Laws 42. Rather than recalculate the industry factor each year, the Legislature set the industry factor at 32.5%, effectively establishing a permanent processing and transportation deduction of 67.5%. *Id.*; *see* Wyo. Stat. Ann. § 39-14-303(b)(ii) (2003), *supra* ¶ 21.

46. The 2003 legislative change originated with the Wyoming Legislature’s 2002 Interim Joint Minerals, Business, and Economic Development Committee (Interim Committee). At the Interim Committee’s July 2002 meeting, representatives of the trona industry, including FMC, General Chemical, and Solvay, presented written materials in support of a statutory amendment to permanently set the industry factor. *See Minutes, Jt. Minerals, Bus. & Econ. Dev. Interim Comm. & App. Y*, (July 11-12, 2002), <http://legisweb.state.wy.us/2002/interim/min/minutes/min0711.htm>. The trona industry proposed the Wyoming Legislature set the industry factor at 32.5%, a weighted average of the industry factor applied between 1990 and 2002. *Id.* The industry’s proposal to the Interim Committee relied upon industry processing costs defined by the State. *Id.*

47. The Department supported the trona industry’s proposal, explaining the factor had slowly increased as producers mined deeper (referred to as “factor creep”). *Id.* The Department agreed with the trona industry that making the industry factor permanent would ease administrative burdens. *Id.* The Interim Committee sponsored the proposed bill that became House Bill No. 6 in the 2003 legislative session and, thereafter, became law. 2003 Wyo. Sess. Laws 42; (*See also* Sachse Test., Tr. 142-45).

48. Finally, in 2012 the Legislature authorized the Department and trona producers to agree upon different valuation methods under limited circumstances:

When the taxpayer and department jointly agree that the application of the methods listed in paragraphs (i) through (v) of this subparagraph does not produce a representative fair market value for the product, a mutually acceptable alternative method may be applied.

2012 Wyo. Sess. Laws 50; Wyo. Stat. Ann. § 39-14-303(b)(vi) (2013).¹⁰ Of significance to the present case, the language refers to valuation “**methods** listed in paragraphs (i) through (v) of this subparagraph[.]” *Id.* (emphasis added).

Solvay I at *12-14, ¶¶ 38-48 (emphasis in original).

[¶ 18] With this legislative history in mind, and considering the Legislature’s selected verbiage, we held that subsection 303(b), *supra* ¶ 11, enacted several valuation approaches, not a single approach. *Solvay I* at *15-16, ¶¶ 51-53. We explained that the “industry factor” set forth in subsection (b)(ii), which both parties agree applies to trona converted

¹⁰ The 2011 trona valuation dispute between the Department and producer FMC Wyoming Corporation likely prompted the Legislature to authorize mutually agreeable methodologies in 2013. In *In re Matter FMC Wyo. Corp.*, 2013 WL 2467819, Docket No. 2011-30 (March 19, 2013), the State Board heard an appeal in which FMC argued the Department was required to continue use of a previously agreed upon valuation method. The Department argued it lacked authority to enter a mutually agreed valuation methodology in the absence of specific statutory language, and prevailed. *Id.* The Legislature thereafter passed statutory language expressly permitting the Department and taxpayers to mutually agree upon a valuation method, an authority the Department already possessed when valuing other minerals. *See e.g.* Wyo. Stat. Ann. §§ 39-14-103(b)(x) (2011) (coal); 39-14-203(b)(vi) (2011) (oil and gas).

into soda ash, encapsulates the valuation process and does not allow for additional deductions under (b)(iv). *Id.* at *15-18, ¶¶ 51-63. As the statute’s history demonstrates, the trona industry’s and Department’s plain objective before the Legislature was to apply a standard deduction encompassing the relationship between production and postproduction costs, and one that would ultimately simplify and streamline the valuation of trona sold as soda ash. *Supra* ¶¶ 17-18. The valuation statute, in total, does not envision a customized processing deduction on a per-taxpayer basis (like coal, oil, or gas under the “proportionate profits” method); it establishes a standard deduction for all “processing” costs incurred through the point of shipment. *Id.*; *see infra* ¶¶ 24, 27.

