# APPENDIX

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SUPREME COURT OF NEVADA

SOUTHERN CALIFORNIA EDISON, Appellant,

v.

The STATE of Nevada DEPARTMENT OF TAXATION, Respondent.

No. 67497

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FILED JULY 27, 2017

398 P.3d 896

BEFORE THE COURT EN BANC.[1]

*OPINION*

By the Court, HARDESTY, J.:

In *Sierra Pacific Power Co. v. State Department of Taxation,* we recognized that "[v]iolations of the dormant Commerce Clause are remedied by compensating for the negative impact to the claimant as measured by the unfair advantage provided to the claimant's competitors." 130 Nev. ——, 338 P.3d 1244, 1246 (2014). We concluded there that, as no competitor was favored by any unfair tax advantage, no tax refund was due. *Id.* Here, faced with a similar dormant Commerce Clause issue, we consider whether appellant Southern California Edison (Edison) is due a refund of use tax paid to Nevada because it made the requisite showing of favored competitors. We also consider whether Edison alternatively is owed a tax credit in an amount equal to the transaction privilege tax (TPT) levied by Arizona. We conclude that Edison is not

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[1] The Honorable Lidia S. Stiglich, Justice, did not participate in the decision of this matter.

owed a refund because Edison has not demonstrated the existence of substantially similar entities that gained a competitive advantage because of the unconstitutional tax. We also conclude that Edison is not due a credit because the TPT does not qualify as a sales tax paid by Edison within the meaning of NAC 372.055.

*FACTS AND PROCEDURAL HISTORY*

Edison is an electrical utility company serving approximately 14 million customers. During all times relevant to this litigation, it owned a majority interest in Mohave Generation Station (Mohave),[2] a coal-fired power plant in Clark County. Mohave bought coal exclusively from Peabody Western Coal Company (Peabody), which extracted the coal in Arizona. The coal was ground up, turned into a slurry mixture, and transported across state lines to Mohave through a 273–mile pipeline.

Respondent State of Nevada Department of Taxation (the Department) levied a use tax on the coal Edison purchased from Peabody, pursuant to NRS 372.185. Edison paid $23,896,668 in use tax for transactions with Peabody between March 1998 and December 2000. During this time, the state of Arizona levied a TPT on Peabody for the coal's production in Arizona totaling $9,703,087.52, which was included in the overall price Edison paid to Peabody.

Pursuant to NRS 372.270, proceeds of minerals mined in Nevada are exempt from the use tax but subject to a net proceeds tax under NRS Chapter 362. Alleging that exempting minerals mined in

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[2] Mohave closed in 2005.

Nevada from the use tax while imposing the use tax on minerals mined outside the state unconstitutionally discriminates against interstate commerce and violates the dormant Commerce Clause, Edison filed a claim with the Department for a refund of the use tax it paid between March 1998 and December 2000.[3] The Department denied the claim, and Edison filed an appeal with the Nevada Tax Commission. The Commission also denied the requested refund.[4]

Edison then filed an independent action in the district court and sought a trial de novo seeking a refund of the taxes it paid.[5] Edison did not seek

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[3] Edison also filed claims for refunds of the use tax paid for the periods January 2001 through September 2003 and October 2003 through December 2005. This appeal only involves Edison's claim for a refund for the period of March 1998 and December 2000. But the parties have agreed that the final judgment in this proceeding will be conclusive as to the other two claims.

[4] The Commission originally granted the request in a closed meeting, and the district court affirmed the Commission's decision. This court reversed based on a violation of Nevada's Open Meeting Law. *Chanos v. Nev. Tax Comm'n,* 124 Nev. 232, 244, 181 P.3d 675, 683 (2008).

[5] After Edison filed its complaint, the Department moved for dismissal, arguing that the proper method for challenging the Commission's denial was through a petition for judicial review. The district court agreed and dismissed Edison's complaint. Edison then petitioned this court for a writ of mandamus, which we granted after determining that the Department was "judicially estopped from asserting that a petition for judicial review is the sole remedy because it specifically told Edison that trial de novo would be available if Edison was unhappy with the Commission's decision." *S. Cal. Edison v. First Judicial Dist. Court,* 127 Nev. 276, 279, 255 P.3d 231, 233 (2011).

prospective relief from its future obligation to pay use tax. After conducting a bench trial but before entering its final decision, the district court stayed the matter pending this court's ruling in *Sierra Pacific* because the cases presented many of the same legal and factual issues. Two weeks after this court published its opinion in *Sierra Pacific,* the district court issued its decision in which it found that, while the negative implications of the dormant Commerce Clause rendered NRS 372.270 unconstitutional,[6] Edison was not entitled to a refund because it did not have favored competitors that benefited from the discriminatory taxation scheme. The district court also denied Edison's other claims. Edison now appeals.

