BOARD OF TAX APPEALS
STATE OF LOUISIANA
LOCAL TAX DIVISION

KELLOGG BROWN & ROOT, LLC

VS. DOCKET NO. L01016

JOSEPH P. LOPINTO, III, SHERIFF AND EX-OFFICIO TAX COLLECTOR FOR THE PARISH OF JEFFERSON, AND THE JEFFERSON PARISH SHERIFF'S OFFICE, BUREAU OF REVENUE AND TAXATION, SALES AND USE TAX DIVISION

CONSOLIDATED WITH

JOSEPH P. LOPINTO, III,
SHERIFF & EX-OFFICIO TAX COLLECTOR
FOR THE PARISH OF JEFFERSON

VS. DOCKET NO. L01015

DYNO NOBEL LOUISIANA
AMMONIA, LLC

AND

DYNO NOBEL LOUISIANA
AMMONIA, LLC

VS. DOCKET NO. L01014

JOSEPH P. LOPINTO, III,
SHERIFF AND EX-OFFICIO TAX COLLECTOR
FOR THE PARISH OF JEFFERSON,
STATE OF LOUISIANA

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JUDGMENT ON CROSS-MOTIONS FOR SUMMARY JUDGMENT
WITH REASONS

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On September 19, 2024, this matter came before the Board for hearing on the Cross-Motions for Summary Judgment filed by Joseph P. Lopinto, III, Sheriff and Ex-Officio Tax Collector for the Parish of Jefferson, and the Jefferson Parish Sheriff's Office, Bureau of Revenue and Taxation, Sales and Use Tax Division (collectively referred to as the "Collector"), Kellogg, Brown & Root, LLC ("KBR"), and Dyno Nobel Louisiana Ammonia, LLC ("DNLA") with Local Tax Judge Cade R. Cole presiding. Present at the hearing were: Cheryl M. Kornick, Caroline D. Lafourcade, and John P. Leblanc, attorneys for KBR; David R. Cassidy, Nicole G.

Frey, and Kelsey C. Luckett, attorneys for DNLA; and Kenneth C. Fonte and John A. Kopfinger, Jr., attorneys for the Collector. At the conclusion of the hearing, the Board took the matter under advisement. The Board now issues Judgment in accordance with the attached Written Reasons.

IT IS ORDERED, ADJUDGED, AND DECREED that the Collector's Motion for Partial Summary Judgment is DENIED.

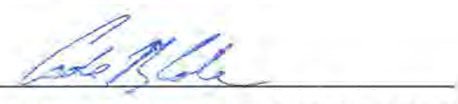
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that KBR's Motion for Summary Judgment is GRANTED IN PART. The Board holds that the MM&E Exclusion does not require that each item of excluded property physically contact the raw material in the manufacturing process. If an item of Tangible Personal Property is shown to have direct and immediate effect on the actual process of manufacturing, and otherwise meets all the criteria for the MM&E Exclusion, then that item is subject to the MM&E Exclusion.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that KBR's Motion for Summary Judgment is DENIED IN PART. The Board holds that the MM&E Exclusion requires more than that an item of Tangible Personal Property merely be necessary for the manufacturing process and used in that process.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that DNLA's Motion for Partial Summary Judgment is DENIED. Genuine disputes of material fact exist as to which items of Tangible Personal Property qualify for the MM&E Exclusion.

Judgment Rendered and Signed at Baton Rouge, Louisiana, on this 30th day of September, 2024.

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE

BOARD OF TAX APPEALS
STATE OF LOUISIANA
LOCAL TAX DIVISION

KELLOGG BROWN & ROOT, LLC

VS. DOCKET NO. L01016

JOSEPH P. LOPINTO, III, SHERIFF AND EX-OFFICIO TAX COLLECTOR FOR THE PARISH OF JEFFERSON, AND THE JEFFERSON PARISH SHERIFF'S OFFICE, BUREAU OF REVENUE AND TAXATION, SALES AND USE TAX DIVISION

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JOSEPH P. LOPINTO, III,
SHERIFF & EX-OFFICIO TAX COLLECTOR
FOR THE PARISH OF JEFFERSON

VS. DOCKET NO. L01015

DYNO NOBEL LOUISIANA
AMMONIA, LLC

AND

DYNO NOBEL LOUISIANA
AMMONIA, LLC

VS. DOCKET NO. L01014

JOSEPH P. LOPINTO, III,
SHERIFF AND EX-OFFICIO TAX COLLECTOR
FOR THE PARISH OF JEFFERSON,
STATE OF LOUISIANA

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WRITTEN REASONS FOR JUDGMENT
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

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On September 19, 2024, this matter came before the Board for hearing on the Cross-Motions for Summary Judgment filed by Joseph P. Lopinto, III, Sheriff and Ex-Officio Tax Collector for the Parish of Jefferson, and the Jefferson Parish Sheriff's Office, Bureau of Revenue and Taxation, Sales and Use Tax Division (collectively referred to as the "Collector"), Kellogg, Brown & Root, LLC ("KBR"), and Dyno Nobel Louisiana Ammonia, LLC ("DNLA") with Local Tax Judge Cade R. Cole presiding. Present at the hearing were: Cheryl M. Kornick, Caroline D.

