NO. 23-760

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATOIL USA ONSHORE
PROPERTIES, INC.,

Petitioner,

v.

MATTHEW IRBY, West Virginia State
Tax Commissioner

Respondent.

PETITIONER'S BRIEF

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Assignment of Error 2: The ICA erred when it failed to apply the holding of, and/or apply the appropriate persuasive authority of, *Hudkins v. State Consolidated Public Retirement Board*, 220 W.Va. 275, 674 S.E.2d 711 (2007) to this case.

Assignment of Error 3: The ICA erred when it concluded that Equinor USA Onshore Properties Inc., formerly known as Statoil USA Onshore Properties Inc. ("Equinor") had to prove, and failed to prove, affirmative misconduct or wrongful conduct by Respondent in this case.

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STATEMENT OF THE CASE

The ICA erred by reversing a May 5, 2022 WVOTA decision titled "Order Upon Remand Denying Tax Commissioner's Motion to Dismiss" in which the WVOTA denied Respondent's motion to dismiss on the grounds of equitable estoppel.

Equinor is a natural gas producer with operations across the United States, including West Virginia. D.R.0025-26 at ¶¶ 2-5. Through its production of natural gas, Equinor has contributed significant value to West Virginia's economy through job creation, infrastructure development, and the payment of taxes. For example, in the 2015 tax year at issue, Equinor has already paid $6,735,784 in severance taxes and is seeking a refund of overpaid amounts totaling $708,438.95 that was denied. *See* D.R.0044-47 (2015 tax document showing taxes paid to date); D.R.342-49 (petition for reassessment listing amount in controversy); D.R.0351 (refund denial letter).

This case arises from Respondent's improper denial of Equinor's request for a refund of overpaid severance taxes on natural gas and natural gas liquids in 2015. On June 28, 2018, Equinor filed an Amended Severance Tax Return for tax year 2015, in which Equinor requested a refund of $4,837,548.01 ("Refund Request"). D.R.0361. On January 23, 2019, Respondent sent a refund denial letter to Equinor, notifying Equinor that the Refund Request would be decreased by $2,216,115.02 ("First Denial"). D.R. 0338. In response to the receipt of this First Denial letter,

Equinor's representatives contacted Respondent to discuss errors in the calculation of the refund reduction. D.R. 0088. Ms. Stacy Acree—the then Assistant Director for the Tax Account Administration—agreed that the reduction was not calculated correctly and emailed Equinor's representative stating that Respondent would be "pulling the refund back" while the mathematical/accounting errors were further explored. D.R. 0317. Accordingly, Respondent withdrew the First Denial and issued a second refund denial letter on February 27, 2019, which amended the decrease in the refund to $1,551,988.68 ("Second Denial"). D.R. 0335. Equinor reviewed the Second Denial and soon concluded it, too, contained a mathematical error. D.R. 0308.

The next day, February 28, 2019, Equinor's representatives again contacted Respondent regarding a mathematical error contained within the Second Denial and requested Respondent to provide a final refund amount that Equinor could appeal. D.R.0308-309; D.R.0245-247. Ms. Acree indicated to Equinor's representatives that the mathematical error would be reconciled and that a subsequent third, and final, refund denial letter would be issued.[1] D.R.0308-309; D.R.0245-247. This reconciliation would provide Equinor with a "good number" that it could then appeal to the WVOTA. D.R.0112; D.R.0246 (we were all trying to get to the final number to get a new letter reissued to appeal"). Ms. Acree assigned the review of the mathematical error to an audit clerk, and based on the audit clerk's findings, Respondent issued a refund check on March 3, 2019, in the amount of $3,285,559.33 in accordance with the Second Denial. D.R.0089. Tragically, the clerk assigned to review the error fell ill and passed away in the fall of 2019. D.R.0308. Despite numerous requests from Equinor for an update, Respondent failed to undertake the review of the mathematical error until January 2020. D.R.0308-309. On February 27, 2020, Ms. Acree, agreeing

[1] Note, at the hearing before the WVOTA, Ms. Acree testified that "she could not recall if [Equinor's representative] was assured a third letter would be issued." D.R. 0089. WVOTA determined, as a finding of fact, that Equinor's representative was told by Ms. Acree that a third refund denial letter would be issued.

that a mathematical error existed in the Second Denial, directed an employee to make an additional refund payment of $23,671.54 to Equinor. D.R.0306; D.R.0323. Ms. Acree copied Equinor's representative an email on the February 27, 2020 email dictating Respondent issue that check, as the apparent notification of the new refund payment. *Id.* However, no third denial letter was ever delivered to Equinor, as promised. Therefore, upon receipt of the new refund check and Respondent's refusal to issue the promised third denial letter, on April 7, 2020, Equinor filed a Petition for Reassessment with the WVOTA challenging the remaining denied amount; notably, the petition (OTA Form 1 April '03) filed by Equinor mandates the disclosure of the amount in controversy, which was an amount Equinor could not provide until the reconciliation of Respondent's mathematical errors. D.R.0089-0090; D.R.0342.

On appeal before the WVOTA, Respondent moved to dismiss the action, asserting that the WVOTA lacked jurisdiction over the Refund Request appeal because Equinor did not appeal within 60 days of the receipt of the Second Denial. D.R.0327; D.R.0330. After a hearing and briefing by the parties, WVOTA agreed that Respondent "could be equitably estopped" from challenging WVOTA's jurisdiction over the Refund Request appeal. D.R.0119; D.R.0149-0160 (Petitioner's Supplement on Issue of Equitable Estoppel); D.R.0163-0187 (Respondent's Brief in Support of Motion to Dismiss); D.R.0284-0325 (Petitioner's Opposition to Motion to Dismiss with exhibits). However, the WVOTA's analysis did not end with the traditional elements of equitable estoppel—and after applying the WVOTA's own interpretation of this Court's precedent, which required an additional showing of "affirmative misconduct or wrongful conduct" by Respondent, the WVOTA granted Respondent's motion to dismiss. D.R.0122.

Equinor timely appealed to the Circuit Court of Kanawha County, West Virginia. D.R.0718-723 (Petition for Administrative Appeal from Decision of West Virginia Office of Tax

Appeal). The parties briefed the Circuit Court. D.R.0661-674 (Petitioner's Brief); D.R.0679-699 (West Virginia State Tax Department's Response Brief); D.R.0700-714 (Petitioner's Reply to West Virginia State Tax Department's Response Brief). After a review of the briefs and applicable case law, the Circuit Court held that the WVOTA had applied the wrong legal standard because a taxpayer need not prove affirmative misconduct or wrongful conduct to equitably estop Respondent. D.R.0095. The Circuit Court remanded the decision back to the WVOTA with instructions to use the proper legal standard. *Id*. Accordingly, the WVOTA issued a second order titled "Order Upon Remand Denying Tax Commissioner's Motion to Dismiss" in which it denied Respondent's motion to dismiss on May 5, 2022, on the ground of equitable estoppel, finding Equinor had met all the elements of the proper legal standard. D.R.0079-81.

