IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Teck Metals Ltd. v. British Columbia (Attorney General),* 2026 BCSC 673

Date: 20260416
Docket: S215738
Registry: Vancouver

Between:

Teck Metals Ltd.

Petitioner

And

His Majesty the King in Right of the Province of British Columbia

Respondent

Before: The Honourable Justice Latimer

On appeal from: a decision of the Minister of Finance for British Columbia, dated January 21, 2021

Reasons for Judgment

Counsel for the Petitioner:	K. L.D. Cook
Counsel for the Respondent:	S.M.L. Kirkpatrick E. A. Barchuk
Place and Dates of Hearing:	Nanaimo, B.C. November 27-28, 2025
Place and Date of Judgment:	Vancouver, B.C. April 16, 2026

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Introduction

[1] This petition proceeding is an appeal from an assessment of the Minister of Finance for British Columbia (the “Minister”) under the *Provincial Sales Tax Act*, S.B.C. 2012, c. 35 [*Act*].

[2] It is about whether the petitioner (“Teck”) was entitled to an exemption from provincial sales tax (“PST”) under the *Act* when it purchased coal for both an exempt use and a non-exempt use.

[3] The resolution of this question depends on this Court’s interpretation of a particular exemption, and an exclusion from that exemption, under the *Act* and the *Provincial Sales Tax Exemption and Refund Regulation*, B.C. Reg. 97/2013 [*Regulation*].

[4] Teck has, for many years, self-assessed PST on coal used in its operations. In so doing, Teck believed that it was eligible for a partial PST exemption based on the carbon content of the coal used for fuming. Coal is essentially composed of three components (23% volatiles, 12% ash, 65% carbon). In accordance with its belief, Teck did not self-assess PST on 65% of the coal used in the reduction process (the “Reduction Process”) of its operation (the “Claimed Exemption”).

[5] The Minister audited some of Teck’s purchases for the period between May 1, 2015, and December 31, 2016.

[6] On April 29, 2019, the Minister issued a notice of assessment (the “Assessment”) in respect of that period. The Minister assessed $192,714.78 for failure to pay tax on the Claimed Exemption of the Reduction Process coal. The Minister also assessed interest; however, the Minister later adjusted the Assessment to remove the interest from the assessed amount.

[7] Teck appealed the Assessment.

[8] On January 21, 2021, the Minister confirmed the Assessment in full. In so doing, the Minister explained, in part:

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> Section 38(3)(a) of the Regulation is clear in its exemption exclusion when a direct agent is used to produce energy. In applying the legislation as worded, there is no allowance to recognize the portion of the coal used in the reducing process as an exempt direct agent. As the coal is also used to produce energy, the exemption is not permitted.

[9] In an email dated March 14, 2025, the respondent (the "Province") advised Teck that even if the exemption exclusion referred to by the Minister did not apply to exclude the coal from the exemption:

> … Teck cannot claim the Exemption on any of the coal, in any case, because Teck did not know in what process it would use the coal when it obtained it and, therefore, could not have known that it would be used as a direct agent in the Reduction Process. The requirements of the Exemption must be met at the time that Teck obtains the coal.

[10] Teck now appeals to this Court.

Statutory Scheme

[11] Before delving into the issues that arise on this appeal, a brief description of the statutory scheme is necessary.

[12] The *Act* imposes PST on all purchases of tangible personal property ("TPP") in British Columbia, subject to limited and specific exemptions:

> **Tax on purchase**
>
> **37** (1) A purchaser who purchases tangible personal property at a sale in British Columbia must pay to the government tax at the applicable rate under section 34.
>
> […]

[13] Section 241 of the *Act* authorizes the Lieutenant-Governor in Council to make regulations providing for exemptions. It provides:

> **Regulations in relation to exemptions**
>
> **241** (1) Despite any other provision of this Act, the Lieutenant Governor in Council may make regulations providing for exemptions from one or more provisions of this Act or a regulation made under it, including, without limitation, regulations doing one or more of the following:
>
> > (a) exempting a person from a requirement to levy, collect, remit or pay all or a portion of tax imposed under this Act;

(b) exempting, in whole or in part, any tangible personal property, software or taxable service from taxation under this Act;

(c) establishing circumstances in which an exemption applies;

(d) setting conditions of, or limitations on, the application of an exemption.

[…]

[14] One such exemption is set out in s. 38 of the *Regulation* which defines the term “direct agent”:

Chemical substances, catalysts and direct agents

38 (1) In this section:

[…]

"direct agent" means a substance that produces or modifies a chemical reaction and that is consumed in the chemical reaction to the point of destruction or dissipation or uselessness for any other purpose.

[…]

[15] Section 38(2) then establishes an exemption (“Exemption”):

(2) Subject to subsection (3), a chemical substance, catalyst or direct agent obtained for use

(a) in processing or manufacturing tangible personal property for sale or lease, and

(b) to produce or modify a reaction that is essential for that processing or manufacturing

is exempt from tax imposed under Part 3 of the Act, other than Division 9 of that Part.

[16] Section 38(3)(a) then sets out an exclusion from the Exemption (“Exclusion”):

(3) The exemption under subsection (2) does not apply to a chemical substance, catalyst or direct agent obtained

(a) for use to produce energy or as a source of energy, unless the chemical substance, catalyst or direct agent is electricity for use in an electrolytic process,

[…]

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Framework of a Tax Appeal

[17] I turn next to principles that guide and constrain this Court's exercise of authority in a statutory appeal under s. 212 of the *Act*.

[18] On a statutory appeal, questions of law, including questions of statutory interpretation such as those that arise on this appeal, are reviewed on a standard of correctness: *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 at paras. 17, 36–37.

