

**BEFORE THE STATE BOARD OF EQUALIZATION
FOR THE STATE OF WYOMING**

IN THE MATTER OF THE APPEAL OF)
MERIT ENERGY COMPANY, LLC) Docket No. **2021-109**
FROM A DECISION BY THE DEPARTMENT)
OF REVENUE (Excise Tax Division))

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

APPEARANCES

Brian Browdy, Ryan LLC, appeared on behalf of Merit Energy Company LLC.

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

DIGEST

[¶ 1] Merit Energy Company, LLC produced oil and gas from wells in Wyoming. Merit used electric pumps to move production fluids vertically from the bottom of the wellbore up to the wellhead, and then from the wellhead horizontally through its gathering system. Merit bought electricity to operate its pumps from Rocky Mountain Power (Rocky), which did not distinguish on its invoices between electricity to bring fluid vertically out of the ground, and electricity to move oil horizontally through the gathering system. Rocky charged, and Merit paid, sales tax on all of the electricity.

[¶ 2] In 2020, the Department of Audit conducted an excise tax audit of Merit for the period of February 1, 2017 through January 31, 2020. The Department adopted the audit findings and issued a final determination that Merit appealed to us. After filing its appeal, Merit retained an outside firm, which determined that 50.7% of the electricity consumed by Merit's pumps was used to raise production fluids to the wellhead, and the remaining 49.3% was used to move the production fluids horizontally through the gathering system. The Department does not dispute that determination. Merit now wants a refund of the sales tax it paid on the electricity used to move production fluids horizontally through the gathering system.

[¶ 3] The parties agreed to expedite this appeal, so in lieu of a hearing the Wyoming State Board of Equalization, Chairman E. Jayne Mockler, Vice-Chairman Martin L. Hardsocg, and Board Member David L. Delicath¹, will rely on the parties' stipulated facts and briefs. We will reverse the Department's determination.

ISSUES

[¶ 4] The parties agree that "[t]he sole issue remaining is whether under Wyo. Stat. Ann. § 39-15-105(a)(iii)(E), Merit is due a refund for a portion of the excise taxes it paid on electricity purchased from Rocky Mountain Power and used by the electronic submersible pumps." (Joint Stipulation of Facts, 3).

JURISDICTION

[¶ 5] The State Board shall "review final decisions of the department [of revenue] upon application of any interested person adversely affected." Wyo. Stat. Ann. § 39-11-102.1(c) (2021). An aggrieved taxpayer may file an appeal with this Board within 30 days after the Department's final decision. Rules, Wyo. State Bd. of Equalization, ch. 2 § 5(e) (2021). The Department issued its final decision on November 9, 2021. (Notice of Appeal). Merit filed its appeal on December 9, 2021, so the appeal is timely and we have jurisdiction.

FINDINGS OF FACT

[¶ 6] The parties have stipulated to these 20 facts:

Electronic Submersible Pumps

1. Merit is engaged in oil and gas production in Wyoming.
2. During the period at issue, February 1, 2017 through January 31, 2020, Merit produced oil and gas from wells in the Spring Creek Field, near Cody, Wyoming, among others. (Pet'r's Exs. 103, 104).
3. These wells do not have enough natural pressure to bring the production fluids—crude oil and water, and some gas—to the surface.
4. To bring the production [fluids] to the surface, Merit employed a series of electronic submersible pumps in the wellbores to generate the

¹ As of March 1, 2023, Mr. Hardsocg is the Board's Chairman, Mr. Delicath is the Vice-Chairman, and Ms. Mockler is the Board Member.

necessary pressure to lift the production fluids to the surface wellhead. (Pet'r's Ex. 106).

5. The electronic submersible pumps consist of an electric motor and a multistate centrifugal pump run on a production string, connected to a surface control mechanism and a transformer by an electric power cable.

6. The pumps convey the production fluids from the bottom of the wellbore up through tubing to the wellhead at the surface. (Pet'r's Ex. 106).

