

No. 501031-II

IN THE COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON

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SOLVAY CHEMICALS, INC.,  
Plaintiff/Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF REVENUE,

Defendant/Respondent.

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**BRIEF OF APPELLANT**

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## I. INTRODUCTION

This case involves the taxation of certain fixed assets used to manufacture hydrogen peroxide at Solvay Chemicals' plant in Longview, Washington under the machinery and equipment ("M&E") exemption. Like many states, Washington exempts "machinery and equipment" used directly in a manufacturing operation from sales and use tax. RCW 82.08.02565.<sup>1</sup> The M&E exemption was enacted in 1995 to encourage the growth and development of the state's private sector manufacturing industry and improve Washington's ability to compete with other states for manufacturing investment. Laws of 2011, ch. 23, §1.

"Machinery and equipment" is defined to include "industrial fixtures, devices, and support facilities, and tangible personal property that becomes an ingredient or component thereof." RCW 82.08.02565. The Department of Revenue's regulations further define the term "industrial fixture" as "an item attached to a building or to land" and the term "device" as "an item that is not attached to the building or site." WAC 458-20-13601(2)(b)-(c). However, "machinery and equipment" does not include property with a useful life of less than a year or buildings. RCW 82.08.02565(2)(b). Importantly, the M&E exemption only applies to

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<sup>1</sup> "Machinery and equipment" is also exempt from use tax under RCW 82.12.02565. Because RCW 82.12.02565 references the definitions in the sales tax exemption section, RCW 82.08.02565, this brief will reference RCW 82.08.02565 for simplicity.

“machinery and equipment” “used directly” in a manufacturing operation. RCW 82.08.02565(1)(a). As such, the term “machinery and equipment” can have a broad definition, but still only exempt a limited amount of items.

Here, the working solution at issue is the primary fixed asset used to create hydrogen peroxide at the Longview Plant. It performs numerous functions related to the production of hydrogen peroxide and has a useful life of 4.5 years. Additionally, the working solution is contained in and becomes a functional part of the reactor units that form the working solution loop, similar to mercury in a thermometer or refrigerant in an air conditioner. Because the working solution is a fixed asset used directly in the manufacture of hydrogen peroxide and not part of the buildings, it is exempt from sales and use tax as either a device, an industrial fixture, or an ingredient or component of the plant’s industrial fixtures. Accordingly, this court should reverse the trial court’s order granting summary judgment to the Department.

## **II. ASSIGNMENT OF ERROR**

The trial court erred in granting summary judgment to the Department, denying Solvay’s motion for summary judgment, and dismissing Solvay’s refund lawsuit.

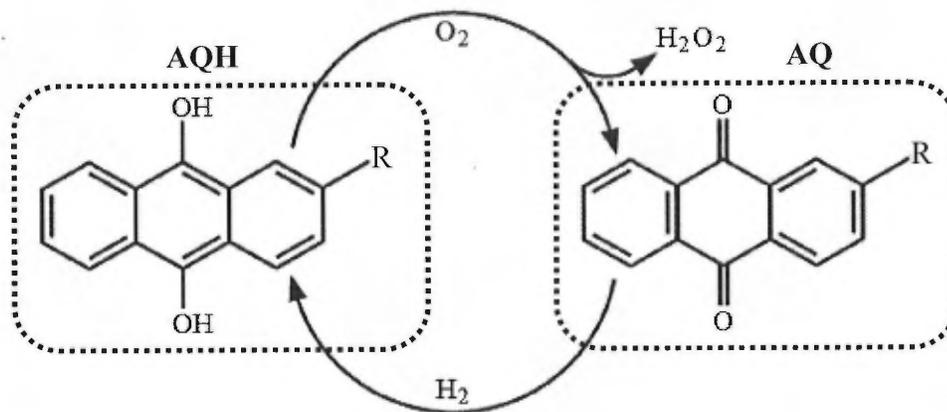
### III. STATEMENT OF ISSUE

Whether the working solution used at Solvay's Longview Plant is exempt from sales and use tax as "machinery and equipment" under RCW 82.08.02565 and RCW 82.12.02565.