[19] An appeal to this Court under the *Act* is a new hearing that is not limited to the evidence and issues that were before the Minister: *Act*, s. 212(6). Findings of fact are therefore not reviewed on a "palpable and overriding error" standard: *Teck Metals Ltd. v. British Columbia,* 2020 BCSC 2065 [*Teck Metals*] at para. 16, leave to appeal to BCCA ref'd 2021 BCCA 289 at para. 46.

[20] In *Northland Properties Corporation v. British Columbia*, 2010 BCCA 177 [*Northland*] at paras. 21–25, the Court of Appeal explained the law of assumptions in assessment appeals. Courts have recognized that there is an imbalance in knowledge about the taxpayer's affairs and that the taxpayer generally has much greater knowledge than the taxing authority. As a result, the taxing authority is entitled to make assumptions of fact as the basis for assessing a taxpayer.

[21] In assessing tax under the *Act* and in affirming such an assessment, the director and the Minister each make assumptions or findings of fact to support the assessment ("assumptions"). The assumptions must be factual, must have been made at the time that the taxing authority's assessment of tax or appeal decision was made, and must be communicated to the taxpayer: *Teck Metals* at para. 21; *Northland* at para. 22.

[22] In an appeal of an assessment, the initial burden is on the taxpayer to prove, on a balance of probabilities, that the assumptions on which the assessment was based are wrong: *Northland* at para. 24. The Court of Appeal, in *Northland*, at

para. 32, set out the ways in which a taxpayer may challenge the taxing authority's assumptions:

> The taxpayer has a number of ways of meeting the Minister's assumptions: *Pillsbury* at 5188. The taxpayer may
>
> > (a) challenge the Minister's allegation that he did assume those facts,
> >
> > (b) assume the onus of showing that one or more of the assumptions was wrong, or
> >
> > (c) contend that, even if the assumptions were justified, they do not of themselves support the assessment.

[23] At para. 35 in *Northland*, the Court then summarized the approach to be taken on appeals of tax assessments:

> In summary form, the proper approach on the appeal of a tax assessment may be described thus:
>
> > i. What are the assumptions?
> >
> > ii. Have some or all of the assumptions been disproven? (i.e., has the taxpayer discharged the initial legal burden?)
> >
> > iii. If the taxpayer has successfully discharged the initial legal burden, then has the Crown shown that the assessment is valid? (i.e., has the Crown discharged the conditional legal burden?)

[24] When the Minister pleads an assumption of fact, this has the effect of shifting the burden of proof to the taxpayer to disprove that assumed fact. Legal statements or conclusions are not to be included in the Minister's factual assumptions. The Minister may assume the factual components of a conclusion based on mixed fact and law but must make clear what the factual assumptions are: *Teck Metals* at paras. 21–22.

<u>Background Facts</u>

[25] Most of the facts that underly this appeal are not in dispute.

[26] The Minister's factual assumptions are set out in the Amended Response to Petition as follows:

> 22 […]

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a) Teck operates a manufacturing plant in Trail, British Columbia where it manufactures or processes raw materials from various suppliers into a variety of goods for resale […]

b) Teck's products include zinc, lead, silver, gold and fertilizer;

c) Teck's products are generally exported or sold to companies who use them in further manufacturing;

d) Teck purchased $5,464,583.16 of coal;

e) Teck did not pay tax on $2,753,068.29 of the coal it purchased;

<u>f) In Teck's manufacturing processes, the coal is used as a direct agent to produce a reaction and also to generate heat;</u>

g) Teck obtained the coal for dual use; and

h) One of the uses for which Teck obtained the coal was to produce heat.

23 […]

a) Teck is registered as a collector under the Act;

b) Teck carries on smelting operations in Trail, British Columbia;

c) Teck engages in fuming recovery of residual metals as part of its smelting operations;

d) Teck operates two slag fuming furnaces, SFF#2 and SFF#3, as part of its sequential smelting process;

e) Teck purchases coal for use in SFF#2 and SFF#3;

f) SFF#2 is used to recover residual metals from recycled products;

g) SFF#3 is used to recover residual metals from primary slag;

h) This recovery of residual metals in both SFF#2 and SFF#3 is a process by which the slag is reduced to metal oxide gases …

i) Coal is utilized in SFF#2 in two sequential two-hour phases as part of a four-hour batch process;

<u>j) During the first phase in SFF#2, coal is used solely to produce heat to bring the slag up to the required temperature;</u>

<u>k) During the second phase in SFF#2, 65% of the coal is used as a reducing agent to recover metal oxides in the fuming process;</u>

<u>l) During the second phase in SFF#2, 35% of the coal is used as a source of energy to maintain the temperature required for the Reduction Process to occur;</u>

m) The coal fed into SFF#2 at each phase is entirely consumed during the process;

n) In SFF#3, the slag is already at the required temperature when it enters the furnace;

o) SFF#3 operates under reducing conditions for the entire cycle;

<u>p) SFF#3 also burns the coal to maintain the temperature of the slag;</u>

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q) The coal fed into SFF#3 is entirely consumed during the process;

r) The energy produced by the burning of the coal is heat, not electricity;

s) The coal is not a heat transfer fluid; and

t) Teck used the coal as both a direct agent and a source of energy.

[Emphasis added.]

