Case No.: 09 OC 00016 1B

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ALAN GLOVER

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DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

SOUTHERN CALIFORNIA EDISON,

Plaintiff,

vs.

THE STATE OF NEVADA, EX REL. DEPARTMENT OF TAXATION,

Defendant.

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

This matter is before this Court based on a Second Amended Complaint filed by Plaintiff, Southern California Edison, as to a decision rendered by Defendant, The State of Nevada, ex rel, Department of Taxation. An eight day bench trial was held January 21-29, 2014. An Order Staying Determination Pending Decision by Nevada Supreme Court was entered on April 30, 2014, pending a decision in *Sierra Pacific Power Company, et al. v. The State of Nevada, Department of Taxation*, 130 Nev. Adv. Op. 93, which was rendered on December 4, 2014. Based on this decision, the following Findings of Fact and Conclusions of Law are entered in this case. An Amended Findings of Fact, Conclusions of Law, and Decision is issued by this Court pursuant to NRCP Rule 60(a), to clarify that this Court heard this matter on the Second Amended Complaint filed as an independent action, and on a Trial De Novo standard, not as a Petition for Judicial Review, based on the decision by the Nevada Supreme Court in *Southern California Edison v. First Judicial District Court*, 127 Nev. Adv. Op. 22 (2011).

FINDINGS OF FACT

1. Defendant State of Nevada *ex rel.* Department of Taxation (the "Department") is an agency of the executive branch of the State of Nevada that is charged with the administration and enforcement of the tax laws set forth in Title 32 of the Nevada Revised Statutes, including chapters 372 and 374 of the Nevada Revised Statutes governing sales and use taxes and local school support taxes, respectively.

2. The Plaintiff, Southern California Edison ("SCE") is a regulated public utility that operated the Mohave Generating Station ("Mohave"), a coal fired power plant in Clark County, Nevada, from 1970 to 2005. SCE owned a majority interest in Mohave.

3. As a result of an agreement with the Department of the Interior, SCE purchased coal in Arizona exclusively from Peabody Western Coal Company ("Peabody") pursuant to Mohave Coal Supply Agreement, dated January 6, 1967, and the Amended Mohave Project Supply Agreement, dated May 26, 1976, wherein Peabody is the seller and Mohave co-owners are the buyers. In exchange for the agreement to purchase coal mined on Indian Reservations in Arizona, SCE was able to purchase the water necessary to operate Mohave from the Colorado River Commission.

4. Peabody obtained the coal from the Black Mesa Mine located on Navajo and Hopi Indian reservations in Arizona. Peabody operated the Black Mesa Mine through lease agreements with the Navajo and Hopi Tribes.

5. SCE determined that the most inexpensive means to transport the coal from Arizona to Nevada was by means of a pipeline.

6. As part of the Coal Supply Agreement, Peabody entered into a Coal Slurry Pipeline Agreement with Black Mesa Pipeline ("BMP") to process the coal into a coal slurry that met SCE's specifications and could be transported to Mohave through the pipeline.

7. The tangible personal property purchased by SCE was the coal slurry product.

8. BMP operated the Coal Slurry Preparation Plant and the pipeline that transported the coal slurry to Mohave. Before delivery of the coal to BMP, Peabody processed the run-of-mine coal by separating rock in a rotary breaker lowering the ash content and reducing the coal to a 2" x 0" size. At the Coal Slurry Preparation Plant, the coal was further crushed by various means to a certain size and blended with water to create coal slurry that could then be transported through the pipeline.

9. The processing by Peabody and BMP created a coal slurry that met SCE's transportation requirements.

10. The price SCE paid Peabody for the coal slurry is set forth in the Amended Mohave Project Coal Supply Agreement, Sec. 6. The price for the coal slurry is paid for the coal delivered to the Mohave Project and is based on the mine price, the price for transportation, and all sale, use, production and severance taxes paid by the seller, mainly Peabody. Thus, Peabody is the entity that paid all taxes, not SCE.

11. The coal slurry was transported more than 270 miles through a pipeline to the Mohave Generating Station.

12. Peabody retained title to the coal when it was transferred to BMP for processing and transportation. After processing and transportation by BMP, the sales transaction between Peabody and SCE took place in Nevada when title to the coal slurry passed to SCE upon delivery at Mohave.

13. Risk of loss for the coal slurry and water passed from Peabody to SCE at the same time title was passed at the receiving facilities of the Mohave Generating Station in Nevada.