*DISCUSSION*

Edison's primary arguments on appeal are: (1) NRS 372.185 (use tax) and NRS 372.270 (use tax exemption) can be harmonized to bring NRS 372.270 within constitutional parameters, and, under its proposed construction, Edison is entitled to a refund

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[6] The district court determined that NRS 372.270 was unconstitutional under the dormant Commerce Clause based on its interpretation of our *Sierra Pacific* decision. However, we did not speak to the constitutionality of NRS 372.270 in that decision. *Sierra Pac.,* 130 Nev. at ——, 338 P.3d at 1245–46. Rather, we accepted the district court's determination that the statute was unconstitutional because no party contested the court's decision on appeal. *Id.* Although the district court erroneously determined NRS 372.270 violates the dormant Commerce Clause based on *Sierra Pacific,* we nevertheless uphold the district court's decision denying Edison's request for a tax refund. *Saavedra–Sandoval v. Wal–Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

because the use tax does not apply to its coal purchases; (2) if this court does not accept Edison's proposed construction, NRS 372.270 is impermissibly discriminatory under the dormant Commerce Clause and Edison made a showing of advantaged competitors caused by NRS 372.270, so it is entitled to a refund pursuant to *Sierra Pacific;* and (3) if this court decides that Edison is not owed a refund, Edison is entitled to a tax credit for the TPT Arizona levied on the coal's production.

*NRS 372.270 cannot be harmonized with NRS 372.185 to bring it within constitutional parameters*

Edison argues that NRS 372.270 is constitutional if it is interpreted in harmony with NRS 372.185. Edison further argues that, under its suggested interpretation, Edison's coal purchases from Peabody qualify for the exemption in NRS 372.270. Although we examined NRS 372.270 in *Sierra Pacific*, we did not consider the constitutionality of the statute because the parties did not challenge that determination by the district court. 130 Nev. at ——— , 338 P.3d at 1245. While Edison also does not take issue with the district court's determination that NRS 372.270, if interpreted as applying to it, violates the dormant Commerce Clause, Edison asserts that NRS 372.270 does not apply to its use of Arizona coal here. This court reviews questions of statutory construction de novo. *I. Cox Constr. Co. v. CH2 Invs., LLC,* 129 Nev. 139, 142, 296 P.3d 1202, 1203 (2013).

Nevada's use and sales tax statutory scheme is structured as follows:

> Under Nevada law, sales and use taxes are complementary, yet mutually exclusive. Sales

> tax applies to the sale of tangible personal property within the state. NRS 372.105. Conversely, use tax applies to the use, storage, and consumption of tangible personal property within the state. NRS 372.185. . . . The use tax complements the sales tax so that all tangible personal property sold or utilized in Nevada is subject to taxation. Use taxation is also a way for Nevada to tax transactions outside the state that would otherwise escape sales taxation. The incidence of Nevada's use tax falls *directly* upon the party that makes the out-of-state purchase and uses the property within the state.

*State, Dep't of Taxation v. Kelly–Ryan, Inc.,* 110 Nev. 276, 280, 871 P.2d 331, 334–35 (1994).

Thus, NRS 372.185 imposes a use tax "on the storage, use or other consumption in this State of tangible personal property purchased from any retailer" in an out-of-state transaction "that would have been a taxable sale if it had occurred within [Nevada]." NRS 372.270 exempts from the sales and use tax "the gross receipts from the sale of, and the storage, use or other consumption in this State of, the proceeds of mines which are subject to taxes levied pursuant to chapter 362 of NRS." NRS Chapter 362 provides for a distinct net proceeds tax on all mining operations within the state. *See, e.g.,* NRS 362.140.

One of Edison's expert witnesses explained at trial that the net proceeds tax has an effective rate of about one percent, whereas the use tax has an effective rate of six or seven percent. Thus,

according to this testimony, NRS 372.270's effect is to favor in-state mines over out-of-state mines.