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[27] I have emphasized certain factual assumptions, above, because during the course of the hearing, despite Teck's submission to the contrary, it became clear that there is at least one factual dispute between the parties. The parties' respective positions are set out below and the factual dispute is underlined:

a) The parties agree that coal used during the first phase (the "Heat Process") in the slag fuming furnace #2 ("SSF#2") is taxable. With respect to the coal used in the second phase (the Reduction Process) in SSF#2 and all the coal used in the slag fuming furnace #3 ("SSF#3"), the parties agree it is a direct agent. Teck argues that the carbon content of the coal is 65%. The carbon is what is used to create the chemical reaction in the Reduction Process. On that basis, Teck self-assessed PST on the basis that 65% of the coal used in the Reduction Process was exempt and 35% was taxable. As set out above, the Minister determined that once any amount of the Reduction Process coal was used as an energy source, the Exclusion operated so that none of the Reduction Process coal qualified for the Exemption. Teck now agrees that either the entire nugget of coal is exempt from PST or none of it is exempt. Therefore, if this Court rules in its favour, moving forward, it would not self-assess PST on 100% of the Reduction Process coal. Despite this new belief, all parties agree that Teck is not, on a retroactive basis, seeking a larger exemption in respect of the Reduction Process coal. Teck now argues, however, that 100% of the Reduction Process coal qualifies for the Exemption because any energy (heat) produced by the Reduction Process coal (which is the second phase in SSF#2 and the entire process in SSF#3) is purely incidental and not essential to the chemical reaction at issue. Therefore, it

is argued, the Exclusion does not apply. This emphasized factual assertion is contested by the Province.

b) The Province argues that 100% of the Reduction Process coal is taxable because <u>there is no evidence that the heat production during the Reduction Process is purely incidental, and not essential</u>. Rather, the Province argues that the energy (heat) is used to maintain the temperature required for the Reduction Process to occur. Therefore, it is argued, the Minister's interpretation of the Exclusion was correct.

[28] This factual dispute is only of potential significance to the second issue on this appeal which is the interpretation of the Exclusion, and I will therefore address it at that stage of the analysis.

<u>**Issues**</u>

[29] The issues for determination are:

a) Whether the manner in which Teck obtains the Reduction Process coal disqualifies that coal from the Exemption?

b) If not, whether the Reduction Process coal is nevertheless excluded from the Exemption by operation of the Exclusion? It is here that I will address the factual dispute set out above as to whether the heat produced by the Reduction Process coal is incidental or essential to the chemical reaction at issue.

<u>**Analysis: Statutory Interpretation**</u>

Principles of Statutory Interpretation

[30] The two issues on appeal are questions of statutory interpretation.

[31] In *Placer Dome Canada Ltd. v. Ontario (Minister of Finance*), 2006 SCC 20 [*Placer*] at para. 21, the Supreme Court of Canada clarified the modern approach to statutory interpretation and the particular approach when interpreting taxing statutes:

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> […] That is, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (p. 578): see *65302 British Columbia Ltd. v. Canada*, 1999 CanLII 639 (SCC), [1999] 3 S.C.R. 804, at para. 50. However, because of the degree of precision and detail characteristic of many tax provisions, a greater emphasis has often been placed on textual interpretation where taxation statutes are concerned: *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54, at para. 11. Taxpayers are entitled to rely on the clear meaning of taxation provisions in structuring their affairs. Where the words of a statute are precise and unequivocal, those words will play a dominant role in the interpretive process.

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Position of the Parties

[32] As noted, it is common ground that the coal used in the Reduction Process is a “direct agent” as defined in the *Regulation*.

[33] The parties’ two narrow disagreements are:

a) Whether the coal used in the Reduction Process is “obtained for use” in that process?

b) If so, whether the Exclusion applies on the facts of this case?

[34] The petitioner says that:

a) The Reduction Process coal is obtained for use as a direct agent because it purchases specific and known quantities of coal for use as a direct agent in the Reduction Process. The Province’s interpretation of the Exemption, which requires that Teck know which pieces of coal will be used in that process at the time of purchase, is overly restrictive and commercially impractical. It is also inconsistent with the evidence, the *Act*, and the Ministry’s own policy.

b) The Reduction Process coal is not excluded from the Exemption because that coal is not being used to produce energy or as a source of energy. Rather, the heat produced is an incidental effect of the reaction that the coal is being used to produce.

[35] The Province disagrees, arguing:

a) The Reduction Process coal is not obtained for that use because Teck obtains coal for different purposes at the same time, without knowing in which process each piece of coal will be used. The requirements of the Exemption must be met at the time that Teck obtains the coal.

b) The Reduction Process coal is being used to produce (heat) energy. The heat is not incidental. It is required for the chemical reaction to occur during the Reduction Process. Even if the heat is not required for the chemical reaction to occur, the Reduction Process coal would be excluded because s. 38(3)(a) captures uses that produce energy whether or not that energy production is essential and/or intended.

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[36] For reasons I will now explain, I conclude that Teck's interpretation of the Exemption is correct, and that the Province's interpretation of the Exclusion is correct.

The Exemption

[37] Dealing first with the statutory scheme, under the *Act* the obligation to pay tax is triggered at the time TPP is purchased: *Act*, s. 37.

[38] There must therefore be certainty at the time of purchase as to what, if any, tax applies to the transaction. That provides important context for the interpretation of exemptions under the *Act*.

[39] Generally, there are two categories of exemptions under the *Act* and *Regulation*.

[40] The first category is an exemption that is conferred based on the type of item being acquired ("Type Based Exemption"). For example, certain drugs and health products and certain publications such as employee newsletters, yearbooks and sheet music: *Regulation*, ss. 3, 16.

[41] Certainty at the time of purchase as to what, if any, tax applies to a transaction involving a Type Based Exemption is achieved because the exemption applies based on the type of item being purchased.

[42] The second category is an exemption based on the use of the item acquired ("Use Based Exemption"). For example, mining supplies obtained for certain uses and production machinery and equipment obtained by a manufacturer for certain uses: *Regulation*, ss. 36, 92.

[43] In a Use Based Exemption, the incidence of tax arises at one point in time, but the actual use occurs at a future date. As with the Type Based Exemption, certainty is required at the time of purchase as to what, if any, tax applies to the transaction involving TPP that may be subject to a Use Based Exemption. However, there is no certainty of use at the time of purchase, because the actual use of the item occurs after the incidence of tax arises.