The appeal to the WVOTA continued, which resulted in a final decision denying Equinor's request for a refund. D.R. 0024-39. Equinor appealed the final decision to the ICA regarding the denial of the Refund Request appeal, and Respondent filed a cross-assignment of error as to the WVOTA's denial of its motion to dismiss. D.R.0009-23. The parties briefed all issues. D.R.0440-482 (Petitioner's Brief); D.R.0483-527 (Respondent's Brief and Cross-Assignment of Error); D.R.0528-576 (Petitioner's Reply & Response in Opposition to Cross-Appeal); D.R.0392-393 (Supplemental Authority Letter of Petitioner); D.R.0394-420 (Supplemental Authority Letter of Respondent). On November 15, 2023, the ICA issued its decision in favor of Equinor as to its refund and severance tax calculations, but found in favor of Respondent in regards to the challenge associated with the Refund Request appeal. D.R.369-391. In other words, the ICA determined Equinor's appeal of the Refund Request was statutorily time-barred. *Id.* This appeal challenges that narrow portion of the ICA's decision.

SUMMARY OF ARGUMENT

To begin, we must clarify the relief Equinor is seeking. Equinor is not seeking an extension or modification of a jurisdictional deadline. It instead seeks an order confirming that its appeal for the 2015 tax year is timely because it was filed within sixty (60) days of Respondent issuing Equinor the last tax refund check for that tax year. In the alternative, Equinor's appeal was timely because the principle of equitable estoppel applies to prevent Respondent from asserting that 60-day deadline, as Equinor relied upon Respondent's promises of future denial letter that would restart that proverbial clock, which never came to pass. In doing so, Equinor is not applying a radical new concept—courts in this state have previously applied equitable estoppel to the government and to tax cases, and it is under this precedent that Equinor seeks relief. Equinor is not advocating for a radical shift in precedent or a new claim of equitable principles; just a straightforward application of existing law to the rather extraordinary facts of this case.

The ICA, however, failed to apply this precedent or properly weigh those facts, choosing instead to create a new, much more stringent standard by which equitable estoppel would apply to Respondent only if the taxpayer could prove the government committed affirmative misconduct or wrongful conduct. The ICA applied this new standard to Equinor and summarily found it lacking, despite never actually comparing the facts of any prior cases to the case at bar. The ICA also disregarded the fact that Equinor had already met the traditional elements of equitable estoppel found in the precedent (which is acknowledged by the Circuit Court of Kanawha County and WVOTA in their decisions below). In doing so, the ICA created an impossible new legal standard that does not provide taxpayers with a meaningful claim of equitable estoppel, as even the WVOTA has openly stated that this "affirmative misconduct or wrongful conduct" standard can *never* be met. For these reasons, and other listed below, the ICA erred when it overturned the

WVOTA's decision made May 5, 2022, which equitably estopped Respondent from asserting the 60-day deadline on appeals.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Equinor requests Rule 20 oral argument as this appeal presents issues of first impression and cases involving issues of fundamental public importance regarding when equitable estoppel is appropriate against the government and when notice of denial of refund to a taxpayer is sufficient to start the taxpayer's appeal deadline.

ARGUMENT

Equinor provides the following legal argument in support of its appeal, all of which leads to a single conclusion: The ICA erred and abused its discretion in applying the principle of equitable estoppel to the undisputed facts of this case, and erred when it overturned the WVOTA's order dated May 5, 2022.

I. Jurisdiction

Pursuant to W.Va. Code § 29A-6-1 and W.Va. Code § 51-11-10 the Supreme Court of Appeals of West Virginia has jurisdiction over this matter as it is an appeal of a final decision of the ICA that was entered after June 30, 2022.

II. Standard of Review

This Court has outlined the standard of review applicable to this case as follows:

> In an administrative appeal from the decision of the West Virginia Office of Tax Appeals, this Court will review the final order of the circuit court pursuant to the standards of review in the State Administrative Procedures Act set forth in W. Va. Code § 29A-5-4(g) [1988]. Findings of fact of the administrative law judge will not be set aside or vacated unless clearly wrong, and, although administrative interpretation of State tax provisions will be afforded sound discretion, this Court will review questions of law *de novo.* West Virginia Code § 29A-5-4(g) provides, in relation to the circuit court's review:

> The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions decision or order are:
>
> (1) In violation of constitutional or statutory provisions; or
> (2) In excess of the statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedures; or
> (4) Affected by other error of law; or
> (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> Further, "[t]he 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996).

III. The ICA Failed to Address Whether Equinor Received Statutorily Sufficient Notice of Denial of Refund Request

We begin, as we must, with the applicable statute, which states that an appeal of a tax assessment to the WVOTA must be filed within sixty (60) days "after the taxpayer is served with notice of denial of taxpayer's claim." *See* W. Va. Code § 11-10-14(d)(1). Thus, the threshold issues are: (a) whether Equinor received notice of the denial of the Refund Request sufficient to satisfy the statute, and (b) when that notice occurred. To be clear, there is no rule, regulation, or decision that requires the "notice" to come in the form of Respondent's standard denial letter form. Despite Equinor laying out its position on this issue in its brief, see D.R.0541, the ICA erred by not addressing it, despite it being dispositive.

Equinor argues that the notice referenced in the statute occurred on February 27, 2020, when Respondent issued to Equinor the second, and final, refund check for that 2015 tax year.

D.R.0323. On that same date, Respondent notified Equinor of the refund check via email. *Id*. Prior to that check being issued or email being sent, the amount of Equinor's refund remained undetermined. It was only with that last refund check that Respondent made its final decisions as to whether Equinor's requested refund would be granted or denied, and in what amounts. Thus, the operative and final "notice of denial of taxpayer's claim" occurred with the February 27, 2020 refund check and email. Equinor filed its appeal to the WVOTA on April 7, 2020, which is undisputedly less than sixty (60) days after February 27, 2020. D.R.0089-90. Thus, under the express wording of the statute, Equinor's appeal was timely. This resolves the entire issue of timeliness, without the need of any equitable principles, in Equinor's favor. The ICA's failure to acknowledge this argument or address the statutory notice provisions was in error and constitutes an abuse of discretion.

Respondent urges that the operative "notice" occurred when the Second Denial was sent, making February 27, 2019 the date upon which the deadline began to run. D.R.0335. However, Respondent does not explain how or why notice must be in the form of its form denial letter when the statute makes no such requirement that notice be in any particular form, or why the Second Denial is operative when it undisputedly contained false and incorrect refund information.

