

Texas Comptroller of Public Accounts STAR System

201511727H

SOAH DOCKET NO. 304-15-2896.27
CPA HEARING NO. 110,819

RE: *****
TAXPAYER NO.: *****
AUDIT OFFICE: *****
AUDIT PERIOD: July 1, 2010 THROUGH September 30, 2011

Direct Payment/RFD

BEFORE THE COMPTROLLER
OF PUBLIC ACCOUNTS
OF THE STATE OF TEXAS

GLENN HEGAR
Texas Comptroller of Public Accounts

J. MARK ROSS
Representing Tax Division

Representing Claimant

SOAH DOCKET NO. 304-15-2897.26
CPA HEARING NO. 110,820

RE: *****
TAXPAYER NO.: *****
AUDIT OFFICE: *****
AUDIT PERIOD: September 1, 2009 THROUGH June 30, 2010

Sales And Use Tax/RFD

BEFORE THE COMPTROLLER
OF PUBLIC ACCOUNTS
OF THE STATE OF TEXAS

GLENN HEGAR
Texas Comptroller of Public Accounts

J. MARK ROSS
Representing Tax Division

Representing Claimant

SOAH DOCKET NO. 304-15-2898.26

CPA HEARING NO. 110,821

RE: *****
TAXPAYER NO.: *****
AUDIT OFFICE: *****
AUDIT PERIOD: July 1, 2009 THROUGH August 31, 2009

Sales And Use Tax/RFD

BEFORE THE COMPTROLLER
OF PUBLIC ACCOUNTS
OF THE STATE OF TEXAS

GLENN HEGAR
Texas Comptroller of Public Accounts

J. MARK ROSS
Representing Tax Division

Representing Claimant

COMPTROLLER’S DECISION

This decision is final on November 30, 2015, unless a motion for rehearing is timely filed. SEE Administrative Procedure Act, Tex. Gov’t Code SECTION 2001.142, .144, .146; 34 Tex. Admin. Code SECTION 1.29, .31, .32. A party that files a motion for rehearing must file it with the Deputy Comptroller through the Special Counsel for Tax Hearings at P.O. Box 13528, Austin, Texas 78711-3528 or by facsimile at 512-936-6190. A copy of the motion must be served on the opposing party. The failure to timely file a motion for rehearing may result in adverse legal consequences.

Administrative Law Judge (ALJ) Peter Brooks of the State Office of Administrative Hearings (SOAH) issued a Proposal for Decision (PFD) that includes Findings of Fact and Conclusions of Law. SOAH served the PFD on each party and each party was given an opportunity to file exceptions and replies with SOAH in accordance with SOAH’s rules of procedure. The ALJ recommended that the Comptroller adopt the PFD as written.

After review and consideration, IT IS ORDERED that the PFD is adopted as changed pursuant to Texas Government Code SECTION 2003.101(e) and (f).

The results from this Decision are Attachments A. The ALJ’s letter to the Comptroller is Attachment B. The PFD as changed is Attachment C. Attachments A, B and C are incorporated by reference.

Attachments A reflect a zero amount due.

SIGNED on this 6th day of November 2015.

GLENN HEGAR
Texas Comptroller of Public Accounts

By: Mike Reissig
Deputy Comptroller

Attachments A, Texas Notifications of Hearing Results
Attachment B, ALJ's letter to the Comptroller
Attachment C, Proposal for Decision as changed

ATTACHMENT B

State Office Of Administrative Hearings
Cathleen Parsley
Chief Administrative Law Judge

September 16, 2015

The Honorable Glenn Hegar
Comptroller of Public Accounts
LBJ Building
111 E. 17th Street, 1st Floor
Austin, TX 78701

RE: SOAH Docket: 304-15-2896.27; 304-15-2897.26; and 304-15-2898.26
TCPA Hearing No.: 110,819; 110,820; and 110,821
Taxpayer No.: *****
***** v. Texas Comptroller of Public Accounts

Dear Comptroller Hegar:

Please be advised that on June 30, 2015, Claimant filed its Exceptions to the Proposal for Decision (PFD) issued on May 29, 2015. Staff filed its Reply on July 6, 2015. The Administrative Law Judge, after reviewing the pleadings filed by the parties, finds that no new arguments have been raised that were not previously addressed in the PFD. Claimant, however, has attempted to supplement the evidentiary record with additional facts regarding the employment history and educational background of the affiant, INDIVIDUAL. Such additional information cannot be considered as the ALJ, under 1 Texas Administrative Code Section 155.153(a)(4), is barred from reopening the record once a PFD is issued. Therefore, the Administrative Law Judge recommends that the PFD be adopted as written

Sincerely,

Peter Brooks
Administrative Law Judge

ATTACHMENT C

SOAH DOCKET NO. 304-15-2896.27
TCPA HEARING NO. 110,819

Taxpayer No. *****

v.

TEXAS COMPTROLLER OF PUBLIC ACCOUNTS

BEFORE THE STATE OFFICE OF
ADMINISTRATIVE HEARINGS

SOAH DOCKET NO. 304-15-2897.26
TCPA HEARING NO. 110,820

Taxpayer No. *****

v.

TEXAS COMPTROLLER OF PUBLIC ACCOUNTS

BEFORE THE STATE OFFICE OF
ADMINISTRATIVE HEARINGS

SOAH DOCKET NO. 304-15-2898.26
TCPA DOCKET NO. 110,821

Taxpayer No. *****

v.

TEXAS COMPTROLLER OF PUBLIC ACCOUNTS

BEFORE THE STATE OFFICE OF
ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

***** (Claimant), an oil and gas well servicer, filed a series of refund claims totaling \$13,616,458.80 for refund periods covering July 1, 2009, through September 30, 2011, for sales tax paid in error on the purchase of proppants and other chemicals used in the hydraulic fracturing process. Claimant contended that the purchase of these items was exempt under the sale for resale exemption. The Tax Division (Staff) of the Texas Comptroller of Public Accounts (Comptroller) denied the refund claims, and Claimant requested refund hearings contesting the denials. In this Proposal for Decision, the Administrative Law Judge (ALJ) finds that Claimant failed to show by clear and convincing evidence that it was entitled to the sale for resale exemption, and the ALJ, therefore, recommends that the denials of the refund claims be affirmed.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

On March 18, 2015, Staff referred these matters to the State Office of Administrative Hearings (SOAH) for a hearing. Claimant was represented by ***** of COMPANY, and Staff was represented by Assistant General Counsel Jon Ross. Staff filed an Unopposed Motion for Joinder seeking to join the three cases in a single proceeding. The ALJ ordered the cases joined because the cases involved the same issues of fact and law as well as the same parties. The record closed on May 19, 2015.

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, those matters are set out in the Findings of Fact and Conclusions of Law without further discussion.

II. REASONS FOR DECISION

Evidence Presented

Staff submitted the following exhibits in each of the docketed cases:

1. Refund denial letter;
2. Refund claim;
3. Refund claim schedules;
4. An entry from Wikipedia titled "Hydraulic fracturing proppants" (http://en.wikipedia.org/wiki/Hydraulic_fracturing-proppants); [ENDNOTE: (1)]
5. A piece titled "Proppants Open Production Pathways," Don Lyle, Contributing Editor, Hart Energy Publishing; [ENDNOTE: (2)]
6. Analysis and Diagnostic of Proppant Flowback in the Orito Field, Colombia, by A. Varela and N. Saavedra, http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0122-5383200000010004; [ENDNOTE: (3)]
7. Printout from a website of CARBO Ceramics, Inc. referring to "CARBO-Resin-coated proppant," <http://www.carboceramics.com/products-and-services/fracture-technologies/resin-coated-p...>, last visited April 28, 2015; [ENDNOTE: (4)]
8. Press release titled Fairmount Santrol Technical Paper Documents the Long-term Economic Value of Curable Resin-Coated Proppant" <http://fairmountsantrol.com/news-and-events/fairmount-santrol-technical-paper-documents...>, last visited April 27, 2015; [ENDNOTE: (5)]
9. Excerpt from website of Environmental Protection Agency (EPA), EPA's Study of Hydraulic Fracturing and Its Potential Impact on Drinking Water Resources: The Hydraulic Fracturing Water Cycle, <http://ww2w2.epa.gov/hfstudy/hydraulic-fracturing-water-cycle>, last visited April 28, 2015; [ENDNOTE: (6)]
10. Dictionary of Petroleum Exploration, Drilling & Production, 2nd Edition, Norman J. Hyne, PhD., page containing definition of flush stage; [ENDNOTE: (7)]
11. U.S. Patent No. 7040418; [ENDNOTE: (8)]
12. U.S. Patent No. 20110162838-System and method for proppant transfer, <http://ww2w.google.com/patents/US20110162838>, last visited April 28, 2015; [ENDNOTE: (9)] and
13. Copies of purchase orders, invoices, bills of lading, checks, and similar documentation previously provided by Claimant loaded on a computer disc.

Staff also provided the administrative record that consisted of the pleadings filed before these matters were referred to SOAH. No exhibits were attached to these pleadings.

During the written submission hearing Claimant provided copies of the following exhibits:

1. A page titled "What is fracturing?"; [ENDNOTE: (10)]
2. A graphic illustration of "Process of Hydraulic Fracturing," http://cdn.bajanreported.com/wp-content/upload/2-12/09/fracking_statesman.jpg, last visited April 20, 2015; [ENDNOTE: (11)]
3. A series of untitled block-style illustrations of certain processes that occur during fracturing, <http://www.hexionfracline.com/assets/images/spring2012/oilplus-canada.jpg>, last visited April 20, 2015; [ENDNOTE: (12)]
4. A print-out of tables taken from the website of Momentive, an oilfield technology group, regarding resin-coated proppants and their "typical applications," [ENDNOTE: (13)] and
5. Affidavit executed by INDIVIDUAL, Claimant's vice president for technical service.

No objections were raised to the admissibility of the parties' exhibits, although Staff did take exception to the probative value of Claimant's exhibits. Staff also submitted the administrative record, consisting of the pleadings filed before this case was referred to SOAH. The exhibits submitted were admitted into the record.

B. Agreed Adjustments

Staff has not agreed to make any adjustments granting refunds or credits.

C. Background and Issues Presented

During the refund periods, Claimant furnished oil and gas hydraulic fracturing services to various well owners in Texas. Hydraulic fracturing is a well stimulation method in which fluid and various other fracturing materials such as sand, ceramic materials (proppants), and chemicals are pumped into a well at an extremely high pressure to create fractures in an oil and gas formation through which oil or gas can flow. Claimant also used cement as a component of well completion services.

Claimant filed refund claims dated August 20, 2013; September 20, 2013; and October 18, 2013 in the amounts respectively of \$228,982.41, \$150,967.43, and \$13,236,508.96, covering respectively the periods of July 1, 2009, through July 31, 2009; August 1, 2009, through August 31, 2009; and September 1, 2009, through September 30, 2011. Claimant requested a refund of the sales tax it paid on the materials purchased to perform hydraulic fracturing services. Claimant contended that the purchase of the materials was an exempt sale for resale because the materials were transferred to the care, custody, and control of its customers as an integral part of the fracturing service. Staff denied each of the three refund claims on the grounds that the asserted basis for the refunds (I.E., the sale for resale exemption) was not valid. Claimant timely requested refund hearings contesting the denials.