Lafourcade, and John P. Leblanc, attorneys for KBR; David R. Cassidy, Nicole G. Frey, and Kelsey C. Luckett, attorneys for DNLA; and Kenneth C. Fonte and John A. Kopfinger, Jr., attorneys for the Collector. At the conclusion of the hearing, the Board took the matter under advisement. The Board now issues these Written Reasons for the foregoing Judgment.

Background:

On April 16, 2013, KBR entered into a "Contract for the Dyno Nobel Louisiana Ammonia Project" (the "Contract") with DNLA for the construction of an Ammonia Plant (the "Plant") in Jefferson Parish. Under the terms of the Contract, KBR agreed to design, execute and complete the construction of the Plant. The Contract further made KBR responsible for delivering all goods,[1] "Plant,"[2] and materials[3] to the "Works"[4] Site (referred to herein as the "Worksite"). Upon delivery to the Worksite, the apparatus, machinery, and anything else intended to form, or forming part of, the permanent works being designed and executed by KBR under the Contract became the property of DNLA.

Although the Contract specified that title transferred on delivery, it also specified that KBR retained care, custody, and control of the property until DNLA took over operation of the Plant. Under the Contract, said take-over occurred upon DNLA's issuance of a Taking-Over Certificate. Issuance of the Taking-Over

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1 The Contract defines Goods as "Contractor's Equipment, Materials, Plant and Temporary Works, or any of them as appropriate." Contractor's Equipment is defined as "all of the Contractor's apparatus, machinery, vehicles and other things required for the execution and completion of the Works and the remedying of any Defects. . . .[E]xclud[ing] Temporary Works, Owner's Equipment (if any), Plant, Materials and any other things intended to form or forming part of the Permanent Works."

2 Plant is defined as "apparatus and machinery intended to form or forming part of the Permanent Works."

3 Materials are defined as "things of all kinds (other than Plant) intended to form or forming part of the Permanent Works, including the supply-only materials (if any) to be supplied by the Contractor under this Contract."

4 The Contract defines Works Site as "those places within the CCC Site where the Permanent Works are to be executed and to which Plant and Materials are to be delivered, and any other adjacent or non-adjacent tract specifically delineated as the Project ISBL in Annex I [Site Plan]." Works is defined as the "Permanent Works and the Temporary Works, or either of them as appropriate." The CCC Site is defined by an "area designated as such on the Site Plan included in Annex I [Site Plan]." Permanent Works are defined as "the permanent works to be designed and executed by the Contractor under this Contract, all in accordance with the scope set out in the Owner's Requirements." Temporary Works are defined as "all temporary works of every kind (other than Contractor's Equipment) required on the Works Site for the execution and completion of the Permanent Works and the remedying of Defects."

Certificate was predicated on completion of the work and a successful 72-hour test-run of the Plant. During the test run, KBR personnel, working with DNLA personnel, ran the plant at operational capacity and produced ammonia.[5] Construction of the Plant began in 2013 and was completed in October of 2016 (the "Construction Period").

Throughout the Construction Period, an agency relationship existed whereby KBR purchased, leased, and/or rented property that is alleged to be Manufacturing Machinery & Equipment ("MM&E") on behalf of DNLA as DNLA's agent. The factual existence of said agency relationship is not disputed. The agency relationship was required by the Contract. The agency relationship is also evidenced in the summary judgment record by two LDR Forms R-1072, Manufacturer's Designation of Mandate. The LDR Forms certify that DNLA authorized KBR to purchase MM&E on its behalf.[6]

DNLA applied for and received Manufacturer's Certificates from both LDR and the Collector. The Manufacturer's Certificates issued by the Collector and introduced on summary judgment cover the period of July 31, 2014, through March 31, 2022. The Business Activity Classification shown on each of the Collector's Certificates is "Nitrogenous Fertilizer Manufacturing." The Manufacturer's Certificates issued by LDR are effective from March 1, 2013, through March 31, 2019.

The Collector conducted sales and use tax audits of both KBR and DNLA (collectively, the "Audit"). The audit of KBR was for the tax periods beginning January 1, 2013, through and including June 30, 2016 (the "KBR Audit Period"), and the audit of DNLA was for March 1, 2013, through and including September 30, 2016 (the "DNLA Audit Period") (collectively, the "Audit Periods"). The outcome of the Audit was that the Collector determined, among other things, that the certain

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[5] Per the Contract, all ammonia produced during the test run became the property of DNLA. Said ammonia was later sold to others.

[6] Two Forms R-1072 were introduced into the record on summary judgment. The first Form states that its effective dates are March 1, 2013, through March 31, 2016. The effective date shown on the second Form is March 1, 2016, with no expiration date.

purchases of goods for construction of the Plant did not qualify for the MM&E Exclusion provided for in Jefferson Parish Code of Ordinances Chapter 35, Article II, Section 35-71 ("Section 35-71"). More specifically, the Collector concluded that the items so purchased were for KBR's use as a contractor, and that neither KBR nor DNLA were manufacturers engaged in manufacturing while the Plant was still under construction during the Audit Periods.

