STATE OF LOUISIANA
BOARD OF TAX APPEALS
LOCAL TAX DIVISION

ARCERLOR MITTAL LAPLACE, LLC,
Petitioner

VERSUS **DOCKET NO. L00187, c/w L00245, L00263, and L00264**

ST. JOHN THE BAPTIST PARISH SCHOOL BOARD; FELIX K. BOUGHTON, IN HIS CAPACITY AS EXECUTIVE MANAGER OF BUSINESS AND FINANCE FOR THE ST. JOHN THE BAPTIST PARISH SCHOOL BOARD; ASSURED COMPLIANCE, INC. AND ACI ST. JOHN LLC,
Respondents

CONSOLIDATED WITH

ARCERLOR MITTAL LAPLACE, LLC,
Petitioner

VERSUS **DOCKET NO. 9225, c/w 9624C, and 9632C**

T.A. "TIM" BARFIELD, JR., IN HIS CAPACITY AS SECRETARY OF THE DEPARTMENT OF REVENUE, STATE OF LOUISIANA; THE STATE OF LOUISIANA,
Respondents

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JUDGMENT

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This matter came before the Board of Tax Appeals (the "Board") for a hearing on the *Motion for Partial Summary Judgment* and *Supplemental Motion for Partial Summary Judgment* filed by Arcerlor Mittal Laplace, LLC, (the "Taxpayer") and the *Cross Motion for Summary Judgment* filed by St. John the Baptist Parish School Board; Felix K. Boughton, in his Capacity as Executive Manager of Business and Finance for the St. John the Baptist Parish School Board; Assured Compliance, Inc. and ACI St. John LLC, (the "Parish") and T.A. "Tim" Barfield, Jr. (now Kimberly Robinson), in his Capacity as Secretary of the Department of Revenue, State of

Louisiana; The State of Louisiana (the "Department") (collectively the "Collectors") on November 26, 2018 with Local Tax Judge Cade R. Cole presiding. Participating in the hearing were Russell Stutes, Jr., Russell Stutes, III, and Drew Talbot for the Collectors and Jesse Adams and Joe Landry for the Taxpayer. After the hearing, the motions were taken under advisement. The Board now issues judgment as follows in accordance with the written reasons attached herewith.

IT IS ORDERED, ADJUDGED AND DECREED that the Taxpayer's *Motion Partial Summary Judgment* BE AND IS HEREBY GRANTED IN PART; the Taxpayer is entitled to a refund of overpayments of Louisiana state sales tax and St. John the Baptist Parish sales tax for repairs to the Electric Arc Furnace (the "EAF") at the Taxpayer's facility in LaPlace, Louisiana (the "Laplace Mill") as the EAF is immovable property; in addition, as agreed to by the Taxpayer and the Collectors, the Taxpayer is entitled to a refund of overpayments of Louisiana state sales tax and St. John the Baptist Parish sales tax for repairs to the elevator at the LaPlace Mill; accordingly, Judgment is rendered in favor of the Taxpayer and against the Collectors concerning the refund of these overpayments to the Taxpayer.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Taxpayer's *Motion Partial Summary Judgment* BE AND IS HEREBY GRANTED IN PART; as agreed to by the Taxpayer and the Collectors, the Taxpayer is entitled to a refund of overpayments of Louisiana state sales tax for the initial purchase and importation of Rolls used at the LaPlace Mill; accordingly, Judgment is rendered in favor of the Taxpayer and against the Department concerning the refund of these overpayments to the Taxpayer.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the *Taxpayer's Motion Partial Summary Judgment* BE AND IS HEREBY DENIED IN

PART; the Taxpayer's summary judgment evidence does not establish that the Reheat Furnace, Flocking Tank, Caster and Truck Scale are immovable property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Taxpayer's *Supplemental Motion for Partial Summary Judgment* BE AND IS HEREBY GRANTED IN PART; the Taxpayer is entitled to a refund of overpayments of Louisiana state sales tax and St. John the Baptist Parish sales tax for purchases of Sulphur X, chemical lime, oxygen and calcium carbide (the "Slag Chemicals"); the Board finds that the Slag Chemicals were purchased for the purpose of further processing into tangible personal property for sale at retail and therefore were not taxable under La. R.S. 47:301(10)(c)(i)(aa) (the "Further Processing Exclusion"); accordingly, Judgment is rendered in favor of the Taxpayer and against the Collectors concerning refund of these overpayments to the Taxpayer.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Collectors' *Cross Motion for Summary Judgment* BE AND IS HEREBY GRANTED IN PART; the Board finds that the Taxpayer's purchases of carbon electrodes were not subject to the Further Processing Exclusion; accordingly, Judgment is rendered in favor of the Collectors and against the Taxpayer concerning this claimed overpayment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Collectors' *Cross Motion for Summary Judgment* BE AND IS HEREBY GRANTED IN PART; as agreed to by the Taxpayer and the Collectors, the Taxpayer's purchases of nitrogen were taxable, accordingly, Judgment is rendered in favor of the Collectors and against the Taxpayer concerning this claimed overpayment.

Judgment Rendered and Signed at Baton Rouge, Louisiana this 8th day of January, 2019.