14. Because Peabody did not have any physical presence in Nevada, SCE paid Use Tax to Nevada for the coal slurry beginning in 1970.

15. SCE de-watered the coal and burned it to generate electricity. SCE further pulverized the coal into a powder that could be blown into the burners, it did not have the means at Mohave to take run-of-mine coal and process it for burning as fuel. SCE also used the water from the coal slurry for cooling at the plant.

16. SCE could not purchase coal in Nevada because there are no commercially viable deposits of coal in Nevada and there were no coal mines operating in Nevada during the 1998 to 2000 period of time at issue in this case. There is no record that any coal mine in Nevada has been subject to the Net Proceeds of Minerals tax or that any coal miner or supplier has ever made a sale of coal in Nevada that was not subject to either sales or use tax.

17. Peabody did not compete with any Nevada companies that mined coal in Nevada.

18. Peabody did not compete with any oil, natural gas, or geothermal producers in Nevada.

19. There is no evidence that any coal transaction in Nevada was exempt from sales or use tax pursuant to NRS 372.270.

20. Beginning in April 2001, SCE filed claims for a partial refund filed with the Department of Taxation for the period between March 1998 and December 2000. This claim was limited to a request for credit toward Arizona sales tax paid by SCE to Peabody.

21. On January 31, 2003, after the Department denied SCE's claims for refund for the time period between March 1998 and December 1999, SCE submitted a Petition for Redetermination limited to those periods arguing for the first time that its consumption of coal at the Mohave Plant was exempt based on the dormant Commerce Clause and that the taxable measure should not have included SMCRA and Black Lung payments, but SCE did not provide amended returns.

22. Thereafter, on October 27, 2003, SCE submitted a letter with revised returns referring to new claims but failed to articulate the grounds for its revised claims.

23. In November of 2003, SCE submitted a brief to the Nevada Tax Commission alleging, in the alternative, that either: (1) SCE's consumption of coal at the Mohave Plant was entirely exempt from Nevada's use tax; or (2) SCE is entitled to a refund based on its inadvertent inclusion of royalties and transportation charges in the measure of its use tax obligation. The brief also alleged that SCE is entitled to a refund based upon taxes and fees remitted to Arizona, the United States, and the Navajo Nation.

24. After a previous decision on SCE's refund request was voided by the Nevada Supreme Court, the Nevada Tax Commission held open hearings on the claims for refund on September 9, 2008, and December 1, 2008.

25. At the December 1, 2008, hearing the Commission voted to deny SCE's refund claims.

26. On March 2, 2009, the Commission served its final written decision, dated February 27, 2009, denying SCE's claims for refund (Ex. E to Plaintiff's Second Amended Complaint).

27. SCE did not pay any sales tax to the State of Arizona on its purchase of the coal slurry. Any tax was paid by Peabody to the state of Arizona.

28. SCE did not pay any taxes to the United States or the Navajo Nation or Hopi Tribe on its purchase of coal slurry. Any tax was paid by Peabody to the state of Arizona.

29. SCE did not pay taxes to the State of Nevada imposed pursuant to Chapter 362 of the Nevada Revised Statutes ("NRS").

30. SCE has not been taxed differently than any other similarly situated taxpayer on the use of coal in the state of Nevada nor any other tax payer who has had a product delivered to Nevada for use in this State.

31. SCE did not suffer any discrimination in fact in comparison to any other purchaser of coal in Nevada.

32. SCE has not suffered any injury as a result of the exemption in NRS 372.270 that would entitle it to retroactive relief.

CONCLUSIONS OF LAW

1. Nevada imposes a sales tax upon retailers for the privilege of selling tangible personal property at retail in Nevada. NRS 372.105. In addition to the sales tax, Nevada imposes a use tax upon consumers for the storage, use or other consumption of tangible personal property in Nevada. NRS 372.185 and NRS 374.190.

2. The use tax is imposed with respect to tangible personal property ". . . purchased from any [out-of-state] retailer on or after July 1, 1955, for storage, use or other consumption in [Nevada]." NRS 372.185(1).

3. The tax applies to tangible personal property which was acquired out-of-state but which would have been subject to sales tax if the sale had occurred in Nevada. NRS 372.185(2).