### IV. STATEMENT OF THE CASE

#### A. Undisputed Facts

Solvay is a chemical manufacturer with a plant located in Longview, Washington. CP 205. The primary product of the Longview plant is hydrogen peroxide. CP 206. Solvay manufactures hydrogen peroxide at the Longview plant using an auto-oxidation process. *Id.* ¶ 8. In this process, anthraquinone ("AQ") (an organic chemical) and its derivatives are used to turn hydrogen ( $H_2$ ) and oxygen ( $O_2$ ) gases into hydrogen peroxide ( $H_2O_2$ ). *Id.* The diagram below shows how AQ combines with the hydrogen gas to form anthrahydroquinone ("AQH"). CP 206 ¶ 9, 212. When AQH is exposed to oxygen, the hydrogen combines with the oxygen to form hydrogen peroxide and AQ. *Id.* ¶ 10.



## 1. AQ Auto-oxidation Process

AQ is a thick, waxy substance. CP 206 ¶ 11. In order for AQ to react with the hydrogen and oxygen, and to recover the hydrogen peroxide at the end of the manufacturing process, the AQ must be suspended in a working solution that can dissolve both the AQ and AQH, and will separate the hydrogen peroxide from the rest of the chemicals at the end of the reaction process. *Id.* ¶¶ 11-12. To perform the task of holding the AQ and AQH in solution and separating the hydrogen peroxide at the end of the reaction process, Solvay combines diisobutyl carbinal (“DBC”) and Aromatic Solvent G (“ASG”) with the AQ to form the “working solution” used in the equipment at its Longview plant. *Id.* ¶¶ 12-13.

The Longview plant is composed of a series of reaction units that form the working solution loop. CP 207 ¶ 16-17. These units allow the working solution to combine with the ingredients and the finished hydrogen peroxide to be separated from the working solution at the end of the process. *Id.* ¶ 16. The working solution continuously circulates between the reaction units and is not intentionally removed from the loop, similar to mercury in a thermometer or refrigerant in a refrigerator or air conditioner. *Id.* ¶ 16; CP 221, Appendix A. The working solution is a functional part of the reaction units that make up the working solution loop and the units cannot function without being filled with working solution. CP 207 ¶ 20.

## 2. Tasks Performed by the Working Solution

The first reaction unit in the working solution loop is the Hydrogenator. In this unit the working solution combines with hydrogen gas. CP 207 ¶ 23. The Hydrogenator is filled with a mixture of working solution and palladium catalyst. *Id.* The palladium catalyst has a sand-like consistency and is suspended in the working solution by rising bubbles of hydrogen. *Id.* Once the working solution has reacted with the hydrogen, it moves through two sets of filters that keep the palladium catalyst in the hydrogenation unit and allows the working solution to move to the Oxidizer. *Id.*

In the Oxidizer, the hydrogenated working solution flows into the top of an oxidation reactor. Compressed air is injected into the bottom of this reactor. *Id.* ¶ 24. As air bubbles rise through the liquid, the working solution reacts with the oxygen in the air to produce hydrogen peroxide. *Id.* When the air exits the top of the oxidation reactor, most of the oxygen has been consumed, and the remaining gas passes through an air pollution control system and then is vented to the atmosphere. *Id.* The working solution then exits the bottom of the oxidizer unit. *Id.* At this point the working solution contains a very low concentration of hydrogen peroxide. *Id.* From here, the working solution moves to the Extraction Column. *Id.*

In the Extraction Column, the working solution carrying the hydrogen peroxide is injected in the bottom of the extraction tower. *Id.*

¶ 25. Purified water is added to the top of this tower. *Id.* Because the working solution is lighter than water, it rises through the tower, passing through a number of perforated trays as it rises. *Id.* The water, which is heavier, moves downward through the tower. *Id.* As the water contacts the working solution, the hydrogen peroxide is transferred from the working solution to the water. *Id.* By the time the working solution reaches the top of the tower, it has been depleted of hydrogen peroxide. *Id.* The working solution then flows into a holding tank from which it circulates back to the hydrogenation unit to begin the process again. *Id.* The water exits the bottom of the tower as a crude hydrogen peroxide solution of approximately 40% hydrogen peroxide and 60% water. *Id.* This hydrogen peroxide solution is then distilled to meet various industry specifications. *Id.* ¶ 26.

### **3. Useful Life of Working Solution**

While minor losses of the working solution do occur, the removal of the working solution from the working solution loop is not a designed part of the plant operation, similar to the refrigerant in a refrigeration system or mercury in a thermometer. CP 208 ¶ 27. In order to replace these losses, Solvay purchases AQ, DBC, and ASG from other chemical companies. CP 209 ¶ 28. These chemicals are stored in separate holding tanks. *Id.* When the minor losses of working solution do occur, Solvay pumps the AQ, DBC, and ASG from their holding tanks into a mixing tank and then injects the fresh working solution into the working solution loop. *Id.* ¶ 29. This is

typically done on a weekly basis. *Id.* Once the working solution has been injected into the loop it has a useful life of approximately 4.5 years. *Id.* ¶ 30.

