IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 22-ICA-111

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STATOIL USA ONSHORE PROPERTIES, INC.,

Petitioner Below, Petitioner,

v.

MATTHEW IRBY, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent Below, Respondent,

RESPONDENT'S BRIEF

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INTRODUCTION

The West Virginia Office of Tax Appeals' ("OTA") order should be affirmed because it properly calculated StatOil's severance tax liability. It correctly used the product value on the settlement sheets to determine the gross value of StatOil's severed gas because that number reflected the value of StatOil's gas when it was sold at the market and it included the post-production processing that the statue and rule make clear should be included. OTA also did not let StatOil claim the fifteen percent safe harbor under W. Va. Code R. § 110-13A-4.8.4 because it had already received a higher-value deduction for its actual transportation and transmission expenses. OTA was right that the rule lets StatOil take one of these deductions but not both. Finally, OTA did not err in disregarding a prior OTA decision that StatOil agrees was non-precedential: the earlier OTA opinion was based on different facts and so is clearly distinguishable. StatOil's assignments of error on the merits should be rejected.

STATEMENT OF THE CASE

I. Severance Tax Calculation Methodology Under West Virginia Law.

West Virginia's severance tax is based upon the gross value of natural resources that have been severed. The "gross value" is the "market value" of the natural resource in the vicinity in which the natural resource is severed. W. Va. Code §11-13A-2(c)(6). The severance tax on oil and natural gas is "five percent of the gross value of the natural gas or oil produced, as shown by the gross proceeds derived from the sale thereof by the producer." W. Va. Code §11-13A-3a(b). In order to determine the gross value, the Tax Department looks to the gross proceeds of the sale of the natural resource. Gross value is generally defined as follows:

> "Gross value" in the case of natural resources means the market value of the natural resource product, in the immediate vicinity where severed, determined after

application of post-production processing generally applied by the industry to obtain commercially marketable or usable natural resource products.

W. Va. Code §11-13A-2(c)(6). The basis of the tax is the "market value" of the resource, not the amount received by the producer in a sale. Accordingly, the following rules apply when determining the gross value:

(A) For natural resources severed or processed (or both severed and processed) and sold during a reporting period, gross value is the gross proceeds received or receivable by the taxpayer.

(B) In a transaction involving related parties, gross value shall not be less than the fair market value for natural resources of similar grade and quality.

(C) In the absence of a sale, gross value shall be the fair market value for natural resources of similar grade and quality.

(D) If severed natural resources are purchased for the purpose of processing and resale, the gross value is the amount received or receivable during the reporting period reduced by the amount paid or payable to the taxpayer actually severing the natural resource. If natural resources are severed outside the State of West Virginia and brought into the State of West Virginia by the taxpayer for the purpose of processing and sale, the gross value is the amount received or receivable during the reporting period reduced by the fair market value of natural resources of similar grade and quality and in the same condition immediately preceding the processing of the natural resources in this state.

W. Va. Code § 11-13A-2(c)(6)(A)-(D).

"Gross proceeds" means "the value, whether in money or other property, actually proceeding from the sale or lease of tangible personal property, or from the rendering of services, without any deduction for the cost of property sold or leased or expenses of any kind." W. Va. Code § 11-13A-2(b)(5). *See also* W. Va. Code R. § 110-13A-2a. In other words, the gross proceeds are "the value of the gas without any expenses taken from it." [22-ICA-111, D.R. at 455, ln. 15-17.]

Natural gas, unlike other natural resources, is taxed based upon "the wellhead value." For natural gas, "gross value is the value of the natural gas at the wellhead immediately preceding transportation and transmission." W. Va. Code §11-13A-2(c)(6)(G). In order to determine the wellhead value, processing and transportation/transmission costs are deducted from the gross proceeds of the sale. W. Va. Code R. § 110-13A-4.8.

The Legislative Rule sets forth four "alternative methods" to determine the permissible amount of transportation and transmission costs. W. Va. Code R. § 110-13A-4.8. The taxpayer must choose one of these methods. *Id.* Most taxpayers claim the fifteen percent safe harbor under W. Va. Code R. § 110-13A-4.8.4. Others calculate their transportation and transmission costs using "actual costs" of transportation and transmission under W. Va. Code R. § 110-13A-4.8.1. In this case, StatOil is attempting to claim both.

The Tax Commissioner's review of these amended returns led him to determine that StatOil was seeking both the fifteen percent safe harbor deduction for transportation and transmission costs, and a deduction for the costs discussed above, costs that StatOil argues are those of the purchaser/plant operators. This determination is what led to the refund reduction letters that form the basis of this appeal.