[44] Turning to the language of the Exemption at issue on this appeal, s. 38(2) of the *Regulation* provides that, among other things, a direct agent "obtained for use" in certain contexts is exempt from tax imposed.

[45] The Exemption is thus a Use Based Exemption.

[46] The language "obtained for use" implies an intent. Thus, for this Use Based Exemption, we must look to the purchaser's intent and expectation, at the time of purchase, for how the TPP will be used in the future. Certainty can only be achieved if the phrase "obtained for use" is interpreted as requiring the purchaser to, on a *bona fide* basis, intend and expect the purchased TPP to be used for an exempt purpose; if this condition is met, the Exemption will apply at the point of purchase.

[47] Because the use does not happen at the point of purchase, but later, this leaves open the possibility that the actual use of an item will differ from its intended and expected use at the time the item was obtained.

[48] In this statutory scheme, the change in use provisions provide a mechanism in the *Act* to ensure the appropriate tax result is achieved. If a Use Based Exemption is claimed, and the item is subsequently used for a taxable purpose, the change in use provisions ensure the appropriate tax is ultimately paid for the TPP: *Act*, s. 82.

[49] The issue that arises on the facts of this case is that Teck uses the same TPP for both a taxable and a potentially exempt purpose.

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[50] The Province argues that Teck cannot claim the Exemption because when Teck obtains the chunks of coal it does not know in what furnace or in what process each piece of coal will be used.

[51] In my view, the Province's interpretation of the Exemption imposes a restrictive requirement that strains the meaning of the words "obtained for use" and makes no practical or commercial sense: *Erco Industries Ltd. v. British Columbia (Minister of Finance)*, [1985] B.C.W.L.D. 1264, 1985 CarswellBC 1426 (B.C.C.A.) at para. 6, Esson J.A. concurring.

[52] The Exemption arises in a manufacturing context. In such an operation, fungible items are acquired and held in inventory for both taxable and exempt uses.

[53] It is true that the same chunks of coal can be used in the Heat Process and the Reduction Process. Teck purchases all the coal used in both processes at the same time, by the metric ton, in rail carloads. It makes these purchases approximately every eight days.

[54] However, Teck knows what quantities of coal are consumed during each minute of the Heat Process and the Reduction Process in SSF#2, and in SSF#3. It is common ground that only the coal used in the Reduction Process (in both SSF#2 and SSF#3) might be eligible for the Exemption.

[55] The operation of the SFFs is scheduled in advance, including planned maintenance shutdowns. Teck maintains a schedule regarding the hours of operation at each of the SFFs; from this schedule Teck forecasts the inventory of the number of rail cars of each type of coal that will be required, on each date, in the Heat Process and the Reduction Process.

[56] Therefore, Teck can and does estimate, with reasonable accuracy, the amount of coal that will be consumed in the Heat Process and the Reduction Process each day when running at full capacity. This information is set out in a coal ordering schedule.

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[57] Using this coal ordering schedule, Teck then obtains the quantity of coal required for use in both the Reduction Process at SFF#2 and SFF#3, together with the quantity of coal required for (the non-exempt) use in the Heat Process at SFF#2.

[58] The coal is obtained several days in advance of its intended use to avoid interruption in supply and resultant shutdown.

[59] Although the quantity of coal required for use in the Heat Process and the Reduction Process is aggregated into a single order, the procurement process establishes that at the time Teck obtains the coal, it knows with a high degree of certainty the specific intended and expected amount of coal that is obtained for use in the potentially exempt Reduction Process (as well as the specific amount of coal that is obtained for use in the taxable Heat Process). I make this finding despite the evidence that the individual placing the order for the coal does not have personal knowledge of the percentage of coal being used in each process. That individual relies on the coal ordering schedule which enshrines Teck's institutional knowledge.

[60] In this case, under the Province's interpretation, in order to qualify for the Exemption on Reduction Process coal, Teck would need to significantly alter its operations.

[61] As noted, presently, Teck orders coal by the metric ton, in rail carloads, several days in advance of when it will be used. The Heat Process coal and the Reduction Process coal are not separated. Upon arrival at the smelting and refinery operation, the coal is off-loaded from the rail cars into storage bins, the contents of the bins are moved to the coal plant by a conveyor belt, where the coal is ground and dried. The coal is then conveyed to fume storage tanks at each slag fuming furnace where it is subsequently fed into the furnaces and used in either the Heat Process or the Reduction Process, in accordance with the production schedule for that date.

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[62] Under the Province's interpretation, in order to qualify for the Exemption on the Reduction Process coal, Teck would need to buy the same quantity of coal for the Reduction Process but would have to:

a) purchase the known quantity of Reduction Process coal separately from the known quantity of Heat Process coal required;

b) ship the Reduction Process coal in distinct and identifiable rail cars, and the Heat Process coal in separate and identifiable rail cars;

c) isolate and separate the process for offloading, drying, and pulverizing Heat Process coal from Reduction Process coal;

d) maintain entirely separate bins for Heat Process coal and Reduction Process coal; and,

e) in the case of SFF#2, alter the manufacturing process at SFF#2 such that Teck would utilize the bin holding the Heat Process coal for the Heat Process, and would then switch to and utilize the bin holding the Reduction Process coal for the Reduction Process.

[63] In other words, Teck would be obtaining the same quantity of coal for the same uses, but in order to claim the Exemption, Teck would have to implement a series of costly and impractical operational changes.

[64] The Province has not advanced any purposive rationale for this restrictive interpretation. It is also not an interpretation that has been applied by the Minister to Teck's operations until after the Assessment, although the Province was aware of the process being used by Teck for many years.