[¶ 19] The other subsection 303(b) valuation requirements, we determined, are subsumed within and were applied through calculation of the (b)(ii) industry factor. *Supra* ¶ 11. That is, the formulaic point of valuation and related valuation principles, including the second sentence of subsection (b)(iv) and classification of expenses required thereby, generate a total deduction of 67.5%, and a cost based valuation quotient of 32.5%. *Supra* ¶¶ 11, 17-19; *infra* ¶¶ 20-23.

[¶ 20] Solvay adamantly contends that the Department’s interpretation, which now aligns with this Board’s ruling in *Solvay I*, renders the second sentence of subsection 303(b)(iv) meaningless. Solvay argues that the industry factor deduction of 67.5% captures only those costs required to process trona into soda ash, and that processing costs incurred beyond the conversion of trona into soda ash are *additionally* deductible. (Solvay Br. 11, 14-18; Oral Argument, Tr. at 9-11).

[¶ 21] We reject Solvay’s inference that it may take additional bagging (“processing”) deductions pursuant to the second sentence in subsection 303(b)(iv), which we highlight below:

(iv) Except as otherwise provided, the mining or production process is deemed completed when the mineral product reaches the mouth of the mine. **In no event shall the value of the mineral product include any processing functions or operations regardless of where the processing is performed;**

Wyo. Stat. Ann. § 39-14-303(b)(iv) (2019) (emphasis added); *supra* ¶ 11. Note that this provision begins with “Except as otherwise provided,....” *Id.* This phrase makes the first sentence applicable only if consistent with other provisions in the statutes. *See In re Estate of Novakovich*, 2004 WY 158, ¶ 25, 101 P.3d 931, 937 (Wyo. 2004) (“Except as otherwise provided” in probate code made Rules of Civil Procure applicable unless otherwise provided); *see also* Wyo. Stat. Ann. § 39-14-302(c) (2019) (Also uses phrase “[e]xcept as otherwise provided” in relation to subsection 303(b)(iv)), *supra* ¶ 11. But, when subsection

(b) is read in *pari materia*, as we must, there is no need to subordinate this provision or apply this language as a qualifier or supplemental deduction to the (b)(ii) industry factor quotient. Rather, subsection 303(b)(iv) applies when taxpayers and the Department must manually value trona production that is not converted into soda ash. In other words, subsections (b)(iii) through (b)(vi) come into play when the industry factor does not. Through this interpretation, subsection 303(b)(iv) logically reconciles with the balance of subsection 303(b) and is not meaningless. “Where legislative intent is discernible a court should give effect to the ‘most likely, most reasonable, interpretation of statute, given its design and purpose.’” *Sullivan v. State*, 2019 WY 71, ¶ 10, 444 P.3d 1257, 1259-60 (Wyo. 2019) (quoting *Wyo. Jet Center, LLC v. Jackson Hole Airport Bd.*, 2019 WY 6, ¶ 12, 432 P.3d 910, 915 (Wyo. 2019)).

[¶ 22] For example, subsection 303(b)(v) similarly states that: “**Except as otherwise provided**, if the product as defined in paragraph (iv) of this subsection is sold at the mouth of the mine, the fair market value shall be deemed to be the price established by bona fide arms-length sale.” Wyo. Stat. Ann. § 39-14-303(b)(v) (2019) (emphasis added), *supra* ¶ 11. Subsection (b)(v), by its terms and when considered as part of the entire statute, illustrates the Legislature’s enactment of alternative valuation criteria that depend upon a producer’s production scheme and location of sale, rather than enactment of a single valuation method in which additional deductions are added to the industry factor deduction. *Id.*

[¶ 23] Similarly, subsection 303(b)(vi), which allows the Department and taxpayers to mutually agree upon a valuation method when other “methods” do not reflect a fair market value, also demonstrates Solvay’s interpretational error. Wyo. Stat. Ann. § 39-14-303(b)(vi) (2019), *supra* ¶ 11. The Legislature enacted this authority in 2012, more than a decade after the industry factor’s original enactment in 1989. *Supra* ¶ 17. The language in subsection (b)(vi) clarifies the Legislature’s understanding of the valuation statute: subsection 303(b) identified valuation “methods,” not a single method with aggregated deductions. *Moncrief*, 856 P.2d at 444-45, *supra* ¶ 16.