FOR THE BOARD:

LOCAL TAX JUDGE CADE R. COLE

STATE OF LOUISIANA
BOARD OF TAX APPEALS
LOCAL TAX DIVISION

ARCERLOR MITTAL LAPLACE, LLC,
Petitioner

VERSUS **DOCKET NO. L00187, c/w L00245, L00263, and L00264**

ST. JOHN THE BAPTIST PARISH SCHOOL BOARD; FELIX K. BOUGHTON, IN HIS CAPACITY AS EXECUTIVE MANAGER OF BUSINESS AND FINANCE FOR THE ST. JOHN THE BAPTIST PARISH SCHOOL BOARD; ASSURED COMPLIANCE, INC. AND ACI ST. JOHN LLC,
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Respondents

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WRITTEN REASONS FOR JUDGMENT

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This matter came before the Board of Tax Appeals (the "Board") for a hearing on the *Motion for Partial Summary Judgment* and *Supplemental Motion for Partial Summary Judgment* filed by Arcerlor Mittal Laplace, LLC, (the "Taxpayer") and the *Cross Motion for Summary Judgment* filed by St. John the Baptist Parish School Board; Felix K. Boughton, in his Capacity as Executive Manager of Business and Finance for the St. John the Baptist Parish School Board; Assured Compliance, Inc. and ACI St. John LLC (the "Parish"), and T.A. "Tim" Barfield, Jr. (now Kimberly Robinson), in his Capacity as Secretary of the Department of Revenue, State of

Louisiana; The State of Louisiana (the "Department") (collectively the "Collectors") on November 26, 2018 with Local Tax Judge Cade R. Cole presiding. Participating in the hearing were Russell Stutes, Jr., Russell Stutes, III, and Drew Talbot for the Collectors, and Jesse Adams and Joe Landry for the Taxpayer. After the hearing, the motions were taken under advisement. The Board now issues the attached Judgment for the following written reasons.

I. Facts and Procedural History

These consolidated cases concern disputes over both Parish sales tax and Louisiana state sales tax. The Taxpayer and the Collectors were previously engaged in litigation in a number of different cases in several forums. Those actions have since been transferred to the Board.[1] The Board consolidated the State and Parish actions (collectively Docket numbers L00263, L00245, 9632C, L00264, 9624C, and 9225) into this proceeding by Order dated December 1, 2017.

The Taxpayer appeals from the denial of a refund of Parish sales tax for the tax period beginning January 1, 2005, and seeks refunds of amounts paid under protest for each subsequent period thereafter. The Taxpayer also appeals from the Department's denials of refunds of state sales tax for the same periods. In addition, the Taxpayer has asserted alternative claims against the state related to the same underlying disputes. The consolidated cases are now before the Board on cross motions for partial summary judgment.[2]

The Taxpayer is a manufacturer of low carbon mild steel. The Taxpayer engaged in steel manufacturing from 2009 to 2016 at its facility in LaPlace,

[1] By Order of the District Courts pursuant to a joint motion of all parties pursuant to Section 4 of Act 335 of 2016.
[2] The consolidated cases were assigned to be heard in the Local Tax Division pursuant to a joint motion pursuant to La. R.S. 47:1402(B)(6)(a)(i).

Louisiana (the "LaPlace Mill"). The Taxpayer purchased the LaPlace Mill and the underlying land in 2009 from the Bayou Steel Corporation ("Bayou"). In 2016, the Taxpayer sold the LaPlace Mill to the Bayou Steel Group ("BSG").

During the tax periods at issue, the Taxpayer produced steel by melting down and processing scrap metal. The Taxpayer's scrap metal melting process was described by Dr. Howard Pielet and Britt Kennedy. Britt Kennedy was originally hired by Bayou to work at the LaPlace Mill in 1981. He is currently employed as BSG's "Melt Shop" Superintendent. Dr. Pielet worked for the Taxpayer for 47 years in research and development in the steelmaking and casting processes.

The steel manufacturing process begins when scrap metal is put into an Electric Arc Furnace (the "EAF"). The EAF melts scrap metal in a spherical chamber, which contains cylindrical carbon electrodes (the "Electrodes"). The EAF generates heat by arcing electricity between the Electrodes. The process causes the Electrodes to naturally degrade over time, and fragments of the Electrodes break off and dissolve into the liquid metal. As a result, carbon from the Electrodes ultimately finds its way into the finished steel product.

Once the scrap metal melts, it is injected it with Sulphur X, chemical lime, oxygen, and calcium carbide (the "Slag Chemicals"). The Slag Chemicals oxidize with impurities in the molten scrap metal to form oxides. The oxides then rise to the surface of the EAF, forming a foamy layer of slag (the "Slag"). The Slag is poured out of the EAF through an aperture on the EAF's rear. The discarded Slag is removed from the Melt Shop by an entity named Barfield Enterprises, Inc. ("Barfield").

The remaining purified liquid steel is then poured from the EAF into a Ladle Metallurgy Furnace (the "LMF"). Inside the LMF, the liquid steel is combined with other materials in order to produce different types of steel. Like the EAF, the LMF also uses Electrodes to generate heat and keep the metal in a molten state. After mixing, the liquid metal is then poured into a "Caster." The Caster forms the mixture into steel billets.

The billets are cooled and sent to a rolling mill (the "Rolling Mill"). Robert Kennedy is BSG's Rolling Mill Superintendent. In his affidavit, he stated that the Rolling Mill reheats the billets it receives from the Melt Shop to an approximate temperature of 2300 degrees Fahrenheit in a natural gas fired furnace (the "Reheat Furnace"). The heated billets are then run through a series of rolls (the "Rolls"). The Rolls shape the billets into a variety of forms, such as beams, angles, channels, flats, round bars and square bars.

On average, one pound of the finished steel is comprised of 0.12% carbon. Dr. Pielet stated in his affidavit that 8.7% of this carbon is supplied by the Electrodes as they dissolve. Thus, the average pound of steel created by the Taxpayer gets an estimated 0.01044% of its carbon content from the Electrodes. Dr. Pielet stated that this figure is an estimate because the carbon atoms from the Electrodes that end up in the finished steel are indistinguishable from carbon from other sources.

Dr. Pielet was specifically asked at deposition whether the Electrodes were purchased for the purpose of adding carbon to the steel. Dr. Pielet responded by stating that it was his opinion that "the main purpose is to conduct the electricity, and a result is the carbon goes into the steel." Dr. Pielet testified that the Electrodes add an amount of carbon that is not insignificant or immaterial. When asked whether the Electrodes' carbon contribution to the finished product was accidental or

incidental, Dr. Pielet answered: "I don't know that I'd call it incidental." He further described the carbon contribution as "planned, expected."