**B. Procedural History**

The Department audited Solvay's records for the January 1, 2008 through December 31, 2011 tax periods. CP 13. As part of that audit, the Department assessed deferred sales tax and use tax on Solvay's purchases of the DBC and ASG used to form the working solution. *Id.* Solvay appealed the assessment within the Department asserting that these purchases were exempt from sales tax under the M&E exemption. CP 11. The Department's appeals division denied the appeal, concluding that the DBC and ASG were not exempt as "machinery and equipment." CP 15. Solvay then paid the tax and timely filed a refund action in Thurston County Superior Court. CP 6-9. Both parties filed cross-motions for summary judgment. CP 388. After hearing argument, the trial court granted summary judgment for the Department, from which Solvay timely filed this appeal. CP 389, 391.

**V. ARGUMENT**

The working solution at issue qualifies for the M&E exemption from sales and use tax. The working solution is the primary fixed asset used in the manufacture of hydrogen peroxide and is part of the machinery and equipment of the plant. The undisputed facts demonstrate that the working

solution falls squarely within the Department’s definition of a “device” and that the working solution is a component of the reactor units that form the working solution loop. Accordingly, Solvay’s purchases of the chemicals used in the working solution are exempt from sales and use tax and Solvay is entitled to a refund of the taxes paid on these purchases.

**A. Standard of Review**

Orders granting summary judgment are reviewed de novo.

*TracFone Wireless, Inc. v. Dep’t of Revenue*, 170 Wn.2d 273, 280-81, 242 P.3d 810 (2010). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

**B. The Workings Solution Falls Within the Plain Language of the M&E Exemption**

The primary objective of statutory construction is “to ascertain and carry out the intent of the Legislature.” *HomeStreet, Inc. v. Dep’t of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009) (quoting *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991)). A statute’s plain meaning should be discerned from all that the Legislature has said in the statute and related statutes that disclose legislative intent about the provision in question. *G-P Gypsum Corp. v. Dep’t of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010). “[A]n enacted statement of legislative purpose is included in a plain reading of a statute.” *Id.* at 310.

When it passed the M&E exemption in 1995, the Legislature found that

[t]he state's current policy of applying sales and use taxes to machinery, equipment, and installation labor used in manufacturing ... has placed our state's private sector at a competitive disadvantage with other states and serves as a significant disincentive to the continuous improvement of products, technology, and modernization necessary for the preservation, stabilization, and expansion of employment and to ensure a stable economy.

Laws of 1995, 1st Spec. Sess., ch. 3, § 1.

The Legislature specifically defined "machinery and equipment" as industrial fixtures, devices, and support facilities, and tangible personal property that becomes an ingredient or component thereof, including repair parts and replacement parts.... "Machinery and equipment" also includes digital goods.

RCW 82.02.02565(2)(a).

While there are no statutory definitions of "industrial fixtures" or "devices," the rule implementing the exemption provides definitions for these terms that recognizes the intent of the Legislature to broadly define the term "machinery and equipment." WAC 458-20-13601 ("Rule 13601"). Rule 13601 defines an "industrial fixture" as "an item attached to a building or to land." WAC 458-20-13601(2)(d). Rule 13601 also defines a "device" as "an item that is not attached to the building or site." WAC 458-20-13601(2)(c). In other words, Rule 13601 defines "industrial fixture" and "device" to encompass all "items" between the two terms.

The term “item” is not defined in the statute or the rule. When a term is not defined in a statute, the courts will look to the plain meaning of the words as they are ordinarily given. *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The rules of statutory construction also apply to administrative rules. *City of Kent v. Beigh*, 145 Wn.2d 33, 45, 32 P.3d 258 (2001). According to *Webster’s Third New International Dictionary*, the term “item” is defined in relevant part as “an individual thing ... something that forms a contributory or component part or section of something specified.” *Webster’s Third New International Dictionary* at 1203 (2002). Read in the context of the statute and rule, the term “item” in Rule 13601 means something that is part of the manufacturing operation. *See* RCW 82.08.02565 (limiting M&E exemption to “machinery and equipment used directly in a manufacturing operation”).