7. After reaching the surface, the production fluids are then conveyed from the wellhead through steel flowlines, or pipes, to the "battery," or surface facilities, where the oil, gas, and water are separated and impurities in the fluids are removed. (*Id.*).

8. The production fluids then exit the surface facility through additional flowlines, which convey the fluids to the Lease Automatic Custody Transfer (LACT) Unit. (*Id.*).

9. The LACT Unit is an assembly of equipment used to measure and transfer crude oil from an oil producer to an end user, or to the next step in the refining process.

10. Merit operates the electronic submersible pumps with enough horsepower to convey the crude oil from the bottom of the wellbore to the surface wellhead, from the wellhead to the surface facilities, and from the surface facilities to the LACT Unit—in one continuous, uninterrupted movement.

11. The electricity utilized and consumed by the electronic submersible pumps is delivered to those pumps inside the wellbore.

12. Merit purchases the electricity used to power the electronic submersible pumps exclusively from Rocky Mountain Power. (Pet'r's Ex. 108).

13. Rocky Mountain Power charged, and Merit paid, Wyoming excise (sales) tax on this electricity. (*Id.*).

14. Merit sells its production fluids downstream of the wellheads. Merit therefore does not sell any production fluids before those fluids reach the surface wellheads.

Audit, Procedural History

15. The Wyoming Department of Audit (DOA) audited Merit's transactions from February 1, 2017 through January 31, 2020 in order to determine its compliance with the sales and use tax code. (Dep't Ex. 502).

16. Based on its audit, the DOA determined that Merit had a tax deficiency of \$512,135.07, along with a credit of \$8,994.71. The Department accepted the DOA's findings and issued an assessment. (Dep't Ex. 500, 502).

17. In addition to the tax deficiency and the credit, the Department also assessed \$145,806.61 in interest, for a total assessment of \$648,946.97. (Dep't Ex. 500).

18. Merit timely appealed the Department's assessment to the State Board of Equalization, raising a series of issues with the Department's assessment. (Pet'r's Ex. 101).

19. The parties have resolved all but one of those issues. The Department recalculated its findings based on the issues it resolved, which results in an overall proposed credit finding of \$295,698.60 (Dep't Ex. 514).

20. The sole issue remaining is whether under Wyo. Stat. Ann. § 39-15-105(a)(iii)(E), Merit is due a refund for a portion of the excise taxes it paid on electricity purchased from Rocky Mountain Power and used by the electronic submersible pumps.

(Joint Stipulation of Facts, 1-3).

CONCLUSIONS OF LAW

A. State Board's review function, burdens of proof, and applicable law

[¶ 7] This Board shall "review final decisions of the department upon the application of any person adversely affected[.]" Wyo. Stat. Ann. § 39-11-102.1(c) (2021). At the request of 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) (2021).

[¶ 8] We have described the Petitioner's burden in this way:

Except as specifically provided by law or in this section, the Petitioner shall have the burden of going forward² and the ultimate burden of persuasion, which burden shall be met by a preponderance of the evidence. If Petitioner provides sufficient evidence to show the Department determination is incorrect, the burden shifts to the Department to defend its action.

Rules, Wyo. State Bd. of Equalization, ch. 2 § 20 (2021).

[¶ 9] There are no material issues of fact in this case: it's all about interpreting statutes and rules. Therefore, our standard of review is 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)). We also apply de novo review to the Department's findings of ultimate fact:

When an agency's determinations contain elements of law and fact, we do not treat them with the deference we reserve for findings of basic fact. When reviewing an "ultimate fact," we separate the factual and legal aspects of the finding to determine whether the correct rule of law has been properly applied to the facts. We do not defer to the agency's ultimate factual finding if there is an error in either stating or applying the law.

Britt v. Fremont Cty. Assessor, 2006 WY 10, ¶ 17, 126 P.3d 117, 122-23 Wyo. (2006) (quoting *Basin Elec. Power Coop., Inc.*, 970 P.2d at 850-51).