II. StatOil's Practice of Severing and Processing Gas.

StatOil is a Delaware corporation with its principal place of business in Houston, Texas and explores and produces oil and natural gas seeking to sell the same. [22-ICA-111, D.R. at 29.] StatOil's natural gas wells produce what StatOil calls "raw gas" which is an alleged combination of water, sand, natural gas liquids, and dry gas. [22-ICA-111, D.R. at 29.] Once this raw gas is removed from the ground, the same travels through pieces of equipment owned by StatOil such as line heaters, three phase separators, and gas dehydrators. [22-ICA-111, D.R. at 29-30.] StatOil believes these pieces of equipment to be part of its transportation and transmission system. [22-ICA-111, D.R. at 30.] Later, the raw gas allegedly arrives at a processing plant owned by a third-party (MarkWest). [22-ICA-111, D.R. at 30.] Once the processing work is completed by MarkWest, two products are allegedly created: (1) "raw make NGLs"; and (2) "residue gas." [22-ICA-111, D.R. at 30.] StatOil alleges that title to all gas passes to MarkWest once the same arrives at the processing plant, but has testified in the record that title to the "residue gas" stays with StatOil while it is in the processing plant to be sold once it leaves the plant. [22-ICA-111, D.R. at 30.] Then, the "raw make NGLs" allegedly leave the processing plant and go to another plant for fractionation. [22-ICA-111, D.R. at 30.] The raw make NGLs become regular NGLs and are allegedly sold by MarkWest. [22-ICA-111, D.R. at 30.]

Documents labeled "Percent of Proceeds Statement," referred to the parties as "settlement statements," are produced by the purchaser of the raw gas/operator of the processing and fractionation plants (MarkWest). [22-ICA-111, D.R. at 30.] These settlement statements contain numerous pieces of information about the gas purchases and three critical dollar values: (1) "product value"; (2) "fees and adjustments"; and (3) "net value." [22-ICA-111, D.R. at 30.] The net value is the product value minus the fees and adjustments, and a box on each statement details the various fees and adjustments. [22-ICA-111, D.R. at 30-31.] The listed fees and adjustments allegedly include marketing fees, pipeline fees, fractionation fees, transport fees, etc. [22-ICA-111, D.R. at 31.] It is undisputed that StatOil receives payment from MarkWest in the amounts listed in the settlement statements as the net value. [22-ICA-111, D.R. at 31.] However, StatOil alleges that the aforementioned fees and adjustments are costs incurred by MarkWest. [22-ICA-111, D.R. at 31.]

III. StatOil's Severance Tax Refund Request.

In January of 2018, StatOil filed a second amended tax return for 2014 requesting a refund of $4,955,873.59. [22-ICA-111, D.R. at 29 & 32.] On November 15, 2018, the Tax Department issued a refund decrease notice to inform StatOil that its severance tax refund for the period ending December 31, 2014 would be reduced to $3,650,809.25—a $1,305,064.34 reduction. [22-ICA-111, D.R. at 28-29.] In December of 2018, StatOil filed a second amended tax return for 2016 requesting a refund of $4,955,873.59. [22-ICA-111, D.R. at 29 & 32.] On December 20, 2018, the Tax Department issued a second refund decrease notice relating to the 2016 tax year, and this notice decreased StatOil's severance tax refund by the requested $2,533,705.53 to $1,831,294.29 – a $702,411.24 reduction. [22-ICA-111, D.R. at 29.] These refund denials were issued pursuant to the authority of the Tax Department by the provisions of W. Va. Code §11-10-1 *et seq*. [22-ICA-111, D.R. at 29.] The Tax Department's review of StatOil's amended tax returns led it to determine that StatOil was seeking both the 15% safe harbor deduction for transportation and transmission costs, and a deduction for the costs discussed above, costs that StatOil argues are those of the purchaser/plant operator (MarkWest). [22-ICA-111, D.R. at 32.]

IV. StatOil's Petitions for Reassessment.

Thereafter, StatOil appealed twice to OTA and filed *Petitions for Reassessment* relating to the November 15, 2018 and December 20, 2018 refund deductions for tax years 2014 and 2016 respectively.[1] [22-ICA-111, D.R. at 29.] An evidentiary hearing was conducted on April 28, 2021, and the parties provided legal briefing of the pertinent issues to OTA. [22-ICA-111, D.R. at 29.] In each of these cases before OTA and this Court, StatOil argues that it should be permitted to claim both the 15% safe harbor for its transportation and transmission costs in addition to actual costs of transportation and transmission. In its *Final Decision Order* entered on August 18, 2022, OTA found that "the evidence in this matter shows that StatOil was charged fees by purchasers of

[1] Additionally, tax years 2015, 2018, and 2019 are on appeal in this Court in Case Numbers 22-ICA-225 and 22-ICA-226.

its natural gas, and that it impermissibly sought to deduct these fees from the gross proceeds of the sale." [22-ICA-111, D.R. at 58.] OTA further found that "[StatOil] was unable to satisfactorily explain how the purchaser's beginning number, the number the purchaser calls 'product value' does not represent the value of the natural gas at the wellhead. [22-ICA-111, D.R. at 58.] Nor was StatOil able to adequately explain the nature of the fees it is charged by the purchaser, or to prove that these fees are not for services rendered by the purchaser." [22-ICA-111, D.R. at 58.] OTA ultimately held in favor of the Tax Department and denied StatOil's petitions because the "[t]he market value of the natural gas in the vicinity of the wellhead, as those terms are used under West Virginia law, is the amount reflected as the 'product value' on the settlement sheets introduced in this matter [and t]he fees contractually charged to the [StatOil] are 'expenses' of StatOil, as that term is used in West Virginia Code Section 11-13A-2(b)(5) and Section 2.7 of Title 110, Series 13A of the West Virginia Code of State Rules." [22-ICA-111, D.R. at 41.]

