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 REPLY BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is necessary and a memorandum decision is inappropriate for this matter. This case involves matters of first impression as to when "notice" of a refund denial is made by the Tax Division and will provide clarity as to the legal standard for applying equitable estoppel to statutory deadlines and/or the Tax Commissioner. Accordingly, Rule 20 oral argument is appropriate.

ARGUMENT

Despite the Tax Commissioner's arguments, the decision of the Intermediate Court of Appeals ("ICA") should be overturned, as it was incorrect to rule that Equinor's petition to the Office of Tax Appeals ("OTA") was outside the statutory timeframe to file. The Tax Commissioner did not make a final determination on Equinor's refund request until February 27, 2020, when it issued a final refund check, and Equinor timely filed within sixty days. Thus, its appeal was timely. Any prior notices, including the first and second refund denial letters, were inadequate.

Moreover, even if the Court does determine that notice was sufficient, equitable estoppel remains the appropriate remedy in this case. The statute is not jurisdictional, and Equinor is seeking a limited application of estoppel to a unique set of facts that have not (and likely will not) appear again in the future.

I. Equinor's Appeal Was Timely

In its brief, Equinor explains that its appeal for tax year 2015 was timely because the Tax Commissioner provided notice of its final decision as to Equinor's refund request on February 27, 2020 when it issued Equinor a final refund check, and Equinor appealed (the remainder of its refund which the Tax Commissioner denied) within sixty days. The Tax Commissioner takes the

position that Equinor's appeal was untimely because notice was provided on February 27, 2019 with the Second Denial Letter. To bolster this position, the Tax Commissioner relies on case law developed under the constitutional theory of procedural due process. To be clear, Equinor has not asserted this claim and has found no case that holds that the notice cited in W. Va. Code § 11-10-14(d)(1), which starts the sixty-day appeal deadline, must also qualify as procedural due process notice. The Tax Commissioner dedicates a large portion of its brief to procedural due process cases that are either factually or procedurally different than this case at bar, which could be—at most—merely persuasive authority.[1] Critically, even *if* procedural due process were relevant or applicable here, which Equinor does not concede, the Second Denial Letter is insufficient under that notice standard.

II. The Notice Provided in the Second Denial Letter was Deficient, as the Tax Commissioner Had Yet to Make a Determination on Equinor's Refund Request.

[1] Additionally, many of the cases cited in the Tax Commissioner's brief on the issue of notice or procedural due process actually support Equinor's position in meaningful ways. For example, in *Lee Trace, LLC v. Raynes*, 232 W.Va. 1183, 751 S.E.2d 703 (2013) the plaintiff was unaware of the consequences of governmental action after a plain reading of the alleged notice, and Footnote 5 specifically states that the courts have permitted tax cases to move forward where their formal notice did not accurately or sufficiently alert taxpayers to appeal rights; here the Second Refund Notice which the Tax Commissioner urges this Court to accept was rendered insufficient and inaccurate within a day due to Equinor's telephone call with a high-ranking representative of the Tax Division, in which it is undisputed that the Tax Commissioner promised a third refund denial letter and the parties' established an understanding that Equinor would not pursue an appeal while that process was pending. In *Pritchard v. Catterson*, 184 W.Va. 542, 401 S.E.2d 475 (1990), W. Va. Code § 29A-5-1 actually lays out specific requirements for any notice of hearing from the West Virginia Board of Medicine, including the "date, time and place of the hearing and a short and plain statement of the matters asserted;" in contrast, the provision at issue here, W. Va. Code § 11-10-14(d)(1), just requires "notice of denial of taxpayer's claim" without any specific form or substance. In *Penn Virginia Operating Co., LLC v. Yokum*, 242 W.Va. 116, 829 S.E.2d 747 (2019), the court recognized that the notice "blurred" the taxpayer's appeal rights, just as Equinor's appeal rights were, at a minimum, "blurred" by the promises and understandings made during its telephone conversation with the Tax Commissioner. Thus, the cases favor Equinor. Finally, in *W.Va. Nonintoxicating Beer Com'r v. A & H Tavern*, 181 W.Va. 364, 382 S.E.2d 558 (1989), the Court found that the notice under W. Va. Code § 11-16-12 was sufficient because the defendant's subsequent conduct comported with it; in contrast, Equinor's subsequent conduct does not establish that the Second Denial Letter was sufficient and, in fact, shows the opposite—Equinor did not appeal as outlined in the Second Letter because it justifiably relied upon the Tax Commissioner's promise of a third letter, and the parties undisputed understanding that no appeal would be pursued while that process was pending. Accordingly, though the Tax Commissioner cites each of these cases for a specific phrase or sentence, the overall holdings and analysis of these cases favor Equinor. The same issue of focusing on a single phrase or word is fatal to the Tax Commissioner's interpretation of the legal standard for equitable estoppel laid out in *Hudkins*, as explained fully in Equinor's brief.