[65] The fact that the potentially tax-exempt coal is purchased at the same time as the taxable coal is no barrier to receiving the benefit of the Exemption. It simply means that the bundled purchase provision of the *Act* applies. The *Act* provides in relevant part:

Definitions

1 In this Act:

[…]

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"non-taxable component" means property, software or a service that, if purchased separately from a taxable component, would not be subject to tax under this Act or would be exempt from tax under this Act;

…

"taxable component" means tangible personal property, software or a taxable service that would be subject to tax under this Act if purchased separately from other property or services;

…

Purchase price if bundled purchase

26 (1) In this section, **"initial price"** means the following:

(a)in relation to a taxable component that is tangible personal property, the purchase price of the tangible personal property under section 9 (a) to (d);

(b)in relation to a taxable component that is software, the purchase price of the software under section 14 (a) to (c);

(c)in relation to a taxable component that is a taxable service, the purchase price of the taxable service under section 17 (a) to (c).

(2) Subject to sections 19 (3) and 26.1, this section applies if a taxable component is sold or provided with a non-taxable component for a single price.

(3) Subject to subsections (4) and (6), for the purposes of this Act, the purchase price of a taxable component is equal to the fair market value of the taxable component.

(4) Subject to subsections (4.1) and (6), for the purposes of this Act, the purchase price of a taxable component is equal to the initial price accepted by the seller, or the person from whom the taxable component passes or is acquired, for all the taxable and non-taxable components sold or provided for the single price if

(a) the fair market value of the taxable component is greater than 90% of the single price and the single price is less than $500, or

(b) the non-taxable component is not ordinarily available for sale separate from the taxable component or is not ordinarily provided separate from the taxable component for a price.

(4.1) Subsection (4) (b) does not apply in relation to software if

(a) the software is the only taxable component sold or provided with a non-taxable component for a single price, and

(b) the software is provided

(i) to a purchaser as part of the purchaser's participation in a prescribed program or activity, and

(ii) only to participants of the program or activity by the person offering that program or activity.

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> (5) Subsection (6) applies in relation to accommodation if
>
> > (a) the accommodation is the only taxable component sold or provided with a meal for a single price, and
> >
> > (b) the meal is the only non-taxable component sold or provided with that accommodation.
>
> (6) For the purposes of this Act, the purchase price of accommodation to which this subsection applies is equal to the amount attributed to the purchase of the accommodation in accordance with the regulations.

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[66] If the Reduction Process coal is not excluded from the Exemption, then it meets the definition of “non-taxable component”, and the Heat Process coal meets the definition of “taxable component”. The application of the fair market value rule means that the purchase price of the Heat Process coal is equal to its fair market value.

[67] The bundled purchase provision of the *Act* evidences the legislature’s intent for exemptions to apply in circumstances where a purchase of taxable and non-taxable property is made together for single price.

[68] I reject the Province’s argument that the word “component” in s. 26 means that the taxable component and the non-taxable component must be different types of TPP. The delineating factor between a taxable component and a non-taxable component is the taxable status of the property. In a Type Based Exemption, the taxable component and non-taxable components would be different types of TPP. However, in a Use Based Exemption, it is the “use” of the property not the “type” that determines taxable status. If the legislature intended that in addition to the taxable status of the property, there be additional delineating features or that the definition of “component” be limited to Type Based Exemptions, it would have said so.

[69] For the above reasons, I conclude that the way that Teck obtains coal for the Reduction Process does not disqualify them from claiming the Exemption.

The Exclusion

[70] Given that I have found that the manner in which Teck obtains the Reduction Process coal does not disqualify that coal from the Exemption, the next question is

whether the Reduction Process coal is nevertheless excluded from the Exemption by operation of the Exclusion.

The Factual Dispute

[71] In answering this question, I will first address the factual dispute set out above as to whether the heat produced by the Reduction Process coal is incidental or essential to the chemical reaction at issue.

[72] The assumptions set out at sub-paras. 23(k), (l), (p) and (t) of the Amended Response to Petition include that the heat is used to maintain the temperature required for the Reduction Process to occur, including maintaining the temperature of the slag.

[73] To discharge its burden of disproving those assumptions, Teck must either:

a) challenge the Minister's allegation that they did assume those facts;

b) assume the onus of showing that one or more of the assumptions was wrong; or

c) contend that, even if the assumptions were justified, they do not of themselves support the Assessment.

[74] Teck has not challenged that the assumptions in question were made, nor argued that the assumptions did not support the Assessment. Rather, Teck has argued, somewhat indirectly, that the assumptions are wrong because the heat produced by the Reduction Process coal is incidental to the chemical reaction at issue.

[75] Teck pleads:

> 7. Coal is utilized in SFF #2 in two sequential two-hour phases as part of a four-hour batch process.
>
> 8. During the first two-hour phase, coal is fed into the furnace at approximately 55 kg/min. Normal levels of oxygen facilitate the combustion of the coal for the purpose of producing energy to heat the solid form Cold Materials to a 1250 degree molten state […].

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> 9. During the Heat Process carbon dioxide is produced from the combustion of the coal.
>
> 10. During the second (2-hour) phase, the coal is burned in a specific manner (that is different than the Heat Process) for the purpose of producing a chemical reductant.
>
> 11. More specifically, in the second phase …
>
>> a. the coal is fed into the furnace at approximately 75 kg/min;
>>
>> b. the coal is combusted with low levels of oxygen (known as a starved condition) in order to produce carbon monoxide;
>>
>> c. the carbon monoxide acts as a reducing agent to produce metal oxides from the slag (the carbon monoxide combines with the metal oxides);
>>
>> d. the metal oxides fume as a gas and exit the SFF at 1300 degrees;
>>
>> e. the fumed gas is then cooled down to 150 degrees and combined with oxygen resulting in its transformation to solid form metal oxide.
>
> 12. SFF#3 operates using 1350 degree molten slag from the Kivcet Furnace. Accordingly, because the slag is already in molten form, the operations at SFF#3 do not involve a Heat Process and instead only involve the Reduction Process for the entire batch of the cycle.
>
> 13. In the Reduction Process, the coal modifies a chemical reaction and is consumed to the point of destruction or dissipation or uselessness for any other purpose.
>
> 14. The carbon monoxide that is necessary for the Reduction Process cannot be produced without the combustion of the full pieces of the coal in a starved condition.
>
> 15. The combustion of the full pieces of coal also simultaneously and unavoidably generates heat in the SFF that is absorbed by the molten slag.