StatOil appealed to this Court soon after asserting six assignments of error. First, it says that OTA erred in finding that the product value reflected on the settlement sheets is the market value of its severed gas. Second, it claims that OTA should have used the "the net value on MarkWest's settlement statements" (*i.e.*, the post-processing value after deducting MarkWest's fees), as StatOil's gross value. Third, StatOil says that the fees MarkWest charged to it should not have been counted as its expenses. Fourth, it asserts that OTA erred when it found that StatOil had deducted its actual costs already. Fifth, it says OTA improperly disregarded a non-binding 2004 OTA decision. Sixth, it asserts that OTA erred by not letting it take the 15 percent safe harbor deduction for its transportation and transmission costs. Pet. Br. No. 22-ICA-111, at 1.

SUMMARY OF ARGUMENT

This Court should affirm OTA on the merits because it properly calculated StatOil's severance tax liability. OTA properly determined that the product value reflected on StatOil's settlement statements reflected its gross value for the purpose of calculating severance tax liability. It correctly held that StatOil's product value, rather than net value, was to be used when calculating severance tax because the price of the product is determined at the point when it becomes marketable and is commercially sold. Additionally, the disputed fees reflected in the product value are post production processing fees which are to be included in the calculation of the gross value up until the product is marketable and "where production ends." W. Va. Code § 11-13A-2(c)(6); W. Va. Code R. § 110-13A-2.7. StatOil's assignments of error one, two, and three are contrary to applicable statutes and rules and so, should be rejected.

As should StatOil's assignments of error four and six. OTA correctly found that the expenses StatOil paid to MarkWest were the producer's expenses. The relevant statute and the rule provide for several alternative methods by which a producer of natural gas may receive an expense deduction from severance tax. Two of these allow a taxpayer to take a fifteen percent safe harbor deduction or take a deduction for actual transportation and transmission expenses incurred. A taxpayer may not take more than one deduction. Here, OTA determined that StatOil was not entitled to a fifteen percent safe harbor deduction because it previously received a deduction for actual transportation and transmission costs reflected in the product value found on the settlement sheets. The contract and state law support OTA's finding and are clear that StatOil was only entitled to one of these deductions. OTA's decision to give it the larger of the two options was not in error. Finally, OTA did not err by not following a 2004 OTA decision. StatOil agrees that the prior decision has no precedential weight (especially before this Court), and it is distinguishable on its facts anyway. StatOil's assignment of error five should be rejected too.

STATEMENT REGARDING ORAL ARGUMENT

The Tax Commissioner requests Rule 20 oral argument because this appeal presents issues of first impression and fundamental importance regarding the methodology for calculating severance tax liability. *See* W. Va. R. App. P. 20(a)(1), (2).

STANDARD OF REVIEW

A final decision from OTA should be reviewed under the standards set forth in the Administrative Procedures Act, W. Va. Code § 29A-5-4g (1988). *See* Syl. pt. 1, *Griffith v. ConAgra Brands, Inc.*, 229 W. Va. 190, 191, 728 S.E.2d 74, 75 (2012). Its findings of fact "will not be set aside or vacated unless clearly wrong." *Id.* While "questions of law" are review "de novo," its "interpretation of State tax provisions" should be "be afforded sound consideration," *id.* and "given great weight unless clearly erroneous." Syl. pt. 2, *Keener v. Irby*, 245 W. Va. 777, --, 865 S.E.2d 519, 520 (2021).

ARGUMENT

OTA properly determined that the "product value" listed on the settlement statements reflects StatOil's "gross value" for purposes of calculating StatOil's severance tax in the 2014 and 2016 tax years. OTA also correctly found that StatOil is not entitled to the fifteen percent safe harbor as StatOil previously received a deduction for actual transportation and transmission expenses and cannot receive both deductions under the rule. Each of StatOil's assignments of error should be rejected, and OTA's decision on appeal should be upheld.

I. OTA's decision correctly determined that the product value reflected on the settlement statements is StatOil's gross value.