On February 12, 2020, the Collector issued a Notice of Intent to Assess to KBR in the amount $20,588,147.38 KBR requested an administrative protest hearing. On July 31, 2020, the Collector issued an "Audit and Assessment Procedural Guideline" with an algorithm for determining which "Items of Machinery and Equipment (M&E) May be Qualified for Classification as Excludable Manufacturing Machinery and Equipment (QMM&E) Pursuant to La. R.S. 47:301 (3)(i)(ii), La. R.S. 47:301(13)(k)(i); and La. R.S. 47:301(28)" [sic] (the "Guideline"). On August 17, 2020, the Collector issued a Notice of Intent to Assess to DNLA in the amount of $1,434,325.48 Of that amount, DNLA protested $258,076.12, plus interest. On November 13, 2020, the Collector issued an Amended Notice of Intent to Assess to DNLA in the amount of $9,340,969.10.

On November 6, 2020, DNLA filed a Petition for Declaratory Judgment with the Board. DNLA's Declaratory Judgment Petition was docketed as No. L01014. DNLA seeks a declaration that the Guideline is invalid. On November 13, 2020, the Collector filed a Petition for Recovery of Delinquent Taxes against DNLA. The Collector's Petition was docketed as No. L01015. Also on November 13, 2020, the Collector issued a Notice of Assessment to KBR in the amount of $13,618,090.08 ("NoA"). KBR petitioned the Board for redetermination of the NoA, which Petition was docketed as No. L01016. The Audit and underlying transactions at issue in all three matters are substantially identical. Accordingly, on KBR's motion, and after all three parties had reached an agreement, the three docket numbers were consolidated for all purposes by Order of the Board issued January 11, 2024.

Each party has moved for partial summary judgment. The Collector prays for partial summary judgment declaring that the purchases of TPP "made by KBR – whether as agent of Dyno Nobel or as a dealer for resale to Dyno Nobel – and delivered into Jefferson Parish between January 1, 2013, and June 30, 2016 and stored for use in the construction" of the Plant are not excluded from Jefferson Parish local sales and use taxation. KBR prays for partial summary judgment to "clarify the law" regarding the MM&E Exclusion. DNLA joins in KBR's motion and also prays for an order "abating the assessment" on items allegedly purchased "by and on behalf of DNLA" on the basis of the MM&E Exclusion.

Summary Judgment Standard:

A motion for summary judgment is a procedural device used when there is no genuine issue of material fact for all or part of the relief prayed for by a litigant. *Samaha v. Rau*, 07-1726 (La. 2/26/08), 977 So.2d 880, *citing Duncan v. U.S.A.A. Ins. Co.*, 06-363 (La. 11/29/06), 950 So.2d 544; *see* La. C.C.P. Art. 966. A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B); *Samaha*, 2007-1726, p. 4, 977 So.2d at 883. On a motion for summary judgment, the initial burden of proof rests with the mover. *Koehl v. RLI Ins. Co.*, 22-370, p. 4 (La. App. 5 Cir. 5/24/23), 367 So.3d 122, *reh'g denied* (June 29, 2023), *writ denied*, 2023-01057 (La. 12/5/23), 373 So.3d 980, *and writ denied*, 2023-01052 (La. 12/5/23), 373 So.3d 981. However, La. C.C.P. 966(D)(1) provides:

> [I]f the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law.

Id.; *Bauman v. Iniguez*, 22-88 (La. App. 5 Cir. 12/21/22), 355 So.3d 151. A material fact is one that ensures or precludes recovery, bears on a party's ultimate success, or is determinative of the legal dispute. *Hines v. Garrett*, 04-0803, p. 1 (La. 6/25/04), 876 So.2d 764, 765. A genuine issue is one upon which reasonable persons could disagree. *Larson v. XYZ Ins. Co.*, 16-0745, pp. 6-7 (La. 5/3/ 17), 226 So.3d 412, 416.

Discussion:

I. The Collector's Motion for Partial Summary Judgment

The Collector's Motion presents two legal issues concerning the MM&E Exclusion under state law and Section 35-71. First, the Collector argues that the items at issue were not purchased by a "Manufacturer." The Collector's rationale is that DNLA was not manufacturer during the Audit Periods because the Plant was not yet in operation, and that KBR was not a manufacturer because it was a contractor engaged in the construction of the manufacturing Plant.

Second, the Collector argues that the Jefferson Parish version of the MM&E Exclusion only applies to use tax and does not apply to sales tax. The Collector points out that the Jefferson Parish MM&E Exclusion in Section 35-71 only reduces the "Cost Price" of qualifying TPP. Under state law, Cost Price is a term that defines an items taxable value for purposes of use tax. Whereas, an item's taxable value for purposes of sales tax is defined as its "Sales Price." Section 35-71 does not use the term "Sales Price," which the Collector interprets to mean that the MM&E Exclusion does not apply to Jefferson Parish sales tax.

(A) Purchases by a "Manufacturer"

Section 35-71 does not define "Manufacturer." However, the Jefferson Parish Sales Tax Ordinances adopt the definitional provisions of La. R.S. 47:301 by reference. Jefferson Parish Code of Ordinances Chapter 35, Article II, Section 35-17. In relevant part, the state statute defines a manufacturer as a "person whose principal activity is manufacturing, as defined in this Subparagraph, and who is assigned by the Louisiana Workforce Commission a North American Industrial Classification System code within . . . the manufacturing Sectors 31-33." La. R.S.

47:301(3)(i)(ii)(bb)(I). In this case, DNLA undisputedly had obtained a NAICS code within Sectors 31-33. The issue here is whether DNLA, and by virtue of its agency relationship, KBR, engaged in manufacturing as their principal activity. For this purpose, the state statutes define "Manufacturing" as:

> [P]utting raw materials through a series of steps that brings about a change in their composition or physical nature in order to make a new and different item of tangible personal property that will be sold to another. Manufacturing begins at the point at which raw materials reach the first machine or piece of equipment involved in changing the form of the material and ends at the point at which manufacturing has altered the material to its completed form. Placing materials into containers, packages, or wrapping in which they are sold to the ultimate consumer is part of this manufacturing process. Manufacturing, for purposes of this Subparagraph, does not include any of the following:
>
> (I) Repackaging or redistributing.
>
> (II) The cooking or preparing of food products by a retailer in the regular course of retail trade.
>
> (III) The storage of tangible personal property.
>
> (IV) The delivery of tangible personal property to or from the plant.
>
> (V) The delivery of tangible personal property to or from storage within the plant.
>
> (VI) Actions such as sorting, packaging, or shrink wrapping the final material for ease of transporting and shipping.[7]

The statutes do use the present tense rather than the future tense, stating a manufacturer is a person who "is" engaged in manufacturing. Furthermore, the definition of manufacturing provides a point in time when manufacturing begins: when the raw materials reach the first piece of MM&E in the transformative process.

The Collector's view effectively nullifies the MM&E Exclusion in almost all applications. Most obviously, the exclusion would be eliminated for any new businesses. No person who did not already have an operating manufacturing facility would be able to qualify as a manufacturer. The Collector's interpretation would also have odd consequences for existing manufacturers. Even temporary inactivity at an otherwise operational facility would apparently preclude application of the MM&E Exclusion. A manufacturer would not be able to claim the Exclusion if their

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[7] La. R.S. 47:301(3)(i)(ii)(cc).

facility was shut down during a natural disaster, while making repairs, or while installing the very same type of equipment that the MM&E Exclusion is supposed to apply to.

Second, Jefferson Parish Ordinance No. 22572, adopted in 2005, pursuant to La. R.S. 47:337.10, states the Council's intent to "help Jefferson Parish become more competitive in attracting **new** manufacturers while providing current manufacturers with a cost incentive to remain here in Jefferson Parish." [emphasis added]. The Jefferson Parish Ordinance accords with the testimony given before the House Ways and Means Committee hearing[8] on the 2004 1st Ext. Sess. HB 2 (subsequently enacted as 2004 1st Ext. Sess. Act 1): the MM&E Exclusion is intended to attract new businesses and incentivize the creation of manufacturing facilities and jobs in Louisiana. Denying the MM&E Exclusion to new businesses runs counter to the expressed legislative intent. The Collector's interpretation also frustrates the stated intent of the Jefferson Parish Council in adopting the Exclusion.

For the foregoing reasons, the Board finds that DNLA was a "Manufacturer" for purposes of the MM&E Exclusion during the Audit Period. The question then becomes whether the Exclusion applies to purchases made by KBR as DNLA's agent. The Board has found no Louisiana cases directly addressing a contractor's purchases of MM&E as agent for a manufacturer. However, Louisiana Courts have given effect to an agency relationship in cases involving entities, such as government agencies, that are totally exempt from sales tax. *E.g. F. Miller & Sons, Inc. v. Calcasieu Par. Sch. Bd.*, 2002-1680, p. 2 (La. 2/25/03), 838 So.2d 1269, 1270; *see Akers v. Bernhard Mech. Contractors, Inc.*, 48,871 (La. App. 2 Cir. 4/16/14, 8–9), 137 So.3d 818, 826, *writ denied*, 2014-1040 (La. 9/12/14), 148 So.3d 931, and *writ denied*, 2014-1100 (La. 9/12/14), 148 So.3d 934, and *writ denied*, 2014-1103 (La. 9/12/14), 148 So.3d 935. Agency relationships have been given effect in other tax cases as well. *See J-W Power Co. v. State ex rel. Department of Revenue & Taxation*,

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[8] Available at https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2004/mar/0308_04_WM.

