

BOARD OF TAX APPEALS
STATE OF LOUISIANA

MONSANTO COMPANY
PETITIONER

VERSUS

DOCKET NO. 11389D

KIMBERLY ROBINSON,
SECRETARY, DEPARTMENT
OF REVENUE

RESPONDENT

ORDER WITH WRITTEN REASONS

This matter came before the Board for hearing on the merits on December 8, 2020. Presiding at the hearing were: Judge Tony Graphia (Ret.), Chairman, and Board Members Cade R. Cole and Francis J. “Jay” Lobrano. Present before the Board were Donald Bowman, attorney for Kimberly Robinson, Secretary, Department of Revenue (“Department”) and Nicole Gould Frey and John King, attorneys for Monsanto Company (“Petitioner”). At the conclusion of the hearing, the Board took the matter under advisement. The Board now issues the attached ORDER for the following written reasons.

Facts and Background

The parties jointly stipulated to the core facts of this case. Petitioner appeals from the denial of its claim for a refund of sales tax in the amount of \$3,960,969.48 (the “Taxes”) paid on purchases of sodium hydroxide (“Caustic”) between January 1, 2012 and December 31, 2014 (the “Tax Periods”). Petitioner purchased Caustic for use at its manufacturing facility in Luling, Louisiana. Petitioner uses the Caustic to reduce the toxicity of several manufacturing waste streams in order to

comply with state and federal pollution control laws, and also to comply with Petitioner's air emission, water discharge, and waste disposal permits. Petitioner could not comply with pollution control laws or its Louisiana Department of Environmental Quality ("DEQ") or Department of Natural Resources ("DNR") permits without the Caustic.

Petitioner filed a refund claim on October 23, 2017 for the Taxes with the Department. Petitioner's refund claim was admitted into evidence by stipulation. Petitioner claimed that caustic is excluded from sales tax as a Pollution Control Device or System ("PCDS") under La. R.S. 47:301(10)(l) (the "PCDS Exclusion"). The Department submitted the refund claim to the DEQ for review. The Department did not make its own investigation into Petitioner's use of Caustic as a PCDS. The DEQ sent a letter to the Department dated April 10, 2018, stating that DEQ did not consider chemicals as parts of a pollution control system eligible for the PCDS Exclusion because the chemicals did not, in DEQ's view, constitute "tangible personal property . . . installed."

The Department denied Petitioner's refund claim on May 22, 2018, stating that "chemicals are not considered as parts of pollution control systems." The Department stipulated that it did not consider the law, regulations, or any policy documentation with regard to Petitioner's refund claims. The Department does not have any policy or protocols to instruct taxpayers on the meaning of the word "installed." All of the preceding facts were established by Joint Stipulation.

The evidence admitted at the hearing (not by stipulation) shows that Petitioner uses three raw materials in its manufacturing process:

phosphorous trichloride (“PCl₃”), disodium iminodiacetate, and formaldehyde mixed with water. At its Luling facility, Petitioner produces these materials and puts them through the Glyphosate Intermediate Process. Petitioner’s end product is the much-discussed herbicide known as “Roundup.” Producing PCl₃ and conducting the Glyphosate Intermediate Process creates acidic waste, specifically hydrochloric acid and phosphoric acid.

Acids have low a pH balance. Generally, a pH between seven and zero is acidic, with a zero pH being the most acidic. A pH of seven is neutral. Acids with a pH below two are considered hazardous pollutants. The acids that Petitioner produces have a pH between zero and one.

Petitioner is required under DEQ, DNR, and Federal permits to neutralize (raise the pH of) its acidic waste. To neutralize an acid, Petitioner must bring it into contact with an alkaline. An alkaline substance has a pH between seven and fourteen. Petitioner purchases Caustic, which is alkaline, from Occidental Chemicals for this purpose. Petitioner does not use Caustic purchased from Occidental Chemicals for any other purpose.

Petitioner’s Senior Environmental Engineer Bradley Phillips described how Petitioner uses Caustic in its pollution abatement procedures. The Caustic arrives at the Luling facility on a barge. The Caustic is unloaded from the barges and pumped into storage tanks on the premises. When appropriate, Petitioner pipes the Caustic from storage into pollution control equipment. A computer-controlled system determines when to remove the Caustic from storage.