The Tax Commissioner's argument that the Second Denial Letter constitutes notice under procedural due process, and therefore W. Va. Code § 11-10-14(d)(1), is unpersuasive. As acknowledged by the Tax Commissioner, "'[a]dequate notice' is a basic prerequisite for 'administrative' actions." Resp't Brief at 20 (quoting *W. Va. Nonintoxicating Beer Comm'r v. A & H Tavern*, 181 W. Va. 364, 368, 382 S.E.2d 558, 562 (1989)). However, the Tax Commissioner argues in its brief that it does not need to calculate the actual amounts of refund being denied in order to provide adequate notice. In fact, the Tax Division claims that its notice does not need to be "mistake-free" or to even meet the "standards applicable in a judicial proceeding." Resp't Brief at 20-21. This position defies both common sense, which dictates that any notice that contains mistakes does not provide adequate notice, and the applicable statute's mandates.

This is, after all, a refund case, so we must return to the applicable tax code governing refunds. After a taxpayer, like Equinor, submits a timely claim for refund or credit, the Tax Commissioner "shall determine the taxpayer's claim and notify the taxpayer in writing of his or her determination." W. Va. Code § 11-10-14(c). Although "determine" or "determination" are undefined terms in this code, subsection (a) provides further clarity as to what steps the Tax Commissioner must take prior to rendering its determination, and states in relevant part: "the Tax Commissioner shall . . . refund to the taxpayer the amount of the overpayment or . . . apply the same as a credit against the taxpayer's liability for the tax for other periods." W. Va. Code § 11-10-14(a). Moreover, the "refund or credit shall include any interest due the taxpayer . . . ." *Id.* In doing so, the legislature mandated that when rendering a determination on a refund claim, the Tax Commissioner must identify the amount of the overpayment, including interest, that a taxpayer should be refunded or credited with. Put another way, the statute requires the Tax Commissioner to actually calculate the dollar value of overpayment for which a refund will be granted—and by

the other side of the coin—the dollar value of taxes properly paid for which a refund will be denied. This makes sense, as the amount of the refund granted (or conversely, denied) would be key information for a taxpayer to know before deciding whether to seek further review or appeal. Given the statutory mandate of W. Va. Code § 11-10-14(a), any notice from the Tax Commissioner that lacks a dollar value, or has incorrect dollar values, as to the amount of refund cannot be sufficient notice of the Tax Commissioner's determination of a refund claim.

The Tax Commissioner nonetheless argues that providing the mere "substance" or rationale behind a denial of refund claim suffices. As claimed in its brief: "[The second refund denial letter] said [the Commissioner] was 'denying marketing, demand fees and administrative fees' as a deduction as well as 'the 15% safe harbor.' . . . The letter notified that the $4.8 million refund it requested was substantially decreased because of that decision.'" Resp't Brief at 21. The Tax Commissioner seemingly argues that as long as the rationale for its decision to deny or grant a refund is provided, the disputed amount is irrelevant or may be incorrect: "Yes, the refund amount in the second letter was short a little over $23,000. . . . But an agency's notice doesn't have to be mistake-free." *Id.* In support of this position, the Tax Commissioner cites to *McJunkin Corp. v. West Va. Human Rights Comm'n*, 179 W. Va. 417, 369 S.E.2d 720 (1988)—a case involving a human rights complaint regarding a layoff. However, in no way does *McJunkin* stand for the proposition that a notice issued by an agency "doesn't have to be mistake-free"; rather, *McJunkin* defines what information a "complaint before an administrative agency" must contain and whether an agency—not the taxpayer—has been provided the appropriate notice to prepare a legal defense. *See* 179 W. Va. at 421, 369 S.E.2d at 724. The case is therefore far afield from the facts and procedural posture of this case, as it looks at an entirely different type of notice (of administrative proceeding in *McJunkin* v. notice of refund denial here) that is made to a different party (to a state

agency in *McJunkin* v. to the taxpayer here). Interestingly, even if *McJunkin* was considered somehow as persuasive authority, the Second Denial Letter would fail its test, as it undisputedly did not contain "essential elements" of the Tax Commissioner's determination, like the dollar amount of overpayment or refund required by W. Va. Code § 11-10-14(a). *See* 179 W. Va. at 421, 369 S.E.2d at 724 (notice of a complaint before an administrative agency must "establish all the essential elements of a particular charge or charges."). Overall, none of the cases cited by the Tax Commissioner, including *McJunkin*, permit the Tax Commissioner to provide a taxpayer with notice riddled with mistakes, particularly as to key information like the dollar amount of the refund granted or denied.