[76] However, Teck has not met its onus of showing that any of the following assumptions are wrong:

> k) During the second phase in SFF#2, 65% of the coal is used as a reducing agent to recover metal oxides in the fuming process;
>
> <u>l) During the second phase in SFF#2, 35% of the coal is used as a source of energy to maintain the temperature required for the Reduction Process to occur;</u>
>
> […]
>
> <u>p) SFF#3 also burns the coal to maintain the temperature of the slag</u>;
>
> […]
>
> t) Teck used the coal as both a direct agent and a source of energy.
>
> [Emphasis added.]

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[77] Indeed, it is based on the facts underlying those very assumptions that Teck did not self-assess PST on 35% of the coal used in the Reduction Process.

[78] Based on the record before me, I cannot conclude that Teck has discharged its burden of disproving the assumptions set out at sub-paras. 23(k), (l), (p) and (t) of the Amended Response to Petition which include that the heat is used to maintain the temperature required for the Reduction Process to occur, including maintaining the temperature of the slag. If the use of the coal to produce heat is both anticipated and "required", then I cannot find such usage to be "incidental".

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The Direct Agent Coal is Excluded from the Exemption

[79] I turn next to interpret the Exclusion.

[80] I begin with the text of the provision.

[81] Teck has claimed that the coal is exempt under the Exemption.

[82] The Exemption is specifically "subject to subsection (3)", which is the Exclusion. For convenience, the Exclusion provides:

> (3) The exemption under subsection (2) does not apply to a chemical substance, catalyst or direct agent obtained
>
> > (a) for use to produce energy or as a source of energy, unless the chemical substance, catalyst or direct agent is electricity for use in an electrolytic process,
> >
> > […]
>
> [Emphasis added.]

[83] There is no dispute that the coal is a direct agent.

[84] In this case, I find that all the coal is obtained to be combusted (burned) in the slag fuming furnaces. All the coal is actually burned in one of the slag fuming furnaces, producing heat. Heat is energy. None of this is in dispute.

[85] What is disputed is whether the coal is obtained "for use" to produce heat or as a source of heat.

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[86] For reasons explained above, I have found it is obtained for use, at least partially, to produce (heat) energy or as a source of (heat) energy. During the second phase in SFF#2, 35% of each piece of coal is obtained for use to produce heat or as a source of heat. Specifically, it is used to maintain the temperature required for the Reduction Process to occur. SFF#3 also uses the coal to maintain the temperature of the slag. That use is not accidental or incidental. It is necessary and anticipated. It is factored into the purchase of the coal. It is the basis upon which Teck self-assessed only a 65% exemption.

[87] Both parties now agree that there is no language in the Exemption or the Exclusion that supports that a partial exemption is available based on some components of the coal being used as a direct agent and some not. Indeed, Teck now takes the position that it should have self-assessed a complete exemption.

[88] Here the coal produces energy but also operates as a direct agent. The production of energy is necessary to the Reduction Process. There are no qualifiers in the Exclusion that suggest that if the substance is used for multiple purposes, including the production of energy or as a source of energy, the substance will not fall within the Exclusion.

[89] In contrast, 'use' is employed elsewhere in the *Act* and the *Regulation* with various qualifiers, including among others: "primarily", "substantially", and "directly": *Act*, ss. 52, 113; *Regulation*, s. 92. When the word "use" or the phrase "obtained for use" is qualified, the qualifier serves a purpose: *Placer* at para. 45, citing *Hill v. William Hill (Park Lane) Ltd.*, [1949] A.C. 530 (U.K.H.L.) at 546.

[90] Indeed, even within s. 38(3) other exemptions are set out which are further qualified. For example,

> (3) The exemption under subsection (2) does not apply to a chemical substance, catalyst or direct agent obtained
>
> […]
>
> > (d) for use <u>for the primary purpose</u> of maintaining, lubricating or prolonging the life of machinery or equipment,
>
> […]

> (h) for use for the purpose of cleaning or sanitizing, unless the chemical substance, catalyst or direct agent is for use for the primary purpose of cleaning or sanitizing the tangible personal property referred to in subsection (2) (a).

[Emphasis added.]

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[91] If the legislature intended for s. 38(3)(a) to be further qualified such that it only excluded direct agents when they were obtained for use for the primary purpose of, or the sole purpose of, producing energy or as a source of energy, it would have said so. Therefore, while a substance may have more than one use, under s. 38(3)(a) any use to produce energy or as a source of energy will exclude the substance from the Exemption.

[92] The words of the Exclusion are clear and unambiguous, particularly in light of the scheme of the *Act* and *Regulation*. If a substance is obtained for use to produce energy or as a source of energy, it will not be exempt under the Exemption, even if it is also a direct agent. As set out above, because of the degree of precision and detail characteristic of many tax provisions, a greater emphasis has often been placed on textual interpretation where taxation statutes are concerned. Where the words of a statute are precise and unequivocal, those words play a dominant role in the interpretive process: *Placer* at para. 21.

The Legislative History

[93] I turn next to a consideration of the object of the *Act* and the intention of the legislature by considering the legislative history. As I will explain, these considerations further bolster the Province's interpretation of the Exclusion as the correct one.