According to the deposition testimony of the Collectors' witness, Dr. Brian Goodall, steel manufacturers control the amount of carbon in their steel by adding measured amounts of powdered carbon during the manufacturing process. Britt Kennedy testified that, at the LaPlace Mill, bags of powdered carbon are added in this manner while the molten steel is in the LMF. Dr. Goodall stated that a deficiency of 0.005% in the carbon content of steel was acceptable for low carbon steel. For example, Dr. Goodall claimed that steel with a carbon content of 0.115% would be acceptable for purposes of job specifications that actually called for steel with 0.12% carbon content.

As explained below, the taxability of the Taxpayer's purchase of Slag Chemicals is at issue in this case. Shelley Rome, who is the Procurement Manager at the LaPlace Mill, testified at deposition, and in her affidavit, that Barfield removes and processes Slag, tundish skulls, mill scrap and other by-products (collectively the "By-Products") from the Melt Shop at the LaPlace Mill. According to Ms. Rome, Barfield processes the By-Products it removes to extract metallic material, including scrap metal. BSG pays Barfield for the service of removing and processing the By-Products. The removal and processing services keep the LaPlace Mill clean and provide a cheap supply of scrap metal.

The Collectors offer the Affidavit of Thomas Hook in support of their position on the Slag Chemicals. Mr. Hook is the Chief Administrative Officer of ACI St. John, LLC and served as the lead auditor during the Parish's examination of the Taxpayer. Attached to Mr. Hook's affidavit is an agreement between Bayou and

Barfield (the "Agreement").[3] Mr. Hook became familiar with the Agreement during the audit. Ms. Rome also claims to be familiar with the Agreement as well, and a copy is attached to her affidavit.

Article B of the Agreement, titled "Melt Shop Services," provides that Barfield has both the right and the obligation to remove "By-Product Materials" from the Melt Shop. Barfield is also specifically made responsible for picking up and removing Slag from the Melt Shop. Barfield is required to keep its own equipment for this purpose. Exhibit A to the Agreement determines the amount that Barfield is paid for Melt Shop Services based on billet tons of steel produced each month.

In Article A of the Agreement, titled "Definitions," By-Product Materials are defined as certain items "generated in the Melt Shop," which require "further processing for reuse or resale." Slag is listed as one of the By-Product Materials. Barfield's work area is defined as an "area within the Bayou Facilities" made available to Barfield pursuant to Article "H" of the Agreement. The Bayou Facilities are defined as "[a]ll of Bayou's property and equipment at its steel mill complex in LaPlace, Louisiana." Actually, the original Agreement deals with Barfield's Work Area in Article G. Article G imposes on BSG the responsibility of providing a place for Barfield to work at the LaPlace Mill, and also for paying for Barfield's utilities needed to perform its obligations under the Agreement.

Article C obligates Barfield to recover scrap metal from the By-Product Materials. Barfield is to separate recovered scrap metal into grades A or B, according to the metals' composite percentage of iron content. Barfield must also

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[3] The Agreement has been amended since its original execution to declare that Bayou's rights and obligations have been assumed by BSG.

ensure that the pieces of scrap metal are sized correctly for their respective grades. Barfield is required to return A and B graded scrap metal to BSG. As long as the scrap metal is within certain size parameters and properly graded, BSG must accept it. BSG has a right of first refusal to purchase any scrap metal that deviates from the specifications in the Agreement. If BSG does not exercise that right, then Barfield may sell the scrap to third parties.

Slag is specifically covered by Article D. Barfield is given the exclusive right to process and sell Slag generated by the EAF. However, BSG has the option to purchase up to 1,000 tons of Slag per month at a set price. BSG is also afforded the option to buy additional slag at Barfield's price, minus a 10% discount. In addition, BSG has the right to dispose of "excessive" stockpiles of Slag at Barfield's expense. BSG is given "the sole right to determine what is considered excessive."

If Barfield sells the Slag to third parties, it is required to pay BSG a 10% royalty. Ms. Rome stated that it is his understanding that such sales have in fact occurred. Ms. Rome also stated that BSG has never actually collected any royalty payments on these sales. Ms. Rome explained that foregoing the royalty payments is done as a gesture of good will towards Barfield.

Article H of the Agreement, titled "Miscellaneous Provisions" contains a "Passage of Title" provision. That provision states that title to the "By-Product Materials, the metallics, mill scale and slag products manufactured therefrom" by Barfield "shall be and shall at all times remain the property of Bayou." However, title to the Slag and mill scale passes to Barfield under the Agreement when those materials are "loaded on railroad cars or trucks for shipment to third party purchasers." At deposition, Ms. Rome acknowledged that the Taxpayer retained

title to the Slag per the Agreement, but testified that Barfield takes possession of the Slag once it is removed from the Melt Shop.

Another issue in this case is the taxability of repairs to certain property at the LaPlace Mill. The particular property at issue includes the EAF, the Reheat furnace and the Caster mentioned above. Also at issue is a flocking tank (the "Flocking Tank"), and a truck scale (the "Truck Scale"). In his affidavit, Britt Kennedy testified that the EAF and Caster are integral parts of the Melt Shop, and cannot be removed without causing substantial damage to themselves and the surrounding structures. The EAF allegedly serves the principal use of the melt shop by heating scrap metal to change it into a liquid state. The Caster allegedly serves the principal use of the melt shop by casting the liquid metal into steel billets. Britt Kennedy also testified that the EAF, Caster, Flocking Tank and Truck Scale were designed to permanently remain at their respective locations at the LaPlace Mill, and that the Flocking Tank and Truck Scale are attached to the ground via concrete platforms. The Flocking Tank is purportedly bolted on to its concrete platform. Photographs of the EAF, Caster, Flocking Tank and Truck Scale are attached to Britt Kennedy's affidavit as Exhibits A, B, C, and D respectively.

Robert Kennedy averred that the Reheat Furnace serves the principal use of the Rolling Mill by heating steel billets to the required temperature at which the billets can be rolled into different shapes. In addition, the Reheat Furnace is alleged to have been designed to remain permanently located in the Rolling Mill, and cannot be removed without causing substantial damage to itself and the surrounding structures. A Photograph of the Reheat Furnace is attached to Robert Kennedy's affidavit as Exhibit E.