Petitioner's manufacturing process releases acidic gas. Petitioner uses "scrubbers" to neutralize these gases. A scrubber is a tank that contains machinery that sprays a liquid into the air inside the tank. In Petitioner's scrubbers, acidic gas enters the tank from the bottom. Sprayers at the top of the tank spray Caustic liquid in a fine mist inwards into the tank. The tank contains trays and other modifications designed to ensure maximum contact between the acidic gas and the Caustic spray. Contact between these substances leads to neutralization.

Neutralization occurs continuously in the scrubbers and consumes Caustic. Petitioner's computer system monitors the scrubbers and adds additional caustic when needed. The computer system is programmed according to Petitioner's environmental permits. Certain permits require a certain percentage of Caustic in the tank. Other permits require a certain pH level. The computer system releases Caustic when needed to maintain the threshold required by the applicable permit.

Petitioner's use of the Glyphosate Intermediate Process also produces powerful acidic liquids during the formation of glyphosate crystals. Petitioner will ultimately dispose of these waste liquids by injecting them into an underground well. Petitioner has a permit from the DNR for this purpose. However, Petitioner's DNR permit forbids Petitioner from injecting hazardous waste into the well. This means that Petitioner must first raise the pH of its waste liquid above two.

Petitioner neutralizes waste liquid with Caustic in Equalization Tank(s). However, the acids that are produced as the glyphosate crystallizes are so strong that the Equalization Tanks alone would not be

able to neutralize them. Therefore, Petitioner adds Caustic at various steps in the process before the waste liquid reaches the Equalization Tanks. Otherwise, the waste liquid would become so acidic that neutralization would become economically infeasible.

In addition to acidic gas and acidic liquid, neutralization in the scrubbers and other industrial processes also creates acidic wastewater. Petitioner has a permit from the DEQ to discharge wastewater into the Mississippi River. However, the discharge permit requires that the pH of wastewater be between six and nine. Petitioner treats the wastewater with Caustic in tanks to achieve the pH required by the discharge permit.

Law and Discussion

La. R.S. 47:301(10)(l) provides in relevant part:

Solely for purposes of the state sales and use tax imposed under R.S. 47:302, 321, and 331, the term “sale at retail” shall not include the sale of a pollution control device or system. Pollution control device or system shall mean any tangible personal property approved by the Department of Revenue and the Department of Environmental Quality and sold or leased and used or intended for the purpose of eliminating, preventing, treating, or reducing the volume or toxicity or potential hazards of industrial pollution of air, water, groundwater, noise, solid waste, or hazardous waste in the state of Louisiana. . . . In order to qualify, the pollution control device or system must demonstrate either: a net decrease in the volume or toxicity or potential hazards of pollution as a result of the installation of the device or system; or that installation is necessary to comply with federal or state environmental laws or regulations.¹

The Board previously denied Petitioner’s Motion for Summary Judgment in this case because the Petitioner did not prove that the

¹The Board agrees with the Department’s legal position that the final sentence of La. R.S. 47:301(l) applies to state taxes.

DEQ's decision was arbitrary or capricious. *Monsanto Co. v. Robinson*, Docket No. 11389D (La. Bd. Tax App. 1/9/20); 2020 WL 772179. The Fifth Circuit denied Petitioner's writ application from the Board's decision. However, in denying the writ application, the Fifth Circuit issued clarifying guidance on how the Board should review the DEQ's decision. Specifically, the Fifth Circuit wrote:

The Board found that Monsanto did not prove the failure to certify caustic as a pollution control device or system was "arbitrary, capricious, or an abuse of agency discretion." While Monsanto argues that an improper deference was given to LDEQ's interpretation of "installed" under the tax statute, deference is given to administrative agencies due to their heightened expertise in the matters that the agency reviews. *Davis v. State Bd. Of Certified Public Accountants of Louisiana*, 13-0514 (La. App. 4 Cir. 12/18/13), 131 So.3d 391, 395. Agency determinations of mixed questions of law and fact, which the agency has been charged to answer, will be reviewed for an abuse of discretion. *Id.*

While the Board should give deference to LDEQ's assessment of facts, the Board is tasked with interpreting the statute "liberally in favor of the tax payer and against the taking authority." *Pot-O-Gold Rentals, L.L. C. v. City of Baton Rouge*, 14-2154 (La. 1/16/15), 155 So.3d 511,512. Although Monsanto argues that there are no issues of fact, the disagreement between the parties on whether or not caustic, or any chemical, constitutes a "pollution control device or system" and whether consumables can be considered "installed tangible property" shows that there are material issues of fact to be proven at a trial on the merits.