Rule 13601 goes on to specifically state that software is an example of a “device.” Therefore, the term “item” is obviously not limited to solid tangible personal property. In fact, listing software as an example shows that the term “device” is not even limited to *tangible* personal property. This reading of the statute is reinforced by the Legislature’s clarification that the term “machinery and equipment” includes “digital goods.” Laws of 2009, ch. 535, § 510. “Digital goods” are defined as “sounds, images, data, facts, or information, or any combination thereof, transferred electronically.” RCW 82.04.192(6)(a).

The intent to broadly define “machinery and equipment” is also supported by the broad exclusions in the definition. The statute excludes hand-powered tools, property with a useful life of less than one year, buildings, and fixtures not integral to the manufacturing operation from the definition of “machinery and equipment.” RCW 82.08.02565(2)(b). If the Legislature had intended a narrow reading of the term “machinery and equipment,” there would be no need to expressly exclude items such as buildings from the definition. Taken together, the statutory provisions operate to limit the exemption to the items that are part of the fixed assets of the manufacturing process.

This shows that the Legislature intended to broadly construe the term “machinery and equipment” as the collection of long-term assets that manufacturers directly use to create products, other than the building. The definitions in Rule 13601, which were adopted by the Department shortly after the enactment of the exemption, further reinforce this reading by defining the terms “device” and “industrial fixture” to include all “items” between the two terms. *See N. Cent. Wash. Respiratory Care Servs., Inc. v. State, Dep’t of Revenue*, 165 Wn. App. 616, 631, 268 P.3d 972 (2011) (courts give “great weight ... to the contemporaneous construction placed upon [the statute] by officials charged with its enforcement”).

**1. The Term “Machinery and Equipment” in RCW 82.08.02565 Applies to All Fixed Assets Used Directly in a Manufacturing Operation, Other Than the Building**

When the M&E exemption was enacted in 1995, the common meaning of the term “equipment” included “(2): all the fixed assets other than land and buildings of a business enterprise.” *Webster’s Third New International Dictionary* at 768 (1993). This definition is remarkably consistent with the statutory definition of “machinery and equipment,” which includes industrial fixtures, devices, support facilities, and digital goods, but excludes buildings and property with a useful life of less than a year. *See* RCW 82.08.02565(2)(b). It is also consistent with the Department’s rule implementing the M&E exemption, which defines “device” as “an item that is not attached to the building or site” and “industrial fixture” as “an item attached to a building or to land.” WAC 458-20-13601(2)(c)-(d). These definitions of “device” and “industrial fixture” show that the key factors in applying the exemption are whether something is: (a) “used directly” in the manufacturing operation, and (b) has a useful life of more than a year. *See* WAC 458-20-13601(7)-(9)(providing lengthy descriptions of what it means to have a useful life over a year and be used directly in a manufacturing operation).

The plain meaning of the term “device” includes “something formed or formulated by design” and “an invention serving a particular purpose, especially a machine used to perform one or more relatively simple tasks.”

*Webster's Third New International Dictionary* at 618 (1993). Read in context, the definition of “device” in Rule 13601 is consistent with this definition as all of the “items” must be “used directly” in the “manufacturing operation,” and therefore would be performing a task. RCW 82.08.02565(1)(a); WAC 458-20-13601(8).

The Department’s own guidance regarding the scope of Rule 13601 is consistent with this reading. In Excise Tax Advisory (“ETA”) 3121, the Department notes that the American Heritage Dictionary defines “device” as a “contrivance or an invention serving a particular purpose, especially a machine used to perform one or more relatively simple tasks.” ETA 3121 (2009), CP 259-61, Appendix B. In determining whether “software” is a device, the Department stated that “the issue is whether the computer software performs a task in relation to the [manufacturing] operation.” *Id.* The Department’s analysis in the ETA is consistent with the language in Rule 13601’s applying the exemption to include all of the items that are directly used (i.e., that perform a task) in the manufacturing process.

**2. The Department’s Rule Applying the Exemption to All Items Directly Used in a Manufacturing Operation Is Consistent with the Statement of Legislative Intent**

The ETA’s focus on whether the item performs a task relative to the manufacturing operation is also consistent with enacted statement of Legislative intent. Defining the M&E exemption in terms of specific physical characteristics or a traditional notion of what constitutes a machine

would create a real risk that the Legislature’s goal to grow the manufacturing sector and encourage “improvement of products, technology, and modernization” would be handicapped by limiting the exemption to older manufacturing processes. *See* Laws of 1995, 1st sp.s., c3 § 1. Applying the exemption to all fixed assets used directly in the manufacturing process, as Rule 13601 does, is much more consistent with the Legislature’s goals.<sup>2</sup> It provides consistent tax treatment for manufacturers even as the tools and manufacturing processes used in their operations evolve.

Software is a prime example of this phenomenon. In the early 1990s software likely would not have fallen within a traditional understanding of what constitutes “machinery and equipment.” However, as manufacturers modernized, the importance of software to the manufacturing operations increased greatly. If sales tax were owed on the purchases of manufacturing software, the modernization costs would be greater and there would be less of an incentive to modernize, contrary to the Legislature’s intent.

Moreover, there is no policy-based reason to limit the M&E exemption to items that are traditionally understood to be machines or equipment. For example, drill bits and blades that are expected to last more

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<sup>2</sup> If an item is capitalized in a taxpayer’s accounting records (i.e., is treated as a fixed asset) it qualifies for the M&E exemption under Rule 13601. *See* WAC 485-20-13601(7)(a).

than a year are eligible for the M&E exemption. WAC 458-20-13601(6)(b). If a manufacturer shifted from a blade cutting system to a jet cutting system that used a liquid solution of abrasive materials to make the cuts, there is no reason the abrasive solution should not also be exempt, if it has a useful life of more than a year, as it performs the same function as the blade. If the exemption did not apply equally to these two systems, then the manufacturer's decision to modernize its manufacturing process could put it at a competitive disadvantage as the long-lasting abrasive solution used in a jet cutting system would be subject to sales tax while the blades for the old system were not.

Nothing in the structure of the M&E exemption shows that the Legislature intended to draw such a distinction and favor one type of manufacturing process over others. Rather, the opposite is true. By broadly defining "machinery and equipment," the Legislature provided an exemption that would maximize the incentives to modernize and would keep up with changes in manufacturing technology. In this context, the term "machinery and equipment" is properly read to include every item that performs a task in the manufacturing operation, unless it is specifically excluded.

### 3. The Working Solution Falls Within the Definition of “Device” and “Industrial Fixture” in Rule 13601

The working solution qualifies for the M&E exemption because it is an “item” that interacts with and acts on the raw ingredients and the finished product. *See* RCW 82.08.02565(2)(c) (identifying the specific activities that show an item is “used directly” in a manufacturing operation). Indeed, the working solution is the part of the plant that actually performs the task of combining the hydrogen and oxygen to form hydrogen peroxide. CP 207-08 ¶¶ 23-25. It is also responsible for conveying the ingredients and finished product between the various production stages. *Id.* Therefore, the working solution is an item that performs a task in relation to the manufacturing operation, similar to software. Because it has a useful life of approximately 4.5 years and is not part of a building, it does not fall within any of the specific exclusions.

While there is some ambiguity as to whether the working solution is attached to the site because it is contained in the reaction vessels and pipes, and therefore is an industrial fixture, it does not matter. If it is attached to the site, it is an “industrial fixture.” *See* WAC 458-20-13601(2)(d) (defining “industrial fixture” as “an item attached to a building or to land”). If it is not attached to the site, it is a “device.” *See* WAC 458-20-13601(2)(c) (defining “device” as “an item that is not attached to the building or site”). Either way, it falls within the definition of “machinery and equipment.”

As discussed above, an “item” is “an individual thing... : something that forms a contributory or component part or section of something specified.” *Webster’s Third New International Dictionary* at 1203 (2002). Here, there is no doubt that the working solution is a thing and that it forms a part of the Longview plant’s manufacturing operation. CP 207 ¶ 20. Like the reaction vessels and pipes it is a fixed asset of the Longview plant. CP 209 ¶ 31. Therefore, the working solution is an item that is either attached or not attached to the site and falls within the definition of either an industrial fixture or a device under Rule 13601.

**4. The Working Solution Falls Within the Plain Meaning of the Terms “Device,” “Industrial Fixture,” and “Equipment”**

As noted above, the plain meaning of the term “device” includes “something formed or formulated by design”<sup>3</sup> and “an invention serving a particular purpose, especially a machine used to perform one or more relatively simple tasks.” ETA 3121. Here, the working solution is something that is carefully designed and crafted to ensure that it can properly perform the tasks of conveying the raw materials around the plant and forming the hydrogen peroxide. As such it meets either definition of the term “device.”

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<sup>3</sup> *Webster’s Third New International Dictionary* at 618.

Additionally, the term “fixture” is defined in relevant part as “(3): chattel ... annexed to realty for the purposes of trade or manufacture ... **d:** an accessory or article that serves a special purpose.” *Webster’s Third New International Dictionary* at 861. Because the working solution serves a special purpose in the manufacturing of hydrogen peroxide, it falls within the plain meaning of the term “fixture” to the extent it is attached to the land through the reaction vessels and pipes.

The working solution also falls within the plain meaning of the term “equipment.” *See Webster’s Third New International Dictionary* 768 (1993) (defining “equipment” as “all the fixed assets other than land and buildings of a business enterprise”). It has a useful life of 4.5 years and is a fixed asset of the Longview Plant. CP 206, 209 ¶¶ 12-13, 31. It is also part of Solvay’s business enterprise as it is the key asset used in creating the hydrogen peroxide Solvay sells. *See* CP 207-08 ¶¶ 20, 23-25. Accordingly, it falls within the plain meaning of the term “equipment.”

**C. The Working Solution Is Also Exempt as an Ingredient or Component of the Reaction Units That Form the Working Solution Loop**

Even if the working solution is not exempt in its own right as a “device” or “industrial fixture,” it is exempt as an ingredient or component of the reaction units that form the working solution loop. The M&E exemption also applies to “tangible personal property that becomes an ingredient or component” of the industrial fixtures or devices used in the

manufacturing operation. RCW 82.08.02565(2)(a). Neither RCW 82.08.02565 nor Rule 13601 defines the term “ingredient or component.” The dictionary defines “component” as “a constituent part: **INGREDIENT.**” *Webster’s Third New International Dictionary* at 466 (2002). The term “constituent” is defined as “serving to form, compose, or make up a unit or whole.” *Id.* at 486. In other words, in the context of the statute, a component is something that forms a part of a device or industrial fixture.

Here, the working solution is a functional part of the working solution loop, which is an industrial fixture.<sup>4</sup> CP 207 ¶¶ 19-20. The working solution is contained in and circulates in the working solution loop. *Id.* ¶ 17. It is not intentionally removed from the loop, similar to mercury in a thermometer or refrigerant in an air conditioner. *Id.* ¶ 19. The working solution loop operates as a unit to manufacture hydrogen peroxide. *Id.* ¶¶ 16-20. While there are different stages, they are all part of one operational unit functioning as one. CP 53 ln. 14-20; CP 57 ln. 15-18. Because all of the stages are linked and the working solution continuously flows between them, Solvay could not run just one stage. *See* CP 79 (one of the stages can only be empty if plant shut down). This is similar to an air

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<sup>4</sup> An “industrial fixture” is “an item attached to a building or to land.” In this case, the working solution loop is composed of a series of reaction units or stages that are attached to the land. CP 207 ¶¶ 17-21; CP 221; CP 230, 232, 243 (picturing different stages in working solution loop).

conditioner or an engine where different stages form a unit that operates as a whole. *See* CP 265 (describing stages in air conditioner).

Since the working solution loop is an industrial fixture, all of its constituent parts are “components” and fall within the definition of “machinery and equipment.” Here, it is undisputed that the working solution is a functional part of the reaction units that form the working solution loop. CP 207 ¶ 20. As such, the working solution is plainly a component of an industrial fixture used in Solvay’s manufacturing operation and is likewise exempt.

## VI. CONCLUSION

For the foregoing reasons, the trial court’s order granting summary judgment to the Department should be reversed and the matter should be remanded with instructions that the chemicals purchased to form the working solution are exempt from sales and use tax under RCW 82.08.02565 and RCW 82.12.02565.

Respectfully submitted August 16, 2017.



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I certify under penalty of perjury under the laws of the state of Washington that, on August 16, 2017, I caused **Brief of Appellant** to be filed with the Court of Appeals, Division II, and caused a true and correct copy of same to be served upon the following parties as indicated below:

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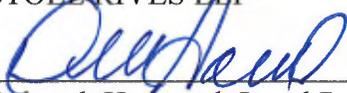
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DATED: August 16, 2017, at Seattle, Washington.

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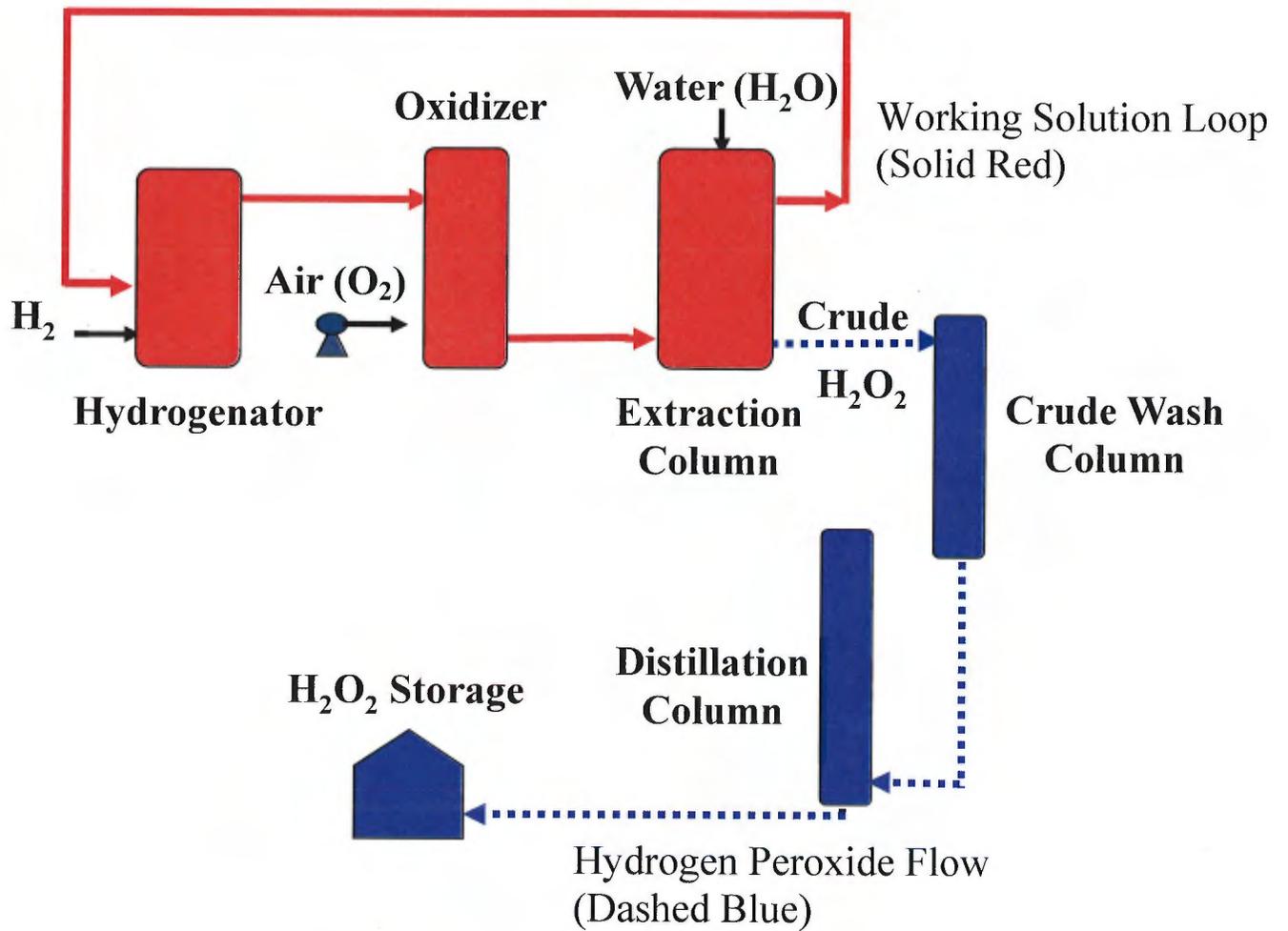
## APPENDICES

Appendix A - Solvay Longview, WA Hydrogen Peroxide Plant  
Simplified Diagram

Appendix B - Excise Tax Advisory 3121 (2009)

# **Appendix A**

## Solvay Longview, WA Hydrogen Peroxide Plant Simplified Diagram



# Appendix B



# Excise Tax Advisory

Excise Tax Advisories are interpretive statements authorized by RCW 34.05.230.

NUMBER: 3121.2009

ISSUE DATE: February 2, 2009

## Manufacturers' Machinery and Equipment Exemption — Devices

The Department has issued a series of excise tax advisories (ETAs) to address questions regarding the retail sales and use tax exemption provided by RCW 82.08.02565 and 82.12.02565, commonly referred to as the manufacturers' machinery and equipment exemption (M&E exemption). This ETA is issued to address the application of the M&E exemption to devices, including books and computer software. Please refer to ETA 3117.2009 for a current list of the issues covered by this series.