The parties have jointly stipulated to the Board that, for purposes of Code of Civil Procedure article 966, all filings related to the instant motions have been timely filed. The parties also agreed that the Taxpayer's opposition memorandum should be treated as a motion for partial summary judgment solely with respect to the issue of the Electrodes (discussed below). In addition, the parties agreed that the Collector's reply memorandum and memorandum in support of its own motion for summary judgment should be treated as an opposition memorandum.

Some issues that were previously raised have been resolved by agreement of the parties. The Taxpayer's *Motion for Partial Summary Judgment* asserted that repairs to an elevator (the "Elevator") were not taxable as repairs to an immovable, and that purchases of the Rolls used in the Rolling Mill were not taxable as purchases of manufacturing equipment. Prior to the hearing, the parties came to an agreement that these particular items were not taxable. Specifically with respect to the Rolls, the Collectors made the limited concession that their initial purchase or importation into Louisiana or the Parish were not taxable. The Taxpayer represented to the Board in pleadings and at the hearing that it is only seeking a refund of taxes paid on the initial purchase of the Rolls. The Taxpayer is not seeking a refund for taxes attributable to repairs or maintenance to the Rolls.

In accordance with the agreement of the parties, the Board will grant partial summary judgment in favor of the Taxpayer specifically as to the non-taxability of repairs to the Elevator, and as to the non-taxability of the initial purchase or importation of the Rolls. In addition, the Taxpayer also stipulated that certain purchases of nitrogen previously alleged to be non-taxable were in fact subject to tax. As agreed to by the parties, the Board will grant partial summary judgment in favor of the Collectors as to the taxability of the Taxpayer's purchases of nitrogen.

II. Issues Presented

The parties both seek summary judgment as to whether the Electrodes were purchased for the purpose of further processing into tangible personal property manufactured for resale such that they are excluded from tax under R.S. 47:301(10)(c)(i)(aa) (the "Further Processing Exclusion"). Both parties also seek summary judgment on the applicability of the Further Processing Exclusion to the purchases of Slag Chemicals. On that issue, the parties respectively dispute whether the Slag was actually produced for resale, and whether the Slag Chemicals were purchased for the purpose of inclusion in the Taxpayer's end-product. Finally, the Taxpayer (but not the Collectors) seeks summary judgment as to the taxability of repairs made to the EAF, the Reheat furnace, the Caster, the Flocking Tank and the Truck Scale.

III. Discussion

a. Summary Judgment Standard

A motion for summary judgment will be granted after an opportunity for adequate discovery, "if the motion, memorandum, and supporting documents 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(A)(3). A material fact is one whose existence or non-existence determines the outcome of a cause of action. *Davis v. Hixson Autoplex of Monroe, L.L.C.*, 51,991, p. 5 (La. App. 2 Cir. 5/23/18), 249 So.3d 177, 181. Any doubt as to a dispute regarding a genuine issue of material fact must be resolved against granting the motion and in favor of a trial on the merits. *Orleans Parish Sch. Bd. v. Lexington Ins. Co.*, 2011-1720, p. 9 (La. App. 4 Cir. 8/22/12), 99 So.3d 723, 729. However, once the motion for summary judgment has been properly supported by the moving party, the non-moving party must produce evidence of a

material factual dispute or the motion will be granted. *Arceneaux v. Lafayette Gen. Med. Ctr.*, 2017-516, p. 4-5 (La. App. 3 Cir. 7/26/17), 248 So.3d 342, 346. Summary judgment may be granted as to a particular issue in favor of one or more parties, even though it does not dispose of the entire case as to that party or parties. La. C.C.P. art. 966(E).

b. Whether the Electrodes were purchased for inclusion in tangible personal property manufactured for resale.

The Further Processing Exclusion excludes "sales of materials for further processing before resale" from the scope of sales tax. *Bridges v. Nelson Indus. Steam Co.* (*NISCO*), 2015-1439 (La. 5/3/16), 190 So.3d 276, 280-82. Thus, a manufacturer's purchases of materials for further processing into items of tangible personal property for resale are not subject to taxation. *See* La. R.S. 47:301(10)(c)(i)(aa). However, not all materials purchased by a manufacturer are exempt; materials that are merely consumed in the manufacturing process are not subject to the Further Processing Exclusion. *Vulcan Foundry, Inc. v. McNamara*, 414 So.2d 1193 (La. 1981).

La. R.S. 47:301(10)(c)(i)(aa) sets forth a three-prong test to determine whether raw materials are subject to the Further Processing Exclusion; the test asks whether:

> [1] The raw materials become a recognizable and identifiable component of the end product.
>
> [2] The raw materials are beneficial to the end product.
>
> [3] The raw materials are material for further processing, and as such, are purchased for the purpose of inclusion into the end product.

The Supreme Court has instructed that the Further Processing Exclusion is not an exemption, rather, it is an exclusion that removes certain transactions from the scope

of taxation *ab initio*. *NISCO*, 2015-1439, p. 5, 190 So.3d at 280. Because it is an exclusion, any legal ambiguity in the Further Processing Exclusion must be construed in favor of the taxpayer. *Id.* at 280-81.

The specifications of low carbon steel require a certain amount of carbon content. The Taxpayer measures the amount of carbon in its steel to ensure that its product meets specifications. Carbon is identifiable in the final product when measured by the Taxpayer. The carbon also contributes to the desired physical characteristics of the steel. Thus, the Board can readily conclude that carbon from the Electrodes is a recognizable, identifiable, and beneficial component of the Taxpayer's end product.