StatOil's first, second, and third assignments of error should be rejected because OTA correctly determined that the "product value" listed on the settlement sheets provided by MarkWest, which included post-production processing fees, accurately reflects StatOil's gross value for the purpose of calculating StatOil's refund for severance tax. StatOil's first three assignments of error fail for the following reasons. First, the "product value" is the price of the gas when it is sold at the market. Second, the definition of the term "gross value" clearly contemplates that post production processing fees are intended to be included and incurred up until the point the product is marketable. Finally, StatOil has presented no evidence that a different number should be used for the product value and therefore has not met its burden. For these reasons more specifically argued below, OTA's decision should be upheld.

A. The price of StatOil's product was determined once the product was commercially sold.

StatOil argues that OTA erred when it concluded that the "product vale" listed on the settlement sheets received from MarkWest was the market value of its severed gas. Instead, it claims that OTA should have used the "net value" on these sheets to calculate its gross value from sales. Pet. Br. 22-ICA-111, at 1. But the relevant statutes clearly say otherwise. Every person engaging in the process of "severing natural gas or oil for sale, profit or commercial use" for natural resources is subject to a severance tax. W. Va. Code §11-13A-3A(a). This tax imposed is "five percent of the gross value of the natural gas or oil produced by the producer as shown by the gross proceeds derived from the sale thereof by the producer." *Id.* § 11-13A-3A(b). "[G]ross value" is defined as "the market value of the natural resource product, in the immediate vicinity where severed." *Id.* § 11-13A-2(c)(6). But critically, the determination of gross value must be made "after application of post production processing generally applied by the industry to obtain commercially marketable or usable natural resource products." *Id.* § 11-13A-2(c)(6).

The statute gives four methods for calculating "gross value." *Id.* § 11-13A-2(c)(6)(A)-(D). One method, is to take "the gross proceeds received or receivable by the taxpayer." *Id.* §11-13A-2(c)(6)(A). "[G]ross proceeds," in turn, is defined as the "value, whether in money or other property, actually proceeding from the sale or lease of tangible personal property or from the rendering of services, without any deduction for the cost of property sold or leased or expenses of any kind." W. Va. Code §11-13A-2(b)(5). A simple application of the plain language of these terms combined with their intended use in the statute clearly shows that the product value is the correct number to use when determining StatOil's gross value.

The definition of "gross proceeds" under West Virginia Code §11-13A-2(c)(6) is clearly an all-encompassing term: it includes more than money from the sale of StatOil's gas. In this instance, it is important to look towards the rule of statutory interpretation. In deciding the meaning of a statutory provision, the Court should look towards the text of the statute to determine if "given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995); *See also,* Syl. pt. 2, *Crockett b. Andrews,* 153 W. Va. 714, 172 S.E.2d 384 (1970) ("[w]here the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.")

Importantly, when a statutory provision is "clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951). In applying the plain language of a statutory provision, "[g]enerally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use." Syl. pt. 4, *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars,* 144 W. Va. 137, 107 S.E.2d 353 (1959).

The basis of the tax is the "market value" of the resource, not the amount received by the producer in any transaction. Accordingly, the following rules apply when determining the gross value:

> (A) For natural resources severed or processed (or both severed and processed) and sold during a reporting period, gross value is the gross proceeds received or receivable by the taxpayer.
>
> (B) In a transaction involving related parties, gross value shall not be less than the fair market value for natural resources of similar grade and quality.
>
> (C) In the absence of a sale, gross value shall be the fair market value for natural resources of similar grade and quality.
>
> (D) If severed natural resources are purchased for the purpose of processing and resale, the gross value is the amount received or receivable during the reporting period reduced by the amount paid or payable to the taxpayer actually severing the natural resource. If natural resources are severed outside the State of West Virginia and brought into the State of West Virginia by the taxpayer for the purpose of processing and sale, the gross value is the amount received or receivable during the reporting period reduced by the fair market value of natural resources of similar grade and quality and in the same condition immediately preceding the processing of the natural resources in this state.

W. Va. Code § 11-13A-2(c)(6)(A)-(D). The statute which governs the severance tax to be paid by StatOil clearly points to the product value being the correct number to be used to determine StatOil's gross value.

StatOil argues that it was OTA that moved the determination of the value of the natural gas, geographically, away from the point where the product is severed. Petr. Br. 22-ICA-111, at 15, and so has incorrectly determined the value of its gas. But StatOil has not provided a price for the gas when it was severed or transferred to MarkWest. Instead, even under its preferred calculation, the product value is the starting point. That value reflects the first time that any money is placed on the gas and is set when the gas is sold commercially at the market. Under the applicable definitions, this price is the "gross value" of the gas.

For this analysis, the "gross value" of natural gas is the "value of the natural gas at the well head immediately preceding transportation and transmission. W. Va. Code R. § 110-13A-2a.10.1. Further guidance as to the gross value of the product at question can be in the legislative rule that mirrors West Virginia Code, but also clarifies that the value of natural resource products produced shall be determined by the "gross proceeds of sales in every instance in which a bona fide sale of such products is made *at the point where production ends*, and whether sold at wholesale or retail. W. Va. Code R. § 110-13A-2.7. To apply the totality of this guidance simply, the gross value is the value of the product at the well head continuing until the point where production ends, before transportation and transmission costs but including post production processing fees. The only difference between the product value and the net value is the disputed fees, which cannot be backed out prior to determining the gross value of the product.