Taking all of this into consideration, for the Tax Commissioner's notice of its determination of Equinor's refund claim to have been adequate and to have complied with the statutory mandate, that notice must have provided the actual, accurate amount of money that was overpaid and being refunded. That amount was not fully determined by the Tax Commissioner until February 27, 2020, when the Tax Commissioner issued a refund check in the amount of $23,671.54 additional dollars to Equinor for the "original refund for this claim." D.R.0363; D.R.0206 (Ms. Acree testifying that the amount of the refund, and not the automatically generated denial letter, is what management at the Tax Division actually reviews and decides).

This was echoed by the Tax Commissioner's representative during the evidentiary hearing, in which Ms. Acree testified as follows:

> ATTORNEY PAPADOPOULOS: So just for clarification, the amount in the second letter which the State is saying should have been appealed, the $3.2 million, was not actually what was refunded. The actual final refund amount after the year had passed was 3.3. In other words, another $23,000 was added. Is that accurate?
>
> MS. ACREE: That's correct.

D.R.0209.

> ATTORNEY PAPADOPOULOS: So the $3.2 million number that was in the second
> letter that the State's claiming should be appealed was not really the final letter, or excuse me, the final number as far as what ---. In other words, that was not in the end an accurate number of what was --- what was refunded?
> MS. ACREE: It was not.

D.R.0212

> ATTORNEY PAPADOPOULOS: Okay. So there is not a letter at the end that indicates
> what the --- you know, the final approval was?
> MS. ACREE: No. It's only in our tax system and the taxpayer has the checks that they
> receive.

D.R.0213

As such, the Tax Commissioner admittedly did not make a full or final determination regarding Equinor's refund claim until February 27, 2020 when it issued the final refund check.[2] Interestingly, at that time, the Tax Commissioner merely copied Equinor's tax consultant on an email, rather than send the promised third denial letter along with the check.[3] Regardless, it is undisputed that both the First Refund Denial Letter and Second Refund Denial Letter contained

[2] Equinor argues that the Code contains a second instance in which an appeal may be lodged; pursuant to Section 11-10-14(d)(1) of the Code: "if the Tax Commissioner has not determined the taxpayer's claim within 90 days after the claim was filed" "the taxpayer may file, with the [Office of Tax Appeals], either personally or by certified mail, a petition for refund or credit." There is no limitation associated with the time to file a petition when the Tax Commissioner fails to make a determination on a refund request. This supports *another* theory under which Equinor's appeal was timely: the Tax Commissioner did not render its final decision on Equinor's refund request within ninety-days of that request being made—in fact, the Tax Commissioner took a year (well over ninety days) to simply render a decision as to the disputed $23,000. Thus, under this second code provision, Equinor was free to appeal its refund request *without* any sixty-day deadline.

[3] Equinor explained in its brief how this email may, too, constitute sufficient notice of the final denial of its refund request. The Tax Commissioner has taken the position that the email cannot act as notice for the purposes of the statute, which is unsupported by the plain language of the statute that contains no such limitation and none of the cases by the Tax Commissioner in its brief found that formal, written, or non-email notice was the only sufficient method of notice. In fact, the Tax Commissioner very well could have issued a third refund denial letter upon making his determination and sending the refund check in February 2020, but inexplicably chose to send an email instead. This leaves the Tax Commissioner's position on notice to be without merit.

inaccurate amounts, and therefore are inadequate for the purposes of providing Equinor notice as to the Tax Commissioner's final determination of its refund request. No final determination was made until February 27, 2020, and Ms. Acree admitted at the evidentiary hearing that Equinor would know that the Tax Commissioner had reviewed its refund claims "because they received the refund." D.R.0206. Equinor timely filed a petition with the West Virginia Office of Tax Appeals on April 7, 2020.[4] This Court should reverse the ICA and find Equinor timely appealed.

III. The Sixty-Day Deadline to File a Petition with the Office of Tax Appeals Should Not Be Considered Jurisdictional In Light of Recent SCOTUS Decision

If the Court does find that the Second Denial Letter provided statutorily sufficient notice, that does not mean that the case resolves in the Tax Commissioner's favor. Equitable estoppel in application to this very rare fact pattern would permit Equinor's appeal to continue.