The real issue in dispute is the third, "purpose" prong of the test. In this case, the question is whether the Electrodes were purchased for the purpose, but not necessarily the primary purpose, of inclusion into the Taxpayer's end product. *NISCO*, 2015-1439, p. 12, 190 So.3d at 284; *see* La. R.S. 47:301(10)(c)(i)(aa)(I)(ccc). The analysis of whether materials are purchased for inclusion or simply used in the manufacturing process must begin with the taxpayer's product(s). *NISCO*, 2015-1439, p. 7-8, 190 So.3d at 281-82; La. Admin. Code 61:1.4301(C)(Retail Sale or Sale at Retail)(d). The pertinent end products here are the Taxpayer's steel billets.

The Collectors argue that *Vulcan* and *Traigle v. PPG Industries, Inc.*, 332 So.2d 777 (La. 1976) are controlling in this case. In *Traigle*, a chemical manufacturer claimed the Further Processing Exclusion for the purchase of graphite blades used in the manufacture of chlorine gas. The manufacturer used the blades to conduct electricity through saltwater. The passage of electricity through the saltwater had the effect of breaking down the water and salt molecules into chlorine,

hydrogen and caustic soda. The chlorine then left the water as a gas. During this process, carbon residue from the graphite combined with loose oxygen atoms to form carbon monoxide and carbon dioxide, which became commingled with the chlorine gas. The residual carbon dioxides and carbon monoxides were found to be "useless waste material (impurities) which would be removed, except that it [was] not economically feasible to do so." *Id.* at 780 (substitutions added). The Supreme Court held that purchases of the graphite blades were not subject to the Further Processing Exclusion. Based on the facts before it, the Court found that "the inclusion of the waste residue of the substance results from an unintended (although unavoidable) inefficiency of the manufacturing process." *Id.* at 781. The Court found it significant that the carbon was "of no benefit to the product sold, and is of the nature of an impurity rather than of an integral part of the finished product." *Id.*

In *Vulcan*, a foundry sought to claim the Further Processing Exclusion for purchases of coke. Coke is a kind of coal residue made up chiefly of carbon. The foundry used coke in the manufacture of ACTM Class 30 gray iron, which contained between 3.10 and 3.30 percent carbon. The foundry shaped the iron into manhole covers and rims, drain grates and other municipal castings.

The manufacturing process involved melting scrap metal in a large crucible. The foundry pre-heated a layer of coke at the bottom of the crucible, and then added scrap metal and more coke in alternating layers. After heating the metal to a liquid state, the foundry drained the molten iron from the bottom of the crucible. The iron was then separated from the slag and poured into casting forms.

The metal lost some carbon during the melting process, but this carbon loss could be partially offset by carbon from the coke. When used as a heat source, coke contributed 0.46% carbon to the finished product; *i.e.* every 100 pounds of finished

product contained 0.46 pounds of carbon from coke. However, the evidence in the record established that coke was used not for its carbon content, but because it burned easily and was less volatile than other fuels. The foundry's corporate officer also testified that the foundry could have used natural gas or electricity as a heat source, but used coke instead because it was more efficient. The corporate officer further testified that the additional carbon from the coke was a secondary benefit to the end product. In addition, if the foundry determined that a batch of iron needed more carbon, it would not add more coke, but could instead add carbon brickettes to the iron during the melting to process.

Based on these facts, the Court held that the foundry's purchases of coke were subject to tax. *Vulcan*, 414 So.2d at 1199. The Court found the coke to have been purchased "for the purpose of heating the scrap iron." *Id.* The small amount of carbon in the finished product was incidental to the coke's use as a heat source. The beneficial side effect of added carbon did not change the Court's conclusion.

The Taxpayer relies on *NISCO* and *Graphic Packaging International, Inc. v. Lewis*, 50,371 (La. App. 2 Cir. 2/3/16), 187 So.3d 499. In *NISCO*, an electric company claimed the Further Processing Exclusion on limestone used in the process of generating electricity and steam. The taxpayer in that case generated electricity through the use of "circulated fluidized boilers" ("CFB") technology. CFB technology utilized petroleum coke which released sulfur emissions when heated. In order to comply with environmental regulations, the taxpayer introduced limestone into the process as a sulfur inhibitor or "scrubbing agent." Calcium and oxygen in the limestone combined with sulfur to form a calcium sulfate ash by-product. The taxpayer sold the ash by-product to a for-profit company, which in turn resold it to third parties.

After trial on the merits, the trial court held that the electric company could not claim the Further Processing Exclusion for the limestone because the ash was an incidental by-product of the creation of electricity and steam. The appellate Court affirmed the judgment. However, the Supreme Court reversed. The Supreme Court held that the ash's status as a by-product did not matter to the "purpose" inquiry, stating that there was "no distinction between primary products and secondary products" under the law. *NISCO*, 2015-1439, p. 8-9, 190 So.3d at 282.

In *Graphic Packaging*, a paper manufacturer sought to claim the Further Processing Exclusion for caustic soda, sodium hydrosulfide and emulsified sulfur. The manufacturer offered testimony from its corporate officer and an expert witness to show that the paper manufacturing process was designed so that a certain amount of those chemicals remained in the final product. Specifically, the corporate officer testified that he performed mass balance calculations to determine the amount of chemicals that remained in the final product at the end of the pulping process. The expert witness testified that the chemicals were used for two purposes: they softened and broke down lignin without damaging cellulose during the pulping process, and they also remained present in the end product, increasing its mass, strength, sizing, and conductivity. The Court found that this evidence supplied sufficient grounds to conclude that the taxpayer had satisfied the "purpose" test. *Graphic Packaging*, 50,371, p. 11-12, 187 So.3d at 507-08.

NISCO is distinguishable because the dispute in this case, unlike the dispute in *NISCO*, is not over whether materials used in creating a by-product can qualify for the exclusion. The Electrodes here are used in manufacturing the Taxpayer's end-product, not a by-product. Nor is *Graphic Packaging* directly on point, because there was substantial evidence in that case showing that the materials purchased were

intended to be incorporated in the final product. There was also no suggestion in *Graphic Packaging* that the materials were used as a heat source.