Critically, Respondent's actions and subsequent words also indicated that the mere delivery of the standard denial letter does not constitute "notice" for the purposes of this statute. Respondent, upon learning of the defects and incorrect calculations in the First Denial, withdrew it and issued the Second Denial, which too suffered from defects. D.R.0246. If "notice," *i.e.*, receipt of a form denial letter, was the sole statutory requirement, then there would not have been any need for Respondent to issue the Second Denial—yet it did. Furthermore, there would be no need for a third denial letter—yet Respondent promised one to Equinor.

Ultimately, Respondent chose to send an email to Equinor's representative in February 2020 notifying them of the new refund check, instead of a third form letter. D.R.0323. The fact that notification was sent through this email and/or the receipt of a new refund check, and not a form denial letter, is not dispositive under the wording of the statute. What is dispositive, however, is the fact that the February 2020 email and refund check notified Equinor, once and for all, of the final amount of its refund for tax year 2015.

Accordingly, Respondent's position that statutory notice occurred with the Second Denial is not supported by the statute, the facts, or its own actions in this case. In contrast, Equinor's position is well grounded in the facts, statute, and common sense. Its appeal was filed less than sixty (60) days after it was notified on February 27, 2020, of Respondent's final determination as to Equinor's refund for tax year 2015. Equinor's appeal is timely, and this case resolve in its favor.

IV. The ICA's Ruling Creates a Conflict Between the Timeliness and Content Provisions of the Underlying Statute as to What is Required for a Petition for Reassessment or Refund.

In an attempt to prevent Equinor's appeal, Respondent asserts an earlier notice deadline, specifically the Second Denial letter sent February 27, 2019. D.R.0335. This argument is flawed factually and legally, as explained above, and creates an unnecessary and impermissible conflict between the timeliness and content provisions of the state tax code.

As has been often quoted throughout this case's history, West Virginia Code § 11-10-14 outlines when a petitioner may challenge the denial of a refund: "That no petition for refund or credit may be filed more than 60 days after the taxpayer is served with notice of denial of taxpayer's claim . . . ." W.Va. Code § 11-10-14(d)(1). This is similarly echoed in the WVOTA's authorizing statute: "Except where a different time for filing a petition is specified elsewhere in this code, a petition filed pursuant to subsection (a) of this section is timely filed if postmarked or

hand delivered to the Office of Tax Appeals within sixty (60) days of the date a person received written notice of an assessment, denial of a refund or credit, order or other decision of the Tax Commissioner." W.Va. Code §11-10A-9. The First Denial, which was withdrawn, and the Second Denial contained language reiterating this sixty-day deadline. DR0335; D.R.0338. Presumably, the third denial letter (that was promised but never arrived) would have contained the same language. Interestingly, the February 2020 email from Ms. Acree that notified Equinor of the final refund check for the 2015 tax year did not contain this language. D.R.0323.

What has been overlooked in this case, however, are the corresponding requirements imposed upon a taxpayer to actually file a petition. In subsection (d) of West Virginia Code § 11-10-14 —the same subsection that decrees when a petition may be filed—paragraph (2) mandates the following: "[t]he petition for refund or credit shall be in writing, *verified under oath by the taxpayer*, or by the taxpayer's duly authorized agent having knowledge of the facts, and *set forth with particularity the items of the determination objected to, together with the reasons for the objections*." W.Va. Code § 11-10-14(d)(2) (emphasis added). Likewise, the WVOTA's authorizing statute requires:

> (a) A proceeding before the Office of Tax Appeals appealing a tax assessment, a denial of a tax refund or credit or any other order of the Tax Commissioner, or requesting a hearing pursuant to the provisions of any article of this chapter which is administered pursuant to article ten of this chapter, *shall be initiated by a person timely filing a written petition that succinctly states:*
>
> (1) The nature of the case;
>
> *(2) The facts on which the appeal is based; and*
>
> *(3) Each question presented for review by the Office of Tax Appeals.*

W. Va. Code § 11-10A-9 (a) (emphasis added).

More specifically, the WVOTA's procedural rules in place at the relevant explain what a "written petition" must contain, which includes:

> d. The type(s) of tax(es) involved or the specific nature of the non-tax matter involved (such as a charitable bingo license revocation);
>
> e. The division, section, unit, or other organizational part of the state tax department that issued the notice of assessment, denied the claim for refund or credit, suspended or refused to issue the license or business registration certificate, or took any other action prompting the filing of the petition;
>
> f. The date on which the petitioner received the written notice that prompted the filing of the petition;
>
> g. If applicable, the taxable period(s) or year(s) involved and the amount of tax, additions, penalty, interest or other amount in controversy;
>
> h. Separately numbered paragraphs stating, in clear, concise, and, as much as possible, specific terms, each and every material error, factual or legal, that the petitioner alleges has been made by the state tax department;
>
> i. The specific relief sought by the petitioner;

W.Va. State Rule § 121-1-21 (commencement of proceedings) (effective through June 20, 2023).

These statutory and procedural requirements indicate that a taxpayer must identify the amount in controversy (including additions, penalty, or interest) and specifically outline "each and every" material error, factual or legal, that the taxpayer alleges has been made by the state tax department. *Id.* The taxpayer must submit this amount in controversy information to Respondent in a document signed under oath that also contains "a statement that the petition is made with the knowledge that a willfully false representation set forth in the petition is a misdemeanor punishable according to law." *Id.*

If Respondent's position is permitted, and the Second Denial letter is the operative start of the appeal period, then the taxpayer is placed in severe conflict because they are required to file a

petition for appeal with information it knows is incomplete or inaccurate. What happens when the denial notice letter is admittedly defective? If the total amount of the refund (*i.e.*, the amount in controversy) has not yet been determined by Respondent or communicated to the taxpayer? If there is a known calculation issue that is supposedly being resolved by Respondent, and an additional refund check was issued establishing the amount in controversy? All of these circumstances occurred in this matter. It is undisputed that the correct amount to be challenged and the corresponding issues associated with that amount were not fully resolved until February 27, 2020, when Ms. Acree confirmed the mathematical error contained in the Second Denial, authorized payment of an additional $23,671.54 to Equinor, and notified it of that payment by email. D.R.0306; D.R.0323. Therefore, February 27, 2020 was the exact date Equinor identified on its petition to the WVOTA as having received the notice of refund denial. D.R.0306. Without the information contained in that February 27, 2020 email and/or payment, Equinor could not correctly recite the information required by West Virginia State Rule § 121-1-18. Until that final payment was received, Equinor could not have verified under oath that its petition contained the correct amount in controversy and that every factual and legal error had been correctly identified. This was recognized by the WVOTA in its initial order:

> We address this matter with some level of discomfort. . . . [Equinor's representative]'s efforts to obtain a "good number" in this matter were, in part, for the benefit of this Tribunal. Simply put, [Equinor's representative] was seeking to avoid stating that an appeal was over $100,000.00, only to come back later and say "now that we have fixed the mathematical/accounting disagreements, this case is really about $90,000.00."
>
> D.R.0112.