The Tax Commissioner attempts to thwart equitable principals by claiming that the statute governing appeals of refund determinations is jurisdictional. Equinor agrees that the legislature intended to impose a strict deadline on appealing a denial of a refund. However, there is a real and meaningful difference between a strict deadline and a jurisdictional deadline, and the latter should not apply to this particular code section. While the applicable code "unambiguously provides that

[4] In its brief, the Tax Commissioner argues there is no conflict between imposing the sixty-day appeal deadline and the fact that a taxpayers' petition to OTA must contain amounts in dispute and other detailed information that was not fully determined within that sixty-day period. The cases cited by Tax Commissioner when trying to side step this fact are unavailing. For example, in *Panhandle Used Equipment, LLC v. Matkovtch*, Case No. 15-0230, 2016 WL 1417785 (Apr. 8, 2016) (unpublished opinion), the Court recognized that the regulation provided "guidance" on the exact issue of forwarding an appeal mailed to the wrong address, and that regulation was never considered by anyone to be in conflict with the deadline statute, as Equinor argues here. In *Manchin v. Dunfee*, 174 W.Va. 532, 327 S.E.2d 710 (1984), electronic and paper voting ballets were at issue and did contain very different procedures for voting—in contrast, the regulation and statute at issue here are part of the same, single procedure, as the regulation requires Equinor to certify the contents of its petition (including but not limited to the final amount of its refund that was denied or is disputed which was unknown to Equinor until February 2020) and the statute contains the deadline for that exact same petition. Because of this, the regulation and statute in conflict here are much more akin to those in the case *Harrison Co. Comm'n v. Harrison Co. Assessor,* 222 W.Va. 25, 658 S.E.2d 555 (2008) cited by the Tax Commissioner, where the two conflicting statutes required an agency to consult two different governing bodies during the same, single process of hiring an employee.

petitions must be filed within sixty days," it does not preclude the Office of Tax Appeals from having jurisdiction over petitions that are filed late. The statute governing when appeals may be filed focuses on what an appellant of a Tax Division determination must do, stating "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). Similarly, the governing language of the OTA's appeals' provisions provides:

> (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 . . .
>
> . . .
>
> (b) 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 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.
>
> (c) The Office of Tax Appeals shall, within five days of receipt of a timely petition filed pursuant to subsection (a) of this section, provide the Tax Commissioner with a copy of the petition.

W. Va. Code § 11-10-9.

While these sections speak to "timely" appeals, they only impose duties upon the taxpayers, and neither expressly speak to OTA's jurisdiction. Tellingly, West Virginia Code §11-10A-8, which is entitled "Jurisdiction of Office of Tax Appeals" expressly provides that "[t]he Office of Tax Appeals has exclusive and original jurisdiction to hear and determine all: . . . (2) Appeals from decisions or orders of the Tax Commissioner denying refunds or credits for all taxes administered in accordance with the provisions of § 11-10-1 et seq. of this code. . . ." Unlike the sister provisions

cited above, the word "timely" is notably missing from the jurisdictional statute. This indicates intent by the legislature to distinguish between the OTA's jurisdictional framework (which speaks only of "appeals" without regard for timeliness) from the requirements imposed upon an taxpayer seeking an appeal (which reference "timely appeals").

While not binding on this Court, recent decisions from the Supreme Court of the United States provide persuasive analysis regarding the jurisdiction of the United States Tax Court that reflects this distinction; as the Supreme Court of the United States stated: "[a] requirement 'does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions.' . . . [T]he important feature is . . . a clear tie between the deadline and the jurisdictional grant.'" *Boechler, P.C. v. Comm'r*, 596 U.S. 199, 206-207 (2022). When considering whether a thirty day time limit for a taxpayer to file a petition for review, it held that a procedural requirement is jurisdictional only if the statute "clearly states" that it is, and concludes the time limit was merely procedural, and not jurisdictional. 596 U.S. at 204-205.

The same distinction between a procedural requirement and a jurisdictional requirement should apply here. The language in the West Virginia statutes do not "clearly state" that the appeal deadline in W. Va. Code § 11-10-14(d) is jurisdictional—the express language does not make it anything more than a procedural requirement. This language, coupled with the analysis contained within *Boechler*, undermine the Tax Commissioner's arguments that Equinor is trying to "'confer[]' '[s]ubject matter jurisdiction'" upon OTA. Resp't Brief at 30. OTA has the authority and jurisdiction under W. Va. Code § 11-10A-8 to review *all* appeals, whether timely or not, that are filed before it. Equinor is simply noting the difference between procedural statutes and jurisdictional ones, for the purpose of applying equitable principles.