[¶ 24] We also have the benefit of the Department’s rules promulgated following enactment of the industry factor in 1989, through which the Department recalibrated the industry factor every two years. *See Solvay I* at * ¶¶ 23, 59. Especially relevant to our analytical review, the Department’s 2006 rules specified that the industry factor quotient included the “total direct costs” to take trona extraction from the mining process, through the processing and transportation functions downstream, all the way through and including the “point of shipment to market”:

(f.) Total direct costs per ton shall include direct mining costs per ton described in paragraph (e) of this section plus direct processing costs per ton. Direct processing costs shall include processing labor (including plant foremen and supervisory personnel whose primary responsibility is processing trona into soda ash), supplies used for processing trona into soda ash; processing plant and equipment depreciation and related real and personal property taxes; fuel, power and other utilities used for processing trona into soda ash; maintenance of soda ash processing plant and equipment; **trona and/or soda ash transportation from the mouth of the mine to the point of shipment; and any other direct costs incurred which are specifically attributable to the mining, processing or transportation of trona and/or soda ash up to and including the point of shipment to market.** Direct processing costs shall be divided by the total tons of trona processed into soda ash to arrive at direct processing costs per ton.

Rules, Wyo. Dep't of Revenue, ch. 6 § 9a. (f.) (2006) (emphasis added); *see also* Wyo. Stat. Ann. § 39-14-301(a)(vii) (2019) (definition of “processing,” which includes transportation and any other enhancement of marketability). These properly promulgated rules had the force and effect of law. *Fullmer v. Wyo. Employ. Com'n*, 858 P.2d 1122, 1123-24 (Wyo. 1993) (citations omitted). Solvay acknowledges that this former regulatory language is inconsistent with its current interpretation of the subsection 303(b)(ii) industry factor’s application. Confronted with this inconsistency, Solvay suggests that these regulations were contrary to statute. (Oral Argument, Tr. at 11-12). Nevertheless, the Department and Wyoming’s trona producers operated under these guidelines for years, a further indication of the statute’s meaning. The Legislature in 2003, at the trona industry’s request and relying on more than a decade of departmental calculations, made the industry factor permanent at 67.5%. *Supra* ¶ 17.

[¶ 25] Solvay’s proffered interpretation also runs contrary to several State Board rulings. In two trona valuation appeals concerning trona processed into soda ash, we ruled that the producer was not entitled to a greater deduction than that established in the industry factor, just as we concluded in *Solvay I. In re FMC Wyo. Corp.*, 2014 WL 5426152, Docket Nos. 2012-52, 2012-53 *12-13, ¶¶ 39-43, (Wyo. State Bd. of Equalization, June 23, 2014); *In re FMC Wyo. Corp.*, 2013 WL 2467819, Docket No. 2011-30 *9-10, ¶¶ 57-62 (Wyo. State Bd. of Equalization, March 19, 2013). Those *FMC Wyo. Corp.* rulings were not appealed, and the Legislature did not revise the trona valuation statutes in response. “Administrative interpretation of a statute is also entitled to weight when the legislature has failed over a long period of time to make any change in the statute, since the failure to change the statute is some indication of an acquiescence [sic] by the legislature to administrative

interpretation.” *Town of Pine Bluffs v. State Bd. of Control of State of Wyo.*, 647 P.2d 1365, 1367 (Wyo. 1982).

[¶ 26] The practical consequence of Solvay’s argument also merits consideration. Subsection 303(b)(ii), *supra* ¶ 11, does not state that the 67.5% industry factor covers only a portion of the deductible processing expenses, and Solvay’s interpretation runs counter to the Legislature’s historic objective of simplifying trona/soda ash valuation. *Supra* ¶ 17. If Solvay is correct, the Department and trona producers must continually resolve questions about additional deductions—those deductions falling outside of the industry factor—on a case-by-case basis. Had the Legislature envisioned an industry factor deduction, supplemented with unspecified processing deductions, it easily could have expressed that intent. We disagree that the Legislature intended such through subsection (b)(iv).¹¹

[¶ 27] Neither does the broad definition of “Processing,” which both parties agree includes bagging, support Solvay’s contention that the industry factor reflects deductions through only the process of actually converting trona ore into soda ash:

crushing, sizing, milling, washing, drying, refining, upgrading, beneficiation, sampling, testing, treating, heating, separating, tailings or reject material disposal, compressing, storing, loading for shipment, transportation from the mouth of the mine to the loadout, transportation to market to the extent included in the price and provided by the producer, processing plant site and post-mouth of mine reclamation, maintenance of facilities and equipment relating to any of the functions stated in this paragraph, and any other function after severance that changes the physical or chemical characteristics or enhances the marketability of the mineral[.]