Thus, as the proper interpretation of the tax exclusion rests on contested facts, the Louisiana Board of Tax Appeals correctly found that resolution by summary judgment was inappropriate. Accordingly, after de novo review, we deny the relief sought by Monsanto."

The Fifth Circuit held that the Board must interpret the PCDS Exclusion liberally in the Petitioner's favor. Therefore, the Board does not give deference to the DEQ's interpretation of the law except when

dealing with mixed questions of law and fact. The Fifth Circuit also agreed that there existed material factual disputes in this case. Specifically, whether Caustic or any chemical can constitute a PCDS and whether consumables can be “installed.”

When this matter came before the Board for hearing on the Petitioner’s Motion for Summary Judgment, counsel for the Department at the time specifically stated that the only element for claiming the PCDS Exclusion that the Petitioner failed to satisfy was the failure to obtain DEQ approval. In *Agrilelectric Power Partners, LTD v. Department of Revenue*, this Board recognized the highly unusual statutory language that provides the approval of DEQ as an element of this underlying tax exclusion. Docket No. 7893, 2014 WL 2930145 (La. Bd. Tax App. 3/19/14). In other words, any deference to DEQ approval was not because of the agency’s role in administration, it was because the law makes their approval an element of the exclusion.

However, the Fifth Circuit’s opinion on Petitioner’s writ application in this matter held that “[w]hile the Board should give deference to LDEQ’s assessment of facts, the Board is tasked with interpreting the statute liberally in favor of the taxpayer and against the taxing authority.” *Monsanto Co. v. Robinson* 2020-C-66 (La. 5 Cir. 3/2/20) (citing *Pot-O-Gold Rentals, LLC v. City of Baton Rouge*, 14-2154 (La. 1/16/15), 155 So.3d 511, 512). The DEQ, through its officers, testified before the Board that it made no factual determinations with respect to Petitioner’s PCDS application. The Department’s denial of the Petitioner’s refund rested solely on the DEQ’s legal position. The DEQ’s legal position is a

stricter interpretation of exclusionary statute that must to be liberally construed in the Petitioner's favor.

The record shows that there are no factual disputes in this matter. The Department and Petitioner submitted joint stipulations prior to the hearing on the merits.² Therein, the parties stipulated that:

Monsanto uses the caustic to reduce the toxicity of several manufacturing waste streams in order to comply with state and federal pollution control laws and its air emission, water discharge, and waste disposal permits. . . .

Monsanto could not comply with pollution control laws or its Louisiana Department of Environmental Quality (LDEQ) or Department of Natural Resources ("DNR") permits without the caustic. . . .

LDR submitted the refund claim to the LDEQ for review, making no independent investigation of its own pertaining to the use of caustic by Monsanto as a pollution control device....

LDR did not consider the law, regulations, or any policy documentation with regard to Monsanto's refund claims. . . .

LDR does not have any policy or protocols to instruct taxpayers on the meaning of the word 'installed.

DEQ took issue with only one aspect of Petitioner's application: the DEQ believed the word "install" limited the exclusion to only permanent equipment, not consumable chemicals like sodium hydroxide. This issue is articulated by the testimony of Mr. Vega, the DEQ Assistant Secretary:

[L]ooking at the language of the statute and the regulations, they - to me, and I am the person who is charged with making that decision, I am the one delegated by the Secretary to make the determinations - the language of the statute did not appear to me to contemplate anything other than the actual hard equipment that would be installed: the device or pollution control equipment that was installed for the purpose of control."

²The trial attorney is no longer with the Department, and its motion for leave to file a 2nd Post Trial Memorandum related to these stipulations was denied.