Vulcan, however, bears a striking factual resemblance to this case. The Electrodes here are used to heat scrap metal in the EAF, just like the coke was used to heat scrap metal in *Vulcan*. The evidence produced by the Taxpayer does not demonstrate that the Electrodes were purchased for the purpose of adding carbon to the Taxpayer's steel. Dr. Pielet testified merely that the added carbon was "planned" and "expected." If the Taxpayer wanted to add carbon to its product, it did so by adding powdered bags of carbon. This suggests to the Board that the addition of carbon from the Electrodes in the finished product was incidental to the Electrodes' actual intended use as a heat source.

The Board finds that *Vulcan* is controlling in this case, where the facts are virtually identical in all meaningful respects. Accordingly, the Board finds that the Electrodes were not purchased for the purpose of inclusion in the Taxpayer's product.

c. Whether the Slag Chemicals are subject to the Further Processing Exclusion – Whether the Slag is manufactured for resale.

Both parties seek summary judgment on the issue of whether the Taxpayer's purchases of the Slag Chemicals are subject to the Further Processing Exclusion. The Taxpayer claims that the Slag Chemicals were purchased for further processing into Slag produced for resale to Barfield. The Collectors argue that the Slag was not actually resold. All parties urge the Board to look to the substance of the transaction between the Taxpayer and Barfield.

The Collectors contend that the transfer of Slag between the Taxpayer and Barfield was not a sale because the Taxpayer actually paid Barfield to remove the

Slag from the Melt Shop. The Taxpayer does not dispute that it paid Barfield to remove the Slag. Instead, the Taxpayer claims that it paid Barfield in cash and Slag in exchange for Barfield's Slag removal services and cheap access to raw materials. In support of this claim, the Taxpayer points to its contractual rights under the Agreement to obtain scrap metal from Barfield at a discounted price. The Taxpayer characterizes the totality of this transaction as a barter, exchange, or other unnamed transaction that falls within the broad scope of the statutory definition of a "sale." The Collector, however, asserts that the Taxpayer simply gave the Slag away.

La. R.S. 47:301(12) defines a sale as "any transfer of title or possession, or both, exchange, barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration . . . ." The terms "barter" and "possession" are not statutorily defined. However, possession for purposes of sales tax has generally been held to mean "actual physical control" over the property in question. *See e.g. Potashnick Const., Inc. v. La. Dep't of Revenue & Taxation*, 470 So.2d 526, 528–29 (La. Ct. App. 1985). Barter has been defined as the exchange of one commodity for another without the use of money, or an exchange of assets for assets, as opposed to a sale of things for money. *See e.g. Bridges v. Prod. Operators, Inc.* (*"POI"*), 2007-0648, p. 10 (La. App. 4 Cir. 12/12/07), 974 So.2d 54, 61. The definition of sale for sales tax purposes has been held to include an innominate contract, other than a barter or exchange, for the transfer of a thing in return for services to be rendered. *See e.g. Columbia Gulf Transmission Co. v. Bridges*, 2008-1006, p. 12 (La. App. 1 Cir. 6/25/09), 28 So.3d 1032, 1041, *writ denied*, 2010-0249 (La. 4/5/10), 31 So.3d 369, *and writ denied*, 2010-0116 (La. 4/5/10), 31 So.3d 371.

The Collectors correctly point out that the substance of a transaction, not its form, is controlling for purposes of determining sales tax liability. *Int'l Paper Co. v. E. Feliciana Parish Sch. Bd.*, 2002-0648, p. 5 (La. App. 1 Cir. 3/28/03), 850 So.2d 717, 721, *writ denied*, 2003-1190 (La. 6/20/03), 847 So.2d 1235.

The Taxpayer cites to the cases of *POI* and *Columbia* in support of its position. *POI* dealt with a provider of natural gas compression services who obtained natural gas from its customer. The service provider used its customer's gas to power compressors located at the customer's well. The service provider took some of the gas extracted from the well and compressed it before it was processed in any way. The compressors, fueled by this gas, moved the rest of the customer's gas downstream to processing plants and ultimately to market.

The gas obtained by the service provider in this manner was totally unrefined, contained contaminants, and was not "market quality." The amount of gas siphoned off was not measured or metered, and the service provider was not entitled to any more gas than was necessary to power the compressors. In fact, contaminants in the gas, such as water vapor, made measuring the amount of gas used inaccurate and inefficient. As payment for its services, the provider received a flat monthly fee.

Columbia involved similar facts, including a taxpayer who was a provider of natural gas compression services. In that case, the taxpayer's natural gas transmission system was regulated by the Federal Energy Regulatory Commission ("FERC") and operated pursuant to a Gas Tariff. The transmission system was large, spanning multiple states, and at certain intervals, the gas being transported would lose pressure and require recompression. Per the terms of the Gas Tariff, some of the gas was diverted to compressor stations for this purpose, three of which were located in Louisiana. The service provider was not charged for gas diverted in this

manner. The amount of gas siphoned off was measured and formed part of the provider's "retainage." The retainage was a pre-determined portion of gas that was expected to be lost during transportation or used by the provider at compressor stations.

In both *POI* and *Columbia*, the Courts found the transfer of natural gas in exchange for services to be sales for purposes of the sales tax statutes. *Columbia*, 2008-1006, p. 14, 28 So.3d at 1042; *POI*, 2007-0648, p. 11-12, 974 So.2d at 61-62. The Court in *POI* found the transaction to be a "barter" or "exchange." *POI*, 2007-0648, p. 11-12, 974 So.2d at 61-62. The Court in *Columbia* found that the transaction was neither a barter, nor an exchange, but an innominate contract that fell within the broad scope of the statutory definition of a "sale." *Columbia*, 2008-1006, p. 14, 28 So.3d at 1042. Neither Court found any factual basis for viewing the transactions as gratuitous. As noted by the Court in *Columbia*, the natural gas was an asset of a business, and "businesses generally do not give away their assets." *Id.* The service providers received from their customers both monetary consideration for their services as well as the fuel necessary to provide those services. This provided the service providers with cheaper access to gas than would otherwise have been available. In turn, this allowed the service providers to offer cheaper rates to their customers for transporting natural gas.