Moreover, the fact that Respondent continued to examine the actual amount in dispute (and issued an additional refund) more than sixty (60) days after the Second Denial was issued

demonstrates that the Second Denial was defective and inaccurate, and did not constitute Respondent's final ruling as to Equinor's Refund Request. D.R.0306.

Despite this mutual understanding that the Second Denial was defective, both Respondent and the ICA take the position that Equinor should have, under oath, filed a petition for appeal that it knew to contain incomplete, defective, or incorrect information about its 2015 tax return within sixty (60) days after receipt of the Second Denial. That is unconscionable, particularly given the potential for perjury and/or charges for a misdemeanor referenced in as the applicable regulation at that time, West Virginia State Rule § 121-1-21. This is certainly not what the regulations require of a taxpayer when filing an appeal, or in the spirit of fairness. Respondent's position also undermines the coordination and communication shared by taxpayers and Respondent when they work collaboratively to resolve issues, and will undoubtedly result in the filing of unnecessary or precautionary appeals that clog the docket of the WVOTA and slow work for all involved.

When two statutes conflict like this, the Court has opined that it "'must, if reasonably possible, construe such statutes so as to give effect to each' but, if effect cannot be given to each, '[t]he general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.'" *State ex rel. Morgantown Operating Co., LLC v. Gaujot,* 245 W. Va. 415, 428-429, 859 S.E.2d 358, 371-372 (2021) (*quoting* Syl. Pt. 9, *Barber v. Camden Clark Mem. Hosp. Corp.,* 240 W. Va. 663, 815 S.E.2d 474 (2018) *(quoting* Syl. Pt. 4, in part, *State ex rel. Graney v. Sims,* 144 W.Va 72, 105 S.E.2d 886 (1958)) and Syl. Pt. 1, *UMWA by Trumka v. Kingdon,* 174 W.Va. 330, 325 S.E.2d 120 (1984)). The correct answer to this conflict is clear: deem the final payment of $23,671.54 as the date Equinor received the notice of refund denial. This is the correct notice under the statute, and has the added benefit of resolving the conflict created by the ICA's decision.

The underlying statutes indicate a desire for petitions to be accurate, so much so that they must be detailed and submitted under oath. Accuracy in this case could only have occurred once Equinor received the final payment on February 27, 2020. Identifying that date as the true date of notice allows for the statutes to "give effect to each other" and be read harmoniously. Accordingly, the Court should find that the true date of notice for the denial of Equinor's 2015 Refund Request occurred on February 27, 2020. As it is undisputed that its appeal was filed within sixty (60) days of that date, it is timely. The case must resolve in Equinor's favor.

V. In the Alternative, Respondent Is Equitably Estopped And the ICA Erred and Abused Discretion Finding Otherwise

Critically, even if Respondent's notice date is considered correct, equitable estoppel of Respondent's challenge to the WVOTA's jurisdiction over the tax year 2015 refund appeal is the correct remedy. Specifically, Equinor was induced by Respondent to refrain from filing an appeal to the WVOTA as (a) the actual amount of tax that was to be disputed was not resolved until February 27, 2020; and (b) Respondent had promised—as the agency had previously done—to withdraw, revise, and resend a subsequent refund denial letter for the 2015 Refund Request. D.R.308-309; D.R.0245-247. That third refund denial letter never arrived despite frequent communications between Equinor and Respondent. D.R.0308-309. Despite this reasonable reliance—and a finding by the WVOTA that the traditional (non-elevated) elements of estoppel were met—the ICA erroneously concluded that Equinor "mistakenly" relied upon a mere "employee" of Respondent and that Equinor could not "avail itself of equitable estoppel to expand [WV]OTA's jurisdiction to consider objections to the Tax Commissioner's determinations concerning tax year 2015" because of Equinor's "sophistication." D.R.0388. In doing so, the ICA also erred and abused its discretion by concluding that equitable estoppel did not apply, questioning the applicability of precedent like *Hudkins* to this case, and finding that a showing of

affirmative misconduct or wrongful conduct is required to estop the government. D.R.0387-391. Overall, the ICA misapplied the legal standard, applied a new and impossible standard, and made a mistake in the facts.

1. The ICA Failed to Apply Applicable Precedent, and Instead Created A New Legal Standard

Surprisingly, this Court—while it has identified equitable estoppel as a potential remedy for parties who have missed deadlines—has yet to be given the opportunity to analyze and apply in detail the elements of estoppel to tax deadline requirements when Respondent, either through Respondent's actions or conduct, directly induces a taxpayer to refrain from bringing an action within the statutory period. Because of this dearth of cases, the WVOTA has turned to this Court's decision in *Hudkins v. State Consol. Pub. Ret. Bd.*, 220 W. Va. 275, 647 S.E.2d 711 (2007) for guidance on how to apply equitable estoppel against Respondent. However, the WVOTA's historical application of this Court's holding has been flawed: instead of analyzing the myriad circumstances in which equitable estoppel has been applied against the government (as cited in *Hudkins*), the WVOTA required taxpayers to prove affirmative misconduct or wrongful conduct. (ICA D.R. 0120). The ICA agreed with the "[WV]OTA's longstanding practice of requiring a taxpayer to prove affirmative misconduct or wrongful conduct by the Tax Commissioner" and found that the WVOTA "properly determined that Equinor did not establish affirmative misconduct or wrongful conduct by the Tax Commissioner in this case." DR.0389. While this Court has made it clear that a citizen seeking to estop the state must meet additional tests in addition to the regular elements of estoppel, the ICA is incorrect to hold that a taxpayer must prove affirmative misconduct or wrongful conduct by Respondent to satisfy this burden. D.R.0387-391. This Court should clarify its holding in *Hudkins* to mirror the interpretation of the Circuit Court

and apply such standard to this case, thereby estopping Respondent from challenging the WVOTA's jurisdiction over the Refund Request.