Wyo. Stat. Ann. § 39-14-301(a)(vii) (2019). Solvay argues that the word “processing” should be limited to those activities directly changing trona ore into soda ash, and not more inclusively to activities that occur thereafter. (Oral Argument, Tr. 11). The word “processing,” however, unambiguously refers to activities beyond the conversion of trona into soda ash and includes any direct enhancement of marketability. *Id.*

[¶ 28] Finally, Solvay argues that a court-derived rule of statutory interpretation requires that we favor its position: “Even if the valuation statute were ambiguous (which it is not),

¹¹ In *Solvay I*, we offered further context to the Legislature’s inclusion of the (b)(iv) language as part of its reorganization of Wyoming’s tax code in 1998. *Solvay I* at *16, ¶¶ 53-55. In sum, the Legislature included this provision as pro forma language in each statutory chapter of the mineral tax code, not to change or adjust specific valuation methods, but as a generic statement of Wyoming’s fundamental mineral valuation structure.

under well-settled Wyoming law ambiguous tax imposition statutes **must** be read in favor of the taxpayer.” (Solvay Br. 16). Although taxpayers often cite this rule as compelling a pro-taxpayer result, its correct application is nuanced and does not apply in the present case. Regarding the rule of strict construction in favor of taxpayers, the Wyoming Supreme Court explained:

In one of the first cases to articulate the rule, *Kelsey v. Taft*, 72 Wyo. 210, 217, 263 P.2d 135, 137 (Wyo. 1953), this Court, in the context of whether certain property was subject to an inheritance tax explained:

It is elementary that taxation is a legislative function and that taxes may be impressed, levied, assessed and collected only under the statutory authority and in the manner provided by law. The power of the taxing officials exists only by virtue of the statutes empowering them to act and can be exercised only within the express authority conferred. See 51 Am. Jur., “taxation”, § 44, p. 74. Even were this not the general law, the provision of the Wyoming Constitution, Article 15, Section 13, establishes a rule which is probably controlling and, in any event, provides an essential background for our analysis:

“No tax shall be levied, except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied.”

Compilations of legal precedents are replete with dissertations of courts, specifically and definitely prohibiting the effectuation of any tax measure by any means other than a clear, definite and unambiguous statement of the legislative authority. Many state and federal cases could be cited on the subject but none is more succinct and positive than *Gould v. Gould*, 245 U.S. 151, 38 S.Ct. 53, 62 L.Ed. 211, in which the Court says:

“In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by [72 Wyo. 220] implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace

matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.”

Virtually all of the cases following *Kelsey* similarly involved interpreting statutes to determine whether a particular property or transaction was subject to taxation or the amount of taxes due, rather than interpreting statutes prescribing the procedures for objecting to an agency’s taxation decision. See, e.g., *Amoco Prod. Co. v. Dep’t of Revenue*, 2004 WY 89, ¶ 18, 94 P.3d 430, 438 (Wyo. 2004); *Estate of Heckert v. State Bd. of Equalization*, 15 P.3d 216, 220-21 (Wyo. 2000); *Chevron v. State*, 918 P.2d 980, 984 (Wyo. 1996); *Luman v. Resor*, 406 P.2d 527, 529-30 (Wyo. 1965). Our discussion of the proper role of the rule of strict construction of tax statutes in *BHP Petroleum Co., Inc. v. State of Wyo. Tax Comm’n*, 784 P.2d 621 (Wyo. 1989), is noteworthy. In that case, we refused to apply the rules of strict construction applicable to taxation statutes when we were asked to decide which of two possible taxpayers should pay but were not required to decide whether a taxation responsibility existed or its amount. *Id.* at 626. Similarly, we will not apply the rule of strict construction to interpret the procedural requirements for perfecting an appeal from an NOV. Instead, our focus when interpreting statutory procedures for notifying a taxpayer of a tax decision must be upon the legislative intent expressed in the statutory language.