As the courts have observed, we cannot presume that a business would simply give away its assets without any consideration. Moreover, the facts here do not support the Collectors' assertion that the Taxpayer simply gave the Slag away. The terms of the Agreement demonstrate that the Taxpayer gave Barfield possession of its Slag in exchange for valuable services. The Taxpayer received a benefit in the form of cheap access to raw materials. The Board therefore finds, based on the

record before it, that the bargain between the Taxpayer and Barfield was supported by sufficient consideration under the broad language of La. R.S. 47:301(12).

For purposes of the sales tax, the term sale is broadly defined, and includes innominate contracts which cannot otherwise be classified under the Louisiana Civil Code. In both *Columbia* and *POI*, transactions involving the exchange of a commodity for a service were held to constitute sales for tax purposes. The transaction here entails a similar exchange, and the Taxpayer's option to purchase discounted raw materials.

The fact that the Agreement allowed the Taxpayer to destroy materials collected by Barfield in its sole discretion might give the Board pause. Coupled with that, the fact that Barfield's work area was inside the LaPlace Mill could raise questions about whether Barfield actually took possession of, *i.e.* exercised physical control over, the materials at issue. However, there is no evidence in the record to suggest that the Taxpayer ever interfered with Barfield's authority over the Slag or other materials. All of the evidence currently in the record suggests that Barfield collected the Slag as agreed, harvested raw materials from it, and then either returned those materials to the Taxpayer or resold them to other parties. Accordingly, the Board finds that the Slag was in fact resold by the Taxpayer.

d. Whether the Slag Chemicals are subject to the Further Processing Exclusion – Whether the Slag Chemicals were purchased for the purpose of inclusion in the Taxpayer's end-product.

As explained above in the discussion concerning the Electrodes, the Further Processing Exclusion applies to purchases of materials that: become recognizable and identifiable parts of the final product; are beneficial to the final product; and are purchased for the purpose of inclusion in the final product. The Board can perceive no genuine dispute that the Slag Chemicals are recognizable and identifiable in the

Slag. They are present in the form of oxides bonded with impurities extracted from the scrap metal. There is also no question that the Slag Chemicals benefit the Slag, because without them, oxidization could not occur, and the Slag could not form.

The only question is whether the Slag Chemicals were purchased for the purpose of inclusion in the Slag. The Collectors argue that the Slag Chemicals were purchased for the sole purpose of removing impurities in the Taxpayer's finished product. The Taxpayer takes the position that although the Slag Chemicals were primarily purchased for this reason, they were also purchased for the secondary purpose of inclusion in the Slag. The Collectors, however, characterize the Slag Chemicals' inclusion in the Slag as merely incidental to their real purpose. The Board finds the Collectors' argument on this issue to be foreclosed by the holding in *NISCO*.[4]

In *NISCO*, the Louisiana Supreme Court explained that an analysis of the Further Processing Exclusion must begin with the end product of the manufacturing process. The Further Processing Exclusion applies to both primary end-products and to by-products, so long as those products are manufactured for resale in the form of tangible personal property. *NISCO*, 2015-1439, p. 8-9, 190 So.3d at 282. The Board must begin its analysis with the proper end product, which in this case is Slag, a by-product. The purpose for which the Taxpayer purchased the Slag Chemicals with respect to the steel end-product does not matter.

In *NISCO*, the Supreme Court outlined several factual considerations that should guide this analysis. The Court found relevant the taxpayer's "purposeful decisions related to engineering, infrastructure, and marketing" of the by-product.

[4] These periods at issue pre-date legislative amendments to the relevant provisions enacted in response to NISCO.

Id. at 285. In particular, the Court noted that: the taxpayer purchased special equipment for the production of the by-product; sought a buyer for the by-product: had sold all of the by-product for the last 22 years; and had a contract with its raw materials supplier that recognized that the raw materials would be used for producing the by-product. The Court found it irrelevant that the taxpayer would have ceased purchasing raw materials if no longer necessary for producing its primary end-product. The Court also de-emphasized the importance of the ratio of primary end-product to by-product sales. The Court cautioned that we should not to focus on whether the cost of purchasing the raw materials exceeded the revenue produced by selling the by-product, or the taxpayer's overall business purpose. The Court further held that the fact that revenue from selling the by-product was more of a cost offset than a source of principal income did not affect the analysis.

The evidence in the record establishes that the Taxpayer, through its predecessor in interest, entered into the Agreement with Barfield to exchange Slag and cash in return for services and cheap access to materials. The Agreement specifies that the Taxpayer will create Slag and that Barfield will take possession of the Slag. This demonstrates to the Board that the Taxpayer intended to produce and exchange Slag. Whether the Taxpayer received comparatively small profit from the exchange does not matter. By giving the Slag to Barfield, the Taxpayer was able to offset the costs of maintaining its Melt Shop and to obtain cheaper access to raw materials. The evidence also establishes that the Taxpayer purchased the Slag Chemicals with the intention that they would oxidize with impurities in molten scrap metal and form Slag. There is no other reasonable inference that can be drawn from the facts, and there is no other alleged purpose for which the Taxpayer purchased these materials. It follows logically that the Taxpayer purchased the Slag Materials

for the purpose of inclusion into the Slag. Accordingly, partial summary judgment will be rendered in favor of the Taxpayer as to the taxability of purchases of Slag Chemicals.

e. The Taxability of Repairs made to the EAF, the Reheat furnace, the Caster, the Flocking Tank and the Truck Scale.

Repairs to tangible personal property used in the taxing jurisdiction are generally considered to be taxable services under both the state and the Parish sales tax regimes. "Tangible personal property" is a common law term synonymous with the Louisiana Civil Code concept of "corporeal movable property." *S. Cent. Bell Tel. Co. v. Barthelemy*, 94-0499, p. 8 (La. 10/17/94), 643 So.2d 1240, 1244. However, the Taxpayer claims that the above items are properly classified as immovable property. Neither regime generally levies a tax on repairs to immovable property.