In *Hudkins*, the plaintiff sought to convert accumulated sick leave to service credit, thereby allowing the plaintiff to retire early. *See* 220 W.Va. at 276-277, 647 S.E.d2d at 712-713. A state agent assured Ms. Hudkins, both verbally and in writing, that such a conversion was possible. *Id.* Based on those assurances, Ms. Hudkins retired. *Id*. Two years later, the state refused to let Ms. Hudkins convert her unused sick leave to service credit. *Id.* Appeals followed, and the case eventually arrived at this Court, in which the Court estopped the state from denying Ms. Hudkins' conversion. In arriving at this conclusion, the Court acknowledged that the government may be estopped and relied on other jurisdictions for guidance, most notably 28 Am.Jur.2d *Estoppel and Waiver* § 140:

> **§ 140. What must be shown to estop government.**
> In recognition of the heavy burden bourne by one seeking to estop the government, courts have held that the doctrine of 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 out weighed 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 estoppel.

See 220 W.Va. at 280, 647 S.E.d2d at 716.

It is from this singular reference to American Jurisprudence that the WVOTA derived its "affirmative misconduct or wrongful conduct" test. However, the ICA did not delve into the actual analysis or holding of *Hudkins* to see whether it required a showing of "affirmative misconduct or wrongful conduct," or analyze whether the WVOTA had proper legal authority for its "affirmative misconduct or wrongful conduct" test. Had it done so, the ICA would have seen the fundamental flaw in both Respondent's argument and the WVOTA's test—they are entirely based on a singular quote of a secondary source, and are contrary to the actual analysis and holding of the *Hudkins* Court. *Hudkins* never considered or required affirmative misconduct or wrongful conduct be proven. *See* 220 W.Va. at 276, 647 S.E.d2d at 712. Indeed, no analysis of what "affirmative misconduct" or "wrongful conduct" is contained anywhere within *Hudkins*—those terms were never used outside of the block quote of American Jurisprudence. *Id.* Rather, when actually rendering its decision, the *Hudkins* Court relied on the traditional elements of estoppel between private parties, as outlined in Syllabus Point 6 of *Stuart v. Lake Washington Realty Corp.*, 141 W.Va. 627, 92 S.E.2d 891 (1956), in Section 28 of the Second Edition of American Jurisprudence, *see Estoppel and Waiver* § 140, and in the advice of Syllabus Point 7 of *Samsell v. State Line Development Company*, 154 W.Va. 48, 174 S.E.2d 318 (1970). *See* 220 W.Va. at 282, 647 S.E.d2d at 717. The *Hudkins* Court concluded that "by permitting estoppel to operate in this case, we will prevent a manifest and grave injustice" and that a "strong public interest or operation of public policy will be defeated by this decision." 220 W.Va. at 282, 647 S.E.2d at 718.

Given the actual analysis and holding of *Hudkins*, the question of whether "affirmative misconduct or wrongful conduct" must be proven for the purposes of estoppel is categorically answered in the negative. The ICA was wrong to find otherwise, and to condone the WVOTA's

practice of doing so.[2] This is particularly true, as the ICA did not independently review or analyze the *Hudkins* decision, or the authority cited therein.[3] Instead, the ICA simply adopted the WVOTA's incorrect interpretation of *Hudkins.* Because it applied the incorrect legal standard, the ICA's decision is in error and an abuse of discretion.

2. <u>Equinor Undisputedly Met the Proper and Traditional Standard for Estoppel Against the Government</u>

Unlike the ICA, the Circuit Court of Kanawha County, West Virginia correctly concluded that "affirmative misconduct or wrongful conduct" is not necessary to estop the government, and directed the WVOTA to apply the following standard:

> [E]stoppel against the government may be raised only when there is affirmative misconduct or wrongful conduct *or*:
> — the injury to the public interest if the government is estopped is out weighed 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.

[2] The ICA appeared to provide great weight to the WVOTA's longstanding practice of applying the "affirmative misconduct or wrongful conduct" test, without any regard to whether that test was well founded in law, or consistently applied among the various Administrative Law Judges. D.R.0388. As WVOTA's May 5, 2022 decision showed, the WVOTA is fully capable of finding estoppel when the proper standard is applied. D.R.0079-81.

[3] The ICA also failed to analyze or consider the block quote from American Jurisprudence contained in *Hudkins*. This was an error and abuse of discretion as the quote, on its face, disproves the WVOTA's and Respondent's position. That quote states that equitable estoppel may be asserted against the state for "affirmative misconduct or wrongful conduct" and immediately states that "[l]ikewise, courts have held an estoppel against the government may be raised" in six different scenarios. The common definition of "likewise" is "in like manner; similarly," or "in addition." *See* "Likewise." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/likewise. Accessed 3 Apr. 2024. This is consistent with how the West Virginia Supreme Court of Appeals has interpreted that word historically, as a synonym of "in addition to." *See, e.g., State v. State Rd. Comm'n*, 100 W. Va. 531, 131 S.E. 7 (1925) (when interpreting regulations, "the words "in addition to" are equivalent to "also," "likewise," and "besides."). Thus, the use of the word "likewise" in the American Jurisprudence demonstrates that (a) "affirmative misconduct or wrongful conduct" are not the only acceptable methods of applying equitable estoppel to the government; and (b) there are equally effective alternatives, including the six situations listed in in the quote. As explained infra, it is precisely those alternatives of "manifest and grave injustice" and "strong public interest" that dictated the holding in *Hudkins*, thereby proving Equinor's interpretation of that case and its American Jurisprudence quote is correct.

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

D.R.0095

This is the traditional standard for estopping the government, and is harmonious with this Court's decision in *Hudkins* and the express language of the American Jurisprudence quote contained therein. It forces parties to meet a higher standard than estoppel when seeking to estop the government, but is not limiting that standard to a showing of "affirmative misconduct or wrongful conduct." This is the correct standard that controls this case.

In applying the Circuit Court's correct standard, the WVOTA correctly concluded that Equinor met all of the factors. It stated:

> In weighing the six factors above, we must deny the Tax Commissioner's Motion to Dismiss. It should be noted that the issue at hand is this Tribunal's jurisdiction to hear the matter, not who may or may not prevail in a case implicating hundreds of thousands of dollars. Taking the factors in order, first, allowing the Petitioner its proverbial day in court will not harm the public interest at all. Estopping the Tax Commissioner will prevent a manifest injustice, namely, it prevents the Tax Commissioner from avoiding liability for a potential error. Giving the Petitioner its day in court will not interfere with the exercise of any government functions. Due to the amount of money involved, not estopping the Tax Commissioner would be highly inequitable or oppressive to the Petitioner, although, as stated above, this Order does not mean that the Petitioner will ultimately prevail. Finally, the Tax Department's conduct in this matter did work a serious injury to the Petitioner, and as stated above, the public's interest is not harmed by giving the Petitioner its day in court.

D.R.0081

The WVOTA therefore expressly found that Equinor satisfied the traditional legal standard for equitably estopping the government. The ICA made no contrary findings or holding. Thus, when the correct standard is applied, all the factors of the traditional legal standard are satisfied, equitable estoppel is warranted, and this case resolves in Equinor's favor.