Furthermore, this Court has been presented numerous times with the question as to whether the sixty-day deadline is subject to equitable modification. Rather than taking the proverbial easy-way-out and declare the deadline jurisdictional with no equitable recourse, the Court has painstakingly analyzed arguments addressing equitable tolling and equitable estoppel numerous times. *See e.g., Bradley v. Williams*, 195 W. Va. 180, 184, 465 S.E.2d 180, 184 (1995). The Court has even gone so far to note that "a rule that entirely barred the consideration of equitable principles in the enforcement of tax refund filing deadlines could be unconscionably harsh." *Helton v. Reed*, 219 W. Va. 557, 561 n.6, 638 S.E.2d 160, 164 n.6 (2006). Thus, the Court has not treated this statute as a truly jurisdictional one that is immune from equitable principles.[5] In fact, that "unconscionably harsh" total bar would only result if the Court adopted the Tax Commissioner's argument, and find the deadline in W. Va. Code § 11-10-14(d) to be jurisdictional and not subject to equity. All of which is contrary to the wording of the applicable state statutes.

As demonstrated by the text of the statutes and this Court's past interpretations, the filing deadline should not be treated as jurisdictional, and it remains subject to equitable principals. Even if the Court finds that notice was provided in 2019, Equinor may nonetheless avail itself of equitable estoppel.

[5] Equinor further notes that some cases relied upon by the Tax Commissioner to conclude that the applicable deadline is jurisdictional and not subject to equitable principles are distinguishable. *See, e.g., Solution One Mortg., LLC v. Helton*, 216 W.Va. 740, 613 S.E.d2d 601 (2005) (failure to provide appeal bond); *Cooper v. City of Charleston*, 218 W.Va. 279, 624 S.E.2d 716 (2005) (subsequence change of city ordinance mooted old provision); and *Doran & Associates, Inc. v. Paige*, 195 W.Va. 115, 464 S.E.2d 757 (1995) (change of language in subsequent statute). Other cases cited by the Tax Commissioner in their brief actually support Equinor's position. *See, e.g., Houyoux v. Paige*, 206 W.Va. 357, 524S.E.2d 712 (1999) (when considering untimely refund request, holding that Tax Commissioner's "almost exclusively" focus on single phrase in deadline statute would render other statutory language meaningless); *Heckler v. Cmty. Health Services of Crawford Cnty., Inc.* 467 U.S. 51 (1984) (refusing government's proffered "flat rule that estoppel may not in any circumstances run against the Government" and noting it is "hesitant . . . to say that there are no cases in which the public interest in ensuring the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government.").

IV. *Hudkins* Both Applies and Provides the Right Test for Equitable Estoppel Against the Government.

Having confirmed that the applicable state law is not jurisdictional and may be modified by equitable principles, we turn to the application of equitable estoppel. The case of *Hudkins v. State Conol. Pub. Ret. Bd.* has been relied upon "[i]n recent years," by the Office of Tax Appeals to rule on the issue of equitably estopping the Tax Commissioner. D.R.0136. It is why—at the onset of this dispute—the OTA "instructed the parties to supplement the pleadings . . . to address the equitable estoppel standard set forth . . . in *Hudkins* . . . ." D.R.0152. From OTA's perspective, "the language [in *Hudkins*] is the most in depth analysis . . . regarding the standards that must be met when one seeks to estop the government." D.R. 0137. Equinor concurs: the *Hudkins* analysis provides substantive analysis on all fronts regarding when estoppel may be applied against the government.

However, the Tax Commissioner—mirroring the discussion as to whether the underlying statutes are jurisdictional—forwards another all-or-nothing argument, demanding that this Court find that governmental (versus proprietary) actions be immune from estoppel. Resp't Brief at 36 ("'[t]he rule' against estopping the State in proprietary cases 'is different' and provides 'ample text and case authority' for the doctrine's application."). The Court must reject these arguments for being unpersuasive; the *Hudkins* decision demonstrated there was no such absolute immunity, and specifically adopted the rationale of other states that estopped the government when it was acting in its governmental capacity, including tax collection.

