

NO. 50103-1-II

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

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SOLVAY CHEMICALS, INC.,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

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**CORRECTED BRIEF OF RESPONDENT**

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## I. INTRODUCTION

Appellant Solvay Chemicals, Inc. proposes an overbroad interpretation of RCW 82.08.02565's retail sales tax exemption for sales of machinery and equipment to manufacturers ("the M&E exemption"). The trial court properly rejected that interpretation as expanding the statute too far. During its manufacturing process, Solvay utilizes two chemicals, Aromatic Solvent G (ASG) and Diisobutyl Carbinal (DC), to form a working solution that helps produce hydrogen peroxide. Solvay maintains that its purchases of the ASG and DC chemicals qualify as "machinery and equipment" that are exempt from retail sales tax under the M&E exemption. Solvay reaches this conclusion by interpreting the term "machinery and equipment" to include all items that are part of the fixed assets of a manufacturing operation.

Solvay's proposed interpretation is both contrary to statutory limitations and the common sense approach that the Washington Supreme Court has adopted for interpreting tax exemptions. The ASG and DC chemicals do not fall within the definition for "machinery and equipment" under RCW 82.08.02565. ASG and DC are not "industrial fixtures" or "devices" under any common understanding of those terms. ASG and DC also are not an "ingredient or component" of qualifying machinery and equipment because they do not enter into and become part of any

machinery and equipment. Thus, the trial court correctly granted summary judgment to the Department, and this Court should affirm that ruling. Solvay's interpretation of the M&E exemption is incorrect as a matter of law.

Alternatively, this Court may also affirm the trial court's order because Solvay failed to provide sellers with an exemption certificate when purchasing the ASG and DC chemicals. RCW 82.08.02565(1)(b) expressly requires that a manufacturer provide an exemption certificate to a seller for a purchase to qualify for the M&E exemption. Solvay did not comply with this statutory mandate, and therefore, its purchases of the ASG and DC chemicals are ineligible for the M&E exemption.<sup>1</sup>

## II. RESTATEMENT OF THE ISSUES

1. For a sale to qualify for the M&E exemption, a manufacturer must purchase "machinery and equipment," which RCW 82.08.02565(2)(a) defines in relevant part as "industrial fixtures, devices . . . and tangible personal property that becomes an ingredient or component thereof, including repair parts and replacement parts." Do Solvay's purchases of ASG and DC fail to qualify for the M&E exemption when they are chemicals mixed together to form a working solution that

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<sup>1</sup> Solvay also argues that its purchases of ASG and DC are exempt from use tax under RCW 82.12.02565, which is the use tax version of the M&E exemption. As discussed in greater detail below, however, the taxes at issue in this case consist of retail sales tax, not use tax. *See infra*, Part IV.B, 33-34.

circulates through other equipment as part of Solvay's manufacturing process for hydrogen peroxide?

2. To qualify for the M&E exemption, RCW 82.08.02565(1)(b) also requires purchasers to provide sellers with an exemption certificate. Do Solvay's purchases of ASG and DC fail to qualify for the M&E exemption when Solvay failed to provide sellers with an exemption certificate at the time it purchased the chemicals?

### **III. STATEMENT OF THE CASE**

#### **A. Overview of Solvay's Hydrogen Peroxide Plant Operations**

Solvay is an international chemical company that manufactures hydrogen peroxide at its plant in Longview, Washington. CP 48-49. To manufacture hydrogen peroxide, Solvay utilizes a process that combines two molecules of hydrogen with two molecules of oxygen to form hydrogen peroxide, or H<sub>2</sub>O<sub>2</sub>. CP 103. Solvay then sells the hydrogen peroxide to its customers. CP 49.

Solvay uses a variety of materials, machinery, and equipment to produce hydrogen peroxide. At Solvay's Longview plant, there is a series of reactors, tanks, filters, pumps, and pipes that Solvay has purchased or constructed to carry out its manufacturing process. CP 53-54, 110-24, 132-33. Because this equipment is used directly in the manufacture of

hydrogen peroxide, it is exempt from retail sales tax, and not at issue in this appeal.

Hydrogen and oxygen are the primary raw materials that Solvay uses to manufacture hydrogen peroxide. CP 106. To facilitate the combining of these raw materials, Solvay also uses palladium as a catalyst during the manufacturing process. Palladium is a fine, sand-like material that causes the necessary chemical reactions for hydrogen peroxide to form. CP 60-61, 110, 114-15, 141. Solvay is not claiming that its purchases of the hydrogen, oxygen, or palladium are exempt from retail sales tax under the M&E exemption. Accordingly, the taxation of these materials is not at issue in this appeal.

In addition to the materials described above, Solvay's manufacturing process involves a working solution that circulates through the various reactors and tanks within the plant. CP 54-55, 106, 145. To create the working solution, Solvay mixes together three different substances: anthraquinone and two chemicals, ASG and DC. CP 54-55. Anthraquinone has a gel-like consistency and is used in the working solution to help the hydrogen and oxygen combine to form hydrogen peroxide. CP 65-67. Solvay is not claiming that its purchases of anthraquinone are exempt from retail sales tax under the M&E exemption. Only its purchases of ASG and DC are at issue.

The ASG and DC chemicals act as solvents in the working solution that help maintain the anthraquinone in a liquid state, which allows it to move through the equipment at Solvay's facility. CP 65-66, 118-19, 143. The DC solvent also prevents the substances in the working solution from separating. CP 119. DC and ASG do not combine with and do not become part of the final hydrogen peroxide product or any of the equipment Solvay uses in the manufacturing cycle. CP 53-55, 65-66, 74-75, 118-19.