Claimant contends that Staff has improperly denied the requested refund of the sales tax paid on tangible personal property (the proppants and other chemicals) that it purchased and ultimately transferred to its customers as part of the fracturing service. Claimant contends that the fracturing service does not change the form or condition of the proppants or chemicals. According to Claimant, the proppants remain in the formation after the service is complete, propping open cracks in the formation. As explained by Claimant, in order to keep the cracks open the proppants must not only retain their form and resist the extreme pressures involved, but must also physically remain in place

to fulfill their intended purpose. Claimant further contends that once the proppants become embedded in the well formation, it retained no rights to the proppants or chemicals, and that, therefore, the well owner has assumed care, custody, and control of all proppants, fluids, and chemicals involved in the fracking process.

Claimant contends that under the plain language of Texas Tax Code SECTION 151.006(a)(1), .006(a)(3), and .302(a), the sale for resale exemption applies to the materials it utilized in performing the fracturing service for its customers. Although not expressly stated in its pleadings, Claimant, is also relying on Texas Tax Code SECTION 151.302(b), which adds the requirement that the taxpayer must have transferred care, custody, and control of the tangible personal property used in performing the service. Claimant further argues that the courts' decisions in COMBS V. ROARK AMUSEMENT & VENDING, L.P., 422 S.W. 3d 632-732 (Tex. 2013), COMBS V. HEALTH CARE SERVS. CORP., 401 S.W. 3d 623 (Tex. 2013), and DTWC CORP. V. COMBS, 400 S.W. 3d 149 (Tex. App. – Austin 2013), support its contention that the sale for resale exemption applies even though the well oil service it performed was not a service taxable under Chapter 151 of the Tax Code, but rather was subject to the oil well services tax under Chapter 191 of the Tax Code.

Claimant also originally raised a second contention that it should be refunded the sales tax paid on the cement purchased for use in providing well completion services. Staff opposed this specific refund claim on the grounds that the claim was not included in the original requests for refund at issue in the first contention. Claimant agrees that the claimed refund for cement purchases will be addressed in a separate refund. As Claimant has withdrawn the refund request for the cement purchases, the ALJ will not address this contention.

Staff rejects Claimant's refund claims on various grounds. Staff insists that the materials that are the subject of the refund claim must have been resold as an integral part of a service listed as a taxable service enumerated in Texas Tax Code SECTION 151.0101. Staff distinguishes the decisions in ROARD AMUSEMENT & VENDING, HEALTH CARE SERVS. CORP., and DTWC CORP. from the instant case, and argues that they do not support Claimant's contention that the sale for resale exemption applies. In addition, Staff contends that Claimant fails to account for the proppants and chemicals that were removed from the oil well through the vacuuming of the wellbore to remove impediments to oil and gas flow as well as through the release of pressure at the surface of the wellbore. The amounts removed were then disposed of as waste. As a result, according to Staff, only a fraction of the proppants and other chemicals injected into the well remained within the formation. Thus, Staff asserts that Claimant failed to identify: (1) what portion of the tangible personal property included in the schedules attached to its refund claims remained within the formation, and which Claimant contends care, custody, and control was transferred to the well owner, and (2) what portion was removed and disposed of as waste, to which care, custody, and control never transferred to the well owner.

Staff also contends that the documents (including purchase orders, invoices, bills of lading, and checks) previously provided by Claimant [ENDNOTE: (14)] are not reconcilable to the schedules attached to the refund claims. Staff points out that the documentation included invoices and credit memos that are not reflected in the schedules. And, according to Staff, the schedules, in turn, reflect transactions for which no corresponding documentation was provided. Finally, Staff also asserts that there are invoices for which no tax was charged and for which Claimant has not established that it self-reported and remitted the tax, yet Claimant included in the transactions in its refund

claims.

D. ALJ's Analysis and Recommendation

The sale for resale of a taxable item is exempted from sales tax. Tex. Tax Code SECTION 151.302(a). A sale for resale is a sale of tangible personal property to a purchaser who acquires the property for the purpose of reselling it in the normal course of business in the form in which it was acquired or as an attachment or integral part of other tangible personal property or taxable service. Tex. Tax Code SECTION 151.006(a)(1) & (3). The Comptroller has applied the dictionary definition of "integral" in construing its meaning. Integral means "essential to completeness." [ENDNOTE: (15)] Thus, an item of tangible personal property is considered integral to the performance of a service if the service cannot be performed without the item. SEE Taxability Letter Ruling STAR (State Tax Automated Research) Accession No. 201002597L (February 17, 2010).