However, Edison contends that NRS 372.185 and NRS 372.270 can be read in a way that avoids interstate discrimination.[7] "[W]hen the language of a statute admits of two constructions, one of which would render it constitutional and valid and the other unconstitutional and void, that construction should be adopted which will save the statute." *Ford v. State,* 127 Nev. 608, 619, 262 P.3d 1123, 1130 (2011) (quoting *Va. & Truckee R.R. Co. v. Henry,* 8 Nev. 165, 174 (1873)).

To harmonize the provisions, Edison points out that use tax is levied on all property that is "acquired out of state in a transaction that would have been a taxable sale" if it occurred in Nevada.

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[7] The Nevada Constitution states:

> The legislature shall provide by law for a tax upon the net proceeds of all minerals, including oil, gas and other hydrocarbons, extracted in this state, at a rate not to exceed 5 percent of the net proceeds. No other tax may be imposed upon a mineral or its proceeds until the identity of the proceeds as such is lost.

Nev. Const. art. 10, § 5(1). Edison argues that the second sentence of this provision is not limited to minerals extracted in this state, so the imposition of the use tax on Edison is unconstitutional. We conclude that this argument is without merit because the second sentence must be read in harmony with the first sentence—no other tax may be imposed on minerals that are extracted in Nevada. *See Sierra Pac.,* 130 Nev. at ——, 338 P.3d at 1247 ("Article 10, Section 5 of the Nevada Constitution prevents the Department from imposing any additional taxes on minerals that are subject to NRS Chapter 362's net proceeds tax (minerals that are mined in Nevada). . . .").

NRS 372.185(2). Edison argues that if the coal mine in Arizona was located in Nevada, the transaction would be exempt from sales tax pursuant to NRS 372.270 and thus not a "taxable sale." Under this reading, NRS 372.185 would not be implicated, and the use tax would not apply to minerals mined outside of Nevada. Such a reading of these statutes, Edison asserts, would treat out-of-state mines and minerals exactly the same as in-state mines and minerals for the purposes of NRS 372.270—all would be exempt from use and sales taxes.

However, the reading confuses the location of the mine with the location of the sale—Nevada-based sales of Arizona-mined coal are taxable in Nevada. Further, Edison's harmonization would also avoid net proceeds tax on its transactions with Peabody. Because Peabody mines in Arizona, the net proceeds tax does not apply. *See* NRS 362.110(1)(a) (providing that "[e]very person extracting any mineral in this State" must file an annual statement with the Department in order to determine the net proceeds tax owed). In *Sierra Pacific*, this court noted that "it is apparent that the Legislature originally enacted [NRS 372.270] to avoid taxing the proceeds of mines already subject to the net proceeds tax." 130 Nev. at ——, 338 P.3d at 1248. The Legislature did not intend for companies using mine proceeds to entirely avoid use, sales, *and* net proceeds taxation, however. Thus, Edison's construction causes an absurd result, and we decline to adopt its proposed construction. *See City Plan Dev., Inc. v. Office of Labor Comm'r*, 121 Nev. 419, 435, 117 P.3d 182, 192 (2005) ("When interpreting a statute, this court . . . seek[s] to avoid an interpretation that leads to an absurd result.").

*Edison does not have substantially similar favored competitors that benefited from the discriminatory taxation scheme*

Edison argues, alternatively, that if NRS 372.270 is not harmonized with NRS 372.185 consistent with its proposed construction, the district court's conclusion that NRS 372.270's tax exemption is unconstitutional under the dormant Commerce Clause should stand. Similarly, the Department does not dispute the district court's determination that NRS 372.270's tax exemption violates the dormant Commerce Clause. Thus, as in *Sierra Pacific,* "we . . . do not consider the lawfulness of the statute as a whole." *Sierra Pac.,* 130 Nev. at ——, 338 P.3d at 1245. Rather, we review the district court's decision in terms of the relief Edison sought at trial and seeks on appeal. The only remedy Edison requests is retrospective relief in the form of a full refund of the taxes it paid on the coal purchase.

Edison argues that it presented the district court with adequate evidence of favored competitors to entitle it to a full refund under *Sierra Pacific*.[8] The

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[8] Edison also argues that *Sierra Pacific* should be overturned because it misconstrues *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Department of Business Regulation of Florida,* 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990). Edison contends that *McKesson* uses the term "competitors" noneconomically (i.e., broadly as a synonym for an entity that gained an advantage under the unconstitutional tax plan regardless of economic competition), and that United States Supreme Court jurisprudence does not require actual discrimination to receive a remedy. We are not persuaded by Edison's argument.