Chevron U.S.A., Inc. v. Dep’t of Revenue, 2007 WY 43, ¶¶ 24-25, 154 P.3d 331, 339 (Wyo. 2007); see also *Wold v. Hunt Oil Co.*, 52 F.Supp.2d 1330, 1335-36 (D. Wyo. 1999) (“[T]he court is precluded from imposing a tax unless the statute is clear and unambiguous on its face.”); *Wyo. Dep’t of Revenue v. Exxon Mobil Corp.*, 2007 WY 112, ¶ 29, 162 P.3d 515, 525-26 (Wyo. 2007) (When interpreting statutes levying taxes, “it is the established rule not to extend their provisions by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out.”).

[¶ 29] Here, the Department does not seek to apply a mineral tax beyond its expressed scope; rather, the parties disagree concerning the valuation of trona production and whether a particular cost is deductible. Even if we apply this rule liberally and more generally to the present dispute, the rule does not assist Solvay. It is Solvay that reorders and joins together, by implication, valuation provisions to achieve an unintended result. Moreover, Solvay advances an interpretation generally at odds with past, unchallenged rulings of this Board. *Supra* ¶ 25. Any deference due Solvay is firmly offset by the analytical strength of the Department’s position, as well as this Board’s original ruling in *Solvay I*.

[¶ 30] We are also unpersuaded by hypotheticals warning of possible valuation incongruity. (Solvay Br. 17-18). These hypotheticals seemingly include activities well beyond the physical shipment of soda ash and, therefore, do not illustrate relatable valuation scenarios. For example, Solvay’s hypothetical use of soda ash to manufacture glass incorporates variable or unknowable conditions and complex business arrangements, the relevance of which, and details surrounding which, we cannot effectively evaluate.

CONCLUSION

[¶ 31] Consistent with our decision in *Solvay I*, we conclude that Solvay is not entitled to an additional soda ash bagging expense deduction pursuant to Wyoming Statutes section 39-14-303(b)(iv) (2019). The trona valuation statute identifies several valuation methods, depending upon how the trona is handled, processed, and sold. The industry factor set forth in subsection 303(b)(ii), when it was calculated in 1989, recalculated every two years thereafter, and became permanent in 2003, incorporated the statutory point of valuation and classification of expenses for deduction purposes. Subsection (b)(iv), applied by virtue of, and subsumed within, the industry factor, is not thereafter applicable under the facts and circumstances presented.

ORDER

[¶ 32] **IT IS HEREBY ORDERED** the Department of Revenue’s audit assessment, to the extent the Department disallowed a separate, additional deduction for bagging expenses and assessed additional severances taxes and interest for Solvay’s 2013-15 trona ore production, is **affirmed**;

[¶ 33] **IT IS FURTHER ORDERED** that the audit assessment is **remanded** to the Department at the parties’ request for the purpose of implementing settled valuation adjustments.

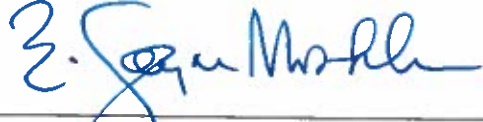
[¶ 34] Pursuant to Wyoming Statutes section 16-3-114 (2019) and Rule 12, Wyoming Rules of Appellate Procedure, any person aggrieved or adversely affected in fact by this decision may seek judicial review in the appropriate district court by filing a petition for review within 30 days after the date of this decision.

DATED this 9 day of April 2020.


STATE BOARD OF EQUALIZATION



David L. Delicath, Chairman



E. Jayne Mockler, Vice-Chairman



Martin L. Hardsog, Board Member

ATTEST:



Jennifer Fujinami, Executive Assistant

CERTIFICATE OF SERVICE

I certify that on the 9 day of April 2020, I served the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION, AND ORDER** by placing a true and correct copy thereof in the United States Mail, postage prepaid, and properly addressed to:

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