3. The New Standard Put Forth By The ICA Is Impossible To Satisfy

The ICA's new standard requires a taxpayer to prove "affirmative misconduct or wrongful conduct" in order to estop the government. D.R.0387-391. This is an impossible standard that deprives taxpayers of any meaningful estoppel claims. The WVOTA, when considering its "affirmative misconduct or wrongful conduct" test, has expressly stated that "[f]or 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." D.R.0095; D.R.0120-0121 (emphasis added). This admission clarifies that the standard put in place by the WVOTA and the ICA is impossible for any taxpayer to prove, so much so that the WVOTA cannot even hypothesize a situation in which it *could* be proven.[4] The "affirmative misconduct or wrongful conduct" standard is—functionally and effectively—a prohibitive and absolute bar to the application of equitable estoppel to Respondent. As this Court has previously said, "a rule that entirely barred the consideration of equitable principles in the enforcement of tax refund filing deadlines could be unconscionably harsh." *Helton* 638 S.E.2d at n. 6. To permit the impossible "affirmative misconduct or wrongful

[4] Both WVOTA and the ICA found that Respondent did not commit affirmative misconduct or wrongful conduct, further confirming the impossibility of this standard. D.R.0079-81; D.R.0130-143; D.R.0387-391. However, Equinor has to stress that WVOTA found that (a) a high ranking official of Respondent who was very knowledgeable of the case promised Equinor that a third denial letter would be sent to it, which would have nullified the Second Denial (as the Second Denial nullified the First Denial) and restarted the sixty day appeal period; (b) Respondent failed to keep that promise to issue a third denial letter; and (c) Respondent seized upon its failure to issue the promised third denial letter to take the position that Equinor had failed to timely file its appeal in an effort to avoid payment of a valid tax refund worth hundreds of thousands of dollars. D.R.0079-81; D.R.0130-143. Respectfully, the facts of this case are extraordinary. Although affirmative misconduct or wrongful conduct is not the correct legal standard (as discussed above), the gravity of Respondent's conduct and the injustice caused are sufficient to justify equitable estoppel regardless of the articulated legal standards. In short, if there was ever a set of facts that met the WVOTA's and ICA's affirmative misconduct or wrongful conduct standard, this is it.

conduct" rule to exist would be "unconscionably harsh" under this Court's own assessment. This further confirms that the decision of the ICA was in error and contrary to law.

4. <u>The ICA Failed To Examine Cases Upon Which It Relied, Which Are Distinguishable</u>

The ICA's holding that "affirmative misconduct or wrongful conduct" is required rested, in large part, upon its assertion that the traditional legal standard contained in *Hudkins* could not stand in light of other, allegedly more pointed precedent, particularly *Cate v. Steager*, No. 16-0599, 2017 WL 2608434, at *1 (W. Va. June 16, 2017).[5] D.R.0387-391. The ICA, however, did not engage in a detailed analysis of that case or its progeny. *Id.*

While Equinor agrees with the ICA that the legislature "intended to impose strict jurisdictional deadlines in connection with tax refunds," it does not agree with the ICA's conclusions that equitable estoppel has not been applied "to tax disputes on facts more compelling than those in the case." D.R.0387-391. Though this Court has not had a recent opportunity to conduct a detailed analysis of when equitable estoppel actually applies in a circumstance—like here—in which a taxpayer was induced to refrain from bringing an action within the statutory period due to the actions or conduct of Respondent, its precedent shows that equitable estoppel absolutely may be applied to Respondent.

This Court has faced the question of equitable estoppel in regard to statutes of limitation and taxation numerous times. The ICA relies upon these past decisions, specifically *Bradley v. Williams*, 195 W. Va. 180, 465 S.E.2d 180 (1995) and *Helton v. Reed*, 219 W. Va. 557, 638 S.E.2d 160 (2006), to support the propositions that "[a] taxpayer's failure to abide by the express

[5] The ICA takes issue with *Hudkins* being a per curium decision, while relying on *Cate* which is unpublished. D.R.0387-391. It also notes that *Hudkins* was limited to its own facts, while *Cate* specifically holds that "[u]pon our review, ***based on the facts and circumstances of this*** case, we find that the circuit court did not err in affirming the OTA's order dismissing petitioner's petition for reassessment." *Cate*, 2017 WL 2608434, at *4; D.R.0387-391. These apparent contradictions are not addressed or explained.

procedures established for challenging a decision of the West Virginia State Tax Commissioner . . . precludes the taxpayer's claim for refund or credit" and that "filing requirements established by statute . . . are not readily susceptible to equitable modification or tempering." *Bradley* at 184, 465 S.E.2d at 184, *Helton* at 561, 638 S.E.2d at 164; D.R.0387-391. However, neither of these cases (nor *Cate*, WL 2608434, at *4 (W. Va. June 16, 2017) (memorandum opinion) which is also cited by the ICA)[6] totally foreclosed the applicability of equitable estoppel. D.R.0387-391. Rather, these cases support the position that equitable estoppel may be appropriate where a taxpayer relies upon actions or conduct of Respondent to the detriment of the taxpayer.

For example, in *Bradley v. Williams*, this Court approved of equitable modification of the statute of limitations and undertook an analysis of the differences between equitable tolling and equitable estoppel:

> The two types of equitable modification [regarding the statute of limitations] are generally recognized: "(1) equitable tolling, which often focuses on the plaintiff's excusable ignorance of the limitations period and on lack of prejudice to the defendant and (2) equitable estoppel, which usually focuses on the actions of the defendant."

[6] The ICA cites to *Cate* and its string-cite to support the proposition that this Court (and others) has "restrict[ed] the use of equitable modification in tax cases." D.R.0387-391. However, *Cate* did not involve the assertion of equitable estoppel against Respondent, and, further, none of those cases offer a parallel to the case at hand—all are distinguishable and several have nothing to do with taxes: *Elk Run Coal Company v. Babbitt*, 930 F.Supp. 239 (S.D.W.Va.1996) (holding that the *government* could not appeal due to a missed non-tax-related deadline); *State ex rel. Clark v. Blue Cross Blue Shield of W.Va., Inc.*, 195 W.Va. 537, 466 S.E.2d 388 (1995) (examining the procedures in seeking claims against insolvent health service corporations), while others, *Helton v. Reed* and *Bradley v. Williams*, have already been discussed and distinguished *supra*. Still others examined the actions of the Respondent and his failure to meet deadlines, including *Concept Mining, Inc. v. Helton*, 217 W.Va. 298, 617 S.E.2d 845 (2005) (indicating that the legislature had spoken directly to the consequence of the Respondent failing to properly review a refund request in a timely manner), or federal tax statutes, *see Webb v. U.S.*, 66 F.3d 691 (4th Cir.1995) (finding that the federal government had not waived sovereign immunity to allow for equitable tolling of tax filing deadlines). Finally, *Cate* cited *Panhandle Used Equip., LLC v. Matkovitch*, 2016 WL 1417785 (2016) (memorandum opinion) to support the proposition that "West Virginia Code § 11-10A-9(b) 'unambiguously provides that petitions must be filed within sixty days of the assessment.'" That case is also distinguishable between the case at hand, as the petitioner in *Panhandle* relied not on the advice provided by Respondent, but instead, the advice provided by "an unlicensed tax preparer." 2016 WL 1417785 at *5. Thus, much of the precedent considered and/or relied upon by the ICA is distinguishable.