4. The use tax is complementary to the sales tax and generally applies when tangible personal property avoids the imposition of sales tax at a point of purchase outside of Nevada. *Nevada Tax Comm'n v. Nevada Cement Co.*, 116 Nev. 877, 8 P.3d 147 (2000). *See also Sparks Nugget, Inc. v. State of Nevada ex rel. Dep't of Taxation*, 124 Adv. Op. No. 15 (March 27, 2008) ("any non-exempt retail sales of personal property that have escaped sales tax are nonetheless taxed when the property is utilized in the state").

5. SCE paid use tax pursuant to NRS 372.185 beginning in 1970 on the coal slurry.

6. NRS 372.185 provides:

> 1. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from any retailer on or after July 1, 1955, for storage, use or other consumption in this State at the rate of 2 percent of the sales price of the property.
> 2. The tax is imposed with respect to all property which was acquired out of state in a transaction that would have been a taxable sale if it had occurred within this State.

7. Because there is no coal mined in Nevada, any sale of coal in Nevada would necessarily be subject to either sales or use tax. The transfer of title to the coal slurry took place in Nevada and pursuant to the Mohave Project Coal Supply Agreements, Nevada law governs.

8. The fundamental objective of the dormant Commerce Clause is "preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *Gen. Motors Corp. v. Tracy*, 519 U.S. 279, 299 (1997).

9. When challenging a state tax based on the dormant Commerce Clause, the taxpayer has the burden to demonstrate that the state tax in question does, in fact, violate the Commerce Clause of the United States Constitution. *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983).

10. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the United States Supreme Court set out a test to determine whether a state tax provision violates the Commerce Clause. A state tax provision will survive a Commerce Clause challenge so long as the tax: (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services

provided by the state. *See Quill v. N. Dakota*, 504 U.S. 298 (1992) (quoting *Complete Auto Transit v. Brady*).

11. The use tax paid by Taxpayers pursuant to NRS 372.185(1) does not violate the dormant Commerce Clause under the Constitution of the United States. *Great Am. Airways v. Nevada State Tax Comm'n*, 101 Nev. 422, 425 (1985).

12. The United States Supreme Court has identified the fundamental objective of the dormant Commerce Clause as "preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *Gen. Motors Corp. v. Tracy*, 519 U.S. 279, 299 (1997). In this case, SCE has not been treated any differently than any of its market competitors. Since there is no unequal treatment and consequently no impediment to free trade, SCE's claim is not within the zone of interests to be protected by the Commerce Clause.

13. There are no facts in the record to support a finding that SCE, by paying use tax on its purchase of the coal slurry, is being discriminated against in comparison to a similarly situated taxpayer. To hold otherwise would be to give an unpalatable windfall to SCE.

14. SCE has not been subject to an illegal or improper tax that would entitle them to a refund of use tax.

15. There is no evidence in the record that SCE's market competitors have claimed an exemption from the payment of Sales and Use tax pursuant to NRS 372.270 on the purchase of coal.

16. Further, the Nevada Supreme Court in the *Sierra Pacific Power Company, et al* case held that NRS 372.270 was not severable and that it was to be stricken down in its entirely. *Sierra Pacific Power Company, et al. v. The State of Nevada, Department of Taxation*, 130 Nev. Adv. Op. 93 (Dec. 04, 2014). Therefore, it cannot be used to create an agreement that there was a

benefit to any Nevada mining operation that would reflect a different treatment to an in state operation.

17. Dormant Commerce Clause case law makes clear that violations must be based on actual injury and it is the burden of the taxpayer to prove the injury. In *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481 (1932), the United States Supreme Court wrote: "Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries." The practical effect here is that there was no discrimination.

18. Further, the United States Supreme Court in *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, Dep't of Bus. Regulation of Florida*, 496 U.S. 18 (1990) analyzed the available remedies when a tax scheme is found to violate the dormant Commerce Clause. *McKesson* dealt with a Florida liquor tax that was found to discriminate against interstate commerce. The case addresses the means to address the injury suffered by a taxpayer in competition with a taxpayer that received beneficial treatment.

The Court concluded that the State had options available for addressing the injury. The State could refund the "difference between the tax [petitioner] paid and the tax [petitioner] would have been assessed were it extended the same rate reductions that **its competitors actually received.**" *Id.* at 40 (emphasis added).

Given the fact that SCE has not provided any facts to suggest that an actual competitor with SCE received tax rate reductions or exemptions that caused injury to SCE, there should be no applicable remedy.