B. Is electricity used to move production fluids horizontally through a gathering system exempt from sales tax under Wyoming Statutes section 39-15-105(a)(iii)(E)?

[¶ 10] "Except as provided by W.S. 39-15-105," Wyoming law imposes sales tax on:

[t]he sales price paid for all services and tangible personal property used in rendering services to real or tangible personal property within an oil or gas well site beginning with and including the setting and cementing of production casing, or if production casing is not set as in the case of an open hole completion, after the completion of the underreaming or the attainment of total depth of the oil or gas well and continuing with all activities

² The burden of going forward, also called the burden of production, is "[a] party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a preemptory ruling such as a summary judgment or a directed verdict." *Burden of Production*, *Black's Law Dictionary*, 236 (10th ed. 2014).

sequentially required for the production of any oil or gas well regardless of the chronological occurrence of the activity.

Wyo. Stat. Ann. § 39-15-103(a)(i)(K) (2021). Merit doesn't contest the taxability of its purchases of electricity to move production fluids vertically from the wellbore to the wellhead. That question is, therefore, not before us and we will not address it. But, Merit does contend that Wyoming Statutes section 39-15-105(a)(iii)(E) (2021) exempts its purchases of electricity to move production fluids horizontally through its gathering system. That statute provides:

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

* * *

(E) Sales of power or fuel to a person engaged in the transportation business when the same is consumed directly in generating motive power for actual transportation purposes [.]

Wyo. Stat. Ann. § 39-15-105(a)(iii)(E) (2021). We will break that language down into its individual elements to see if Merit can satisfy them all.

1. Is electricity “tangible personal property consumed in production”?

[¶ 11] We see three sub-parts to this question:

- Is electricity tangible personal property?
- Was the electricity consumed? And, if so;
- Was the electricity consumed in production?

[¶ 12] The first sub-part is easily answered in the affirmative: Wyoming Statutes section 39-152-101(a)(ix) (2021) specifies that electricity is tangible personal property. The second sub-part is also answered in the affirmative because the parties have so stipulated. (Joint Stipulation of Facts, ¶ 11).

[¶ 13] The Department contends that Wyoming Statutes section 39-15-105(a)(iii)(E) (2021) requires that the electricity was “consumed in production of tangible personal property that will be subject to sale.” (Dep’t Br. 7). The Department does not provide authority for that requirement, and it does not appear in the statute. We will, therefore, apply the “consumed in production” statutory language.

[¶ 14] “The production process for crude oil * * * is completed after extracting from the well, gathering, heating and treating, separating, injecting for enhanced recovery, and any other activity which occurs before the outlet of the initial storage facility or lease automatic

custody transfer (LACT unit)[.]” Wyo. Stat. Ann. § 39-14-203(b)(iii) (2021). From that, we can conclude that everything after extraction from the well and before the outlet of the LACT unit is part of the production process. The electricity at issue here was consumed in moving oil through the production process; so we believe it was “consumed in production.” We conclude, therefore, that the electricity at issue was tangible personal property consumed in production.

2. Was this a “sale of power or fuel to a person engaged in the transportation business”?

[¶ 15] The Department concedes that all parts of this question are satisfied³. (Dep’t Br. 7).

3. Was the electricity “consumed directly in generating motive power for actual transportation purposes”?

[¶ 16] Once more, we can divide this question into three sub-parts:

- Was the electricity consumed?
- Did the electricity generate motive power?
- For actual transportation purposes?