195 W. Va. 180, 184, 465 S.E.2d 180, 184 (1995).

Equitable estoppel is the remedy sought in this immediate case, and the analysis contained within *Bradley* is relevant:

> '[E]stoppel applies when a party is induced to act or to refrain from acting to her detriment because of her reasonable reliance on another party's misrepresentation or concealment of a material fact.' . . . Further, 'in order to create an estoppel to plead the statute of limitations the party seeking to maintain the action must show that he was induced to refrain from bringing his action within the statutory period by some affirmative act or conduct of the defendant or his agent and that he relied upon such act or conduct to his detriment.'
> . . .
> Finally, '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 of estoppel against the state*.'

Id. (citations omitted) (emphasis in original).

This Court further considered the application of equitable estoppel in *Helton v. Reed*. 219 W.Va. 557, 638 S.E.2d 160 (2006). Like in *Bradley*, the Court reaffirmed that filing requirements may be susceptible to equitable modification or tempering. *See Helton* at 561, 638 S.E.2d at 164. Indeed, the Court explicitly noted that "a rule that entirely barred the consideration of equitable principles in the enforcement of tax refund filing deadlines could be unconscionably harsh." *Helton* at n. 6. The Court, however, did not analyze the elements of equitable estoppel and instead resolved the case on other equitable grounds, specifically finding that the petitioner in that case was subject to the legal maxim: "he who seeks equity must do equity." *Id.* at 561, 638 S.E.2d at 164. "[The petitioner] wants 'sauce for the goose' – the application of strict jurisdictional deadlines to the procedural error by the commissioner, but not 'sauce for the gander' – the application of the same strict deadlines to a procedural error by [the petitioner]." *Id.* at 562, 638 S.E.2d at 165.

Therefore, while the Court found the petitioner's arguments in *Helton* unavailing, it did reaffirm that tax refund filing deadlines can be modified using equitable principles. *Id.*

As such, this Court's precedent defines the threshold question for whether estoppel may be considered as: "did the Respondent, either through actions or conduct, induce a taxpayer to refrain from bringing an action within the statutory period?"

In *Bradley*, the court unequivocally answered "no" to this question, and therefore did not further analyze the application of estoppel.[7] Here, however, the WVOTA answered the question in the affirmative:

> To summarize, this Tribunal views the facts in this matter as such: the Petitioner receives a refund reduction and calls the Tax Department and says "we are obviously going to appeal your reducing our refund by millions of dollars, but there is a math/accounting error." The Tax Department says 'okay we'll take a look at it, and you'll get a new letter.' Shortly thereafter the Petitioner does in fact get a second refund reduction letter, however, there is still a math/accounting problem. Petitioner calls the Tax Department a second time and is essentially told the same thing as in the first call. The Petitioner waits for the third letter and it never comes. Upon further inquiry, Petitioner is told 'sorry, your issue fell through the cracks, but when you got the refund check you should have known to hurry up and file your appeal. Sorry, you missed the deadline.' Under those facts, this tribunal rules that the Tax Commissioner could be equitably estopped from asserting that the Petitioner missed its statutory deadline to file an appeal with this Tribunal.

D.R.0118-0119.

Taken together, *Hudkins*, *Bradley*, *Helton*, *Cate*, and others set forth the proper framework for this case, whereby equitable estoppel may apply to a tax deadline when Respondent, either

[7] "[I]t becomes clear that the doctrine of equitable estoppel is simply inapplicable. For the Appellant to have been precluded from asserting that the statute of limitations had run, there must have been a misrepresentation, or some affirmative conduct, by the Commissioner to the Appellees which induced the Appellees to refrain from following the statutory procedures for challenging the Commissioner's decision." *Bradley*, 195 W. Va. at 185, 465 S.E.2d at 185.

through actions or conduct, induced a taxpayer to refrain from bringing an action within the statutory period when the traditional equitable estoppel factors are met. The ICA erred by not applying this standard, and in concluding that equitable estoppel had not been applied to "tax disputes on facts more compelling than those in the case."[8] D.R.0387-391. Application of the correct standard for equitable estoppel to the undisputed facts of this case requires a finding in favor of Equinor.

a. <u>The ICA Mischaracterized Ms. Acree's Position And Equinor's "Sophistication"</u>

The ICA based its decision, in part, on its assessment that Equinor "mistakenly" relied upon a mere "employee" of Respondent, and opined that Equinor could not "avail itself of equitable estoppel to expand the [WV]OTA's jurisdiction to consider objections to the Tax Commissioner's determinations concerning tax year 2015" because of its "sophistication." D.R.0387-391. However, the facts of this case contradict that conclusion.

First, it was not a mistake for Equinor to have relied upon Ms. Acree's representations that a third refund letter would be issued, because she was not a mere "employee" of Respondent. This was not a random, low-level tax employee providing *ad hoc* advice to a walk-in taxpayer as to whether a car was entitled to a tax credit.[9] Ms. Acree's title at that time was "Assistant Director"

[8] The facts of this case are unique and fairly unusual, given they are due, in some part, to the unfortunate illness and death of an employee of Respondent. That employee had been tasked by Ms. Acree to perform certain calculations and reconciliations after the Second Denial letter had been issued and found to be incorrect, but was unable to do so. The WVOTA also found that a third refund letter was promised, but never actually delivered despite another refund check being issued—that was communicated by email instead. Taken together, the facts if this case are just as compelling, if not more so, than prior precedent.