The example given to illustrate the definition provided above, which is also referenced by StatOil, is when "[t]he entire output of natural gas from A's well is purchased at the well head and by a public utility for $25,000. On his severance tax return, A will report $25,000 as gross income." W. Va. Code R. §110-13A-2a.10.1. However, this is clearly not the transaction that occurred in this case. StatOil has provided no evidence to suggest that there should have been a different determination of price other than the number reflected in both the product value and the net value, excluding the disputed fees. Because the StatOil has provided no such evidence, the Tax Commissioner and OTA used the information available to them at the time which is illustrated in the NGL Agreement between StatOil and MarkWest.

The NGL Agreement states that the value of the product is reflected in the "average sales price" based on the "weighted average sales price per gallon received by MarkWest for each individual Fractioned Product sold during the calendar month." [22-ICA-111, D.R. at 162 at ¶ 5(C)(i)-(ii). StatOil attempts to use this as evidence that the product value on the settlement sheet represents an inflated price for product which includes more value than the "raw" materials sold to MarkWest and not the value of the product in its raw form at the time of the transfer. However, nothing in the Agreement specifically says that this number represents the product value versus the net value. In fact, the Agreement does not specifically state whether the gross value shall be determined by the product value or the net value. Instead, StatOil attempts to stretch the agreement further than it allows.

While StatOil argues extensively that the NGL Agreement explains StatOil's compensation of natural gas and purports to explain what the terms at issue mean, the Agreement does not state that the product value is not to be used to calculate the gross value for severance tax purposes. Because the statutory provision is clear and unambiguous, the plain language indicates that the "value" of the product sold was intended by the Legislature to included more than simply money for the product, but other value, such as the fees from the settlement statement fees. Therefore, OTA properly held that the product value found on the settlement statements constitutes StatOil's gross value which is used to calculate StatOil's severance tax.

B. Under W. Va. Code §11-13A-2 gross value includes post production processing fees incurred until the product is marketable.

StatOil also argues that OTA's decision impermissibly moves the determination of the value of the product away from the well head. It says that the product value found on the settlement statements represents a weighted version of the product. While OTA correctly determined that the product value represents the value of the product when it becomes marketable, StatOil's argument also fails simply by looking at the text of the definition of "gross value."

For reference, the definition of "gross value" also included "the market value of the natural resource product, in the immediate vicinity where severed, *determined after application of post production processing generally applied by the industry to obtain commercially marketable or usable natural resource products.*" W. Va. Code § 11-13A-2(b)(6) (emphasis added). While it is clear that post production processing fees incurred are to be included in the gross value until the product is marketable, the statute makes clear that the processing shall not include any "conversion or refining process." W. Va. Code § 11-13A-2(c)(9)(A). These definitions indicate that regardless of the value of the product, the post production processing (other than conversion and refinement) are to be included in the determination of the gross value. These post production processing fees are to be factored in until the time that the product "becomes marketable."

At the time of the transfer of the product from the StatOil to MarkWest, there was no money exchanged, only an Agreement in place stating MarkWest would process the product and get it to the point of being marketable. The price of the product is then determined once the product is marketable and monthly payments are made to StatOil based upon the price of the product as it is commercially sold. StatOil states that the NGL Agreement stated MarkWest would undertake any third party fees. Petr. Br. 22-ICA-111, at 16. However, according to the code section above, the fees at issue before this Court would not be considered third party fees. Rather, they would be considered the post production processing fees that the definition of "gross value" mandates be included in the calculation of gross value. *See* W. Va. Code § 11-13A-2(b)(6). MarkWest acts only as a company contracted to step in to get the product to the point where it is marketable. If MarkWest did not get the product to the point where it is marketable, then StatOil would have had to do that itself or find another company to process the product. Either way, the statute makes clear that the post production processing fees are to be included in the gross value up until the gas is marketable.

As StatOil concedes, at the time of the transfer, the product is an "impure mix of various natural resources, water, and sediment." [22-ICA-111, D.R. at 162-63]. At this point, the product is considered "raw gas" which MarkWest fractionates to make individual NGLs which are marketable. [22-ICA-111, D.R. at 162-63]. The product is clearly not marketable at the time of the transfer from StatOil to MarkWest. MarkWest must undergo necessary processing after receiving the product in its raw form to make the product marketable. The processing fees MarkWest incurs on behalf of StatOil would necessarily be included as post production processing fees up until the point at which the product becomes marketable. Any argument that the fees do not trace back to StatOil because of a "transfer of custody or control" does not align with the clear intention of the Legislature in specifically including post production processing fees. As a result, the product value which reflects these post production processing fees is the proper indication of gross value to be used for severance tax purposes.