19. The United States Supreme Court wrote:

Thus, in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express

discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply. The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such.

Gen. Motors Corp. v. Tracy, 519 U.S. 279, 300 (1997).

20. The Legislature enacted NRS 372.270 which provides "the gross receipts from the sale of and the storage, use or other consumption in this State of, the proceeds of mines which are subject to taxes levied pursuant to chapter 362 of NRS" are exempt from sales and use tax. NRS Chapter 362 levies a tax on the net proceeds of minerals extracted in Nevada. *See* NRS 362.120 *et seq*. In other words, minerals which are subject to the net proceeds of minerals of tax under NRS Chapter 362 are exempted from the sales and use tax assessed in NRS Chapter 372.

21. The exemption in NRS 372.270 is only a partial exemption that applies only to the extent of actual payment of the Nevada net proceeds tax. A.G.O. 76 (June 27, 1955). The Attorney General concluded "that the sales tax is placed upon that portion of the gross receipts constituting the value of the product which is not taxed under the Net Proceeds of Mines Tax." *Id.*

22. The Nevada Supreme Court has ruled that sales and use tax exemptions are to be narrowly construed in favor of taxability. *Shetakis Distributing Co. v. Dep't of Taxation,* 108 Nev. 901, 907, 839 P.2d 1315, 1319 (1992). The language of the Nevada Constitution Article X Section 5(1) and NRS 362.110[1] clearly limits the net proceeds tax, and the corresponding exemption from sales and use taxes, to minerals extracted in Nevada.

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[1] NRS 362.110 requires that the net proceeds form be filed by "every person extracting minerals in this State . . ."

23. The coal in question was mined or extracted outside of Nevada and is, therefore, not subject to the net proceeds of minerals tax in Nevada and is not exempted from Nevada sales and use tax by NRS 372.270, which statute has been stricken by the Nevada Supreme Court.

24. Because of the requirement to narrowly construe tax exemptions, SCE is required to clearly show that the sales and use tax exemption of NRS 372.270 was intended to apply to coal mined outside Nevada. This is not the case.

25. The Constitutional provision is not ambiguous to a reasonably informed person but clearly applies only to minerals extracted in Nevada.

26. The Nevada Supreme Court in the *Sierra Pacific Power Company et al* case held that there was no refund available to the utility company in that case because there had been no actual injury. *Sierra Pacific Power Company, et al. v. The State of Nevada, Department of Taxation*, 130 Nev. Adv. Op. 93 (Dec. 04, 2014). Here, as in that case, SCE did not pay any higher tax than did its competitors. No competitor gained a competitive advantage under the tax scheme.

Although the exemption to the use tax set forth in NRS 372.270 is unconstitutional and in violation of the Dormant Commerce Clause, the use tax itself is not unconstitutional. Thus, the tax itself complained of was lawfully assessed. NRS 372.270 has no applicability because there was no competitor that obtained an advantage thereunder; and, as such, there was no actual discrimination against interstate commerce. *See Sierra Pacific Power Company, et al. v. The State of Nevada, Department of Taxation*, 130 Nev. Adv. Op. 93 (Dec. 04, 2014). In fact, to not charge a use tax would have given a benefit to SCE which other taxpayers did not enjoy. SCE is on an even playing field with all such companies in the state of Nevada in regard to this issue.

27. SCE is not entitled to a credit for the Arizona Transaction Privilege Tax that Peabody paid to the State of Arizona.

NAC 372.055 provides,

In determining the amount of use tax that is due from a taxpayer, the Department will allow a credit toward the amount due to this State in an amount equal to sales tax legitimately paid for the same purchase of tangible personal property to a state or local government outside of Nevada, upon proof of payment deemed satisfactory to the Department. Here there was no "same purchase." SCE paid no direct tax to the state of Arizona.

In the contract between the parties SCE agreed to reimburse Peabody as part of the sale price the taxes that Peabody paid to Arizona. This reimbursement was a part of the purchase price SCE paid to Peabody for the coal slurry. The State of Nevada was entitled to collect use tax measured by the entire price of the coal slurry. HELLERSTEIN, STATE TAXATION, ¶ 17.08 (3d ed. 2013).