We recognize that the Supreme Court of Alabama's decision in *Ex parte Surtees*, 6 So.3d 1157, 1163 (Ala. 2008) (holding

district court concluded that "[t]here are no facts in the record to support a finding that [Edison], by paying use tax on its purchase of the coal slurry, is being discriminated against in comparison to a similarly situated taxpayer" and that "[Edison] did not pay any higher tax than did its competitors." "Where a question of fact has been determined by the trial court, this court will not reverse unless the judgment is clearly erroneous and not based on substantial evidence." *Certified Fire Prot., Inc. v. Precision Constr., Inc.,* 128 Nev. 371, 377, 283 P.3d 250, 254 (2012) (internal quotations omitted).

"State courts have the duty of determining the appropriate relief for Commerce Clause violations, and, to satisfy due process requirements, courts must provide 'meaningful backward-looking relief' to correct taxes paid pursuant to an unconstitutional scheme." *Sierra Pac.,* 130 Nev. at ——, 338 P.3d at 1248 (quoting *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla.,* 496 U.S. 18, 31, 110 S.Ct. 2238, 110 L.Ed.2d 17

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that a "favored competitor" need not be the "mirror image" of the taxpayer seeking a refund for dormant Commerce Clause violations), may be, but is not necessarily, inconsistent with our approach in *Sierra Pacific.* We nevertheless believe that *McKesson* and other dormant Commerce Clause remedy cases contemplate true economic competition. *See McKesson,* 496 U.S. at 48, 110 S.Ct. 2238 (noting that the unconstitutional tax "placed petitioner at a relative disadvantage in the marketplace vis-à -vis competitors distributing preferred local products"); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 279, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997) (stating that if "the entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed, eliminating the burden would not serve the dormant Commerce Clause's fundamental objective").

(1990)). Importantly, the injured party must demonstrate the existence of favored competitors—i.e., "competitor[s] who benefited from the discriminatory tax scheme"—for a monetary remedy to attach. *Id.* at 1249. Despite an assertion by the injured party that a favored competitor exists,

> we would have to answer the threshold question of whether the competitor is a "substantially similar entit[y]" before determining whether [the injured party] was entitled to a monetary remedy as a result of a dormant Commerce Clause violation. *See Gen. Motors Corp. v. Tracy,* 519 U.S. 278, 298–99 [117 S.Ct. 811, 136 L.Ed.2d 761] (1997). For a dormant Commerce Clause violation to exist, the claimed discrimination must create a competitive advantage between the "substantially similar entities." *Id.* However, competitive markets are generally narrowly drawn. *See Gen. Motors,* 519 U.S. at 301–03 [117 S.Ct. 811] (concluding that natural gas marketers did not serve the same market as local distribution companies, even though similarly situated geographically); *Alaska v. Arctic Maid,* 366 U.S. 199, 204 [81 S.Ct. 929, 6 L.Ed.2d 227] (1961) (drawing a distinction between salmon caught and frozen in Alaska but canned somewhere else, and salmon freshly canned in Alaska).

*Sierra Pac.,* 130 Nev. at ——, 338 P.3d at 1249 n.7 (first alteration in original).

Based on this analysis, this court determined in *Sierra Pacific* that the appellants did not have substantially similar advantaged competitors

because Nevada mines do not produce commercially viable qualities or quantities of coal, and thus, its competitors also had to purchase these products out of state and were subject to the use tax. *Id.* at 1249 & n.6. Therefore, because no coal-using competitor was favored under NRS 372.270, "the tax scheme did not actually discriminate against interstate commerce, [and] a refund—or any other remedy—[was] not necessary to satisfy due process." *Id.* at 1249.

Here, like in *Sierra Pacific*, the district court found, and the record reflects, that Edison does not compete against power companies that use coal mined in-state because there are not large enough coal deposits in Nevada to justify commercial operations. Edison does not dispute this finding and instead argues that geothermal, oil, and natural gas resources were mined in Nevada, that energy producers using these materials were favored under NRS 372.270, and that these competitors are substantially similar to coal energy producers. According to Edison, geothermal, oil, and natural gas power plants provide the same homogeneous commoditized output as coal power plants—electrical energy. Thus, it argues that in the electrical industry, all energy producers compete against each other regardless of the fuel source used.