C. The Tax Commissioner and OTA are entitled to deference if the Court finds ambiguity in the controlling statutes.

The statutory provisions which govern the calculation of gross value for the purpose of determining severance taxes are clear and indicates that gross value includes the value of the product at the market and any post production processing fees incurred on behalf of the StatOil. But, if this Court determines ambiguity exists, then the Tax Commissioner and OTA are entitled to deference in their interpretation and application. Case law is well-established that if a statutory provisions are clear and the Legislature has "spoken directly to the precise question as issue [and]

… the intention of the Legislature is clear, that is the end of the matter." Syl. pt. 3, *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995). If the intention and the provision is clear, the agency's position can only be upheld "if it conforms to the Legislature's intent." *Id.* This further means that "[n]o deference is due the agency's interpretation at this stage." *Id.*

However, if this Court determines there is ambiguity, "[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." Syl. Pt. 7, *Lincoln Cnty. Bd. Of Educ. v. Adkins*, 188 W. Va. 430, 424 S.E.2d 775 (1992). This Supreme Court of Appeals has gone a step further to provide that if a statute is silent or, in this case, ambiguous on a specific issue, "and the administrative agency is authorized to promulgate legislative rules—in this case the Tax Department—then the administrative agency has discretion to interpret the statute." Syl. pt. 11, *Keener v. Irby*, 245 W. Va. 777, 785, 865 S.E.2d 519, 527 (2021). It has noted courts must give deference to the Tax Commissioner in the presence of an ambiguous statutory provision. *E.g., Steager v. Consol Energy, Inc.*, 242 W. Va. 209, 223, 832 S.E.2d 135, 149 (2019). For example, in *Appalachian Power* the high court stated:

> Our power to review the Tax Commissioner's decisions on policy grounds in extremely limited. We are not at liberty to affirm or overturn the Commissioner's regulation or decision merely on the basis of our agreement or disagreement with his policy implications, even when important issues of taxation are at stake.

195 W. Va. at 588, 466 S.E.2d at 439. Rather, "an agency's interpretation will stand unless it is 'arbitrary, capricious, or manifestly contrary to the statue.'" *Id.* at 589, 466 S.E.2d at 440.

Because the Tax Commissioner and OTA's decisions are provided deference, if any ambiguity exists their determination that product value shown on the settlement statements which include fees stemming from StatOil's contractual agreements with March West represent StatOil's gross value for the purpose of calculating severance taxes is permitted. StatOil has presented no evidence that Tax Commissioner's decision was "arbitrary, capricious, or manifestly contrary to the statute" as required to challenge an agency's interpretation. Therefore, OTA's decision upholding Tax Commissioner's position that StatOil's product value on the settlement represents its gross value and OTA's decision should be upheld.

D. StatOil has not met its burden in providing sufficient evidence of an alternate product valuation.

The product value shown on the settlement statement fees is to be considered the gross value which includes all fees that are incurred on behalf of StatOil. However, if the Court is not convinced that the product value shown on the settlement statement reflects the gross value, it is due to the fact that the StatOil has failed to meet its burden in providing sufficient evidence to show what the proper price should be. It is clear that StatOil has the burden of showing that the product value used to represent StatOil's gross value is not the correct number to be used to determine the gross value for the purpose of calculating severance tax. W. Va. Code § 11-10A-10(e). StatOil has not met this burden.

StatOil relies heavily on the NGL Agreement by arguing that the agreement explains why the "product value" is higher than the net value and that because the product value on the settlement statement is a weighted average, that the net value should be used. Petr. Br. 22-ICA-111, at 16. But the Agreement does not show that the "net value" of the product on the settlement statement should represent the gross value for severance tax purposes. Further, StatOil has not provided any price which would represent the price of the product at the well head when the product was severed. Finally, StatOil also failed to provide any evidence as to what the value of the product was at the time of the transfer of the product from StatOil to MarkWest. The only value able to be considered is the price of the product when it is actually sold for at the market. StatOil is trying to argue that the product value is not an accurate number but has not offered any evidence of the price its gas would sell for at the wellhead or at the time of the transfer from StatOil to MarkWest.

Therefore, if the Court is not convinced that the product value is the accurate number which reflects the gross value of the product to be used for severance tax purposes, then this Court should remand the proceedings so that more factual determinations can be made.

E. OTA's ruling does not force StatOil to utilize a different accounting method for State and Federal taxes.

West Virginia Code § 11-13A-7 states that a "taxpayer's method of accounting under this article shall be the same as the taxpayer's method of accounting for federal income tax purposes." But StatOil incorrectly assumes that the "method" referred to in the statute are the type of proceeds, whether gross or net, claimed for federal tax and West Virginia severance tax purposes must be the same. But West Virginia Code §11-13A-7 only requires that the method of accounting, whether cash or accrual, be consistent. This Code section specifically refers to these methods of accounting by stating "[i]n the absence of any method of accounting for federal income tax purposes, the accrual method of account shall be used, unless the Tax Commissioner, in writing, consents to the use of another method." W. Va. Code § 11-13A-7

StatOil's claims that the use of the product value as gross proceeds would require it to change its accounting method wholly ignores the purpose of West Virginia Code §11-13A-7 in allowing taxpayers to keep whichever method of accounting, whether it be cash or accrual, for both state and federal. None of the statements from the evidentiary hearing or the decision from OTA violate West Virginia Code § 11-13A-7.