Claimant must establish that its customers had primary possession and were primarily responsible for custody, control, and care of the tangible personal property at issue. Tex. Tax Code SECTION 151.302(b); and ALSO SEE SHARP V. CLEARVIEW CABLE TV, INC., 960 S.W.2d 424 (Tex. App.? Austin 1998, pet. denied). Claimant must show its entitlement to the sale for resale exemption by clear and convincing evidence. 34 Tex. Admin Code SECTION 1.40(2)(A).

The parties disagree whether Claimant performed a service to which the sale for resale exemption is applicable. The parties dispute whether, under the recent court decisions referenced earlier and the applicable Tax Code provisions, tangible personal property can be resold as an integral part of a service that is not subject to sales tax but is subject to a different tax, such as the oil well service tax. The ALJ, however, concludes that this issue does not need to be addressed to resolve the contested refund claims because the ALJ finds that Claimant failed to prove that care, custody, and control of the tangible personal property was transferred to the customers, which constitutes a necessary element of the sale for resale exemption under Texas Tax Code SECTION 151.006(a)(1), .006(a)(3), and .302(b). [ENDNOTE: (16)] Claimant in its Reply to Notice of Hearing by Written Submission attached exhibits which it contends establish (1) that the fracturing does not change the form or condition of the proppants; (2) that the proppants remain in the formation after the fracturing is completed; and (3) that thereafter the well owner retains care, custody, and control of the proppants. However, the five exhibits offered by Claimant in support of these assertions lack the required persuasiveness that establish by clear and convincing evidence that care, custody, and control was transferred to the well owner. [ENDNOTE: (17)] The authoritativeness of the first three exhibits, which purport to describe the hydraulic fracturing process, is questionable. The first exhibit, which literally answers the question: "What is fracturing?" bears no attribution; not even an internet address, assuming it is a print-out of a website. Similarly, no context or authorship is provided for the second exhibit, which consists of an illustration of the process of hydraulic fracturing, which significantly does not contain a reference to the role the proppants play in holding the fractures open. The graphic contains the following caption: "Source: Denver Post research." It appears to have been part of a story that may have been published in The Denver Post. No other detail beyond an internet address was provided. Thus, no basis for the reliability of the information contained in Exhibit 2 was provided. The third exhibit consists of six block illustrations depicting the bonding attributes of the "uncoated frac sand" and of a proppant called "OilPlus™." The provenance and authorship of these illustrations were not provided. There is an internet address provided but

there is no other identification as to the source of the illustrations. None of these three exhibits qualifies as an authoritative publication, whose contents could be treated as presenting an undisputed, established scientific fact. In addition, none of these three exhibits directly addresses whether the proppants or other chemicals used by Claimant remain unchanged in the formation subject to the care, custody, and control of the well owner.

The fourth exhibit consists of two tables printed from the website of a business known as Momentive, which is described as an oilfield technology group. The tables appear to describe in summary form the physical properties of certain products identified as "Curable Sand" and "Curable Ceramics," which could be proppants. The significance of the tables' contents, which are technical in nature, is not readily understood without an accompanying explanation provided, for example, by an expert's affidavit. Consequently, Claimant's reliance on the description of the products' properties to establish the nature of the proppants it used is not particularly persuasive.

The final exhibit provided by Claimant is an unsworn affidavit executed by Claimant's vice president for technical service, INDIVIDUAL. In the affidavit, INDIVIDUAL testifies that not only are the proppants designed to remain unchanged and intact in the formation after injection, but also that only small traces of the proppants flow back to the surface after a fracturing job. He does testify that the proppants and other fluids, including the chemicals used in the fracturing, that remain in the formation are owned by the well owner and are removed by a third party service provider contracted by the well owner. There are shortcomings with this affidavit. Claimant does not lay a predicate for INDIVIDUAL's credibility as a witness. For example Claimant did not establish the affiant's experience working in the oil and gas well services industry, the scope of his responsibilities and duties as Claimant's vice president for technical service, or his educational and technical qualifications. It is also significant that INDIVIDUAL acknowledged that proppants and other fluids are removed from the well, which suggests that they were not intended to remain in the care, custody, and control of the well owner, but were destined to be removed as waste.