[9] See D.R.0114. The WVOTA's "classic example" of equitably estopping Respondent involves a hypothetical taxpayer who purchased a flex fuel vehicle when there was a credit for such. The vehicle's owner drove the vehicle to a local tax office where an employee told the taxpayer the vehicle was eligible for the credit—this advice was mistaken, as the tax employee did not realize the vehicle was used and therefore ineligible for the credit. To bring this hypothetical car owner into a more comparable position to Equinor, however, he or she would have had to have spoken to this same tax employee for years about this same flex fuel credit; the two would have "constant contact"; the two would have often times worked together to determine the eligibility of the credit in years past; and the tax employee had, at all times prior, acted according to their representations about the credit, among others.

with the Tax Account Administration, and she was the supervisor overseeing this particular Refund Request. Moreover, Ms. Acree demonstrated her authority in this matter by: (1) representing that she would "pull[] back" the First Denial; (2) having that First Denial *actually* pulled back consistent with her representation; (3) ordering the issuance of the Second Denial with a revised refund amount; (4) having a refund check issued to Equinor from Respondent; (5) directing an employee of Respondent to resolve further mathematical issues; and (6) after confirming there was in fact a mathematical error in the amount of the refund listed in the Second Refund letter, directed an employee of Respondent to pay a specific amount to Equinor via check. *See* D.R.0089, D.R.0130-143 (WVOTA findings of fact); D.R.263-264 (testimony of Ms. Acree); D.R.308-309, D.R.0317, D.R.0323 (email in which Ms. Acree orders February 2020 refund check); D.R.0335. She was not a mere employee following orders or acting without authority; rather, she acted—multiple times—with the effect of the authority of Respondent, consistent with her title. The ICA's mischaracterization of her status and authority was in error and simply contrary to the undisputed facts. If anything, Ms. Acree's title and demonstrated authority provided additional reasons as to why Equinor should have relied upon her representation that a third denial letter would be issued.

Second, Equinor was right to rely on the statements of Ms. Acree and had no reason to doubt her follow-through that a third denial letter was forthcoming. She had, multiple times, followed through with her prior representations in this matter, including her representation that the First Denial would be pulled back, that a Second Denial would be sent, that two different refund checks would be issued, and that a specific employee of Respondent had been tasked with investigating calculation discrepancies. Unfortunately, due to the sickness and death of the employee that was directed to reconcile the numbers for the third refund letter, Respondent allowed

the issue to lapse or, as the WVOTA described, permitted it to fall "through the cracks." *See* D.R. 118-119; D.R.308-309.

Third, Equinor was right to rely on the statements of Ms. Acree because what she represented would occur (i.e., that third letter was forthcoming) was entirely consistent with the parties' past practice. The amount in the First Denial had been incorrect, and Ms. Acree pulled back that letter and issued the Second Denial to replace and moot it. Ms. Acree then agreed with Equinor that the amount in the Second Denial was also incorrect. At that time, she represented in a telephone call that a third denial letter would be issued to Equinor. That representation was consistent with Respondent's past practice, and was exactly what had been done with the First Denial and Second Denial. This past practice of pulling back an incorrect denial letter and replacing it with a new one made it even more reasonable for Equinor to rely upon it.

Fourth, the ICA put far too much weight and negative connotation upon Equinor being "a sophisticated taxpayer, represented by a very sophisticated consulting firm." D.R.0114. The ICA viewed this sophistication adversely, perhaps in reference to a hypothetical fleetingly referred to in a footnote of *Helton*.[10] However, this sophistication is not a determinative element of analysis in any of the cases cited by Respondent or the ICA, and Respondent has put forth no authority that a "sophisticated" party cannot assert equitable principles. It could be, at most, one of the many non-dispositive factors that may be considered. In actuality, the sophistication of Equinor and/or its tax consultant is not negative at all—it is precisely what allowed for a strong coordination and collaboration between the parties. There is ample evidence that Equinor and Respondent were in

[10] *Helton v. Reed*. 219 W.Va. at 561 n.6, 638 S.E.2d at 164 (2006) which states, in part, "Of course, a rule that entirely barred the consideration of equitable principles in the enforcement of tax refund filing deadlines could be unconscionably harsh. (Consider the case of an unsophisticated taxpayer who was given erroneous information by a tax official.)" To be clear, nowhere else in *Helton* does it consider a taxpayer's sophistication as an element of equitable estoppel, nor does it hold that a sophisticated taxpayer cannot assert equitable principles.

frequent contact regarding this case. D.R.0114 (Equinor was "in constant contact with the Tax Department, discussing every detail of the company's tax filings."); D.R. 0133; D.R.308-309. The parties have effectively communicated for many years, and often worked out their numerical discrepancies, as they attempted to do here. *Id.* This resulted in a shared history where the parties followed through with the actions they represented they would do, particularly as it came to the pullback and issuance of new denial letters. None of this evidence was given any persuasive weight by the ICA, though it also arose from the "sophistication" of Equinor and/or its consultant.

For these reasons, the ICA erred and/or abused its discretion to the extent it based its decision on a mischaracterization of Ms. Acree's position or authority, and on how Equinor's "sophistication" was a negative factor against equitable estoppel. Instead, Ms. Acree's title and demonstrated authority rendered Equinor's reliance more reasonable, and the parties developed a shared history of productive communications and collaboration because of the alleged "sophistication."

CONCLUSION

For the foregoing reasons, Equinor requests this Court to reverse the ICA's ruling. Equinor's appeal was timely filed after receiving notice on February 27, 2020 about Respondent's final determination of its refund for tax year 2015. In the alternative, Equinor has undisputedly established all elements of the traditional test for equitably estopping the government, which is the only test for which there is actual precedent.

Based on the foregoing, and the arguments presented by Equinor in its briefings before the WVOTA (see D.R.0149-160 and D.R.0284-325), Circuit Court of Kanawha County, West Virginia (see D.R.0662-674 and D.R.700-714) and the ICA (see D.R.0440-482, D.R.0528-576, and D.R.0392-393), Equinor respectfully requests that this Court:

1. Reverse the November 15, 2023 decision of the ICA as to the issue of equitable estoppel found at D.R.0387-391;

2. Affirm the May 5, 2022 decision of the WVOTA found at D.R.0079-81;

3. Affirm the April 12, 2022 decision of Kanawha County Circuit Court at D.R.0082-96;

4. Remand this case to the WVOTA for a reassessment of Equinor's request for refund for tax year 2015 consistent with this Court's opinion; and

5. Grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

Equinor USA Onshore Properties Inc.

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NO. 23-760

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATOIL USA ONSHORE
PROPERTIES, INC.,

Petitioner,

v.

MATTHEW IRBY, West Virginia State
Tax Commissioner

Respondent.

CERTIFICATE OF SERVICE

I, Chelsea E. Thompson, counsel for the Petitioner, do hereby certify that service of the foregoing **PETITIONER'S BRIEF** has been made upon counsel for the Respondent on April 18, 2024, by causing a true copy of the same to be transmitted through the File and Serve X-Press system which will send notification of the same to all counsel of record.

/s/ Chelsea E. Thompson
Chelsea E. Thompson, Esq. (WV Bar No. 12565)