**B. Steps In Manufacturing Hydrogen Peroxide**

Solvay's manufacturing process for hydrogen peroxide generally consists of three steps: (1) hydrogenation, (2) oxidation, and (3) extraction. CP 61, 110-14, 132-133. The hydrogenation step begins with a reactor that is filled with the working solution and the palladium catalyst. CP 54-55, 110, 135. Solvay then introduces hydrogen into this reactor. CP 54, 135. The palladium causes a chemical reaction where the hydrogen molecules attach to the anthraquinone molecules in the working solution. CP 60-61, 110. When the hydrogen and anthraquinone have bonded, the working solution travels through a series of filters to remove the palladium catalyst. CP 60-61, 68, 111.

The working solution, which now contains the bonded hydrogen and anthraquinone, passes through pipes to another tank where the oxidation step occurs. CP 70, 111-12, 137. During the oxidation stage,

Solvay adds compressed air to the working solution. CP 71-72, 112-13.

This causes the hydrogen that has bonded to the anthraquinone to combine with the oxygen molecules in the compressed air, forming a very weak concentration of hydrogen peroxide. CP 71-72, 113.

Finally, the combined hydrogen and oxygen molecules in the working solution are pumped into another tank for the extraction phase. CP 74-75, 113-14, 139. In that phase, Solvay adds purified water to the tank. CP 74-75, 113-14. The purified water helps to fully form the hydrogen peroxide molecules and removes the anthraquinone from the final hydrogen peroxide product. CP 74-75, 113-14.

The fully-formed hydrogen peroxide is pumped to a storage area of the facility where Solvay prepares it for shipment to customers. CP 114. The working solution is pumped back to the hydrogenation reactor to begin the manufacturing cycle again. CP 80-81.

**C. Solvay's Purchases of ASG and DC Chemicals**

During the manufacturing process, some of the chemicals in the working solution are lost. CP 77-79, 83, 122-25. Due to these losses, Solvay purchases ASG and DC several times throughout the year. CP 127-30, 147-60. Solvay then adds these chemicals to the working solution on a regular basis to ensure that the substances in the working solution are maintained in the proper concentrations. CP 83-84, 125.

Historically, Solvay has not paid retail sales tax when purchasing the ASG and DC chemicals from its suppliers. CP 13, 163. Additionally, Solvay did not provide any evidence to the trial court demonstrating that it gave sellers an exemption certificate when making these purchases.

**D. The Department's Assessment and Prior Instructions**

In 2007, the Department issued a tax assessment to Solvay's predecessor in interest, Solvay Interlox, Inc., for unpaid "deferred sales tax and/or use tax" on its purchases of ASG and DC. CP 163. Solvay Interlox challenged the assessment before the Department's appeals division, claiming that it did not owe retail sales tax or use tax because the chemicals qualified as "machinery and equipment" under RCW 82.08.02565 and RCW 82.12.02565. CP 164. In a written determination, the Department denied Solvay Interlox's claim. CP 162. The Department concluded that ASG and DC were not themselves "machinery and equipment" used in a manufacturing process, and were not "ingredients or components" of qualifying machinery or equipment. CP 165-66. Solvay Interlox did not seek judicial review of the Department's determination.

Notwithstanding this prior determination, Solvay Interlox, and then Solvay, continued to purchase the ASG and DC chemicals from suppliers without paying retail sales tax. CP 169-82. Thus, when the Department audited Solvay for the January 2008 through December 2011 tax periods,

the Department—consistent with its prior determination—assessed the company for \$113,350 in unpaid “deferred sales tax/use tax” on its purchases of ASG and DC.<sup>2</sup> CP 169-82.

Solvay appealed the assessment to the Department’s appeals division, again arguing that the chemicals qualified as “machinery and equipment” under RCW 82.08.02565 and RCW 82.12.02565. CP 13. For the same reasons described in its prior determination, the Department rejected Solvay’s argument and upheld the assessment. CP 13-15.

Shortly thereafter, Solvay paid the assessment and filed this action seeking a refund of the assessed taxes, claiming that its purchases of ASG and DC qualified for the M&E exemption. CP 6-9. The parties filed cross-motions for summary judgment. CP 18-33, 271-83. The trial court granted summary judgment to the Department and denied Solvay’s motion. CP 393-94. Solvay now appeals to this Court.

#### IV. ARGUMENT

Courts review questions of law from a summary judgment order de novo. *Avnet, Inc. v. Dep’t of Revenue*, 187 Wn.2d 44, 49, 384 P.3d 571

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<sup>2</sup> The Department uses the term “deferred sales tax” to refer to “purchases from vendors registered with the Department” that have not collected retail sales tax. CP 172. In such cases, the purchaser defers the retail sales tax and the tax becomes “due when the purchase is later determined to be taxable.” CP 164, 172. In contrast, use tax “applies to purchases from vendors not required to be registered with the Department” and “arises at the time the property is used . . . in Washington.” CP 172 (citing RCW 82.12.020). While the Department’s assessment refers to “deferred sales tax/use tax,” the Department explains in further detail below why the taxes at issue are retail sales tax, not use tax. *See infra*, Part IV.B, 33-34.

(2016). Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to summary judgment as a matter of law. *Wash. Imaging Services, LLC v. Dep't of Revenue*, 171 Wn.2d 548, 555, 252 P.3d 885 (2011). While this Court's review is de novo, Solvay bears the burden of proving that it qualifies for the M&E exemption and is entitled to a refund. *Avnet, Inc.*, 187 Wn.2d at 49-50 (citing RCW 82.32.180, which provides that "the burden shall rest upon the taxpayer to provide that the tax as paid by the taxpayer is incorrect").