Tracts of land, with their component parts, are immovables. La. C.C. art. 462. Buildings and "other constructions permanently attached to the ground" are component parts of a tract of land. La. C.C. art. 463. The dispute is over whether the above-listed items are buildings, other constructions, or component parts thereof.

The Taxpayer claims that statements in the affidavits of Robert Kennedy and Britt Kennedy support its position that the property at issue is immovable. At the hearing, counsel for the Collectors represented to the Board that, at their depositions, these affiants stated that they had no opinion on whether the items mentioned above were movable or immovable. The Collectors also characterize the affiants' statements as self-serving and conclusory. The Taxpayer, on the other hand, disagrees with the Collectors' characterization of the depositions, and points out that the parties have had ample time to conduct discovery.

Generally, ultimate facts and conclusions of law contained in supporting affidavits cannot be considered in granting summary judgment. *See Farmer v. Reyes*, 95-0734, p. 3 (La. App. 4 Cir. 11/16/95), 665 So.2d 129, 131. The Board will not consider the affiants' statements to the extent that they express conclusions of law. The Board looks instead to the specific facts as shown by the evidence. The attached pictures depict portions of the LaPlace Mill itself. The parties have had sufficient time to inspect the premises since the commencement of these proceedings, and there has been no attack on the authenticity of the photographs.

The Taxpayer characterizes the Flocking Tank as an 'other construction' permanently attached to the ground. Three criteria generally determine whether a thing is an 'other construction' under Louisiana law: the size of the structure; the degree of its integration or attachment to the soil; and its permanency. *Bayou Fleet P'ship v. Dravo Basic Materials Co.*, 106 F.3d 691 (U.S. 5th Cir. 1997). All three criteria must be satisfied. According to the Taxpayer, the Flocking Tank is properly viewed as an 'other construction' because it is large, attached to the ground via concrete base, and designed to remain in its location permanently. While it seems likely that the Flocking Tank could qualify, considering the arguably contradictory deposition testimony about the knowledge of these issues, the Taxpayer fails to establish its entitlement to summary judgment on this issue.

The Taxpayer also argues the Flocking Tank, EAF, Reheat furnace, Caster, and Truck Scale qualify as immovables because they are component parts of an "other construction" under Civil Code article 466. Things become component parts of an 'other construction' when they are attached to the other construction and serve its principal use. La. C.C. art. 466. Other things become component parts of either a building or other construction if they are attached to such a degree that they cannot

be removed without substantial damage to themselves or to the building or other construction. *Id.* The Taxpayer contends that the Flocking Tank, EAF, Reheat Furnace, Caster and Truck Scale all cannot be removed without substantial damage to themselves or the surrounding structures.

Whether removal of a thing would cause substantial damage to thing itself or surrounding structure is a fact-intensive inquiry. For example, in *Lapalco Village Joint Venture v. Pierce*, 16-731 (La. App. 5 Cir. 6/15/17), 223 So.3d 691, the Louisiana Fifth Circuit reversed a grant of summary judgment on the issue of "substantial damage." The Court found the issue unsuited for summary judgment. The Court noted that there were photographs in the record that showed a large hole in the exterior wall of the grocery store that had been caused by the removal of the cooler units. Additional evidence in the form of an affidavit stated that the units were attached to the roof and side walls of the premises, and that the units used electricity from electrical service boxes located on the premises.

The photographs provided to the Board do not show how the Flocking Tank, Reheat Furnace or Caster are connected to their surrounding structures. Nor do the photographs show whether these items could be detached and disassembled without causing substantial damage to themselves, or to the structures to which they may be attached. In the absence of that information, the Board cannot determine what damage, if any, their removal would cause. Accordingly, the Taxpayer has not demonstrated its entitlement to summary judgment on these issues. However, solely with respect to the EAF, the Board finds that the photograph supplied is sufficient to determine that the EAF is thoroughly connected to the Melt Shop and would cause substantial damage to the Melt Shop if removed. The photograph of the EAF shows a multitude of large tubes and piping connecting the EAF to the Melt Shop, with a

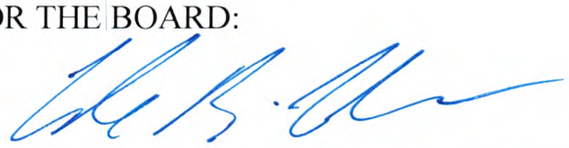
significant degree of complex attachment. The Collectors have not produced any evidence to show that this item could be safely removed. Accordingly, partial summary judgment will be rendered in favor of the Taxpayer as to the taxability of repairs to the EAF.

Finally, the Taxpayer also asserts that the EAF, Reheat furnace, Caster, and Truck Scale qualify as immovables because they are component parts of the LaPlace Mill, which itself is an 'other construction.' Things become component parts of a construction "other than a building" when they are attached to the other construction and serve its principal use. La. C.C. art. 466. Things attached to a building become component parts if, according to prevailing usages, they "serve to complete a building of the same general type, without regard to its specific use." La. C.C. art. 466. Therefore, in order to accept the Taxpayer's argument, it is necessary to determine whether the LaPlace Mill is an "other construction" or a building.

The evidence currently in the record is insufficient to permit the Board to determine whether the LaPlace Mill is a building or other construction. The photographs only show parts of the surrounding structures. It is not clear to the Board whether those structures are open air, or if they have characteristics commonly associated with buildings. Because the Board cannot determine whether the surrounding structures are buildings or other constructions, the Board cannot determine whether the property at issue must serve to complete a building of the general type at issue or serve the purpose of an 'other construction.' In addition to the above, the Board must consider the potential fairness issues with respect to the prior deposition answers. Accordingly, the Board will deny the Taxpayer's motion on the issue of immovable property, except for the EAF (and the Elevator) as explained above.

Baton Rouge, Louisiana this 8TH day of January, 2019.

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE