IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 22-ICA-225

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STATOIL USA ONSHORE PROPERTIES, INC.,

Petitioner Below, Petitioner,

v.

MATTHEW R. IRBY, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent Below, Respondent,

RESPONDENT'S BRIEF AND CROSS-ASSIGNMENT OF ERROR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

Other Authorities

CROSS-ASSIGNMENT OF ERROR

The West Virginia Office of Tax Appeals ("OTA") correctly affirmed the Tax Commissioner's calculation of StatOil USA Onshore Properties' severance tax liability. Yet, this Court should still reverse based on the following:

> OTA and the Circuit Court of Kanawha County should have dismissed Statoil's case for lack of jurisdiction because the *Petition for Reassessment* (herein "**Petition**") at OTA was filed beyond the 60-day period prescribed by statute.

INTRODUCTION

StatOil's Petition should never have gotten this far. It is undisputed that the Petition was filed approximately 13 months after the Tax Commissioner issued a Second Refund Decrease Letter to StatOil. Under West Virginia Code § 11-10-14 "no petition for refund or credit may be filed more than **sixty days** after the taxpayer is served with notice of denial of taxpayer's claim." W. Va. Code § 11-10-14(d)(1) (emphasis added). OTA initially dismissed the petition but when that order was appealed to circuit court, the lower court reversed finding that the Tax Commissioner could be equitably estopped from asserting the jurisdictional deadline. It remanded the case to OTA, and OTA thereafter denied the motion to dismiss. Even though OTA ultimately decided in favor of the Tax Commissioner on StatOil's tax liability, it was an error to even consider the merits at all. This Court should fix this error on appeal.

The deadline for filing at OTA that StatOil missed was a jurisdictional prerequisite for its case and is "not readily susceptible to equitable modification or tempering." *Helton v. Reed*, 219 W. Va. 557, 561, 638 S.E.2d 160, 164 (2006). Equitable estoppel can never extend such deadlines since "jurisdiction of the subject-matter . . . must exist as a matter of law" and cannot be "conferred by" the parties. *Ellithorp v. Ellithorp*, 212 W. Va. 484, 490, 575 S.E.2d 94, 100 (2002). Even if it could, the circuit court was too ready to find estoppel against a State agency: it found that estoppel could be applied even without "affirmative misconduct" by the Tax Commissioner or his employees. Finally, assuming proof of affirmative misconduct is not necessary, OTA misapplied the estoppel factors the circuit court thought were applicable. This Court should correct the lower tribunals' mistake and order that StatOil's 2015 OTA Petition be dismissed for lack of jurisdiction.

But if this Court reaches the merits, OTA's order should be affirmed because OTA 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 statute and rule make clear should be counted. 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. If reached, 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.

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" natural gas liquids ("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 Petitioner 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 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.

On June 28, 2018, StatOil filed a 2015 Amended Severance Tax Return requesting a refund of $4,837,548.01. [22-ICA-225, D.R. at 307.] On January 23, 2019, the Tax Department issued a refund decrease notice to inform StatOil that its severance tax refund for the period ending December 31, 2015 would be reduced to $2,621,432.99 – a $2,216,115.02 reduction. [22-ICA-

225, D.R. at 308.] After discussions with StatOil's accounting firm, Ryan, LLC ("Ryan"), the Tax Department notified Ryan in writing that it would pull back the refund for further review to resolve a discrepancy in the supporting schedules. [22-ICA-225, D.R. at 308.]

Upon resolving the discrepancy in the supporting schedules, the Tax Department issued a second Refund Decrease Letter to StatOil on February 27, 2019, approving a severance tax refund of $3,285,559.33—a $1,551,988.68 decrease from the severance tax refund initially requested. [22-ICA-225, D.R. at 321.] Like the First Refund Decrease Letter, the Second Refund Decrease Letter stated

> [I]f you have any objections to this decrease overpayment of tax, you must file a petition for reassessment with the independent Office of Tax Appeals . . . within sixty (60) days from receipt of this letter. ... *If you fail to file the aforesaid petition within the time prescribed by law, the decreased overpayment shall become conclusive.*

[22-ICA-225, D.R. at 321 (emphasis added).] Following issuance of the Second Refund Decrease Letter, a refund check for $3,285,559.33 was mailed to StatOil March 3, 2019.

The Tax Department continued to work with StatOil regarding a potential additional $23,000 correction to the approved refund amount but became delayed in its review of this issue due to the death of the responsible audit clerk. On February 27, 2020, the Tax Department sent an email increasing StatOil's 2015 severance tax refund by $23,671.54. [22-ICA-225, D.R. at 323.]

IV. StatOil's Petition for Reassessment.

A. OTA's dismissal of StatOil's late-filed petition for reassessment and the circuit court's reversal.

On April 7, 2020, StatOil filed a *Petition for Reassessment* with OTA. [22-ICA-225, D.R. at 342.] On April 28, 2020, the Tax Commissioner filed its Answer and Motion to Dismiss for Lack of Jurisdiction on the basis that West Virginia Code § 11-10-14(d)(1)'s mandatory requirement that "no petition for refund or credit may be filed more than sixty days after the taxpayer is served with notice of denial of taxpayer's claim" is not discretionary, and OTA lacks jurisdiction to hear untimely petitions. [22-ICA-225, D.R. at 330.] StatOil opposed the Tax Commissioner's motion, arguing that the Tax Commissioner should be equitably estopped from challenging OTA's jurisdiction because StatOil, through Ryan, believed that a corrected third decrease letter would be issued based on its conversations with a Tax Department employee (who later passed away), which would have extended the appeal deadline.

OTA conducted an evidentiary hearing on the Tax Commissioner's Motion to Dismiss and StatOil's Opposition on October 7, 2020. On January 8, 2021, OTA issued its *Order Granting Respondent's Motion to Dismiss for Lack of Jurisdiction* based upon OTA's longstanding interpretation of the Supreme Court of Appeals of West Virginia's decision in *Hudkins v. State Consolidated Public Retirement Board*, 220 W. Va. 275, 674 S.E.2d 711 (2007) (per curiam), as permitting a claim of equitable estoppel against the government "only if, in addition to traditional elements of estoppel, the party raising the estoppel proves affirmative misconduct or wrongful conduct by the government or a government agent[,]" neither of which were established by StatOil at the hearing. [22-ICA-225, D.R. at 136.]

On March 8, 2021, StatOil filed a *Petition for Appeal* in the Circuit Court of Kanawha County, West Virginia, seeking to reverse OTA's dismissal order. On April 12, 2022, the circuit court entered a *Final Order* reversing the dismissal order and remanding the case to OTA to rule on the Tax Commissioner's motion to dismiss consistent with the circuit court's *Final Order*. [22-ICA-225, D.R. at 95-96.] In its order, the circuit court held that "affirmative misconduct or wrongful conduct by the government" need not be proven in order to equitably estop the government. [22-ICA-225, D.R. at 94-95.] The circuit court further held that OTA was required to weigh six *Hudkins* factors and balance the respective interests of the Tax Commissioner and

StatOil. [22-ICA-225, D.R. at 95.] Upon remand, and based on the circuit court's construction of *Hudkins*, OTA denied the Tax Commissioner's motion to dismiss. OTA based its decision on StatOil not being able to pursue its appeal for its $708,438.95 refund claim if the motion to dismiss was granted, weighed against OTA's finding that the Tax Commissioner would not be harmed "by giving [StatOil] its day in court." [22-ICA-225, D.R. at 81.]

B. OTA's ruling on the merits, affirming the Tax Department's Calculation.

On October 7, 2022, OTA entered its *Order Affirming Tax Commissioner's Refund Denial.* [22-ICA-225, D.R. at 40.] In that Order, the parties agreed to be bound by OTA's August 18, 2022 *Final Decision* in appeals "involving the same facts of this matter, but for other tax years[]" and that the amount of the refund denial for the 2015 tax year was $708,438.95. [22-ICA-225, D.R. at 41.] The August 18, 2022 *Final Decision* involved the 2014 and 2016 tax years, which are also on appeal in this Court in Appeal No. 22-ICA-111. Additionally, tax years 2018 and 2019 are on appeal in this Court in Appeal No. 22-ICA-226.

In each of these cases, 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*, OTA found that "the evidence in this matter shows that StatOil was charged fees by purchasers of its natural gas, and that it impermissibly sought to deduct these fees from the gross proceeds of the sale." [22-ICA-225, D.R. at 37.] OTA further found that "the Petitioner 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-225, D.R. at 37.] "Nor was the Petitioner 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-225, D.R. at 37.] OTA ultimately held in favor of the Tax Department and denied StatOil's Petition 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 Petitioner are 'expenses' of the Petitioner, 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-225, D.R. at 38.]

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 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-225, at 1.

SUMMARY OF ARGUMENT

I. Even though OTA correctly calculated StatOil's tax liability, it erred in addressing the merits at all: StatOil's petition was jurisdictionally defective and should have been dismissed prior to being decided on the merits. StatOil filed its petition at OTA nearly eleven months after the statutory sixty-day deadline. The Supreme Court of Appeals has repeatedly treated this deadline (and other procedural hurdles for tax appeals) as jurisdictional. But OTA's initial dismissal order was reversed by the circuit court and remanded for further consideration of several factors the court thought could estop the Tax Commissioner from asserting this jurisdictional bar. And on remand, OTA refused to dismiss based on equitable estoppel.

This decision was in error. First, the case law of the Supreme Court of Appeals is clear that equitable estoppel simply does not apply to statutory jurisdictional deadlines, such as the 60-day limitations period for filings appeals to OTA. Second, even assuming equitable estoppel could apply (which the Tax Commissioner contests), the circuit court erred in holding that StatOil was not required to prove affirmative misconduct by the Tax Department. And third, even assuming affirmative misconduct is not a prerequisite for estopping the State, OTA erred in holding that the factors in *Hudkins v. State of West Virginia Consolidated Public Retirement Board*, 220 W. Va. 275, 647 S.E.2d 711 (2007), weigh in favor of denying the Tax Commissioner's motion to dismiss. This Court should correct the circuit court's mistake and order that StatOil's OTA petition (in this tax year 2015 case) be dismissed for lack of jurisdiction.

II. If this Court does not reverse with instructions to dismiss, it should affirm on the merits because OTA properly calculated StatOil's severance tax liability. OTA properly determined that the product value reflected on Equinor'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 Equinor 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. For these reasons, 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

The "jurisdictional issues" raised in this appeal "are questions of law" subject to "de novo" review. *State ex rel. Univ. Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 343, 801 S.E.2d 216, 221 (2017). The lower tribunal's application of "equitable principles" are reviewed for "abuse of discretion." *Helton v. Reed*, 219 W. Va. 557, 560, 638 S.E.2d 160, 163 (2006). Otherwise, final decisions from OTA are 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 should "not be set aside or vacated unless clearly wrong." *Id.* While "questions of law" are reviewed "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

I. The Circuit Court And OTA Erred In Failing To Dismiss StatOil's Untimely Petition For Lack Of Jurisdiction.

OTA calculated StatOil's severance tax liability for 2015 correctly. But it should never have gotten there in this appeal. Instead, the circuit court should have affirmed OTA's initial dismissal of the petition as untimely filed. The statutory deadline StatOil missed was jurisdictional, and despite OTA's and the circuit court's conclusions, it cannot be equitably excused. Even if it could, the circuit court was too willing to do so: it used the wrong standard for equitably estopping against a State agency. And even under the circuit court's relaxed standard, estoppel is not warranted. This Court should fix the circuit court's and OTA's errors and dismiss StatOil's case.

A. OTA lacked jurisdiction because StatOil missed the statutory deadline to file its petition.

StatOil's appeal of the February 27, 2019 Second Refund Decrease Letter to OTA was untimely, which deprived OTA of jurisdiction to hear this appeal. The appeal was filed on April 7, 2020, well over a year after the letter was received and approximately eleven months after the deadline to appeal lapsed. Both the First Refund Decrease Letter and the Second Refund Decrease Letter expressly stated:

> [I]f you have any objections to this decrease overpayment of tax, you must file a petition for reassessment with the independent Office of Tax Appeals . . . within sixty (60) days from receipt of this letter. … If you fail to file the aforesaid petition

within the time prescribed by law, the decreased overpayment shall become conclusive."

[D.R. at 304.]

West Virginia Code § 11-10-14 provides the exclusive remedy for obtaining a refund or credit relating to taxes assessed under Chapter 11 and makes clear that "no petition for refund or credit may be filed more than sixty days after the taxpayer is served with notice of denial of taxpayer's claim." W. Va. Code § 11-10-14(d)(1). *See also* W. Va. Code § 11-10A-9(b) (stating that such a petition "is timely filed if postmarked or hand delivered to the Office of Tax Appeals within sixty days of the date a person received written notice of an assessment, denial of refund or credit, order or other decision of the Tax Commissioner.").

OTA's jurisdiction under West Virginia Code § 11-10A-8(2) to hear appeals of Tax Commissioner orders denying refunds or credits is limited to those appeals brought "in accordance with the provisions of § 11-10-1 et seq. of the Code." OTA has no jurisdiction or discretion to hear untimely-filed appeals that do not comply with the deadline in West Virginia Code § 11-10-14(d)(1). The Legislature's clear intent was to impose a strict jurisdictional deadline. It could have incorporated an exception to this strict jurisdictional deadline if it desired to do so, but it did not. "A statutory provision which 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." *In re Donald M.*, 233 W. Va. 416, 421, 758 S.E.2d 769, 774 (2014) (citing Syl. pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951)). The Supreme Court of Appeals has held that "[a] taxpayer's failure to abide by the express procedures established for challenging a decision of the West Virginia State Tax Commissioner, enunciated in West Virginia Code § 11-10-14(c) and (d) (1995), precludes the taxpayer's claim for refund or credit." Syl. pt. 1, *Bradley v. Williams*, 195 W. Va. 180, 181, 465 S.E.2d 180, 181 (1995).

B. Equitable estoppel cannot confer statutory jurisdiction in tax cases.

Again, it is undisputed that StatOil missed the statutory 60-day deadline to file its Petition. The Supreme Court of Appeals has held that "filing requirements established by statute, like the ones involved in the instant case are not readily susceptible to equitable modification or tempering." *Helton*, 219 W.Va. at 561, 638 S.E.2d at 164. In *Cate v. Steager*, 2017 WL 2608435 (June 16, 2017), the Supreme Court of Appeals cited the following cases in support of the *Helton* court's holding that statutory appeal deadlines are not subject to equitable modification.

> *See, Webb v. U.S.,* 66 F.3d 691 (4th Cir.1995) (stating that there is no equitable tolling of tax filing deadlines); *See also Elk Run Coal Company v. Babbitt,* 930 F.Supp. 239 (S.D.W.Va.1996) (holding that government could not appeal due to missed deadline); *Concept Mining, Inc. v. Helton,* 217 W.Va. 298, 617 S.E.2d 845 (2005) (stating that the Tax Commissioner's intent was irrelevant and procedural error prohibited consideration of Commissioner's appeal); *State ex rel. Clark v. Blue Cross Blue Shield of W.Va., Inc.,* 195 W.Va. 537, 466 S.E.2d 388 (1995) *Bradley v. Williams,* 195 W.Va. 180, 465 S.E.2d 180 (1995) (concluding that taxpayer's failure to abide by the express procedures established for challenging a decision of the West Virginia State Tax Commissioner precludes the taxpayer's claim for refund or credit); (addressing strict deadlines in insurance insolvency cases); *Solution One Mortg., LLC v. Helton,* 216 W.Va. 740, 613 S.E.2d 601 (2005) (stating that tax statutes which require the giving of bond as a prerequisite to the prosecution of an appeal are strictly construed and their requirements are mandatory and jurisdictional).We have also held that West Virginia Code § 11–10A–9(b) "unambiguously provides that petitions must be filed within sixty days of receipt of the assessment." *Panhandle Used Equip., LLC v. Matkovitch,* No. 15–0230, 2016 WL 1417785 (W.Va. Apr. 8, 2016)(memorandum decision).

As discussed by the Fourth Circuit Court of Appeals in *Webb v. United States*, "[n]ot only are equitable principles generally of limited application in tax cases, but statutes of limitations have long been considered of particular importance in such cases." 66 F.3d 691, 694-93 (4th Cir. 1995). There is "a significant judicial reluctance to 'bend the rules,' even for strong equitable reasons, in tax filing cases," *Helton*, 219 W. Va. at 561, 638 S.E.2d at 164, n. 6, because deadlines are of particular importance in tax cases where the finality provided by a statute of limitations is "an almost indispensable element of fairness as well as of practical administration of an income tax policy." *See Webb,* 66 F.3d at 694-95 (citing *Rothensies v. Electric Battery Co.*, 329 U.S. 296, 301 (1946)). Equitable estoppel should only be applied against the government "with the utmost caution and restraint." *Estate of Carberry v. Comm'r of IRS,* 933 F.2d 1124, 1127 (2d Cir. 1991).

Additionally, the Supreme Court of Appeals has held that the government should not be estopped when it is acting in a governmental capacity, as the Tax Department did here when it was communicating with StatOil about its tax refund claim. *McFillan v. Berkeley Co. Planning Comm'n*, 190 W. Va. 458, 465, 438 S.E.2d 801, 808 (1993) ("a municipality acting in a governmental, rather than a proprietary, capacity is not subject to the law of equitable estoppel and ... therefore, estoppel cannot be based on unauthorized acts of municipal authorities acting in a governmental capacity."). In *Shaffer v. Monongalia General Hospital,* 135 W.Va. 163, 169-70, 62 S.E.2d 795, 798 (1950), the Supreme Court of Appeals stated that:

> The basic test in determining whether a public corporation, in its operations, is engaged in a discharge of a governmental function or is acting in a proprietary capacity is whether the act performed is for the common benefit of the public or is for the special benefit or profit of the corporation.

"[T]ax collection is a governmental, as opposed to a proprietary, function." *W. M. R.R. v. Goodwin*, 167 W. Va. 804, 820, 282 S.E.2d 240, 250 (1981). Here, the Tax Department's communications with StatOil about its tax refund (as the Tax Department does with all taxpayers in need of this service) was an act performed for the common benefit of the public, and the Tax Department was not acting "for [its] private gain[.]" *McFillan*, 190 W. Va. at 465, 438 S.E.2d at 808. Thus, equitable estoppel should not apply to the Tax Department for this additional reason.

In short, the doctrine of equitable estoppel should generally have no application in extending the deadline to appeal a decision of the Tax Department to OTA.

C. The circuit court erred in holding that proving affirmative misconduct is not required to estop the Tax Department.

Even if equitable estoppel could extend jurisdictional deadlines, OTA was correct that StatOil did not meet the elevated burden of proof (*i.e.*, affirmative misconduct) applicable in cases where the government is estopped in its proprietary capacity. On appeal, the circuit court erred in holding that affirmative misconduct is not a required element.

In proceedings before OTA, the burden of proof is on the petitioner. *See* W. Va. Code § 11-10A-10(e). To bring a basic claim for equitable estoppel, a litigant must show five elements: "there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real fact; it must have been relied on or acted on it to his prejudice." Syl. pt. 4, *Hudkins*, 220 W. Va. at 276, 647 S.E.2d at 712. Equitable estoppel cannot arise "merely because of action taken by one on a misleading statement made by another. In addition thereto, it must appear that the one who made the statement intended or reasonably should have expected that the statement would be acted upon by the one claiming the benefit of estoppel, and that he, without fault himself, did act upon it to his prejudice." Syl. pt. 4, *Barnett v. Wolfolk*, 149 W. Va. 246, 246, 140 S.E.2d 466, 467 (1965).

Applying the facts before it to the traditional test for equitable estoppel, OTA determined that the "Petitioner prevails, but it is a close call." [22-ICA-225, D.R. at 138.] During the hearing, a Ryan employee testified that he was told a third refund denial letter would be issued after a $23,000 error was explored; however, the Tax Department's witness testified that she could not recall whether Ryan was told that a third refund denial letter would be issued. [22-ICA-225, D.R. at 132.] The Tax Department's witness also testified that it is not the policy or practice of the Tax Account Administration Division to send out updated refund denial letters after a refund check is sent to the taxpayer. [22-ICA-225, D.R. 235-26.] StatOil's witness (a Ryan employee) testified that nobody advised him to wait or delay in filing the Petition with OTA. [22-ICA-225, D.R. at 255.].

Viewing these facts in a light most favorable to StatOil, OTA presumed that Ryan was advised that a third refund decrease would be forthcoming, that the statement was made by a Tax Department employee having constructive knowledge that a third letter might not be issued, that Ryan/ StatOil did not know that a third letter might not be issued, and that Ryan/StatOil acted in reliance on the Tax Department's representation to their detriment. [22-ICA-225, D.R. at 117-19.]

However, as OTA found, this test alone is insufficient to equitably estop the State. The "Government may not be estopped on the same terms as any other litigant." *Hecker v. Community Health Servs.*, 467 U.S. 51, 60 (1984). Again, "[t]he general rule is that estoppel may not be invoked against a governmental unit when functioning in its governmental capacity." *Samsell v. State Line Dev. Co.*, 154 W. Va. 48, 59, 174 S.E.2d 318, 325 (1970); *see also Wood County Court*, 148 W. Va. 303, 309, 134 S.E.2d 725 (1964); *Martin Distributing Co., Inc. v. Matkovich*, No. 14-AA-7, 2015 WL 12553470, at *8 (W. Va. Cir. Ct. July 23, 2015). "In accordance with [this] well settled principle, [the Supreme Court of Appeals of West Virginia] has stated many times that the state and its political subdivisions are not bound, on the basis of estoppel, by the Ultra vires or legally unauthorized acts of its officers in the performance of government functions." *Samsell,* 154 W. Va. at 59, 174 S.E.2d at 325 (cleaned up). This is because "[t]o permit such estoppel on the basis of mistake or ill advised action would hinder and hamper governmental functions; and may be contrary to the public interest in many cases." *See Cawley v. Bd. of Trustees*, 138 W. Va. 571, 584, 76 S.E.2d 683, 690 (1953); *McFillan*, 190 W. Va. at 465, 438 S.E.2d at 808.

The Supreme Court has further "held that the principles of estoppel should be applied reluctantly when individuals or private corporations are involved. Estoppel is applied with much greater reluctance against the state or the public." *Samsell*, 154 W. Va. at 62, 174 S.E.2d at 327. "The doctrine of estoppel should be applied cautiously, only when equity clearly requires that it be done, and this principle is applied with especial force when one undertakes to assert the doctrine against the state." Syl. pt. 3, *Hudkins*, 220 W. Va. at 276, 647 S.E.2d at 712. *See also, e.g.*, Syl. pt. 7, *Samsell*, 154 W. Va. at 49, 174 S.E.2d at 320; Syl. pt. 5, *Bradley v. Williams*, 195 W. Va. 180, 181, 465 S.E.2d 180, 181 (1995). This is particularly the case when public funds are at issue. *Brown Funeral Home, Inc. v. Matkovich*, No. 14-AA-8, 2015 WL 12553480, at *8 (W.Va. Cir. Ct. July 23, 2015) ("Courts have additionally taken a particularly strict approach to estoppel claims against the government when dealing with public funds.") (citing *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990) ("Even our recent cases evince a most strict approach to estoppel claims involving public funds."). *See also, Beckley v. Wolford*, 104 W. Va. 391, --, 140 S.E. 344, 345 (1927) (holding that the State is not subject to the laws of estoppel when acting in a governmental capacity, and taxation is an act of sovereignty).

In spite of case law described above, StatOil still argues that affirmative misconduct need not be proven under *Hudkins*. This is incorrect. In *Hudkins*, the Supreme Court of Appeals of West Virginia turned to 28 Am.Jur.2d *Estoppel and Waiver* § 140 for guidance on "What must be shown to estop the government" and quoted that source as follows:

> In recognition of the heavy burden bourne by one seeking to estop the government, **courts have held that the doctrine of equitable estoppel may be raised against the government only if, in addition to the traditional elements of estoppel, the party raising the estoppel proves affirmative misconduct or wrongful conduct by the government or a government agent**. Likewise, courts have held an estoppel against the government may be raised only when –
>
> -- the injury to the public interest if the government is estopped is outweighed by the injury to the plaintiff's personal interest or the injustice that would arise if the government is not estopped.
>
> -- raising the estoppel prevents manifest or grave injustice.

-- raising the estoppel will not defeat a strong public interest or the operation of public policy.

-- the exercise of government functions is not impaired or interfered with.

-- circumstances make it highly inequitable or oppressive not to estop the government

-- the government's conduct works a serious injury and the public's interest will not be harmed by the imposition of the estoppel.

Id., 220 W. Va. at 280, 647 S.E.2d at 716 (emphasis added). In reaching the decision that the Board should be estopped in *Hudkins*, the court concluded: "We believe the principles set forth in 28 Am.Jur.2d *Estoppel and Waiver* § 140 and in Syllabus Point 6 of *Stuart v. Lake Washington Realty Corp., supra*, and the cautious advice provided in Syllabus Point 7, *Samsell v. State Line Development Company, supra,* have been met." *Id.*

Since the *Hudkins* decision was issued in 2007, OTA has consistently and routinely applied the plain language of its reasoning and required litigants asserting a claim of equitable estoppel against the State to show "affirmative misconduct or wrongful conduct by the government or a government agent."[1] Circuit courts have affirmed OTA's reliance on the plain language of *Hudkins*

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[1] *See, e.g.,* Final Decision No. 17-274, West Virginia Office of Tax Appeals, 2019 WL 11070960, at *4 (January 28, 2019) ("This Tribunal rules that the statements in the June 27th email, while not entirely correct, as applied to the Petitioner's situation, were not affirmative misconduct or wrongful conduct. Therefore, we cannot rule that the Petitioner has met its burden of showing that the Tax Commissioner should be equitably estopped from issuing the assessment that forms the basis of this matter."); Final Decision No. 16-269 AFTC, West Virginia Office of Tax Appeals, 2018 WL 11232383, at *3 (October 25, 2018) (holding that it is not wrongful conduct subject to estoppel for the Tax Department to erroneously grant a tax credit and later correct that error); Final Decision No. 14-115 RP, West Virginia Office of Tax Appeals, 2018 WL 11232371, at *3 (April 23, 2018) ("[W]e do not believe (nor do we think the West Virginia Supreme Court of Appeals would believe) that a Tax Department employee mistakenly failing to ascertain whether a vehicle is new or used (for tax credit purposes) would rise to the level of 'wrongful conduct' as that term is used in *Hudkins*."); Final Decision No. 12-443 PM, West Virginia Office of Tax Appeals, 2014 WL 11393002, at *4 (December 9, 2014) ("In his brief, the Petitioner does not even attempt to argue that, in the discussions back and forth, the Tax Department officials committed affirmative misconduct or wrongful conduct. . . . Therefore, we cannot rule that the Petitioner has met his burden of showing that the Tax Commissioner should be equitably estopped from denying his requested tax credit.").

on multiple occasions. *Martin Distrib. Co., v. Matkovich*, 2015 WL 12553470, at *8 (W. Va. Cir. Ct. July 23, 2015) (affirming OTA dismissal of equitable estoppel claim because "[t]axpayers did not meet this heightened burden at the Office of Tax Appeals and there is absolutely no evidence in the record indicating that the Tax Department committed affirmative misconduct or wrongful conduct."); *Brown Funeral Home, Inc. v. Matkovich*, 2015 WL 12553480, at *8 (W. Va. Cir. Ct. July 23, 2015) (same).

But at circuit court, StatOil argued that OTA's interpretation of *Hudkins* placed too high of a burden on taxpayers: it said it would always be impossible to prove that the State, through its agents, intended to trip taxpayers up by deliberately giving them the wrong advice. The circuit court agreed, and held that that the opening guidance from 28 Am.Jur.2d *Estoppel and Waiver* § 140 quoted in *Hudkins* (that "the doctrine of equitable estoppel may be raised against the government only if, in addition to the traditional elements of estoppel, the party raising the estoppel proves affirmative misconduct or wrongful conduct by the government or a government agent") be ignored and, instead focused on the five factors listed in the latter part of that quote. *Hudkins* does not support, discuss, or direct the circuit court's pick-and-choose approach.

While it is true that the Supreme Court of Appeals in *Hudkins* did not discuss its application of "affirmative misconduct or wrongful conduct" to the facts of that case, it did conclude that "the principles set forth in 28 Am.Jur.2d *Estoppel and Waiver* § 140… have been met." *Hudkins*, 220 W. Va. at 280, 647 S.E.2d at 716. Nowhere in *Hudkins* does the Supreme Court instruct courts to disregard the "affirmative misconduct or wrongful conduct" requirement, as the circuit court held.

The circuit court erred in focusing solely on public policy factors contained in *Hudkins*. OTA originally explained in its dismissal order that it declined to weigh the public interest due to this element being a "classic slippery slope" because "all of the cases [OTA] hears involve fights over public dollars" and "we are of the opinion that [OTA] should not be the place to decide how many tax dollars are okay to be lost when a Taxpayer is seeking to estop the Tax Commissioner." [22-ICA-225, D.R. at 120.] OTA further explained that:

> This Tribunal has always been of the opinion (and still is) that the phases [*sic*] "affirmative misconduct" and "wrongful conduct" control our decision in cases such as this. We believe so, for the simple reason that they are contained in *Hudkins* decision, and that they were put there for a reason. Moreover, to our knowledge, the *Hudkins* decision is the most in depth analysis of a topic this Tribunal is asked to address on a regular basis. We apply the plain and ordinary meaning to the phrases "wrongful conduct" and "affirmative misconduct" and take them to mean something more than a mistake on the part of a government agent. For this Tribunal to rule for a Taxpayer and estop the Tax Commissioner, we would need to be presented with facts showing that a Tax Department employee set out to trip up a Taxpayer, by deliberately giving them wrong advice or doing some other affirmative act to affect the Taxpayer's tax filings. We do not ever expect to be presented with such facts, for the simple reason that it would be difficult to conjure up a motive for such behavior.

[22-ICA-225, D.R. at 120-21.]

OTA's plain-meaning interpretation of *Hudkins* does not impose an impossible burden on citizens and, therefore, does not violate citizens' due process rights. Like any legal test requiring proof of intent, it is a difficult standard to meet. But there is good reason for imposing this high burden on parties seeking to estop the State from enforcement of its laws. If the State could be estopped from enforcing its laws every time a State employee makes an innocent mistake, innocently gives erroneous advice or miscommunicates with a citizen, or drops the ball due to the untimely death of an employee, the public would certainly be harmed. *Hudkins'* guidance that more than a simple mistake is required in the form of "affirmative misconduct or wrongful conduct" is consistent with prior precedent. The Supreme Court of Appeals has long recognized that permitting "estoppel [against the government] on the basis of mistake or ill-advised action would hinder and hamper governmental functions; and may be contrary to the public interest in many cases." *Cawley*, 138 W. Va. at 584, 76 S.E.2d at 690 (1953); *McFillan*, 190 W. Va. at 465, 438 S.E.2d at 808 (1993).[2] Thus, the "heavy burden bourne by one seeking to estop the government" is for the public's protection. *Hudkins* guidance for applying equitable estoppel to the State should be read and applied in its entirety, and OTA's interpretation that the guidance "from the *Hudkins* Court means that a Tax Department employees mistaken advice to a Taxpayer cannot, absent special circumstances, change the tax laws of this state" should be affirmed. [22-ICA-225, D.R. at 121-22.]

D. OTA erred in finding that the *Hudkins*' equity factors should estop the Tax Department in this case.

On remand from the circuit court, OTA estopped the Tax Department from asserting the statutory and jurisdictional deadline for StatOil's late-filed appeal based on the circuit court's analysis of the *Hudkins* factors. Even assuming affirmative misconduct need not be proven, OTA erred in its application of the *Hudkins* factors because the equities presented in this case are distinguishable from those presented in *Hudkins*. There, Ms. Hudkins retired in reliance on assurances from the State of West Virginia Consolidated Public Retirement Board ("Board") and her employer that she could freeze unused sick leave and use those hours as service credit upon applying for retirement. *Hudkins*, 220 W. Va. at 276-277, 647 S.E.2d at 712-713. Ms. Hudkins was an individual unsophisticated in such matters and not represented by a professional firm. StatOil, on the other hand, is a sophisticated corporate taxpayer represented by a sophisticated international tax firm. "[T]he Board's staff was dedicated to the business of advising employees

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[2] The Supreme Court of Appeals has also commented that "a great author and jurist characterizes such decisions [permitting the government to be estopped] as 'exceptional cases,' 'a law unto themselves,' and justifies them only on the theory that the acts which were held to constitute estoppel amounted to fraud." *See City of Beckley*, 104 W. Va. 391, 140 S.E. at 345 (citing Dillon, Municipal Corporations (5th Ed., par. 1194 and note 1, p. 1903).

concerning retirement benefits" on a daily basis, and Ms. Hudkins had a right to rely on that advice. *Id.* at 281, 647 S.E.2d at 717. Also, the parties in *Hudkins* did not dispute that a Board employee advised Ms. Hudkins that she was eligible to claim service credit for sick leave. *Id.*

In this case, it is undisputed that both refund decrease letters advised Ryan of the 60-day deadline to appeal, and Ryan was well aware of the strict statutory basis for this deadline. [22-ICA-225, D.R. at 321.] The Tax Department witness could not recall whether or not, as Ryan's witness testified, Ryan had been advised that a third refund decrease letter would be issued, given that the Tax Department receives a large volume of calls from taxpayers; however, the Tax Department's witness testified that it is not the policy or practice to send updated refund letters once a refund check is mailed to a taxpayer. Additionally, Ryan's witness admitted that nobody from the Tax Department advised Ryan not to file an appeal. Therefore, it is unclear how StatOil can claim it was relying on the Tax Department's advice in deciding not to timely file a Petition for Reassessment. Without being advised to do so by the Tax Department, Ryan, an international accounting firm with a sophisticated understanding of tax laws in West Virginia, chose to disregard the strict 60-day deadline to appeal described in the refund decrease letters and required by statute (*see* W. Va. Code § 11-10-14(d)(1) ("no petition for refund or credit may be filed more than sixty days after the taxpayer is served with notice of denial of taxpayer's claim.") to continue discussing a potential $23,000 mathematical error – instead of protecting StatOil's right to appeal the denial of a $1.5 Million refund based upon its belief, which it did not receive in writing, that a third letter was forthcoming. Equitable estoppel simply should not apply to these facts. OTA erred in holding "allowing [StatOil] its proverbial day in court will not harm the public interest at all." [22-ICA-225, D.R. at 81.] As noted above, the public interest is clearly harmed when public funds are involved in equitable estoppel claims.

*   *   *   *   *

Even though it calculated StatOil's tax liability correctly, OTA should be reversed because it should never have reached the merits of this case. StatOil's Petition should have been dismissed as untimely. The lower tribunals improperly extended the jurisdictional deadline to file based on inapplicable equitable principles and even relaxed the standard for estoppel applicable in other contexts. This Court should correct this error and reverse with instructions to dismiss StatOil's Petition as jurisdictionally barred.

II. The Tax Commissioner And OTA Properly Calculated The Value Of The Gas StatOil Severed In 2015.

If the case survives this jurisdictional hurdle, OTA should be affirmed on the merits. It 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 2015 tax year. 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 (assuming the merits can be reached) OTA's decision on appeal should be upheld.

A. OTA 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, second, and third assignments of error fail for three 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.

1. The price of StatOil's product was determined once it 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-225, 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 "[i]f the text 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 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-226, 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 found 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 (emphasis added). 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 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 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-225, D.R. at 162, ¶ 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. 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.

2. 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. StatOil 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 is 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 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 and monthly payments are made to StatOil based upon the price of the product as it is commercially sold. The price of the product is then determined once the product is marketable. StatOil continuously states that the NGL Agreement stated MarkWest would undertake any third party fees. Petr. Br. 22-ICA-225, 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-225, 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-225, 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.

3. 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 StatOil. But, if this Court determines ambiguity exists, then Tax Commissioner and OTA are entitled to deference in their interpretation and application. Case law is well-established that if 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 statute.'" *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 the Tax Commissioner's position that StatOil's product value on the settlement statements represents its gross value and OTA's decision should be upheld.

4. 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 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-225, 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 Petitioner to MarkWest. The only value that can 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.

5. 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 Petitioner 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 nor Petitioner's arguments 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. Nor did the Court in *CAMC* did not have an legislative rule to guide it.

B. 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-225, 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. §11-13A-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 take 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 of fifteen percent of the gross proceeds—known as the "fifteen percent safe harbor" deduction. W. Va. Code R. § 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.* § 110-13A-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-225, 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.

C. 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 argues that OTA erred in declining to follow an OTA decision issued on February 5, 2004. [*See* 22-ICA-111, D.R. at 239 (herein the "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-225, 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's 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 & 248.] 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 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 at 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 argues 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-225, 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 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 one federal circuit puts it: "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) (citing *Cardales-Luna*).

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 factual findings, the legal reasoning for not following the 2004 Decision was more than "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 OTA's ruling be reversed with instructions to dismiss StatOil's Petition for lack of jurisdiction or in the alternative, 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-225

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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