In this case, the trial court's order granting summary judgment to the Department provides a logical, common sense interpretation of the M&E exemption while also giving effect to the Legislature's intent. Chemicals mixed together to form a working solution for manufacturing hydrogen peroxide are not "machinery and equipment" under RCW 82.08.02565. That statute defines "machinery and equipment" as "industrial fixtures," "devices," or an "ingredient or component" of a fixture or device. The ASG and DC solvents are chemicals that do not fall within the ordinary meaning of a "fixture" or "device" in an industrial setting. The ASG and DC chemicals also are not "ingredients or components" of a fixture or device because they do not enter into and become part of the reactors, tanks, pipes, and pumps at Solvay's plant.

Solvay's interpretation of the "machinery and equipment" definition is overbroad and should be rejected.

**A. The Trial Court Correctly Concluded That Solvay's Purchases of the ASG and DC Chemicals Do Not Qualify for the M&E Exemption**

Washington imposes retail sales tax on each "retail sale" within the state. RCW 82.08.020(1). A "retail sale" includes "every sale of tangible personal property . . . to all persons irrespective of the nature of their business." RCW 82.04.050(1)(a). The tax is imposed on the purchaser, although it is typically collected and remitted by the seller. RCW 82.08.050(1). In this case, Solvay made several purchases of ASG and DC chemicals during the tax period. Thus, as the purchaser, Solvay owed retail sales tax on these purchases unless an exemption applied. *See HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 455, 210 P.3d 297 (2009) ("Taxation is generally the rule and deductions or exemptions are the exceptions.").

Solvay contends that the working solution it uses to manufacture hydrogen peroxide is exempt from sales tax under the M&E exemption. *See App. Br.* at 8-20. In this appeal, however, Solvay only seeks a refund of retail sales tax that it paid in relation to purchases of two chemicals that form the working solution, ASG and DC. CP 9. Thus, to prevail in this appeal, Solvay must demonstrate that the ASG and DC chemicals, not the

working solution, qualify as “machinery and equipment” under RCW 82.08.02565. To qualify for the M&E exemption, Solvay must comply with all of the requirements that the Legislature set forth in RCW 82.08.02565. In this case, Solvay has failed to do so.

**1. To qualify for the M&E exemption, a taxpayer must satisfy all the required elements.**

The Legislature enacted the M&E exemption in 1995. Laws of 1995, 1st Spec. Sess., ch. 3, § 2. As relevant here, the exemption provides that retail sales tax “does not apply to sales to a manufacturer . . . of machinery and equipment used directly in a manufacturing operation.” RCW 82.08.02565(1)(a). To substantiate the tax-exempt status of the sale of qualifying machinery and equipment, a manufacturer must provide a seller with an exemption certificate “in a form and manner prescribed by the department by rule.” RCW 82.08.02565(1)(b). Thus, the M&E exemption applies to (1) sales to a manufacturer, (2) of machinery and equipment, (3) used directly in a manufacturing operation, (4) where the manufacturer has provided the seller with an exemption certificate. This appeal presents questions of law pertaining to the second and fourth requirements.

Key definitions applying to the M&E exemption are provided in RCW 82.08.02565(2). Most notably, the Legislature has defined

“machinery and equipment” in RCW 82.08.02565(2)(a) as “industrial fixtures, devices, and support facilities, and tangible personal property that becomes an ingredient or component thereof, including repair parts and replacement parts.” The term “machinery and equipment” does not include “[h]and-powered tools,” “[p]roperty with a useful life of less than one year,” “[b]uildings,” and “[b]uilding fixtures that are not integral to the manufacturing operation.” RCW 82.08.02565(2)(b). Beyond these exclusions, RCW 82.08.02565 does not address the scope of the term “machinery and equipment” further.

The Department, however, has adopted WAC 458-20-13601 (Rule 13601) to provide additional guidance to taxpayers on the scope of the definition of “machinery and equipment.” Rule 13601 further explains the meaning of the terms that the Legislature included in RCW 82.08.02565’s definition of “machinery and equipment.” Under Rule 13601, the Department defines “industrial fixture” as “an item attached to a building or to land” and gives examples of the term, which include “fuel oil lines, boilers, craneways, and certain concrete slabs.” WAC 458-20-13601(2)(d). The Department also defines “device” as “an item that is not attached to the building or site,” with examples including “[f]orklifts,

chainsaws, air compressors, clamps, free standing shelving, software, ladders, wheelbarrows, and pulleys.”<sup>3</sup> WAC 458-20-13601(2)(c).

In addition to Rule 13601, the Department has issued an excise tax advisory specifically addressing the term “device” in RCW 82.08.02565. CP 203-04 (ETA 3121.2009 (Feb. 2. 2009)). The Department’s excise tax advisory explains that while the Legislature did not define “device” in the statute, Rule 13601’s examples for the term “reflect the notion that the phrase ‘machinery and equipment’ has a meaning within the context of an industrial setting.” CP 203-04. Thus, according to the excise tax advisory, the scope of the exemption should be determined according to the “ordinary and common meaning” for the terms “machinery and equipment,” and “device.” CP 204. Rule 13601’s examples of a “device” fit within the common meaning for these terms. CP 203-04.

Unlike Solvay, the Department proposes an interpretation of the M&E exemption that is consistent with RCW 82.08.02565’s plain language, Rule 13601, and the Department’s excise tax advisory. Under RCW 82.08.02565, the term “machinery and equipment” is limited to items that are commonly understood as “machinery and equipment,” “industrial fixtures,” “devices,” or an “ingredient or component” of such

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<sup>3</sup> Rule 13601(2)(p) also defines “support facility,” which appears in RCW 82.08.02565’s definition for “machinery and equipment.” Because Solvay does not argue that the ASG and DC chemicals are support facilities, the Department will not address the meaning of this term further.

fixtures or devices. As explained below, the ASG and DC chemicals that Solvay purchased do not fall within the common understanding of any of these terms. The trial court correctly rejected Solvay's claim, ruling that Solvay's purchases of the chemicals do not qualify for the M&E exemption. CP 393-94.

**2. ASG and DC are not "industrial fixtures" or "devices" within RCW 82.08.02565's definition for "machinery and equipment"**

When interpreting a statute, a court's primary purpose should be to carry out the Legislature's intent as embodied in the statute's plain language. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). In discerning legislative intent, "the interpretation of a statute's plain language is guided by the common and ordinary meaning of its words." *Bowie v. Dep't of Revenue*, 171 Wn.2d 1, 11, 248 P.3d 504 (2011). A court may determine the ordinary meaning of undefined terms in a statute by referring to a dictionary in use at the time the statute was adopted. *Am. Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 519-20, 91 P.3d 864 (2004). Nonetheless, a court should still consider undefined terms "in the context of the statute in which they appear, not in isolation, or subject to all possible meanings in the dictionary." *Citizens Alliance for Property Rights Legal Fund v. San Juan County*, 184 Wn.2d 428, 437, 359 P.3d 753 (2015) (internal quotations omitted).

Under RCW 82.08.02565, the definition of “machinery and equipment” includes “industrial fixtures” and “devices.” In 1995, when the Legislature enacted the M&E exemption, the dictionary defined “fixture” as “chattel (as shelving or machinery) annexed to realty for purposes of trade or manufacture.” *Webster’s Third New International Dictionary* 861 (1993). At that time, the dictionary also defined “device” as “a piece of equipment or a mechanism designed to serve a special purpose or perform a special function.” *Id.* at 618; *see also* CP 204 (excise tax advisory defining “device” as a “contrivance or an invention serving a particular purpose, especially a machine used to perform one or more creatively simple tasks”). Thus, based on these dictionary definitions, the only difference between a “fixture” and a “device” is whether the mechanism is attached to real property. Beyond this distinction, the ordinary meaning of both terms is a mechanism designed to serve a special purpose.

This Court’s interpretation of the M&E exemption should not end with these dictionary definitions. This Court also should consider the ordinary meaning of “industrial fixtures” and “devices” in light of the common understanding of “machinery and equipment” in an industrial setting. In fact, the Washington Supreme Court has already applied this

common sense approach to interpreting tax statutes in a different context.

*See Bowie*, 171 Wn.2d at 11-12.

In *Bowie*, franchisees of Val-Pak Direct Marketing System claimed that they were entitled to the lower business and occupation tax rate for publishers because Val-Pak envelopes met the definition of “periodical or magazine” under former RCW 82.04.280. *Id.* at 5-6. That statute defined a “periodical or magazine” to mean “a printed publication” that was issued regularly at stated intervals. *Id.* at 11 (citing former RCW 82.04.280). While the dictionary appeared to define “publication” very broadly, the Supreme Court recognized that the term must be given its meaning in light of things “commonly understood” to be “periodicals or magazines.” *Id.* at 11-12. Accordingly, the Supreme Court concluded that “Val-Pak envelopes are not ‘periodicals or magazines’ because they are not ‘printed publications’ as that term is commonly understood and as defined in the dictionary.” *Id.* at 12.

The same analysis applies here. The dictionary definitions of “fixture” or “device” are broad, referring to a mechanism designed to serve a special purpose. However, this Court must consider the meaning of the words “fixture” and “device” in light of “machinery and equipment,” as that term is commonly understood. The Department’s excise tax advisory sheds light on the common understanding of “machinery and

equipment.” CP 203-04. For purposes of the M&E exemption, the advisory defines “machinery” 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.” CP 204 (citing *Webster’s II New Riverside University Dictionary*). While the excise tax advisory does not address the meaning of “equipment,” the dictionary contains a wide range of definitions for this term, including “the implements (as machinery or tools) used in an operation or activity.” *Webster’s Third New International Dictionary* 768 (1993).

Given this context, the ASG and DC chemicals are not “industrial fixtures” or “devices” within the meaning of the term “machinery or equipment” in RCW 82.08.02565. ASG and DC are not machinery or tools that Solvay uses to manufacture hydrogen peroxide. ASG and DC also are not systems of rigid bodies constructed and connected to change, transmit, and direct applied forces for a specific purpose. Instead, these chemicals ensure that the working solution remains in a liquid state and that the substances within the working solution do not separate. CP 65-66, 118-19, 143. Accordingly, while the ASG and DC chemicals serve a purpose in Solvay’s manufacturing process, they simply do not fall within

the common understanding of a “fixture,” “device,” “machinery,” or “equipment.”

Rule 13601 supports this conclusion. While Solvay asserts that ASG and DC fall within the broad definitions of “industrial fixture” and “device” in Rule 13601, Solvay ignores the full context of the rule. App. Br. 9-10. Following these definitions, the Department’s examples recognize that “industrial fixtures” and “devices” have a particular meaning in an industrial setting. *See* WAC 458-20-13601(2)(c) (“device” examples include “[f]orklifts, chainsaws, air compressors, clamps, free standing shelving, software, ladders, wheelbarrows, and pulleys”), (d) (“industrial fixture” examples include “fuel oil lines, boilers, craneways, and certain concrete slabs”). Thus, the terms “industrial fixtures” and “device” should only incorporate things that are similar to these specific examples. *See Olympic Tug & Barge v. Dep’t of Revenue*, 188 Wn. App. 949, 953, 355 P.3d 1199 (2015) (“When a statute includes general terms in conjunction with specific terms, we deem the general terms only to incorporate those things similar in nature or comparable to the specific terms.”) (internal quotations omitted). The ASG and DC chemicals are nothing like these examples, and therefore, are not “industrial fixtures,” or “devices.”

This is true even with regard to the Department's example of software as a "device." Solvay argues that this reference to software supports its expansive interpretation of "machinery and equipment" in RCW 82.08.02565. App. Br. at 10, 13-14. The Department, however, has explained that software qualifies as a "device" only when it actually controls other eligible machinery or equipment. *See* CP 204 (software that controls the operation of equipment cutting logs into lumber qualifies for the M&E exemption). Thus, in this context, the Department has logically applied the M&E exemption to software when it is acting as a mechanism designed to control other qualifying machinery or equipment. That logical extension of the M&E exemption should not be used to expand the exemption even further to apply to chemicals that do not fit within any ordinary understanding of the terms "machinery and equipment," "fixture," or "device."

Importantly, the working solution and the chemicals that form the working solution are in no way similar to software, as Solvay argues. App. Br. at 16. They do not control the reactors, tanks, pipes, filters, or any other machinery or equipment that Solvay uses to manufacture hydrogen peroxide. Instead, the ASG and DC chemicals are mixed together with anthraquinone to form the working solution, which circulates through equipment to create the proper conditions for manufacturing hydrogen

peroxide. Thus, the ASG and DC chemicals serve a purpose in Solvay's manufacturing process, but they are not "fixtures" or "devices" under any common understanding for those terms.

**3. ASG and DC are not "ingredients or components" of any qualifying "machinery and equipment"**

RCW 82.08.02565(2)(a) also defines "machinery and equipment" as including "tangible personal property that becomes an ingredient or component" of qualifying machinery or equipment. Similar to the terms "industrial fixtures" and "devices," the Legislature did not further define "ingredient or component" in RCW 82.08.02565. Accordingly, this Court may refer to the dictionary to determine the ordinary meaning of "ingredient or component." *Am. Cont'l Ins. Co.*, 151 Wn.2d at 519-20. The dictionary defines "component" as "a constituent part: INGREDIENT." *Webster's Third New International Dictionary* 466 (1993). In turn, the dictionary defines "ingredient" as "something that enters into a compound or is a component part of any combination or mixture." *Id.* at 1162. Thus, taken together, RCW 82.08.02565's definition of "machinery and equipment" includes things that enter into and become part of "industrial fixtures," or "devices."

These dictionary definitions are consistent with the manner in which the Department has interpreted the phrase "ingredient or

component” in other tax statutes relating to retail sales tax. *See generally Campbell & Gwinn, LLC*, 146 Wn.2d at 9-11 (when determining plain meaning of a statute, courts may consider provisions in statute at issue, as well as related statutes). For example, the Legislature excludes from the definition of a “retail sale” purchases of tangible personal property, such as chemicals, that become an “ingredient or component of a new article of tangible personal property.” RCW 82.04.050(1)(a)(iii). In this context, the Department has explained that “ingredient or component” means “articles of tangible personal property which physically enter into and form a part of a new article or substance.” WAC 458-20-113(2). Given the dictionary definitions described above, the Department’s interpretation of “ingredient or component” can also apply in the context of the M&E exemption. Thus, the term “ingredient or component” in RCW 82.08.02565 means tangible personal property that physically enters into and forms a part of other eligible machinery or equipment.

Here, the ASG and DC chemicals are not “ingredients or components” of any qualifying machinery or equipment because they do not enter into and form a part of any “machinery and equipment” in Solvay’s manufacturing facility. Instead, ASG and DC merely circulate through various equipment in Solvay’s plant. CP 53-57. Circulating through equipment, however, does not mean that the ASG and DC

chemicals actually enter into and become a part of the reactors, vessels, pipes, or pumps in Solvay's plant. The chemicals are not "ingredients or components" of any qualifying machinery and equipment.

Solvay does not address ASG and DC specifically, but asserts that the working solution is an "ingredient or component" because it is "a functional part of the working solution loop," which it defines as the "series of reaction units or stages" in Solvay's plant. App. Br. at 19-20. Thus, rather than identifying any specific piece of equipment that the ASG and DC chemicals enter into and become a part of, Solvay simply claims that the working solution is an "ingredient or component" of the entire manufacturing process. Solvay's interpretation ignores RCW 82.08.02565's plain language, which expressly defines "machinery and equipment" as including "tangible personal property that becomes an ingredient or component" of "industrial fixtures," or "devices." The working solution does not enter into and form a part of any fixture in Solvay's plant simply because Solvay uses the "working solution" as part of its manufacturing process for hydrogen peroxide.

To support its interpretation, Solvay analogizes the working solution to "mercury in a thermometer or refrigerant in an air conditioner." App. Br. at 19. According to Solvay, the working solution is similar to these materials because the working solution is not intentionally removed

from the reactors. App. Br. at 19. Solvay's analogy misses the point. Even if mercury in a thermometer or refrigerants in an air conditioner are comparable to ASG and DC, this similarity is immaterial because neither of these things qualifies for the M&E exemption. While mercury or refrigerants may be encased within other equipment, they still are merely moving through that equipment. Mercury does not enter into and become part of the glass bulb or tube in a thermometer, and refrigerants do not enter into and become part of the pipes, valves, or compressors in an air conditioner. Similarly, the working solution does not enter into and become a part of the reactors, pumps, and pipes in Solvay's plant by circulating through this machinery and equipment. Accordingly, the ASG and DC chemicals are not "ingredients or components" of any qualifying machinery and equipment under RCW 82.08.02565.

**4. Solvay's broad interpretation of the M&E exemption is inconsistent with the rules of statutory interpretation**

As set forth above, the Department's interpretation of "machinery and equipment" in RCW 82.08.02565 is consistent with this Court's responsibility to give a rational and sensible meaning to statutes. *See State v. Thomas*, 121 Wn.2d 504, 512, 851 P.2d 673 (1993) ("Statutes and rules are, if possible, to be given a rational, sensible construction."). In contrast, Solvay asks this Court to adopt the broadest possible interpretation of

“machinery and equipment” in RCW 82.08.02565. *See* App. Br. at 9-11. According to Solvay, the term “machinery and equipment” means all “items that are part of the fixed assets of the manufacturing process.” App. Br. at 11. Solvay’s interpretation is directly contrary to the manner in which courts interpret tax exemptions.

**a. Solvay’s proposed interpretation is overbroad and renders the statutory definition of “machinery and equipment” meaningless**

In a plain meaning analysis, courts should interpret a statute “so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *G-P Gypsum Corp. v. Dep’t of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010) (internal quotations omitted).

Solvay’s interpretation of the M&E exemption fails to achieve this goal.

Rather than giving meaning to the term “machinery and equipment,” Solvay focuses on RCW 82.08.02565’s other conditions for the M&E exemption. App. Br. at 11-12. Specifically, Solvay suggests that the “key factors” in applying the M&E exemption are whether a purchase is “used directly” in the manufacturing operation, and has a useful life of more than a year. App. Br. at 12. From this focus, Solvay concludes that “machinery and equipment” must mean “every item that performs a task in the manufacturing operation, unless it is specifically excluded.” App. Br. at 15. When interpreting a statute, however, this Court should not pick

and choose what it deems to be the “key factors” in a statute. Instead, this Court should give effect to all of the language in RCW 82.08.02565, including the definition of “machinery and equipment.”

Solvay’s interpretation does just the opposite. It relies upon the other requirements in the M&E exemption to assert that this Court should adopt a broad interpretation of “machinery and equipment.” The existence of other requirements in the M&E exemption, however, does not mean that RCW 82.08.02565 applies to any and all items used directly in a manufacturing process. Indeed, by accepting Solvay’s interpretation, this Court would read the term “machinery and equipment” right out of the statute. *See State v. Reis*, 183 Wn.2d 197, 217, 351 P.3d 127 (2015) (courts should not read terms out of a statute). If the Legislature truly intended such an expansive interpretation, there would have been no reason for the Legislature to use the term “machinery and equipment” and create a definition for that term in RCW 82.08.02565.

Solvay’s broad interpretation also does not make sense in light of changes that the Legislature has made to the definition of “machinery and equipment” since it originally adopted the M&E exemption. In 2009, the Legislature specifically added “digital goods” to the definition of

“machinery and equipment.” Laws of 2009, ch. 535, § 510.<sup>4</sup> Solvay contends that this amendment supports its expansive reading of the statute as applying to the ASG and DC chemicals. App. Br. at 10. Solvay is wrong. If Solvay were correct that the Legislature intended to define “machinery and equipment” as broadly as possible, there would have been no reason for the Legislature to add “digital goods” to the definition. The Legislature added “digital goods” to the statutory definition because those items would not otherwise have qualified under the common and ordinary meaning of “machinery and equipment.” Thus, ASG and DC still must fit within the common understanding for “machinery and equipment.”

Solvay insists that its reading of RCW 82.08.02565 is consistent with the statement of intent that the Legislature set forth when creating the M&E exemption. *See* App. Br. at 9, 13-14. Specifically, Solvay points out that the Legislature intended the M&E exemption to encourage the “improvement of products, technology, and modernization.” App. Br. at 14 (citing Laws of 1995, 1st Spec. Sess., ch. 3, § 1). Based on this intent, Solvay argues that the Department’s interpretation hinders the Legislature’s goal by limiting “the M&E exemption to items that are

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<sup>4</sup> “Digital goods” are “sounds, images, data, facts, or information, or any combination thereof, transferred electronically.” RCW 82.04.192(6)(a). “Digital goods” do not include “[t]elecommunications services and ancillary services” under RCW 82.04.065, “[c]omputer software” under RCW 82.04.215, or “[t]he internet and internet access” as defined in RCW 82.04.297. RCW 82.04.192(6)(b).

traditionally understood to be machines and equipment.” App. Br. at 14.

Solvay’s argument is flawed for two reasons.

First, Solvay’s assertion that this Court must interpret the definition of “machinery and equipment” broadly to account for new developments in technology is not a concern under the facts of this case. Solvay does not claim, and there is no evidence in the record, that the use of ASG and DC to produce hydrogen peroxide is a new manufacturing process that Solvay developed.<sup>5</sup> Thus, allowing the ASG and DC chemicals to qualify for the M&E exemption in no way helps achieve the Legislature’s goal of incentivizing the modernization of manufacturing operations.

Second, Solvay misstates the Department’s position on the scope of the M&E exemption. The Department’s interpretation is not limited to a “traditional notion” of what constitutes a machine or equipment. *See* App. Br. at 13-14. Instead, this Court should interpret RCW 82.08.02565’s definition of “machinery and equipment” based on the common understanding of these terms. As Solvay itself points out, the Department has recognized that the common understanding of “machinery and equipment” will evolve and require the Department to make reasonable

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<sup>5</sup> In fact, the process that Solvay utilizes to manufacture hydrogen peroxide appears to have been in use since at least 1939. *See Hydrogen Peroxide*, [https://en.wikipedia.org/wiki/Hydrogen\\_peroxide#Manufacture](https://en.wikipedia.org/wiki/Hydrogen_peroxide#Manufacture) (last accessed September 11, 2017).

and logical decisions regarding the application of the M&E exemption. *See* CP 260-61 (excise tax advisory explaining circumstances in which software qualifies for M&E exemption). Such changes, however, do not mean that this Court should apply RCW 82.08.02565 as broadly as possible to include any item whatsoever used in a manufacturing operation. In fact, by doing so, this Court would fail to give any real meaning to the term “machinery and equipment,” even though the Legislature expressly defined that term in RCW 82.08.02565.

**b. Tax exemptions, like the M&E exemption, are narrowly construed**

In the tax context, the Washington Supreme Court has recognized, “Taxation is the rule and exemption is the exception.” *Budget Rent-A-Car of Wash.-Or. v. Dep’t of Revenue*, 81 Wn.2d 171, 174, 500 P.2d 764 (1972). Accordingly, courts must interpret tax exemptions narrowly, but consistently with the Legislature’s intent. *HomeStreet, Inc.*, 166 Wn.2d at 455. Solvay’s interpretation of the M&E exemption forgets this basic principle for interpreting tax statutes.

Instead, Solvay advocates for an expansive reading of RCW 82.08.02565 that intrudes upon other retail sales tax exemptions that the Legislature specifically set forth for chemicals. *See AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 393, 325 P.3d 904

(2014) (plain meaning analysis should consider the context of the entire statutory scheme). As previously mentioned, RCW 82.04.050(1)(a)(iii) excludes from the definition of a “retail sale” purchases of things like chemicals that become an ingredient or component of a new article of tangible personal property or substance. The same statute also excludes from the term “retail sale” purchases of a “chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale.” RCW 82.04.050(1)(a)(iii). When the Legislature created the M&E exemption, it was well aware of these existing sales tax exemptions related to chemicals. *See* CP 355-56 (Final Bill Report, Second Engrossed Substitute Senate Bill 5201, 54th Leg., 1st Spec. Sess. (1995) (recognizing certain existing sales tax exemptions in connection with manufacturing)).

Despite the Legislature’s recognition of these existing sales tax exemptions, Solvay’s interpretation would allow manufacturers to avoid the more stringent requirements for receiving a sales tax exemption under RCW 82.04.050(1)(a)(iii), and simply qualify for the M&E exemption by using long-lasting chemicals directly in their manufacturing process. In contrast, the Department’s interpretation gives meaning to the term “machinery and equipment” without encroaching upon these other sales

tax exemptions related to manufacturing. *See Filo Foods, LLC v. City of Sea Tac*, 183 Wn.2d 770, 792, 357 P.3d 1040 (2015) (courts interpret statutes “to achieve a harmonious total statutory scheme . . . which maintains the integrity of the respective statutes”) (internal quotations omitted). Accordingly, this Court should accept the Department’s interpretation and uphold the trial court’s order granting summary judgment to the Department.

**B. The Trial Court’s Decision Also Should Be Upheld Because Solvay Failed To Provide Sellers Of ASG And DC With An Exemption Certificate**

The trial court granted summary judgment to the Department after concluding that the ASG and DC chemicals do not qualify as “machinery or equipment” under RCW 82.08.02565. This Court, however, may affirm the trial court’s order on yet another basis. RCW 82.08.02565 mandates that a purchaser provide an exemption certificate to a seller for a purchase to qualify for the M&E exemption. Solvay fails to even address this condition of the M&E exemption in its opening brief, despite asking this Court to conclude that its purchases of the ASG and DC chemicals “are exempt from sales and use tax.” App. Br. at 20.<sup>6</sup>

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<sup>6</sup> The parties addressed the issue of the exemption certificate requirement in their summary judgment submissions to the trial court. CP 31-32, 294-95, 314-15, 349-52, 366-68. Because the trial court concluded that the ASG and DC chemicals do not qualify as “machinery and equipment” under RCW 82.08.02565, it did not reach the exemption certificate issue. VRP 37 (Feb. 10, 2017). Solvay’s failure to meet RCW

For the majority of the tax period, RCW 82.08.02565 expressly stated that retail sales tax “shall not apply to sales to a manufacturer . . . of machinery and equipment used directly in a manufacturing operation . . . *but only when the purchaser provides the seller with an exemption certificate* in a form and manner prescribed by the department by rule.” Laws of 1999, ch. 211, § 3 (emphasis added) (previously codified at RCW 82.08.02565(1)). In 2011, the Legislature slightly revised this requirement, but the gist of the statute remained the same: “Sellers making tax-exempt sales under this section must obtain from the purchaser an exemption certificate in a form and manner prescribed by the department by rule.” Laws of 2011, ch. 23, § 2 (codified at RCW 82.08.02565(1)(b)). Thus, throughout the tax period, RCW 82.08.02565 required purchasers like Solvay to provide sellers with an exemption certificate when claiming the M&E exemption on a purchase.

The Department’s Rule 13601 mirrors the language contained in RCW 82.08.02565. Rule 13601(3)(a) reiterates that to qualify for the M&E exemption, “[t]he purchaser must provide the seller with an exemption certificate.” Rule 13601 further explains that “[t]he exemption certificate must be completed in its entirety.” *Id.* It then directs taxpayers

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82.08.02565’s exemption certificate requirement is an alternative basis upon which this Court may affirm the trial court. *See Bavand v. OneWest Bank*, 196 Wn. App. 813, 825, 385 P.3d 233 (2016) (appellate court may affirm on any basis supported by the record).

to use a particular M&E exemption form that the Department has created. *See id.* (“A copy of an M&E exemption certificate form may be obtained from the department’s website . . . or by contacting the department’s taxpayer service’s division . . .”).

Despite this express requirement in both the statute and Rule 13601, nothing in the record demonstrates that Solvay provided sellers with an exemption certificate when purchasing the ASG and DC chemicals. Instead, after this litigation began, Solvay belatedly provided exemption certificates to the sellers of ASG and DC for purchases that Solvay had made years ago. CP 373-86 (exemption certificates issued on February 8, 2017, for purchases made between 2008 and 2012). To be entitled to any refund, however, Solvay must strictly comply with all the express requirements in a statute. *See Guy F. Atkinson v. State*, 66 Wn.2d 570, 575, 403 P.2d 880 (1965) (taxpayer must strictly comply with all statutory requirements to receive refund).

In this case, the statutory mandate requiring a purchaser to provide a seller with an exemption certificate is not burdensome, it helps auditors confirm that purchases of machinery and equipment are exempt, and it protects sellers from being held liable for a non-qualifying sale. If the Legislature had not intended to require purchasers to provide sellers with an exemption certificate, it would not have included this mandatory

language in RCW 82.08.02565. *Compare* RCW 82.08.02565(1) (allowing exemption only if purchaser provides the seller with an exemption certificate) *with* RCW 82.04.470(5) (as an alternative to providing copies of a reseller permit or exemption certificate, permitting seller to prove a sale is a tax exempt wholesale sale “by demonstrating facts and circumstances . . . that show the sale was properly made without payment of retail sales tax”).

Before the trial court, Solvay insisted that RCW 82.08.02565’s exemption certificate requirement applies to sellers, not purchasers. CP 294-95; VRP 30. In support of this argument, Solvay pointed out that the statute only requires sellers to “retain a copy of the certificate” for their files. CP 366-67 (quoting RCW 82.08.02565(1)(b)). Solvay’s argument misunderstands the Department’s position. The Department does not argue that Solvay must retain a copy of the M&E exemption certificate in its files. Instead, the Department argues that Solvay must present some evidence that it provided sellers with an exemption certificate when purchasing the ASG and DC chemicals. Solvay failed to do so, and apparently only issued the exemption certificates to the sellers for its purchases of ASG and DC years later, as a result of this litigation.

Solvay also argued to the trial court that RCW 82.08.02565’s exemption certificate requirement does not apply to its case because the

Department assessed “use tax and/or deferred sales tax” against it. CP 367-68. According to Solvay, this means that it need only have complied with the M&E exemption in RCW 82.12.02565 (the use tax version of the M&E exemption), which did not contain an exemption certificate requirement during the tax period. VRP 17; *see* Laws of 2003, ch. 5, § 5. This is not the case. The Department refers to “use tax/deferred sales tax” in its assessments when the taxpayer has deferred payment of the retail sales tax on a transaction until the full circumstances are known to determine whether a tax exemption applies. *See* CP 164 (citing Wash. Dep’t of Revenue, Determination No. 01-145R, 24 Wash. Tax Dec. 11 (2005)). Thus, while the Department’s reference to “use tax/deferred sales tax” in its audit papers may have been imprecise, Solvay cannot rely upon this reference in the Department’s audit to circumvent the legal consequences of its purchases.

The statutory scheme for retail sales tax is clear: Retail sales tax is imposed upon each sale of tangible personal property and “must be paid by the buyer to the seller.” RCW 82.08.020(1)(a); RCW 82.04.050(1)(a); RCW 82.08.050(1). Thus, Solvay’s retail sales tax liability arose at the time the sale occurred for the ASG and DC chemicals. To be exempt from this liability, Solvay must have complied with all of the conditions in RCW 82.08.02565, including the requirement that a purchaser provide the

seller with an exemption certificate. Solvay did not do so, and therefore, owes retail sales tax on its chemical purchases. *See* RCW 82.08.050(10) (when a buyer fails to pay retail sales tax to the seller and the seller has not paid the tax to the Department, the Department “may, in its discretion, proceed directly against the buyer for collection of the tax”).

## V. CONCLUSION

The Department requests that this Court affirm the trial court’s grant of summary judgment to the Department. Solvay’s purchases of the ASG and DC chemicals do not qualify for the M&E exemption because they do not fall within the common and ordinary meaning of “machinery and equipment” under RCW 82.08.02565. Alternatively, Solvay’s purchases of the ASG and DC chemicals do not qualify for the M&E exemption because Solvay failed to provide sellers with an exemption certificate when making these purchases.

RESPECTFULLY SUBMITTED this 10th day of October, 2017.

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DATED this 10th day of October, 2017, at Tumwater, WA.

  
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Carrie A. Parker, Legal Assistant

**ATTORNEY GENERAL'S OFFICE - REVENUE & FINANCE DIVISION**

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