The ALJ, based on the evidence provided by Claimant, concludes that Claimant failed to prove by clear and convincing evidence that the proppants remained in the formation [ENDNOTE: (18)] and were not removed as waste or lost through the release of pressure at the surface. In addition, Claimant includes in its refund claims both proppants and other chemicals used in the fracturing of the formation. Yet Claimant does not consistently assert in its pleadings that the tangible personal property referred to as "other chemicals" remained unchanged in the formation and that the well owner thereafter exercised care, custody, and control over these "other chemicals." Therefore, the ALJ concludes that Claimant, having failed to establish that it transferred care, custody, and control over the proppants and other chemicals included in its refund claims, did not establish by the requisite clear and convincing evidence that it was entitled to the sale for resale exemption. Therefore, the refund claims should be denied.

As discussed earlier, Staff also contends that Claimant has failed to establish the amount of sales tax that it paid in error and that thus should be refunded to it. Staff directly questioned that the documentation produced by Claimant did not support the transactions that Claimant included in its refund claim schedules. Staff contends that the schedules listing the transactions making up the refund claims were only partially reconciled to the invoices and credit memos produced by Claimant. However, Claimant did not reply to the contentions,

thus leaving them unrebutted. Claimant's failure to respond constitutes another basis for rejecting the refund claims filed by Claimant.

III. FINDINGS OF FACT

1. During the refund periods, ***** (Claimant), an oil and gas well servicer, furnished oil and gas hydraulic fracturing services to various well owners in Texas.
2. Hydraulic fracturing is a well stimulation method in which fluid and various other fracturing materials such as sand, ceramic materials (proppants), and chemicals are pumped into a well at an extremely high pressure to create fractures in an oil and gas formation through which oil or gas can flow.
3. Claimant filed refund claims dated August 20, 2013; September 20, 2013; and October 18, 2013 in the amounts respectively of \$228,982.41, \$150,967.43, and \$13,236,508.96, covering the corresponding periods of July 1, 2009, through July 31, 2009; August 1, 2009, through August 31, 2009; and September 1, 2009, through September 30, 2011.
4. Claimant requested a refund of the sales tax it paid on the materials (proppants and other chemicals) purchased to perform the hydraulic fracturing services on the grounds that the purchase constituted an exempt sale for resale.
5. The Tax Division (Staff) of the Texas Comptroller of Public Accounts (Comptroller) denied each of the three refund claims on the grounds that the asserted basis for the refunds (I.E., the sale for resale exemption) was not valid.
6. Claimant timely requested a refund hearing contesting the denial of the refund claims.
7. On March 18, 2015, Staff referred the case to the State Office of administrative Hearings (SOAH) for a hearing based on the parties' written submissions.
8. Staff issued a Notice of Hearing by Written Submission. The notice of hearing contained a statement of the nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
9. The ALJ ordered that the record close on May 19, 2015.
10. Claimant did not identify the tangible personal property chemicals included as "other chemicals" in the refund claim.
11. Claimant did not establish that the tangible personal property referred to as "other chemicals" remained in the well formation so that the well owner assumed care, custody and control of the chemicals.
12. Claimant did not establish the amount of proppants and other chemicals that remained in the well formation and whose care, custody, and control was transferred to the well owner.
13. Claimant did not establish how it calculated the sales tax paid on the

proppants and other chemicals used in providing the fracturing service.

14. Claimant failed to establish the authoritative and persuasiveness of the information contained in the exhibits it submitted in this proceeding.