2010-1598, (La. 3/15/11) 59 So.3d 1234 (allowing mandatary to maintain a payment under protest action on behalf of principals); *Bridges v. X Commc'ns, Inc.*, 03-441, p. 12 (La. App. 5 Cir. 11/12/03), 861 So.2d 592, 599, *writ denied*, 2003-3431 (La. 2/20/04), 866 So.2d 830 (recognizing officer's authority to bind corporation to a prescription waiver).

Additionally, LDR permits a manufacture to designate a purchasing agent for purposes of the MM&E Exclusion. LAC 61:I.4301(C)("Cost Price")(h)(vi) provides:

> Persons acting as mandataries (agents) of manufacturers can claim the exclusion on purchases of qualifying machinery and equipment that will ultimately be used by a business assigned an eligible NAICS code by the Department of Labor. The mandatary must obtain the manufacturer's exclusion Form R-1071 and provide it, with a copy of the contract of mandate or the Department's Form R-1072 (Manufacturer's Designation of Mandate), to the seller at the time of purchase.

The Board sees no reason to depart from the general principles of agency and create an exception to the norm for businesses in Jefferson Parish. Accordingly, the Board finds that the MM&E Exclusion is applicable to purchases of TPP made by KBR pursuant to the mandate granted to it by DNLA, provided that those purchases satisfy all of the requirements of the Exclusion.

Finally, the Board observes that any ambiguity in the MM&E Exclusion, must be construed in favor of the taxpayers and against the Collector. A tax exclusion is a provision that abrogates the scope of taxation *ab initio*. *Harrah's Bossier City Inv. Co., LLC v. Bridges*, 2009-1916, p. 10 (La. 5/11/10), 41 So.3d 438, 446. A tax exemption on the other hand creates an exception for a transaction that would otherwise be taxable. *Id.* Unlike an exclusion, a tax exemption is a special privilege and any legal ambiguity therein is construed against the taxpayer. *Vulcan Foundry, Inc. v. McNamara*, 414 So.2d 1193, 1197 (La.1982). Here, while the Collector's reading of the MM&E Exclusion is understandable, it is not appropriate considering this interpretive maxim. The Board must adopt the reasonable interpretation offered by the taxpayers.

(B) "Cost Price"

The Collector argues that Jefferson Parish only adopted the MM&E Exclusion with respect to use tax. The Collector points out that Section 35-71 only mentions "Cost Price" The Ordinance states:

> (a) In accordance with LSA-R.S. 47:337.10(1), for purposes of the imposition of the sales and use tax levied by the Parish of Jefferson, the cost price of machinery and equipment used by a manufacturer in a plant facility predominately and directly in the actual manufacturing for agricultural purposes or the actual manufacturing process of an item of tangible personal property, which is for ultimate sale to another and not for internal use, at one (1) or more fixed locations within Jefferson Parish, the cost price shall be reduced by one hundred (100) percent beginning January 1, 2006.

The State MM&E Exclusion has separate provisions for use tax, which is based on "Cost Price," and sales tax, which is based "Sales Price." *See* La. R. S. 47:301(3)(i)(i) and (k)(i). Furthermore, the legislature granted local taxing authorities the ability to partially adopt the MM&E Exclusion, including the authority to adopt the MM&E Exclusion as to the "sales, cost, or lease and rental price of manufacturing machinery and equipment." La. R.S. 47:337.10(I)(1).

Adopting the MM&E Exclusion only for use tax would put Jefferson Parish businesses at a competitive disadvantage. Sales and use taxes are complementary taxes.[9] The use tax puts businesses within Jefferson Parish on the same footing as businesses outside the jurisdiction who do not have to collect Jefferson Parish's sales tax. Manufacturers can purchase MM&E from an out-of-parish vendor where the Jefferson Parish sales tax will not apply, and then import that property into Jefferson Parish. According to the Collector's interpretation of the law, MM&E imported in that manner would not be subject to use tax, but would be subject to sales tax if the manufacturer had purchased the same MM&E from a business

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[9] As stated by the Louisiana Supreme Court:

> Use tax developed because local merchants were disadvantaged when local consumers purchased similar goods in a state where no sales tax or a lower tax was imposed. The states realized that they would lose business and their sales tax base would be eroded because of this lack of tax parity between local purchases and purchases made in non-tax states. The use tax was enacted to address these concerns. The use tax is collected against a taxpayer's use, storage, or consumption of property, typically purchased out of state, that would have been subject to a sales tax in the state of use had the goods been bought within the taxing jurisdiction

Word of Life Christian Ctr. v. West, 2004-1484, p. 10 (La. 4/17/06), 936 So.2d 1226, 1233.

within Jefferson Parish. As a result, it would become more expensive for manufacturers to buy from Jefferson Parish businesses. This would defeat the purpose of the use tax and it is not what the legislature and Jefferson Parish Council provided for in adopting the MM&E Exclusion.

Moreover, when read in context with the other Jefferson Parish sales tax Ordinances, it is apparent that the term Cost Price is used interchangeably with Sales Price. As noted by DNLA in their Opposition Memorandum, two thirds of the Parish's sales tax rate is levied by Sections 35-23(a)(1), 35-24(a)(1), 35-24.1(a)(1) exclusively on the "cost price" of an item. If that term is meant to exclusively refer only to Use Tax, then the Jefferson Parish sales tax rate would actually be 1%. It is obvious that Parish's sales tax rate is intended to be 3% and that "Cost Price" is used synonymously with "Sales Price."