Even assuming that SCE was entitled to a credit for sales tax Peabody paid, this credit does not apply to the Arizona Transaction Privilege Tax because in this context it is not a sales tax, it is levied on a seller's, Peabody's, gross receipts rather than each individual sale and is for the privilege of doing business in the State of Arizona. *Arizona Dep't. of Revenue v. Robinson's Hardware,* 721 P.2d 137, 141 (Ariz. Ct. App. 1986).

28. SCE may not exclude taxes Peabody paid to the federal government from the measure of use tax. In the contract between the parties SCE agreed to reimburse Peabody for taxes and fees that Peabody paid to the federal government. This reimbursement was a part of the purchase price SCE paid to Peabody for the coal slurry. Peabody was the actual taxpayer, not SCE. SCE paid no direct tax to the federal government. The State of Nevada was entitled to collect use tax measured by the entire price of the coal slurry. HELLERSTEIN, STATE TAXATION, ¶ 17.08 (3d ed. 2013).

29. SCE claims that the federal taxes should not have been included in the sales price subject to Nevada use tax under NRS 372.025. Prior to its amendment NRS 372.025 provided,

1. "Gross receipts" means the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:

(a) The cost of the property sold. However, in accordance with such rules and regulations as the Tax Commission may prescribe, a deduction may be taken if the retailer has purchased property for some other purpose than resale, has reimbursed his vendor for tax which the vendor is required to pay to the State or has paid the use tax with respect to the property, and has resold the property before making any use of the property other than retention, demonstration or display while holding it for sale in the regular course of business. If such a deduction is taken by the retailer, no refund or credit will be allowed to his vendor with respect to the sale of the property.

(b) The cost of the materials used, labor or service cost, interest paid, losses or any other expense.

(c) The cost of transportation of the property before its sale to the purchaser.

2. The total amount of the sale or lease or rental price includes all of the following:

(a) Any services that are a part of the sale.

(b) All receipts, cash, credits and property of any kind.

(c) Any amount for which credit is allowed by the seller to the purchaser.

3. "Gross receipts" does not include any of the following:

(a) Cash discounts allowed and taken on sales.

(b) The sale price of property returned by customers when the full sale price is refunded either in cash or credit, but this exclusion does not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned.

(c) The price received for labor or services used in installing or applying the property sold.

(d) The amount of any tax, not including any manufacturers' or importers' excise tax, imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer.

4. For purposes of the sales tax, if the retailers establish to the satisfaction of the Tax Commission that the sales tax has been added to the total amount of the sale price and has not been absorbed by them, the total amount of the sale price shall be deemed to be the amount received exclusive of the tax imposed.

In the contract between the parties, SCE agreed to reimburse Peabody for taxes that Peabody paid to the federal government. This reimbursement was a part of the price SCE paid to Peabody for the coal slurry. Again, Peabody was the actual taxpayer, not SCE. The State of Nevada was entitled to collect sue tax measured by the entire price of the coal slurry. HELLERSTEIN, STATE TAXATION, ¶ 17.08 (3d ed. 2013).

Further, the federal taxes paid by Peabody do not fall within the exclusion in NRS 372.025(3)(d) because the taxes did not concern retail sales. The fee imposed by the Surface Mining Control & Reclamation Act of 1977 is an assessment or excise tax on all coal produced for sale by surface or underground mining. *United States v. Tri-No Enterprises, Inc.*, 819 F.2d 154, 158 (7th Cir. 1987). The tax imposed by the Black Lung Benefits Revenue Act of 1977 is also an excise tax. *See e.g. Warrior Coal Mining Co. v. U.S.*, 72 F.Supp. 2d 747 (W.D. Ky. 1999)

and *Costain Coal Inc. v. U.S.,* 126 F.3d 1437 (C.A. Fed. 1997). Since the federal taxes Peabody paid pursuant to the Surface Mining Control & Reclamation Act of 1977 and the Black Lung Benefits Revenue Act of 1977 are excise taxes and not retail sales taxes, the exclusion does not apply.