[94] The Exemption was first provided for in the 1960 version of the *Social Service Tax Act*, R.S.B.C. 1960, c. 361, which reads as follows:

> ***Exemptions***
>
> **5.** The following classes of tangible personal property are specifically exempted from the provisions of this Act:—
>
> […]

> (h) Such tangible personal property by way of chemical, animal, mineral, or vegetable matter as the Lieutenant-Governor in Council may determine by regulation, used as a catalyst, or as a direct agent for the transformation or manufacture of a product by contact or temporary incorporation, or such tangible personal property as is used for the purpose of being processed, fabricated, or manufactured into, attached to, or incorporated into other tangible personal property for the purpose of retail sale:

Regulation 2-25 defined the term “direct agent”:

> A ‘direct agent’ as used in Sec. 5(h) of the Act and in Regulation 3-11 means a substance which, by contact or temporary incorporation with materials being fabricated, or manufactured into product, is used or consumed directly to produce a reaction or combination of materials by altering the speed of the reaction.
>
> (*Domglas Co. v. Attorney-General of British Columbia*, [1977] 2 A.C.W.S. 1064, 1977 CarswellBC 951 (B.C.S.C.) [*Domglas*] at para. 7).

Regulation 3-11 read:

> Tangible personal property by way of chemical, animal, mineral, or vegetable matter purchased by manufacturers and used as a catalyst or a direct agent is exempt from the application of the tax.
>
> (*Domglas* at para. 7).

[95] In 1979 a new version of the *Social Service Tax Act* was enacted (R.S.B.C. 1979, c. 388, s. 4(1)(h)), which largely mirrored the exemption contained in the 1960 enactment.

[96] The Exclusion was first enacted in 1987: *Miscellaneous Statutes Amendment (No. 5) 1987*, 36 Eliz. 2, c. 60, s. 45 [*1987 Amendment*].

[97] It is common ground between the parties that the Exclusion was enacted in response to this Court’s decision in *Canada Cement Lafarge Ltd. v. British Columbia (Min. of Fin.)*, [1987] 18 B.C.L.R. (2d) 267, 1987 CanLII 2447 (B.C.S.C.). In that case, the Court considered whether natural gas used as a source of (heat) energy was a direct agent. The Court concluded that because the heat energy produced the chemical reactions required to transform the mixture to clinker, it met the terms of the Exemption: at para. 21.

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[98] Fifty-one days later, the *1987 Amendment* was enacted to retroactively amend the *Act* as follows:

> 4.(1) The following classes of tangible personal property are specifically exempted from this Act:
>
> > (*h*) tangible personal property by way of chemical, animal, mineral or vegetable matter determined by regulation, and used as a catalyst, or as a direct agent for the transformation or manufacture of a product by contact or temporary incorporation;
>
> (1.1) Where tangible personal property, other than electricity used in an electrolytic process, is used to produce energy, it shall conclusively be deemed not to qualify for exemption under (1)(h).
>
> …
>
> [Emphasis added.]

[99] The BC Ministry of Finance *Tax Interpretation Manual* (the "TIM") contains the following comments with respect to the s. 4(1.1) Exclusion [later s. 76(2)].

> **Interpretation**
>
> The *Miscellaneous Statutes Amendment Act* (No. 5) 1987, enacted Section 76(2) retroactive to April 1, 1983, to clarify the original intent of the exemption under Section 76(1)(b). Section 76(2) established that fuels used to produce energy, such as electricity, natural gas, and propane, other than electricity used in an electrolytic process, do not qualify for exemption as catalysts or direct agents under Section 76(1)(b).
>
> These amendments were made retroactive to clarify the original intent of the legislation and to avoid the potential revenue loss from the additional litigation which would otherwise have resulted from the *Canada Cement Lafarge Ltd.* court decision of October 28, 1987.
>
> […]
>
> The general intent of Sections 76(2) […] is to exclude fuels (and electricity) used to generate energy, in particular electricity. However, these sections are not intended to exclude tangible personal property that may produce heat energy during use. (Emphasis Added)

[100] In *Fiberglas Canada Inc. v. British Columbia*, [1993] B.C.W.L.D. 070, 1992 CarswellBC 2681 (B.C.S.C.) [*Fiberglas*] at para. 14, Lowry J., as he then was, commented on the purpose and the function of both the Exemption and the Exclusion:

> In my view, the legislative purpose of the amendments, and more particularly the tax exemption preserved therein, is not entirely clear. It is clear that, following the *Canada Cement Lafarge* decision, the legislature sought to

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> remove the exemptions under s. 4(1)(h) and (h.1) of the *Act* relating to energy producing substances subject only to one exception. It may be that the legislature sought to preserve the exemption for electricity used, as it was, in the process that was the subject of the *Erco Industries* case – a process involving electrolysis that the Court of Appeal described as an electrolytic process.
>
> [Emphasis added.]

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[101] Teck argues that the Exclusion does not apply where heat is incidentally produced during the essential use of a direct agent, in the intended chemical reaction. However, I have found that the heat produced in this case is not incidental, it is required, anticipated, and planned for.

[102] Teck also argues that the Exclusion does not apply in circumstances where the intended reaction is produced from something other than energy, citing: *Fiberglas*; *Domglas*; and *Aljane Greenhouses Ltd. v. British Columbia*, [1989] B.C.W.L.D. 1439, 1989 Carswell 1419 (B.C.S.C. Chambers) [*Aljane BCSC*], leave to appeal to BCCA ref'd [1990] B.C.W.L.D. 296, 1989 CarswellBC 1371 (B.C.C.A.) [*Aljane BCCA*].

[103] I do not read those cases as establishing that proposition.

[104] In *Domglas*, there was a dispute about whether natural gas, and other substances, met the statutory definition of direct agents on the facts of that appeal: at para. 25. The Court concluded they did not: *Domglas* at para. 31. As I have noted, the question of whether the coal is a direct agent in this case is not in dispute. The Court's discussion of that definition is not of assistance in interpreting the Exclusion.