StatOil's reliance on *Charleston Area Medical Center, Inc. v. State Tax Dept. of West Virginia*, 224 W. Va. 591, 687 S.E.2d 374 (2009) ("*CAMC*") is misplaced. Plainly stated, a method of accounting in the statute refers to whether a taxpayer's financial books utilize the accrual, cash or hybrid methods. The use of "methods" in the statute does not indicate any reference of whether product value versus net value is used in determining gross value for severance tax.

Furthermore, West Virginia's severance tax is in no way related to federal Medicaid funding, like the statutory framework in *CAMC*, statutes which involve federal matching funds that result from the State's imposition of its health care provider taxes at issue in *CAMC*. W. Va. Code § 11-27-1. Also, the Court in *CAMC* did not have a legislative rule to guide it.

II. StatOil is not entitled to the fifteen percent safe harbor in addition to the deduction for transportation and transmission it already received.

StatOil's fourth and sixth assignment of error should also be rejected. Petr. Br. 22-ICA-111, at 1. OTA properly held that StatOil was not entitled to the fifteen percent safe harbor deduction from severance tax pursuant to W. Va. Code R. §110-13A-4.8.4 because StatOil previously received a deduction for actual expenses it paid to MarkWest.

As previously stated, the West Virginia State severance tax statute and rule require that the gross value of natural gas, unlike other natural resources, is determined "at the wellhead immediately preceding transportation and transmission." W. Va. Code R. §110-13A-4.8. The Legislative Rule sets forth four "alternative methods" to determine what deductions may be taken and determine the allowable amount of transportation or transmission costs. W. Va. Code R. § 110-13A-4.8. It is important to note that the taxpayer may choose one of these methods and is not entitled to taking multiple deductions once a method is chosen. *Id.*

At issue in the appeal before this Court are two of the four methods presented. The method most utilized by producers is a deduction in the amount fifteen percent of the gross proceeds—known as the "fifteen percent safe harbor" deduction. W. Va. Code § 110-13A-4.8.4.

This deduction is an automatic fifteen percent deduction from gross proceeds. If used, it is the only deduction for transportation and transmission expenses for severance tax purposes a producer may take. Alternatively, producers may take a deduction for actual transportation and transmission expenses incurred. *Id.* At 4.8.1. In the present case, StatOil is not entitled to receive the fifteen percent safe harbor as it previously received a deduction for actual transportation and transmission costs incurred for the post production processing fees incurred on behalf of StatOil to get the product in a marketable state and to the market to be commercially sold.

StatOil argues that it originally requested the fifteen percent safe harbor for the tax years at issue pursuant to Regulation 4.8.4. Petr. Br. 22-ICA-111, at 35. While it is correct that StatOil sought to utilize the fifteen percent safe harbor and received a denial of safe harbor request, StatOil only sought such a deduction after it had previously received a deduction for actual transportation and transmission costs from fees incurred on behalf of StatOil. Upon review, the Tax Commissioner determined that StatOil had taken actual transportation and transmission costs in the form of fees on the settlement statements and therefore were not permitted to receive the fifteen percent safe harbor. [22-ICA-111, D.R. at 49]. The Tax Commissioner determined the product value on the settlement statements reflects the gross value and shows expenses for which StatOil enjoyed a deduction from severance tax. [22-ICA-111, D.R. at 49]. This is also further evidence by the fact that StatOil even wrote a check to MarkWest for the difference between the two numbers. [22-ICA-111, D.R. at 52-53]. As OTA determined, StatOil's fees are not so far disconnected as it argues, since StatOil reimburses MarkWest for the fees when they are incurred on StatOil's behalf. [22-ICA-111, D.R. at 35].

As stated previously, there is a singular permissible deduction from severance tax. As reflected in StatOil's tax return, it received a deduction for fees shown on the settlement statements. Because the product value on the settlement statements, which include the fees at issue is considered the gross value to be used to calculate severance taxes owed by the producer, the only deduction StatOil could have received was a deduction for transportation or transmission costs. Therefore, StatOil is not entitled to the fifteen percent safe harbor as it has already taken deductions for actual transportation and transmission costs.