However, we believe that determining the market based on outputs would lead to an overbroad market where competitors are not similar. Drawing the market in such a way would group coal electrical producers with natural gas, nuclear, wind, hydroelectric, solar, and geothermal. These production methods are not similar for the purposes of this dormant Commerce Clause analysis because

they require varying inputs. Notably, the dormant Commerce Clause is only implicated in this case because of *the different tax rate that inputs are subject to*. The controversy here has nothing to do with the way that Nevada is taxing electrical energy; it has to do with the effective tax rate of mined coal.

Because Edison failed to demonstrate the existence of substantially similar advantaged competitors, and a violation of the dormant Commerce Clause requires that there be "a competitor who benefited from the discriminatory tax scheme for the injured party to merit a monetary remedy," we conclude that Edison is not entitled to any refund of use tax paid. *Sierra Pac.*, 130 Nev. at ——, 338 P.3d at 1249.[9]

*Edison is not entitled to a tax credit based on the TPT paid to Arizona*

Edison argues that even if a refund is not warranted, it is entitled to a $9,703,087.52 tax credit because it paid the TPT in Arizona. Edison contends that the TPT is, in substance, a sales tax regardless of its name. The Nevada Administrative Code dictates when a tax credit should be awarded:

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[9] Edison also argues that it is entitled to a refund pursuant to NRS 372.630 and NRS 372.690. NRS 372.630(1) states that if a tax has been "erroneously or illegally collected" it must "be refunded to the person." NRS 372.690 states that any judgment received by an injured taxpayer plaintiff "must first be credited" on the applicable sales or use tax due from the plaintiff, and then "[t]he balance of the judgment must be refunded to the plaintiff." We conclude that Edison's argument is without merit because these statutes would only be applicable here if Edison could demonstrate that there is a substantially similar favored competitor.

> In determining the amount of use tax that is due from a taxpayer, the Department will allow a credit toward the amount due to this State in an amount equal to sales tax legitimately paid for the same purchase of tangible personal property to a state or local government outside of Nevada, upon proof of payment deemed satisfactory to the Department.

NAC 372.055. Thus, for Edison to be entitled to a tax credit, the TPT must be a sales tax.

Whether the TPT is a sales tax is a question of law that we review de novo. *See Garcia v. Prudential Ins. Co. of Am.,* 129 Nev. 15, 19, 293 P.3d 869, 872 (2013). "Sales taxes are imposed on the purchaser rather than on the seller. A sales tax is a distinct and separate charge which the retail seller is required to collect as a pass through entity for the benefit of the state." 85 C.J.S. *Taxation* § 2143 (2010) (footnote omitted).

The Arizona TPT is generally provided for by statute:

> There is levied . . . by the department, . . . privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales or gross income.

Ariz. Rev. Stat. Ann. § 42-5008(A) (2013). The TPT is broken into 15 different classifications. See Ariz. Rev. Stat. Ann. §§ 42-5061 through 42-5075. "The mining classification is comprised of the business of mining, quarrying or producing for sale, profit or

commercial use any nonmetalliferous mineral product that has been mined, quarried or otherwise extracted within the boundaries of this state." Ariz. Rev. Stat. Ann. § 42-5072(A) (2013). "The tax base for the mining classification is the gross proceeds of sales or gross income derived from the business." Ariz. Rev. Stat. Ann. § 42-5072(B) (2013).

The Supreme Court of Arizona has stated that the mining TPT

> is not a tax upon sales. It is purely an excise tax upon the privilege or right to engage in business in Arizona measured by the gross volume of business conducted within the state. The legal incidence of the tax falls on the seller. The taxable event is the engaging in the business of mining in Arizona.

*Indus. Uranium Co. v. State Tax Comm'n*, 95 Ariz. 130, 387 P.2d 1013, 1014 (1963) (citation omitted); *see also Ariz. Dep't of Revenue v. Robinson's Hardware,* 149 Ariz. 589, 721 P.2d 137, 141 n.2 (Ariz.Ct.App. 1986) ("Appellant continuously refers to the transaction privilege tax at issue here as a 'sales' tax. In doing so, it confuses two dissimilar types of taxes, since we have repeatedly held that a transaction privilege tax is not a 'sales' tax."); *City of Phoenix v. West Publ'g Co.,* 148 Ariz. 31, 712 P.2d 944, 946–47 (Ariz.Ct.App. 1985) ("Th[e TPT] is to be distinguished from a sales tax, which is generally added to the selling price and is borne by the consumer, with the vendor being made an agent of the taxing authority for purposes of collection."). Additionally, the Arizona Department of Revenue website provides an overview of the TPT that describes it as follows:

> The Arizona transaction privilege tax is commonly referred to as a sales tax; however, the tax is on the privilege of doing business in Arizona and is not a true sales tax. Although the transaction privilege tax is usually passed on to the consumer, it is actually a tax on the vendor.