[105] At issue in *Fiberglas* was the meaning of "electrolytic process" in the Exclusion: at para. 2. In that case, this Court concluded the words meant an "electrochemical process involving the principles of electrolysis": *Fiberglas* at para. 24. In reaching that conclusion, the Court rejected that electricity used in the glass making process was such a process, reasoning that while there may be some electrochemical reaction it was "infinitesimal and is to be avoided", was "not desirable", and served "only to impede the use of electricity to heat the melt by impairing the efficiency of the electrodes": *Fiberglas* at para. 23. The electricity was

therefore subject to taxation because it was used to produce heat energy: *Fiberglas* at para. 24.

[106] In *Aljane BCSC*, the petitioners argued that natural gas that was used to heat a greenhouse should be exempt from taxation: at para. 5. The exemption at issue in that case read as follows:

> 4(1)(h.1) Tangible personal property used for the purpose of being processed, fabricated or manufactured into, attached to or incorporated into other tangible personal property [...] for the purpose of retail sale or lease;
>
> (*Aljane BCSC* at para. 3).

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[107] The petitioners argued that when natural gas was combusted, the carbon atoms from the natural gas combined with oxygen to produce carbon dioxide. The carbon dioxide so produced was absorbed or “incorporated” into the vegetables being grown in the greenhouses, enhancing their growth: *Aljane BCSC* at para. 6.

[108] The Chambers Judge rejected this argument based on the wording of the exemption at issue in that case. The Court held at para. 9:

> In my opinion, if the words in s. 4(1)(h.1) are read in their "grammatical and ordinary sense", then it is the natural gas itself that must be incorporated into the vegetables to qualify for the exemption. It is not sufficient, in my opinion, that the carbon dioxide produced from the burning of the natural gas is incorporated into the vegetables. To so hold would, in my view, strain the words of s. 4(1)(h.1) well beyond their plain and ordinary meaning.
>
> [Emphasis added.]

[109] Thus, the Court’s decision turned on the fact that the *exemption* did not apply.

[110] Despite having concluded that the exemption did not apply on the facts of the case, the Court went on to consider the Exclusion and held:

> **10** The evidence in this case establishes that the natural gas burned by the petitioners produces heat, a form of energy.
>
> **11** Section 4(1.2) of the Act provides that where tangible personal property is used to produce energy "it shall conclusively be deemed not to qualify for exemption" under s. 4(1)(h.1).
>
> **12** The evidence discloses that heat is essential to the operation of the greenhouses and that the fact that carbon dioxide is produced as a result of the combustion of the natural gas with its attendant enhancement of

vegetable growth is only incidental. That this is so is apparent when it is considered that the vegetable plants only absorb carbon dioxide during daylight hours yet the natural gas is burned at all hours of the day and night so as to maintain uniformity of temperature in the greenhouses.

[111] Given that the Court had already determined that the exemption did not apply, this Court's comments at para. 12 are *obiter*. In any event, the Court of Appeal dismissed the petitioner's application for leave to appeal in *Aljane BCCA*, on the basis, in part, that if substances produce energy then the Exclusion applies whether that is the purpose of the use or not*:*

> **4** The appellant relied on the concept of release of energy for success in the *Canada Cement Lafarge* case. However, after that decision the legislature amended the Act and added to s. 4 the following two subsections:
>
> > (1.1) Where tangible personal property, other than electricity used in an electrolytic process, is used to produce energy, it shall conclusively be deemed not to qualify for exemption under subsection (1)(h).
> >
> > (1.2) Where tangible personal property, other than electricity used in an electrolytic process, is used to produce energy, it shall conclusively be deemed not to qualify for exemption under subsection (1)(h.2).
>
> **5** Counsel for the applicant endeavours to get around the effect of those sections by arguing that they must be read as including the words "in order to produce energy" in each of the subsections. In effect he introduces a purpose into each of the subsections. He says the chambers judge erred in failing to so interpret the Act.
>
> **6** Counsel for the Crown on the other hand contends that leave should be refused because there is no reasonable prospect of the appeal succeeding. In that connection he refers to the decision of Mr. Justice Macfarlane in *Quintette Coal Limited v. The Minister of Finance* (23 January 1989) Victoria Registry V00883 (B.C.C.A.).
>
> **7** Counsel for the Crown bases his submission on the fact that the applicant in order to succeed on the appeal must overcome two hurdles. The first is that they must establish that natural gas is incorporated into the vegetables grown in the greenhouse. The second one is that the petitioners must establish that natural gas is not used by them to produce energy. The Crown argues that it is not natural gas which was incorporated into the vegetables but only carbon dioxide which is a by product of the combustion of natural gas which produces both carbon dioxide and water. It is only the carbon dioxide which is beneficial to the vegetables and is incorporated in them.
>
> **8** As to the second hurdle the Crown urges that while it was the production of energy upon which the appellant in the *Canada Cement Lafarge* succeeded, the effect of s. 4(1.2) is to preclude the application of that victory in the present case.

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> 9 In my view, the two hurdles presented to the applicants are indeed insurmountable. I think this case falls squarely within the decision of Mr. Justice Macfarlane in the *Quintette Coal* case and because there is no reasonable prospect of success on the appeal, the application for leave must be refused.
>
> [Emphasis added.]

[112] *Aljane BCSC* does not assist the petitioner in this case where I have found that the heat is essential to the operation of the slag fuming furnaces.

[113] I conclude that the Exclusion was added to limit the Exemption in precisely the situation at bar: where a substance that acts as a direct agent in a reaction that is essential for processing or manufacturing *also* produces energy or is a source of energy.

Conclusion

[114] In summary, the petitioner is precluded from relying on the Exemption by operation of the Exclusion. I dismiss the petitioner's appeal.

[115] The respondent, as the substantially successful party, shall have its costs at Scale B.

"Latimer J."

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