[¶ 17] The parties agree that the electricity was “consumed directly in generating motive power.” (Joint Stipulation of Facts, ¶ 11; Dep’t Br. 8). The parties dispute, however, whether that motive power was generated for actual transportation purposes. The Department contends that electricity doesn’t qualify for the Subparagraph (iii)(E) exemption unless it is “consumed in transportation of tangible personal property that occurs as part of the production process of the tangible personal property that will ultimately be subject to sale.” (Dep’t Br. 10). The Department doesn’t support that contention with

³ We aren’t convinced that Merit is “engaged in the transportation business” even though the electricity at issue is used to move production fluids through the gathering system. Just about any business that deals with tangible objects has to transport those objects at some point: a plumber transports materials and tools to a job site; a bakery transports a cake to a wedding reception; an art gallery transports a sculpture for installation in a client’s building. They all transport things in the course of their businesses, but we don’t believe they’re engaged in “the transportation business.” The statute’s definite article “the” before the described noun “transportation business” refers to a specific business type, not a generic activity. The exemption’s purpose is to exempt fuel and power that transportation businesses use or consume when providing a transportation service. Indeed, the operative statutory subsection is but one of several addressing a series of business sectors or types, i.e. manufacturing, processing, agriculture. But, because the Department has conceded the point, that question is not before us and we cannot decide it. *Solvay Chem. Inc. v. Dep’t of Revenue*, 2018 WY 124, 430 P.3d 295 (Wyo. 2018).

authority beyond the statute itself, which doesn't contain those requirements. We will apply the actual statutory language.

[¶ 18] “Transportation,” “transportation purposes,” and “actual transportation purposes” are not defined in any relevant statute, rule, or court decision, and the parties haven't pointed out a definition that is specific to the oil and gas business. Therefore, we look to their ordinary and obvious meanings. *Big Al's Towing and Recovery v. Dept. of Revenue*, 2022 WY 145, ¶ 17, 520 P.3d 97, 102 (Wyo. 2022) (When the words in a statute are not defined by statute or rule, the Court will look to their “common dictionary definitions”).

[¶ 19] We believe that an apt definition of “transport” is “to transfer or convey from one place to another.” *Transport, Meriam Webster's Collegiate Dictionary* 1330 (11th ed. 2014). Similarly, “transportation” means “an act, process, or instance of transporting or being transported.” *Transportation, Meriam Webster's Collegiate Dictionary* 1330 (11th ed. 2014). Merit's production fluids are certainly conveyed from the wellhead to the LACT using some of the electricity it buys from Rocky. We conclude, therefore, that the electricity at issue was consumed directly in generating motive power for actual transportation purposes.

[¶ 20] The plain language of Wyoming Statutes section 39-15-105(a)(iii)(E) (2021) exempts Merit's purchases of electricity that it uses to move production fluids horizontally from the wellhead to the LACT. The Department's argument to the contrary would require us to add language to the statute. We may not do so. *Travelocity.com LP v. Wyo. Dep't of Revenue*, 2014 WY 43, ¶ 20, 329 P.3d 131, 139 (Wyo. 2014) (“we will not enlarge, stretch, expand, or extend a statute to matters that do not fall within its express provisions”).

DECISION

[¶ 21] Merit has demonstrated that it is entitled to an exemption for that portion of its electricity purchases that it used to move production fluids horizontally from the wellhead to the LACT. Accordingly, the Department erred in refusing to acknowledge that exemption, and we will reverse its decision.

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ORDER

[¶ 22] The Wyoming Department of Revenue's decision is **reversed** and remanded to the Department for further action consistent with this decision.

[¶ 23] Pursuant to Wyoming Statutes section 16-3-114 (2021) 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 16 day of March 2023.

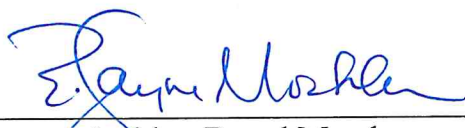
STATE BOARD OF EQUALIZATION



Martin L. Hardsocg, Chairman



David L. Delicath, Vice Chairman



E. Jayne Mockler, Board Member

ATTEST:



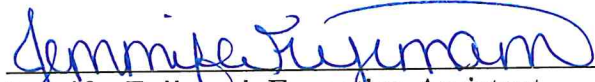
Jennifer Fujinami, Executive Assistant

CERTIFICATE OF SERVICE

I certify that on the 16 day of March 2023, 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 the following:

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