*Transaction Privilege Tax,* State of Arizona Department of Revenue, https://www.azdor.gov/business/transactionprivilegetax.aspx (last visited June 6, 2017).

Here, the district court found that Edison "did not pay any sales tax to the [s]tate of Arizona on its purchase of the coal slurry. Any tax was paid by Peabody to the state of Arizona." The district court then concluded that "[i]n the contract between the parties[, Edison] agreed to reimburse Peabody as part of the sale price the taxes that Peabody paid to Arizona. This reimbursement was a part of the purchase price [Edison] paid to Peabody for the coal slurry."

If the TPT was a sales tax, it would be borne by Edison, and Peabody would simply be an agent of collection. However, the district court concluded, and we agree, that Edison did not bear the cost of the tax, and Peabody was not an agent that collected the tax; rather, it was Peabody, as the seller, that was responsible for the tax—it simply passed on the cost to Edison. In a pretrial pleading, Edison admitted that it "reimbursed Peabody for Arizona transaction privilege tax," and the contract between the parties clearly demonstrates that Edison would reimburse Peabody for all taxes Peabody paid for the coal slurry delivered to Edison.

Although Edison argues that the mining TPT functions as a sales tax because it is levied on gross proceeds of sales, that alone does not render it a sales tax. *Homestake Mining Co. v. Johnson*, 374 N.W.2d 357, 362 (S.D. 1985) ("Merely because the measure of the tax is gross receipts, does not mean the nature of the tax is a sales tax."). "The sale cannot occur until there has been a severance from the earth in the first instance. Thereafter, a sale merely determines the metal's value and thus provides a measure for the tax and a time for collection." *Id.* The mining TPT, as a tax levied for the privilege of conducting nonmetalliferous mining business in Arizona, simply uses gross proceeds of sales to determine the value of the tax owed upon severance from the ground.

Further, Edison contends that the TPT has an exemption "for sales for resale," which is consistent with any true sales tax. We agree that such a provision is an essential component of a sales tax. *See* 67B Am. Jur. 2d *Sales and Use Taxes* § 173 (2010). The purpose of this exemption is to "avoid[ ] multiple taxation of the same property as it passes through the chain of commerce from producer to wholesaler to distributor to retailer." *Id.* Edison cites to two sections of Arizona's administrative code in support of its argument, *see* Ariz. Admin. Code §§ R15-5-101 and R15-5-122, but these administratively promulgated provisions only apply to the *retail classification*, not the mining classification. And the administrative code applicable to the mining classification—Ariz. Admin. Code §§ R15-5-901 through 15-909—does not provide for a resale exemption.

Accordingly, because the mining TPT is not a sales tax within the meaning of NAC 372.055, we hold that the district court did not err in concluding that Edison was not entitled to a tax credit.

*CONCLUSION*

We conclude that NRS 372.270 cannot be harmonized with NRS 372.185 to provide Edison a refund. Edison also has not demonstrated the existence of substantially similar competitors that were advantaged by the unconstitutional tax. Furthermore, Edison is also not entitled to a tax credit because the TPT is not a sales tax within the meaning of NAC 372.055. Accordingly, we affirm the district court's final judgment.

We concur:

Cherry C.J.

Douglas J.

Gibbons J.

Pickering J.

Parraguirre J.

Case No.: 09 OC 00016 1B

Dept. No.: 1

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

SOUTHERN CALIFORNIA EDISON,

Plaintiff,

vs.

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

Defendant.

**AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION**

This matter is before this Court based on a Second Amended Complaint filed by Plaintiff, Southern California Edison, as to a decision rendered by Defendant, The State of Nevada, ex rel, Department of Taxation. An eight day bench trial was held January 21-29, 2014. An Order Staying

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

**FINDINGS OF FACT**

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

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

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

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

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

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

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

8. BMP operated the Coal Slurry Preparation Plant and the pipeline that transported the coal slurry to Mohave. Before delivery of the coal to BMP, Peabody processed the run-of-mine coal by separating rock in a rotary breaker lowering the ash content and reducing the coal to a 2" x O" size. At

the Coal Slurry Preparation Plant, the coal was further crushed by various means to a certain size and blended with water to create coal slurry that could then be transported through the pipeline.