30. SCE is not entitled to exclude from the measure of use tax taxes Peabody and/or Black Mesa paid to the Navajo Nation and Hopi tribe. In the contract between the parties SCE agreed to reimburse Peabody for taxes that Peabody and/or Black Mesa paid to the Navajo nation and/or the Hopi Tribe. This reimbursement was a part of the price SCE paid to Peabody for the coal slurry. Again, Peabody was the actual taxpayer, not SCE. The State of Nevada was entitled to collect use tax measured by the entire price of the coal slurry. HELLERSTEIN, STATE TAXATION, ¶ 17.08 (3d ed. 2013)

As set forth above, NRS 372.065(3)(d) excludes, "the amount of any tax, not including any manufacturers' or importers' excise tax, imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer" from the definition of sales price. The Navajo Nation Business Activity Tax and Possessor Interest Tax do not fall within this exclusion because these are not taxes imposed with respect to retail sales. The Business Activity Tax imposed by the Navajo Nation is a tax on the privilege of doing business on the Navajo Nation lands. *Pittsburg & Midway Coal Mining Co., v. Watchman,* 52 F.3d 1531, 1535 (10th Cir. 1995). The Possessory Interest Tax levied by the Navajo Nation is based on the value of property leased on tribal lands. *Peabody Coal Co. v. Navajo Nation,* 75 F.3d 457, 468 (9th Cir. 1996). These are not retail sales taxes and there is no basis for not including them in the sales price of the property used to compute the measure of the use tax.

31. SCE is not entitled to exclude from the measure of use tax taxes paid to the state of Arizona. SCE argues that it should not have paid use tax on amounts paid to Peabody for the

Arizona Ad Valorem Tax and the Arizona Transaction Privilege Tax, "because such amounts are not includable in the sales price subject to Nevada use tax under NRS 372.065." This argument fails because these taxes are not taxes on retail sales.

In other words, sales price does not include a tax imposed on a retail sale. The exclusion does not apply to Peabody's sales of coal to SCE because the taxes Peabody paid were not taxes on retail sales. The Arizona Transaction Privilege is not a tax on a retail sale. *See Arizona Dept. of Revenue v. Robinson's Hardware*, 721 P.2d 137 (Ariz. App. 1986); *In re Inselman,* 334 B.R. 267 (D.Ariz., 2005); and, *City of Phoenix v. West Publishing Co.,* 712 P.2d 944, 946-47 (Ariz. Ct. App. 1986). The Arizona Ad Valorem Tax is also not a sales tax; rather, it is a property tax paid to the State of Arizona based upon the assessed valuation of the property. *Bahr v. State of Arizona,* 985 P.2d 564, 565 (Ariz. Ct. App. 1999).

As such SCE may not exclude from the measure of use tax, taxes that Peabody paid to the state of Arizona.

32. SCE is not entitled to exclude transportation costs from the measure of use tax. Prior to its amendment in 2002 NAC 372.101 provided,

1. Except as otherwise provided in subsection 3, any charge for freight, transportation or delivery included in the sale of tangible personal property is subject to sales and use taxes.
2. Any charge for freight, transportation or delivery that appears on the invoice of the seller is part of the selling price even if stated separately and is not deductible from the price of the property as shown on the invoice.
3. A charge for freight, transportation or delivery is not taxable if:
   a. It is invoiced to the purchaser by the freight carrier; and
   b. Title to the property passes before shipment.

A charge for freight, transportation or delivery that is not connected with the sale of tangible personal property is a charge for a service and is not subject to sales and use taxes.

Transportation costs were included in the calculation of use tax at the time SCE incurred the tax liability. Therefore, SCE is not entitled to exclude from the sales price the amounts it paid for transportation costs.

33. Based on the evidence before the court, SCE is not entitled to any refund on its payment use tax on its consumption of a coal slurry product at the Mohave Generating Station in Nevada.

34. Based on this decision, this Court does not have to reach a decision on whether the coal lost its identity when it became coal slurry with the application of the transformation process.

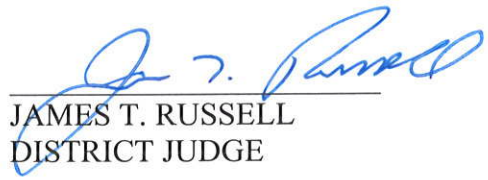
DECISION

Based on the foregoing and good cause appearing,

IT IS HEREBY ORDERED that the relief prayed for by the Plaintiff in its Second Amended Complaint is DENIED and judgment is awarded to the Defendant.

IT IS SO ORDERED.

Dated this 17th day of December, 2014.



JAMES T. RUSSELL
DISTRICT JUDGE

CERTIFICATE OF MAILING

The undersigned, an employee of the First Judicial District Court, hereby certifies that on the 17th day of December, 2014, I served the foregoing to counsel of record, as follows:

☒ By depositing a copy thereof in the United States Mail at Carson City, Nevada, postage paid, addressed as follows:

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