Specifically, *Hudkins* did not consider or render any ruling on whether the underlying agency was acting in a proprietary or governmental capacity. This complete absence of consideration or analysis undermines the Tax Commissioner's argument that the "capacity" is a determinative factor or a complete bar to equitable principals. Instead, the *Hudkins* court relied

upon and cited to *Wisconsin Dep't of Revenue v. Moebius Printing Co.*, 89 Wis.2d 610, 279 N.W.2d 213 (1979). There, the Supreme Court of Wisconsin held that a taxpayer could void an assessment issued by the tax department because the taxpayer relied upon a statement issued after an audit by a tax department employee that indicated the taxpayer was doing "an excellent all around job in compliance with the . . . sales tax law" and that the tax "exemption certificates it had on file were valid." *Id.* at 617, 633, 279 N.W.2d at 216, 223. The Supreme Court of Wisconsin applied equitable estoppel against the government—even though the agency was acting "in its governmental capacity"—as it found that the traditional elements of estoppel were clearly present, and that "it would be unconscionable to allow the state to revise an earlier position." *Id*. at 641, 279 N.W.2d at 226. Clearly, not "[a]ll signs" found within the *Hudkins* decision "indicate that the opinion should only apply in proprietary (and not government capacity) cases . . . ." as claimed by the Tax Commissioner. Resp't Brief at 36. The analysis and holding in *Hudkins* actually confirms the opposite, that the "capacity" is not a determinative factor and equitable estoppel may be applied to tax statutes.

Furthermore, the Tax Commissioner's note that the Court has limited subsequent application of *Hudkins* is a red herring. *Hudkins* remains good law, has never been overturned, and was cited as the leading authority on equitable estoppel by OTA at the inception of this case. The Court refused to extend the holding in *Hudkins* in two subsequent cases because the agency at issue *was acting in its capacity as employer* when the alleged misrepresentation was made. *See Ringel-Williams v. W. Va. Consol. Pub. Ret. Bd*., 237 W. Va. 702, 708, 790 S.E.2d 806, 812 (2016); *W. Va. Consol. Pub. Ret. Bd. v. Jones*, 233 W. Va. 681, 687, 760 S.E.2d 495, 501 (2014). That was not the case in *Hudkins*. *Hudkins v. State Consol. Pub. Ret. Bd*., 647 S.E.2d 711, 712 (W. Va. 2007) (plaintiff worked for DHHR and not the Defendant State Consolidated Public Retirement

Board). Here, there is no employment relationship between Equinor and the Tax Commissioner, so the Court's reasons in *Ringel* and *Jones* to refuse to extend *Hudkins* are not present. Equinor seeks only the application of the holding in *Hudkins* to the very unique facts of this case. As even the *Ringel* case noted, "This Court has made plain that, *while equitable estoppel may apply to the State*, it applies only where the State makes a misrepresentation upon which an individual detrimentally relies." *Ringel-Williams v. W. Virginia Consol. Pub. Ret. Bd.*, 790 S.E.2d 806, 811 (W. Va. 2016) (emphasis added). That is precisely what Equinor seeks to do—apply equitable estoppel as it relied, to its detriment, upon the misrepresentation of a high-ranking government employee.

Overall, the *Hudkins* court properly considered the extent to which equitable estoppel may be used against the government, including cases that involved tax disputes. Other decisions, including *Ringel*, have confirmed that equitable estoppel remains an option. The Court should disregard the red herring argument related to governmental versus proprietary capacity, and adopt the legal standard for applying equitable estoppel to the government that was applied in *Hudkins*.

V. Equinor Has Met the *Hudkins* Standard for Equitable Estoppel to be Enforced Against the Government.

Equinor's situation is one of the rare cases in which the government should be equitably estopped as it satisfies the legal standard set forth in *Hudkins*. Equinor has consistently argued, as was recognized in *Hudkins*, that "[t]he 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." 220 W. Va. at 280, 647 S.E.2d at 716. However, "the general rule that equitable estoppel does not apply against a governmental agency is not without exceptions." *Id.* The unique facts of the case at hand, including the death of the tax department employee, the sophistication of the taxpayer, direct participation by a high-ranking

government official, and the familiarity of the parties with each other, all fit into the already recognized exceptions.

The evidence presented before the OTA—and the behavior of the parties—clearly demonstrates that the Tax Division's conduct regarding the issuance of the third refund denial letter induced Equinor to postpone the filing of its petition with the OTA. Conceding that Equinor is a sophisticated taxpayer, represented by a sophisticated consultant that has filed dozens of petitions with OTA, Equinor was and is familiar with the published procedures required to challenge a refund denial. *See* D.R.0255. Moreover, as it had done for tax years 2014 and 2016, Equinor had expressed a desire to petition the denial of the refund request for 2015: "everybody . . . was under the understanding that we were going to petition the full denied amount." D.R.0251; D.R.0245. However, as there had already been an error by the Tax Division that resulted in the reissuance of a refund denial letter, the parties were "working . . . to get to the correct amount on the final letter" "to make sure once [Equinor] filed the petition . . . [the parties] were all on the same page." D.R.0245. The parties mutually sought to determine the correct number on appeal.