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

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

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

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

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

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

15. SCE de-watered the coal and burned it to generate electricity. SCE further pulverized the coal

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

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

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

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

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

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

21. On January 31, 2003, after the Department denied SCE's claims for refund for the time period between March 1998 and December 1999, SCE submitted a Petition for Redetermination limited to those periods arguing for the first time that its consumption of coal at the Mohave Plant was exempt based on the dormant Commerce Clause and that

the taxable measure should not have included SMCRA and Black Lung payments, but SCE did not provide amended returns.

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

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

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

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

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

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

28. SCE did not pay any taxes to the United States or the Navajo Nation or Hopi Tribe on its

purchase of coal slurry. Any tax was paid by Peabody to the state of Arizona.

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

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

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

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

**CONCLUSIONS OF LAW**

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

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

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

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

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

6. NRS 372.185 provides:

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

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

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

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

10. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the United States Supreme Court set out a test to determine whether a state tax provision violates the Commerce Clause. A state tax provision will survive a Commerce Clause challenge so long as the tax: (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state. *See Quill v. N Dakota*, 504 U.S. 298 (1992) (quoting *Complete Auto Transit v. Brady*).

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

12. The United States Supreme Court has identified the fundamental objective of the dormant Commerce Clause as "preserving a national market for competition undisturbed by preferential

advantages conferred by a State upon its residents or resident competitors." *Gen. Motors Corp. v. Tracy*, 519 U.S. 279, 299 (1997). In this case, SCE has not been treated any differently than any of its market competitors. Since there is no unequal treatment and consequently no impediment to free trade, SCE's claim is not within the zone of interests to be protected by the Commerce Clause.

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

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

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

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

17. Dormant Commerce Clause case law makes clear that violations must be based on actual injury and it is the burden of the taxpayer to prove the

injury. In *Gregg Dyeing Co. v. Query,* 286 U.S. 472, 481 (1932), the United States Supreme Court wrote: "Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries." The practical effect here is that there was no discrimination.

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

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

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

19. The United States Supreme Court wrote:

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

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

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

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

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

22. The Nevada Supreme Court has ruled that sales and use tax exemptions are to be narrowly construed in favor of taxability. *Shetakis Distributing Co. v. Dep't of Taxation,* 108 Nev. 901, 907, 839 P.2d 1315, 1319 (1992). The language of the Nevada Constitution Article X Section 5(1) and

NRS 362.110[1] clearly limits the net proceeds tax, and the corresponding exemption from sales and use taxes, to minerals extracted in Nevada.

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

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

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

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

Although the exemption to the use tax set forth in NRS 372.270 is unconstitutional and in violation of the Dormant Commerce Clause, the use tax itself is not unconstitutional. Thus, the tax itself

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

complained of was lawfully assessed. NRS 3 72.270 has no applicability because there was no competitor that obtained an advantage thereunder; and, as such, there was no actual discrimination against interstate commerce. *See Sierra Pacific Power Company, et al. v. The State of Nevada, Department of Taxation,* 130 Nev. Adv. Op. 93 (Dec. 04, 2014). In fact, to not charge a use tax would have given a benefit to SCE which other taxpayers did not enjoy. SCE is on an even playing field with all such companies in the state of Nevada in regard to this issue.

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

NAC 372.055 provides,

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

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

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

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

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

> 1. "Gross receipts" means the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:
>
> (a) The cost of the property sold. However, in accordance with such rules and regulations as the Tax Commission may prescribe, a deduction may be taken if the retailer has purchased

property for some other purpose than resale, has reimbursed his vendor for tax which the vendor is required to pay to the State or has paid the use tax with respect to the property, and has resold the property before making any use of the property other than retention, demonstration or display while holding it for sale in the regular course of business. If such a deduction is taken by the retailer, no refund or credit will be allowed to his vendor with respect to the sale of the property.

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

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

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

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

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

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

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

(a) Cash discounts allowed and taken on sales.

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

property at a price greater than the amount charged for the property that is returned.

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

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

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

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

Further, the federal taxes paid by Peabody do not fall within the exclusion in NRS 372.025(3)(d) because the taxes did not concern retail sales. The fee imposed by the Surface Mining Control & Reclamation Act of 1977 is an assessment or excise tax on all coal produced for sale by surface or underground mining. *United States v. Tri-No Enterprises, Inc.*, 819 F.2d 154, 158 (7th Cir. 1987).