In addition to the issues discussed in this ETA series, machinery and equipment must also meet the other requirements of the statutes to be eligible for the exemption. For example, some of the requirements include:

- Purchaser/User must be a manufacturer, processor for hire, or a tester for a manufacturer or processor for hire,
- Must purchase machinery or equipment (devices, industrial fixtures, support facilities, pollution control equipment),
- The machinery or equipment must be used directly in a manufacturing, research and development, or testing operation,
- The machinery or equipment must have a useful life of one year or more, and
- The machinery or equipment must be used more than 50% of the time on an eligible activity.

Therefore, readers are advised that RCW 82.08.02565, RCW 82.12.02565, and WAC 458-20-13601 should also be referenced when making determinations about taxability.

The M&E exemption defines "machinery and equipment" as "industrial fixtures, devices, and support facilities." Questions have been raised about the meaning of the term "device," particularly in regard to whether books and computer software qualify for the M&E exemption. The issue involves the definition of "machinery and equipment," and because that definition applies broadly to the whole exemption, the analysis and outcome is the same regardless of the type of operation in question.

The statute does not provide a definition of "device." Device is defined in Rule 13601, the M&E rule. The examples given in the rule reflect the notion that the phrase "machinery and equipment" has a

**All ETAs were cancelled on February 12, 2009 and those which had a continued use were rewritten and reissued using a new numbering system. The new ETAs are numbered using the following format 3nnn.yyyy. The Department of Revenue issued ETA 3001.2009 which includes a cross reference table showing the old and new ETA numbers for those ETAs that were rewritten.**

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meaning within the context of an industrial setting. In that context “machinery and equipment” do work and have an applied function.

It is an established rule of statutory interpretation that words in a statute are given their ordinary and common meaning and that courts and others may resort to dictionaries to determine the meaning of statutory language. The common dictionary definitions of machinery and equipment, device, and book indicate that books are not within the scope of the exemption. For example, the Webster’s II New Riverside University Dictionary defines machinery as “machines or machine parts in general.” Machine is defined as “a system, usu. of rigid bodies, constructed and connected to change, transmit, and direct applied forces in a predetermined way to accomplish a particular objective, as performance of useful work.” The American Heritage Dictionary of the English Language: Fourth Edition 2000 uses this definition of device: 1. A contrivance or an invention serving a particular purpose, especially a machine used to perform one or more relatively simple tasks.

Rule 13601 defines device as “an item that is not attached to the building or site” and provides examples that are ordinarily considered to be equipment or machinery. The examples in Rule 13601 are “[f]orklifts, chainsaws, air compressors, clamps, free standing shelving, software, ladders, wheelbarrows, and pulleys.” These examples fit within the common dictionary definition of “machinery and equipment” and “device.”

### ***Books***

In order to be eligible as a device the property has to perform a task and do work. Books do not meet the definition of device. The American Heritage Dictionary of the English Language, Fourth Edition defines “book” as “[a] set of written, printed, or blank pages fastened along one side and encased between protective covers; and Black’s Law Dictionary, Fifth Edition defines it as “[a]n assembly or concourse of ideas expressed in words.” Similarly, libraries and magazines do not meet the definition of device. Books are used for reference and to assist in or guide or control decision making but are not used by a person in the same manner as machinery and equipment, which have an applied function.

### ***Computer Software***

Computer software satisfies Rule 13601’s definition of device because it performs a task and is also not attached to a building or site. Consequently, computer software can qualify for the M&E exemption if it meets a used directly test. The issue is whether the computer software performs a task in relation to the qualifying operation. For example, a computer software program that controls the operation of equipment that cuts logs into lumber qualifies for the M&E exemption. It performs a task, the control of a piece of eligible machinery, and is used directly in the manufacturing operation. On the other hand, a CD-ROM of a repair manual for this equipment does not qualify for the M&E exemption because the computer software does not perform a task in the manufacturing operation. The Department uses the definition of “computer software” in RCW 82.04.215(2), which is as follows:

“Computer software” means a set of coded instructions designed to cause a computer or automatic data processing equipment to *perform a task*. [Emphasis added.]

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**STOEL RIVES LLP**

**August 16, 2017 - 4:20 PM**

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