The internal procedures and actions taken by the Tax Division further confirm why Equinor was induced to refrain from filing a petition with the OTA upon receipt of the Second Denial Letter. The Tax Commissioner, through its then acting director Ms. Acree,[6] promised that a third denial refund letter would be issued. Additionally, as Ms. Acree testified, the parties agreed that no appeal would be pursued when they discovered the First Denial Letter was wrong:

> MS. ACREE: If they had chosen to file a claim on that, they could have. But in reviewing the fact that the --- the claim was valid based on the information that we had, the $2.6 million, that is the amount

[6] Many of the cases cited by Tax Commissioner actually denied application of equitable estoppel because the representation or act was unauthorized. *See, e.g.*, *Freeman v. Polling*, 175 W.Va. 814, 338 S.E.2d 415 (1985), *Martin v. Pugh*, 175 W.Va. 495, 334 S.E.2d 633 (1985), *Cunningham v. Cnty. Ct. of Wood Cnty.*, 148 W.Va. 303, 134 S.E.2d 725 (1964), *United States v. Vanhorn*, 20 F.3d 104 (4th Cir. 1994); and *Miller v. United States*, 949 F.2d 708 (4th Cir. 1991). That is not the case here, as Ms. Acree's title and position authorized to her to do exactly what she did.

> the Tax Department approved, and that would be a valid amount. However, since the refund had not been approved by upper management, and Mr. Gaytan felt that there was a discrepancy with what the --- with the amount they received, and in speaking with the Audit Clerks and then additionally finding out later that the 15 percent safe harbor had not been included in the Schedule C, **then we agreed to go ahead and review that versus letting them file a petition**, or we could have denied it because they didn't calculate it, but we didn't. We decided to work with them on it to get it cleared up.

D.R.0203 (*emphasis added*)

There is no evidence that this understanding changed, as the Second Denial Letter also contained a "discrepancy" that the Tax Commissioner agreed to "review." Thus, Equinor reasonably believed that a third letter would be forthcoming because a high-ranking employee of the Tax Commissioner had promised it, and the parties had directly spoken about an appeal for tax year 2015, and there was mutual understanding that Equinor would not—and should not—pursue an appeal until the numbers were final.

Instead of an appeal, the parties understood that the disputed amount would be reviewed. The Tax Division had placed the review of the $23,000 into the hands of the audit clerk who had the authority and ability to generate, review and issue the refund denial letters. D.R.0201-0207. The upper management of the Tax Division "bowed out to leave [the audit clerk] to review [the disputed amount]." D.R.0208. Unfortunately, the audit clerk fell seriously ill and passed away in September 2019. Due to this tragedy, the Tax Commissioner's office was left in a state of disarray:

> And then, when she passed, we were going through, trying to figure out what was going on, where things were because she was the Senior Tax Audit Clerk, and so she handled the more complex cases, and she had numerous. And trying to find, you know, what she completed and what she hadn't was a --- very daunting task.

D.R.0208-0209. As such, the delegated task of reviewing $23,000 in dispute was left incomplete. By the time the Tax Commissioner was able to "find" what the tax clerk had not completed for

Equinor's tax appeal, a year had passed. The review was completed, and another refund check issued to Equinor in February 2020.

The present situation vastly differs from those cases relied upon by the Tax Commissioner to argue that equitable estoppel is not available. In *Bradley v. Williams*, 195 W. Va. 180, 465 S.E.2d 180, (1995), a taxpayer sought the advice of the Tax Commissioner regarding the taxation of federal retired benefits. 195 W. Va. 180, 185, 465 S.E.2d 180, 185. The Tax Commissioner's statement provided to the taxpayer "was an accurate representation of the law of this state . . . at that time" that only became incorrect after an intervening change in the law. *Id.* Moreover, "nothing in the Commissioner's response could constitute an affirmative act which would have reasonably induced the Appellees to refrain from further challenging the Commissioner's response . . . ." *Id.* Similarly, in *Helton v. Reed*, the taxpayer, on his own volition and not in reliance upon an affirmative act by the Tax Commission, submitted a petition to the Tax Division rather than to the Office of Tax Appeals. 219 W. Va. 557, 638 S.E.2d 160 (2006). In *Cate v. Steager*, 2017 WL 2608434 (June 16, 2017), the taxpayer simply missed the deadline, without any action or representation by the state. And in *Panhandle Used Equip., LLC v. Matkovich*, 2016 WL 1417785 (Apr. 8, 2016), the state's representations were merely consoling a taxpayer, who had mailed an appeal to the wrong address, that the mail might make it to the right place at the right time.