(C) "Conclusion on the Collector's Motion

The Collector's arguments defeat the expressed intent for the MM&E Exclusion to incentivize new businesses and to make Jefferson Parish more competitive in attracting manufacturers. The Board is not compelled to accept this reading of the Exclusion when there is a more reasonable interpretation available that is supported by reading the law in the context of all of the related statutes and ordinances. In addition, contracts of mandate have generally been given effect in Louisiana tax law cases and there is no compelling reason to create a special exception in this case. As such, the denial of the Collector's Motion for Partial Summary Judgment is appropriate.

II. KBR's Motion for Partial Summary Judgment

KBR asks the Board for a ruling holding that the MM&E Exclusion applies to property that is integral to, and used in, the manufacturing process that changes a raw material into an end product for sale to another. KBR argues that the MM&E Exclusion does not require that every individual item actually touch and change the material. Rather, KBR would have the Board hold that the overall process must effect said change and that items which are part of that process according to an

"integrated plant" theory are excluded from tax. KBR primarily relies on the Board's ruling in *Cora-Texas Mfg. Co., Inc. v. Robinson*, BTA Docket No. 11065D (La. Bd. Tax App. 12/5/19), 2019 WL 7605424 (Order and Written Reasons) (hereafter "*Cora-Texas (BTA)*"), and the affirming opinion of the First Circuit in *Cora-Texas Mfg. Co., Inc. v. Robinson*, 2020-0972, (La. App. 1 Cir. 4/16/21), 323 So.3d 886, *writ denied*, 2021-00684 (La. 9/27/21), 324 So.3d 103 (hereafter "*Cora-Texas (1st Cir.)*").

KBR's reliance on these decisions is misplaced. First, the Board decided *Cora-Texas (BTA)* on the merits, not on summary judgment. The Board reached its decision only after weighing competing witness testimony. To do that, the Board was required to evaluate the credibility of the witnesses at trial. Such determinations are not permitted at the summary judgment stage.

Second, the majority of the claims involved trucks and trailers that were expressly carved out of the MM&E Exclusion by La. R.S. 47:301(3)(i)(aa)(II)(ccc) and (ddd). With respect to other property, the Board weighed the evidence for each particular category of sampled invoices, and considered each individual invoice for property that was uncategorized. The Board did not reach its decision on these items as a matter of law based on an "integrated plant" theory. In fact, the Board's ruling makes no mention of an "integrated plant."

In interpreting the law, the Board relied on the language of the statute and LDR's implementing regulation. The Board stated:

> La. R.S. 47:301(3)(ii)(ff) defines "used directly" as "used in the actual process of manufacturing." La. Admin. Code 61:I.4301(h)(iii)(a) states that "used directly" describes the manner in which the MM&E alters the physical characteristics of the product during the manufacturing process. According to regulation, non-taxable MM&E must have "an immediate effect upon those products manufactured for ultimate sale to another person." *Id.*[10]

The First Circuit held that the Board correctly interpreted the law and did not commit manifest error in its findings of fact. *Cora-Texas (1st. Cir.)*, 2020-0972 at p. 10, 323 So.3d at 893.

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[10] *Cora-Texas (BTA)*, at *5.

Under the law, an item must be "used directly" in the manufacturing process to qualify as MM&E. "Used directly" is further defined to mean used in the "actual process of manufacturing." The manufacturing process is one that changes a raw material into a finished product. Thus, the language of the statute requires MM&E to be directly involved in the actual process that causes a change in the material. In addition, LDR's Regulations advise that the "used directly" language requires that the item have an "immediate" effect on the raw materials. However, DNLA would interpret the law to only require that an item of TPP be "integral" or necessary to the manufacturing process and used in that process. The Board does not agree with that interpretation of the language in the statute. The legislature could have required that an item only be "used," but it did not do so.

However, the law does not explicitly require physical contact between the MM&E and a raw material. If an item of TPP is shown to have direct and immediate effect on the actual process of manufacturing, and otherwise meets all the criteria for MM&E, then it is MM&E. The necessary proof will depend on the facts of the particular manufacturing process and the particular item at issue. This is fact-intensive inquiry that will normally not be suited for resolution on summary judgment. In this case, the summary judgment record contains competing affidavits from experts that disagree over which items have a direct and immediate effect on the ammonia manufacturing process. Accordingly, the Board holds that KBR is not entitled to summary judgment as prayed for.

III. DNLA's Motion for Partial Summary Judgment

DNLA asks the Board to rule on whether eleven enumerated categories of items qualify as MM&E.[11] "Manufacturing machinery and equipment" is defined as

> [T]angible personal property or other property that is eligible for depreciation for federal income tax purposes and that is used as an integral part in the manufacturing of tangible personal property for sale. "Machinery and equipment" shall also mean tangible personal property or other property that is eligible for depreciation for federal income tax purposes and that is used as an integral part of the production, processing, and storing of food and fiber or of timber.