The sole reason for the DEQ's denial was its own interpretation of the PCDS Exclusion statute and regulations.

The Fifth Circuit has already instructed the Board not to defer to the DEQ's interpretation of the law. As an exclusion, any legal ambiguity in the PCDS Exclusion must be "construed liberally in favor of the taxpayers and against the taxing authority." *See also, Harrah's Bossier City Inv. Co., LLC v. Bridges*, 2009-1916 (La. 5/11/10), 41 So. 3d 438, 446. The DEQ's interpretation resonates as a perfectly logical application of the statutory language. However, the Board finds that DEQ's interpretation adds requirements that cannot be squared with our obligation to construe any statutory ambiguity in the taxpayer's favor.

When interpreting the law, words "shall be construed according to the common and approved usage of the language." La. R.S. 1:3. Dictionaries are a valuable source for determining the "common and approved usage of words." *Dunn v. City of Kenner*, 2015-1175, p. 9 (La. 1/27/16), 187 So.3d 404, 411. Merriam-Webster defines "install," in relevant part, as "to set up for use or service," and "to establish in an indicated place, condition, or status." Merriam Webster's Dictionary, <https://www.merriam-webster.com/dictionary/install>. The definition of install contemplates that something may be installed for "use." Liberally construed in the Petitioner's favor, use can be interpreted to refer to something that is consumed or used up. Furthermore, the statute itself applies to items that "sold or leased and used." However, the DEQ interpreted the word "install" to implicitly exclude items which are used

or consumed. The Board disagrees with the DEQ's interpretation of the law related to the meaning of "installed."

The facts here show that Petitioner installs Caustic. Petitioner sets up the Caustic in its storage tanks. Petitioner uses Caustic to neutralize acidic waste. Therefore, when Petitioner sets up the Caustic, it does so for use in its pollution control scheme. Petitioner's use of Caustic within a common and approved definition of "install."

Caustic is, however, not a "device." Merriam-Webster defines "device" in relevant part as "something devised or contrived" such as a "plan, procedure," or "technique," or "a piece of equipment or a mechanism designated to serve a special purpose or perform a special function." Merriam-Webster's Dictionary, <https://www.merriam-webster.com/dictionary/device>. Petitioner has a plan, procedure, or technique to reduce pollution. Petitioner's pollution control plan is designed around Caustic. However, in a very basic sense, Caustic is the chemical used in the plan, not the plan itself.

Merriam-Webster defines "system" in relevant part as "an assemblage of substances that is in or tends to equilibrium," "a group of devices or artificial objects or an organization forming a network especially for distributing something or serving a common purpose," or "an organized or established procedure." Merriam-Webster's Dictionary, <https://www.merriam-webster.com/dictionary/system>. Black's Law Dictionary (2nd ed.) defines system as: "[d]etailed procedures, methods and routines to carry out an activity, problem solve or perform a duty." Considering our duty to interpret any legal ambiguity in the exclusion in

favor of the taxpayer, the Board holds that the caustic in this instance is being introduced as part of a particular detailed procedure and method for the express purpose of pollution control.

Conclusion

The Department generally conceded that the elements of this exclusion were met except DEQ's approval, and agreed to a written stipulation that it made "no independent investigation of its own pertaining to the use of caustic by Monsanto as a pollution control device." DEQ's representative testified that it made no factual determinations in this case. It based its view over its legal interpretation of the statutory meaning of "installed."

Under the unique posture of the record in the present case, the Board finds that the Petitioner is entitled to the claimed refund. The Department agreed that Petitioner uses Caustic as a procedure for pollution control. Therefore, its Caustic is pollution control system. Accordingly, the DEQ incorrectly determined that Caustic is not a PCDS, and the Department incorrectly denied Petitioner's claim for refund.

The parties are instructed to jointly present a proposed Judgment with decretal language and proper calculations concerning the refund and interest. If the parties cannot agree then each party shall submit its proposed Judgment and Memorandum in support by May 10, 2021.

Baton Rouge, Louisiana this day 14 day of April, 2021.

FOR THE BOARD:



VICE CHAIRMAN CADE R. COLE

Judge Tony Graphia (ret.), Chairman, dissents without written reasons.