The tax imposed by the Black Lung Benefits Revenue Act of 1977 is also an excise tax. *See e.g. Warrior Coal Mining Co. v. U.S.*, 72 F.Supp. 2d 747 (W.D. Ky. 1999) and *Costain Coal Inc. v. U.S.*, 126 F.3d 1437 (C.A. Fed. 1997). Since the federal taxes Peabody paid pursuant to the Surface Mining Control & Reclamation Act of 1977 and the Black Lung Benefits Revenue Act of 1977 are excise taxes and not retail sales taxes, the exclusion does not apply.

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

As set forth above, NRS 372.065(3)(d) excludes, "the amount of any tax, not including any manufacturers' or importers' excise tax, imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer" from the definition of sales price. The Navajo Nation Business Activity Tax and Possessor Interest Tax do not fall within this exclusion because these are not taxes imposed with respect to retail sales. The Business Activity Tax imposed by the Navajo Nation is a tax on the privilege of doing business on the Navajo Nation lands. *Pittsburg &*

*Midway Coal Mining Co., v. Watchman*, 52 F.3d 1531, 1535 (10th Cir. 1995). The Possessory Interest Tax levied by the Navajo Nation is based on the value of property leased on tribal lands. *Peabody Coal Co. v. Navajo Nation*, 75 F.3d 457, 468 (9th Cir. 1996). These are not retail sales taxes and there is no basis for not including them in the sales price of the property used to compute the measure of the use tax.

31. SCE is not entitled to exclude from the measure of use tax taxes paid to the state of Arizona. SCE argues that it should not have paid use tax on amounts paid to Peabody for the Arizona Ad Valorem Tax and the Arizona Transaction Privilege Tax, "because such amounts are not includable in the sales price subject to Nevada use tax under NRS 372.065." This argument fails because these taxes are not taxes on retail sales.

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

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

32. SCE is not entitled to exclude transportation costs from the measure of use tax.

Prior to its amendment in 2002 NAC 372.101 provided,

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

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

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

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

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

**DECISION**

Based on the foregoing and good cause appearing,

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

**IT IS SO ORDERED.**

Dated this 17th day of December, 2014.

s/ James T. Russell
JAMES T. RUSSELL
DISTRICT JUDGE

## Nevada Revised Statute 362.010

### 362.010. Definitions

As used in this chapter, unless the context otherwise requires:

1. "Mine" means an excavation in the earth from which ores, coal or other mineral substances are extracted, or a subterranean natural deposit of minerals located and identified as such by the staking of a claim or other method recognized by law. The term includes a well drilled to extract minerals.

2. "Mineral" includes oil, gas and other hydrocarbons, but does not include sand, gravel or water, except hot water or steam in an operation extracting geothermal resources for profit.

3. "Patented mine or mining claim" means each separate, whole or fractional patented mining location, whether such whole or fractional mining location is covered by an independent patent or is included under a single patent with other mining locations.

## Nevada Revised Statute 362.100

### 362.100. Duties of Department

1. The Department shall:

(a) Investigate and determine the net proceeds of all minerals extracted and certify them as provided in NRS 362.100 to 362.240, inclusive.

(b) Appraise and assess all reduction, smelting and milling works, plants and facilities, whether or not associated with a mine, all drilling rigs, and all supplies, machinery, equipment, apparatus, facilities, buildings, structures and other improvements used in connection with any mining, drilling, reduction, smelting or milling operation as provided in chapter 361 of NRS.

2. As used in this section, "net proceeds of all minerals extracted" includes the proceeds of all:

(a) Operating mines;

(b) Operating oil and gas wells;

(c) Operations extracting geothermal resources for profit, except an operation which uses natural hot water to enhance the growth of animal or plant life; and

(d) Operations extracting minerals from natural solutions.

## Nevada Revised Statute 372.185

### 372.185. Imposition and rate

1. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from any retailer on or after July 1, 1955, for storage, use or other consumption in this State at the rate of 2 percent of the sales price of the property.

2. The tax is imposed with respect to all property which was acquired out of state in a transaction that would have been a taxable sale if it had occurred within this State.

## Nevada Revised Statute 372.270

### 372.270. Proceeds of mines

There are exempted from the taxes imposed by this chapter the gross receipts from the sale of, and the storage, use or other consumption in this State of, the proceeds of mines which are subject to taxes levied pursuant to chapter 362 of NRS.