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[11] In addition, DNLA joins in KBR's request for a ruling on the legal interpretation of the MM&E Exclusion. For the reasons explained *supra*, the Board will deny that request as prayed for.

(I) Machinery and equipment, for purposes of this Subparagraph, also includes but is not limited to the following:

(aaa) Computers and software that are an integral part of the machinery and equipment used directly in the manufacturing process.

(bbb) Machinery and equipment necessary to control pollution at a plant facility where pollution is produced by the manufacturing operation.

(ccc) Machinery and equipment used to test or measure raw materials, the property undergoing manufacturing or the finished product, when such test or measurement is a necessary part of the manufacturing process.

(ddd) Machinery and equipment used by an industrial manufacturing plant to generate electric power for self consumption or cogeneration.

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(II) Machinery and equipment, for purposes of this Subparagraph, does not include any of the following:

(aaa) A building and its structural components, unless the building or structural component is so closely related to the machinery and equipment that it houses or supports that the building or structural component can be expected to be replaced when the machinery and equipment are replaced.

(bbb) Heating, ventilation, and air-conditioning systems, unless their installation is necessary to meet the requirements of the manufacturing process, even though the system may provide incidental comfort to employees or serve, to an insubstantial degree, nonproduction activities.

(ccc) Tangible personal property used to transport raw materials or manufactured goods prior to the beginning of the manufacturing process or after the manufacturing process is complete.

(ddd) Tangible personal property used to store raw materials or manufactured goods prior to the beginning of the manufacturing process or after the manufacturing process is complete. . . .

(ff) "Used directly" means used in the actual process of manufacturing or manufacturing for agricultural purposes.[12]

1. Catalysts

DNLA argues that the Catalysts are depreciable, and have a useful life of many years, and further stipulates that the Catalysts do not qualify for the further processing exclusion. The Collector maintains that items in this category are not machinery or equipment. DNLA acknowledges that fact, but contends that the Catalysts are "other" property that can qualify for the MM&E Exclusion.

The Process Description introduced into the record on summary judgment shows that several different catalysts are used in a number of different chemical

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12 La. R.S. 47:301(3)(i)(ii)(aa)(I)(aaa) – (ddd), (II), (ff).

reactions throughout the process. However, there is nothing in the summary judgment record establishing that the Catalysts are depreciable. In addition, some Catalysts may be consumed to remove impurities and become waste in the process. For example, the Process Description states that the Zinc Oxide catalyst reacts with hydrogen sulphide to produce an "effluent stream." There is a genuine question of material fact as to whether transporting waste out of the process occurs after the manufacturing has stopped. Accordingly, the Board finds that the record does not support granting summary judgment as to the Catalysts.

2. Electrical Equipment and Bulks

DNLA argues that because the Plant uses electricity to power machines and equipment necessary to the manufacturing process, any tax related to the purchase of transformers, wires, switches, insulation, conduits, junction boxes, and other items normally associated with the use of electricity should be excluded from tax. The Board disagrees with the breadth of this approach. The MM&E Exclusion applies to items of TPP that are "used directly" and have an immediate effect on the "actual process of manufacturing." Electricity is necessary to power machinery, but necessity alone is not sufficient to satisfy the definition of MM&E. Furthermore, the items in this category are not directly mentioned in the Process Description. Thus, the Board finds that the record does not support granting summary judgment as to Electrical Equipment and Bulks.[13]

3. Exchangers

DNLA argues that its heat exchangers heat and cool raw materials at certain points in the process, which is necessary to facilitate important chemical reactions, in the Reforming Step, the Shift Conversion Step, the Methanation Step, and the Ammonia Synthesis Step. MM&E does not include "[h]eating, ventilation, and air-

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[13] During the hearing, the Board questioned counsel as to whether electrical systems would be carved out of the definition of MM&E by La. R.S. 47:301(3)(i)(ii)(aa)(II)(aaa), discussed *infra* at Paragraph 6, which applies to the structural components of a building. Electrical installations would appear to be properly classified as component parts of an immovable for purposes of sales and use taxes. *See* La. R.S. 47:301(16)(q) and La. Civ. Code art. 466 prior to the enactment of 2008 Act 632. The question will need to be resolved at trial. At this stage, it seems unlikely that the electrical systems are "structural" components, and the Board is unable to determine whether any specific item was installed on a "building," an "other construction," or a piece of movable property.

conditioning systems, unless their installation is necessary to meet the requirements of the manufacturing process, even though the system may provide incidental comfort to employees or serve, to an insubstantial degree, nonproduction activities." La. R.S. 47:301(3)(i)(ii)(aa)(II)(ccc). This provision, a carve-out of a carve-out, preserves the MM&E Exclusion for systems that are "necessary" to the manufacturing process. Consequently, the Board does not agree with the Collector's assertion that the heat exchangers must, on their own, cause a chemical or structural change in the raw material. The Heat Exchangers, as described in the Process Description, appear to meet the requirements of MM&E. However, the record on summary judgment does not allow the Board to determine which items fit in this category. DNLA will need to establish which items are Exchangers at trial.