Contrast those situations with Equinor's in which there was very clearly reliance upon a representation—Equinor made clear to the Tax Commissioner that it was seeking to appeal the denial of the refund, the Tax Commissioner promised a third refund letter would be issued, and the Tax Commissioner's representative testified that the parties understood and agreed the Tax Commissioner would continue further review of the Second Refund Letter instead of Equinor filing an appeal. Given these very unique facts, Equinor justifiably relied to its detriment upon the

representations of the Tax Commissioner. Full analysis the traditional elements of equitable estoppel, including reliance, was provided in Equinor's brief, and will not be repeated here. That analysis and conclusion remain unchanged, particularly as the ICA did not find that that Equinor failed to meet the traditional elements of equitable estoppel—it instead held that affirmative misconduct or wrongful conduct was needed, and unmet.

Equinor offers only two closing points as to the applicability of equitable estoppel in this particular case. First, to the extent that this Court finds that *Hudkins* requires a showing of affirmative misconduct or wrongful conduct to equitably estop the Tax Commissioner (which, for the reasons stated in Equinor's brief, it should not), Equinor argues that the threshold has been met here. As described above, the death of the clerk put the Tax Commissioner's office into disarray, and it took the Tax Commissioner a full year to discover that Equinor's issue with the Second Refund Letter remained unresolved. Upon discovering this, the Tax Commissioner did not adhere to its promises and understanding; instead, it seized an opportunity to benefit from its own delay and mistake. In 2020, the Tax Commissioner confirmed the dispute amount of roughly $23,000.00 and issued Equinor another refund check, but refused to provide the promised third refund letter which would have mooted the Second Denial Letter and "restarted" the appeal deadline. Instead, it simply copied Equinor's tax consultant on an email. More egregiously, the Tax Commissioner also refused to uphold the parties' prior mutual understanding that Equinor would not file an appeal while the disputed amount was under review with the clerk, and instead asserted that Equinor had missed its deadline to appeal and was precluded from having OTA consider its refund claim. This is the precise type of "gotcha" scenario described by OTA that should and would qualify as affirmative misconduct or wrongful conduct.

Second, contrary to the Tax Commissioner's concerns, application of equitable estoppel in this particular case, with its rare and unique facts, would not "impair or interfere with' the 'government [tax collection] functions' and 'public interests' the sixty-day deadline was designed to serve." Resp't Brief at 38. To be clear, in no way would applying equitable estoppel here impact the governmental functions of the Tax Commissioner to "see that the laws concerning the assessment and collection of all taxes and levies, whether of the state or of any county, district or municipal corporation thereof, are faithfully enforced." W. Va. Code § 11-1-2. Moreover, estoppel does not mandate that Equinor receive a refund—it merely allows Equinor the ability to argue its case before the OTA. Similarly, the public interests or operation of public policy will not be adversely impacted by estopping the Tax Commissioner; rather, the public interest will improve. Applying estoppel in this case will prohibit the government from misleading—and potentially under-refunding—taxpayers with inaccurate refund denial letters. *See* D.R.0203.

Conclusively, the ICA was incorrect in prohibiting the use of equitable estoppel to allow for Equinor's petition to be heard before the OTA, and the Tax Commissioner fails to provide any relevant support for why this Court should not follow the Circuit Court's and subsequent OTA's decisions that allowed for the petition to proceed.

CONCLUSION

For the foregoing reasons as discussed herein, Equinor requests the Court to dismiss the Tax Commissioner's arguments and reverse the ICA's ruling as to the 2015 tax year. The Commissioner did not issue a determination on Equinor's refund until February 27, 2020 and therefore Equinor's April 2020 petition was timely. Alternatively, pursuant to *Hudkins,* Equinor has met the threshold to equitably estop the government from seeking the dismissal of this case. Based on the foregoing, Equinor respectfully requests that this Honorable Court:

1. Reverse the November 15, 2023 decision of the ICA as to the issue of equitable estoppel;

2. Affirm the May 5, 2022 decision of the OTA;

3. Affirm the April 12, 2022 decision of Kanawha County Circuit Court;

4. Remand this case to the OTA for a reassessment of Petitioner's request for refunds 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.

Equinor USA Onshore Properties Inc.
By counsel,

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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 Equinor USA Onshore Properties Inc., do hereby certify that service of the foregoing **PETITIONER'S REPLY BRIEF** has been made upon counsel for the Respondent on June 24, 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)