IV. CONCLUSIONS OF LAW

1. The Comptroller has jurisdiction over this matter pursuant to Texas Tax Code ch. 111.

2. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a proposal for decision with findings of fact and conclusions of law pursuant to Texas Government Code ch. 2003.

3. Staff provided proper and timely notice of the hearing pursuant to Texas Government Code ch. 2001.

4. The sale for resale of a taxable item is exempted from sales tax. Tex. Tax Code SECTION 151.302(a).

5. A "sale for resale" is a sale of tangible personal property to a purchaser who acquires the property for the purpose of reselling it in the normal course of business in the form in which it was acquired or as an attachment or integral part of other tangible personal property or taxable service. Tex. Tax Code SECTION 151.006(a)(1) & (3).

6. In order to be entitled to the resale exemption, Claimant must firmly establish that primary care, custody, and control of the tangible personal property were transferred to its customers as an integral part of the taxable service. Tex. Tax Code. SECTION 151.302(b) and .006(3); 34 Tex. Admin. Code SECTION 3.285(a)(2)(C); and ALSO SEE SHARP V. CLEARVIEW CABLE TV, INC., 960 S.W.2d 424 (Tex. App.- Austin 1998, pet. denied).

7. Claimant did not establish by clear and convincing evidence that the care, custody, and control of the proppants and other chemicals, that were the subject of the refund claims, were transferred to its customers. Tex. Tax Code SECTION 151.302(a), .302(b); and ALSO SEE 34 Tex. Admin Code SECTION 1.40(2)(A).

8. Claimant failed to show by clear and convincing evidence that the purchase of the proppants and other chemicals that were the subject of the refund claims was an exempt sale for resale.

9. The denial of the refund claims should be affirmed.

SIGNED May 29, 2015.

PETER BROOKS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

ENDNOTE(S)

(1) The internet citation appears at the foot of the exhibit's pages. No other citation was provided by Staff.

- (2) The information attributing authorship and publisher was provided by Staff.
- (3) The internet citation appears at the foot of the exhibit's pages. No other citation was provided by Staff.
- (4) The internet address appeared at the foot of the exhibit's pages. No other citation was provided by Staff.
- (5) The internet citation appears at the foot of the exhibit's pages. No other citation was provided by Staff.
- (6) The internet address appeared at the foot of the exhibit's pages. No other citation was provided by Staff.
- (7) The information regarding the publisher and editor was provided by Staff.
- (8) Staff in its Response and Additional Evidence and Argument attached copies of Exhibits 4-12. However, only the title page for Exhibit 11 was included in the submission made to SOAH. No content was provided.
- (9) The internet address appeared at the foot of the pages in the exhibit.
- (10) No attribution was provided by Claimant.
- (11) The only attribution provided, other than the internet address that appeared at the foot of the page, is a caption reading: "Source: Denver Post research."
- (12) No further attribution was provided other than the internet address that appeared at the bottom of the page.
- (13) No further information was provided by Claimant attributing authorship or publication except for e reference to a 2013 copyright held by Momentive Specialty Chemicals, Inc.
- (14) These documents were included in Exhibit 13 introduced by Staff.
- (15) Merriam-Webster online: <http://www.merriam-webster.com/dictionary/integral> ; SEE ALSO, 7-Eleven, INC. V. COMBS, 311 S.W.3d 676, 687 (Tex. App. – Austin 2010, pet. den.).
- (16) Staff does appear to agree that the proppants and other chemicals were transferred as an integral part of the fracturing service.
- (17) These are Claimant's Exhibits 1-5 attached to its Reply to Notice of Hearing.
- (18) An issue that was not addressed by either party is whether the proppants if they remained in the formation keeping the fractures open had become incorporated into the realty and therefore were no longer tangible personal property. Thus, raising the question whether they remained eligible for the sale for resale exemption.

ACCESSION NUMBER: 201511727H

SUPERSEDED: N

DOCUMENT TYPE: H

DATE: 11/06/2015

TAX TYPE: SALES