4. Instrumentation, Instrumentation Bulks & Controls

DNLA describes Instrumentation and Instrumentation Bulks & Controls as computer systems that control necessary aspects of the manufacturing process. MM&E expressly includes: "[c]omputers and software that are an integral part of the machinery and equipment used directly in the manufacturing process." In addition, the Process Description describes several steps during which it is necessary to control pressure, temperature, and air quantity. Thus, items in this category appear to qualify as MM&E. However, as with the Exchangers, DNLA will need to show at trial which items fit within this category.

5. Piping, Valves, and Bulks

This category encompasses piping that transfers raw materials or waste. Items used to transport materials within the manufacturing process may be covered by the MM&E Exclusion. However, items used to transport raw materials before the manufacturing process begins or after it ends do not qualify. For this category DNLA will need to show at trial that the item in question transports a material during the manufacturing process.

6. Vessel Platforms, Structural Steel, Pipe Support Steel

DNLA describes items in this category as metal frames that hold up piping and other metal supports that hold up machinery. There is a genuine dispute as to whether items that merely support piping do anything to directly and immediately to affect the actual manufacturing process. In addition, some of these items may be structural components of a building. A structural component of a building is, by definition, not MM&E unless it is "so closely related to the machinery and equipment that it houses or supports that the building or structural component can be expected to be replaced when the machinery and equipment are replaced."[14] At trial, DNLA will need to demonstrate the requisite connection and effect of these items on the transformative process, and will also bear the burden of proving that the items are not structural components of a building where applicable.

7. Reformer Furnaces

The Reformer Furnaces turn natural gas into Ammonia and preserve heat for the efficiency of the manufacturing process. These items are MM&E. However, the Collector asserts that this category contains parts and components that, when looked at as individual line items on an invoice, do not directly and immediately affect the manufacturing process. It will be DNLA's burden at trial to prove what items fall into this category. With respect to individual parts of items, the Exclusion requires a direct and immediate effect on the transformative process. At trial, KBR and DNLA will have to show the requisite necessity of these items and their connection to the transformational events in the process.

8. Rotating Equipment

The Rotating Equipment is described as compressors and machinery that move raw materials from one stage in the process to the next. Additionally, the compressors are used to provide temperature control. As explained in the foregoing discussions on piping and heating, some of these items may qualify for the MM&E Exclusion, if the requisite showing is made at trial. In addition, and with respect to

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[14] La. R.S. 47:301(3)(i)(ii)(aa)(II)(aaa).

items that transport effluent or waste, such items will not qualify for the MM&E Exclusion to the extent that they provide transportation before the beginning, or after the end of, the manufacturing process.

9. Concrete

Like the piping and steel discussed above, the structural components of a building do not qualify as MM&E unless they are so closely related to the machinery and equipment that it houses or supports that the building or structural component can be expected to be replaced when the machinery and equipment are replaced. DNLA and KBR will need to demonstrate at trial that items in this category bear the requisite close relation to machinery and equipment, but it is not likely that items in this category will qualify as MM&E.

10. Utility / Water Treatment

DNLA asserts that the water treatment equipment is necessary to treat river water and to produce steam for the manufacturing process. Whether or not this equipment qualifies for the MM&E Exclusion will depend on whether or not the river water is shown to be a raw material that is transformed into a finished product by the manufacturing process. In addition, even if the water is a raw material, equipment that transports the water prior to the start of the manufacturing process does not qualify for the MM&E Exclusion.

11. Spares

DNLA argues that its spare machinery and equipment is subject to the MM&E Exclusion. LAC 61:I.4301(C)(" Cost Price")(h)(viii)(ii)(c) provides:

> Purchases of spare machinery and equipment, such as compressors, pumps, and valves, qualify for the exclusion provided these items satisfy the definition of machinery and equipment provided in R.S. 47:301(3)(i). Spare machinery and equipment, such as bolts, nuts, gaskets, oil, etc., which cannot be depreciated for federal income tax purposes, do not qualify for the exclusion.

Spare items can qualify as MM&E, if they are **not** non-depreciable consumables like "bolts, nuts, gaskets, oil, etc," and they satisfy all of the other criteria for

MM&E. DNLA and KBR will need to prove at trial that items in this category are not consumables.

Conclusion:

For the foregoing reasons, the Board finds that DNLA is not entitled to summary judgment. At trial DNLA, and KBR to the extent that it joins with DNLA, will need to prove that the items claimed have a direct and immediate effect on the actual manufacturing process, which is the process by which raw materials are transformed into a finished product of TPP for resale. That determination is not appropriate at this stage, because the summary judgment record contains contradictory evidence. Accordingly, DNLA's Motion will be denied.

Baton Rouge, Louisiana, this 30th day of September, 2024.

FOR THE BOARD:

LOCAL TAX JUDGE CADE R. COLE