III. OTA was not bound by its 2004 decision and Did Not Err in Disregarding that Decision.

StatOil's fifth assignment of error is also without merit. It further argues that OTA erred in declining to follow an OTA decision issued on February 5, 2004. [*See* 22-ICA-111, D.R. at 239 ("2004 OTA Decision".] While StatOil admits that the 2004 Decision was not binding on OTA, it argues that it is "persuasive authority" because, according to StatOil, "it deals with nearly identical facts[.]" Pet. Br. 22-ICA-111, at 35. While StatOil may argue that the cases have "extreme factual similarities", OTA is clearly not bound by the *factual findings* of prior OTA decisions. Here, OTA key factual findings were the opposite of the factual findings made in the 2004 Decision. Thus, OTA correctly declined to follow the non-binding 2004 decision.

In its 2004 Decision, OTA made the factual findings that "[t]he purchaser's adjustments occur after the point of sale and do not represent the Petitioners' production costs[]" and "[a]s a result, the gross proceeds for their natural gas production shown on [their] severance tax returns do not include or otherwise reflect the various purchaser's adjustments made to determine the price they received for that production." [22-ICA-111, D.R. at 245 & 00248.] OTA ultimately concluded, based on those findings of fact, that "the well-mouth value of the natural gas severed by the Petitioners – that amount is the measure of the severance tax – does not include the qualitative and place-utility values added by the various processing and transportation services employed *by the purchasers* of such gas." [22-ICA-111, D.R. at 252 (emphasis in original).]

In the instant case, OTA made different factual findings than the administrative law judge in the 2004 Decision. Specifically, OTA found that "[d]espite [StatOil's] repeated insistence that the fees and adjustments on the settlement statement are those of the purchaser, *the facts and evidence of this case counsels otherwise*." [22-ICA-111, D.R. at 31 (emphasis added).] OTA found that this case is specifically distinguishable from the 2004 Decision because his "decision had the benefit of testimony and exhibits subject to examination and cross examination[]" and "the evidence in this matter shows that [StatOil] was charged fees by purchasers of natural gas, and that it impermissibly sought to deduct fees from the gross proceeds of the sale." [22-ICA-111, D.R. at 37.] OTA additionally found that StatOil "was unable to satisfactorily explain how the purchaser's beginning number, a number that the purchaser calls 'product value' does not represent the value of the natural gas a the wellhead. Nor was [StatOil] able to adequately explain the nature of the fees it is charged by the purchaser, or prove that those fees are not for services rendered by the purchaser." [22-ICA-111, D.R. at 37.]

StatOil says that the instant case and the 2004 Decision have "similar legal arguments" and OTA therefore did not have a "viable basis to wholly dismiss [it]." Pet. Br. 22-ICA-111, at 34. StatOil also argues that OTA's "reasoning for failing to analyze, address, differentiate, or rely upon the 2004 Decision is not legally cognizable." *Id.* at 35. StatOil further states that that the two cases "deal[] with nearly identical facts regarding purchaser's expenses under the same statutory language." *Id.*

But this argument ignores the fact that OTA made *different factual findings* following its consideration of the evidence in this case. Simply put, based on the evidence presented to it during the hearing, OTA found that the fees on the settlement statements were the StatOil's fees, which StatOil improperly sought to exclude from the gross value. OTA was certainly not bound by any contrary *findings of fact* in the 2004 Decision. As the First Circuit Court of Appeals has stated "a decision dependent upon its underlying facts is not necessarily controlling precedent as to a subsequent analysis of the same question on different facts and a different record." *Gately v. Massachusetts*, 2 F.3d 1221, 1227 (1st Cir. 1993). "That rule is no more than a restatement of the familiar idea that prior cases are often distinguishable on their facts." *United States v. Cardales-Luna*, 632 F.3d 731 (1st Cir. 2011). In other words, "[s]tare decisis 'deals only with law.'" *Wallace v. Norwegian Cruise Line Ltd.*, 2011 WL 13112227 (S.D. Fla. May 9, 2011).

In this case, OTA explained that—based on different findings of fact—the 2004 Decision was "less than helpful to the resolution of this matter[.]" [22-ICA-111, D.R. at 37.] While StatOil may disagree with OTA's factual findings, the legal reasoning for not following the 2004 Decision was certainly "legally cognizable." The two cases did not deal with "identical facts" because the factfinder (OTA) made different findings based on review of the evidence. OTA's rejection of the 2004 decision was proper.

CONCLUSION

For the foregoing reasons, the Tax Commissioner requests that StatOil's assignments of error be rejected and OTA's ruling be affirmed on the merits

Respectfully submitted,

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 22-ICA-111

STATOIL USA ONSHORE PROPERTIES, INC.,

Petitioner Below, Petitioner,

v.

MATTHEW IRBY, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent Below, Respondent,

CERTIFICATE OF SERVICE

I, Sean M. Whelan, do hereby certify that on this 2nd day of February, 2023, the foregoing "*Respondent's Brief*" of Matthew Irby, State Tax Commissioner of West Virginia, was electronically filed with the Clerk of the Court using the File & Serve Express system, which will send notification of such filing to the following:

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