



**THE ATTORNEY GENERAL
OF TEXAS**

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July 24, 1967

Honorable Robert S. Calvert
Comptroller of Public Accounts
State of Texas
Austin, Texas

Opinion No. M-109

Re: Whether oil and gas produced under an oil and gas lease executed by the United States to a private party lessee and covering lands over which the United States has exclusive jurisdiction are subject to the gas and oil production taxes levied by Articles 3.01 and 4.02, respectively, Title 122A, Taxation-General, V.C.S., and the regulation pipeline tax imposed by Article 6032, V.C.S.

Dear Mr. Calvert:

You ask my opinion as to whether the oil and gas produced from land within the Federal enclave, commonly known as the Corpus Christi, Texas, Naval Air Station, are subject to the Texas gas and oil production taxes and the regulation pipeline tax.

The gross production taxes in question are imposed by Articles 3.01 and 4.02, respectively, Title 122A, Taxation-General, Vernon's Civil Statutes; the regulation pipeline tax in question is imposed by Article 6032, Vernon's Civil Statutes.

Our opinion is that the oil and gas produced, other than the 16-2/3 per cent thereof which is payable as royalty to the lessor, the United States, is subject to these taxes.

The land in question, was acquired by the United States by condemnation pursuant to Articles 5242, 5247 and 5248, Vernon's Civil Statutes, by judgment dated July 5, 1940, in

the District Court of the United States for the Southern District of Texas, Corpus Christi Division. We assume the fee simple title was acquired.

Subsequently, on December 12, 1940, pursuant to Articles 5242, 5247 and 5248, Vernon's Civil Statutes, the Governor of Texas ceded to the United States exclusive jurisdiction over said land for so long as the land should remain the property of the United States, provided however that the State retained concurrent jurisdiction for execution of all civil and criminal processes upon any person upon said land. The deed further provides that,

" . . . The United States of America shall be secure in its possession and enjoyment of all said lands, and said lands and all improvements thereon shall be exempt from any taxation under the authority of the State of Texas, so long as the same are held, owned, used, and occupied by the United States of America for any of the purposes expressed in the foregoing statutes and not otherwise." (Emphasis supplied.)

Jurisdiction over said land was formally accepted on behalf of the United States.

Thereafter, on December 1, 1962, the United States of America executed to Humble Oil & Refining Co. an oil and gas lease covering the land under consideration. The lessee has informed us that all of the lands under consideration from which production is had are on the mainland, that none of them are submerged lands or tidelands.

The pertinent provisions of this lease are as follows:

1.

The form used is styled a "Protective Oil and Gas Lease."

2.

The lease, at its inception, reads as follows:

"THIS LEASE, entered into . . . by and between the United States of America, . . .

hereinafter called the lessor, and Humble Oil and Refining Company, . . . hereinafter called the lessee, . . .

"WITNESSETH:

"Sec. 1. Rights of lessee. In consideration of rents and royalties to be paid, and the conditions and covenants to be observed as herein set forth, the lessor does hereby grant to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits owned by the lessor, except helium gas, in or under the following described land . . ."

3.

The term of the lease is stated as:

" . . . for a period of five years and so long thereafter as oil or gas is produced in paying quantities: . . ."

4.

The lease contains the further grant:

" . . . Except as otherwise provided and subject to the conditions herein specified, the lessee shall have the right to construct and maintain upon the leased lands all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures as may be necessary to the full enjoyment of this lease."

5.

Section 2, styled "The lessee hereby agrees:" contains the following relevant provisions:

"(d) Rentals and royalties. (1) To pay annual rentals and royalties on production

under this lease as provided in Attachment B which is made a part hereof."

Attachment B provides for a royalty of 16-2/3 per cent of the production to the lessor.

"(k) Taxes and wages, freedom of purchase. To pay when due, all taxes lawfully assessed and levied under the laws of the State or the United States upon improvements, oil, and gas produced from the lands hereunder or other rights, property, or assets of the Lessee;

.. .

Articles 3.01 and 4.02 impose an occupation tax on the business of producing gas and oil, respectively, within this State. Article 6032, commonly known as the Regulation Pipeline Tax, imposes a tax upon each barrel of crude petroleum produced within this State ". . . which shall be in addition to and collected in the same manner as the present gross receipts production tax on crude petroleum. . . ." These taxes are occupation taxes. Group No. 1 Oil Corporation v. Sheppard, 89 S.W.2d 1021 (Tex.Civ.App. 1935, error ref.); State v. Humphrey, 159 S.W.2d 162 (Tex.Civ.App. 1942).

The oil and gas lease conveyed to Humble, the lessee, a present determinable fee estate in all of the oil and gas (except helium gas) in and under the lands covered by it. The above quoted provisions of the lease, and its other relevant provisions, are analogous in law to the provisions of the oil and gas lease considered in Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290 (1923), 29 A.L.R. 566. This case and the unbroken line of the subsequent decisions of our Texas courts following it are unequivocal to the effect that this type of oil and gas lease is a present sale or conveyance of real property and operates to transfer the oil and gas in place in the premises described therein and to sever those minerals from the surface. 42 Tex.Jur.2d 368, Oil and Gas, Sec. 175, and the pages and sections following and particularly the cases cited at page 369, note 1.

Decisions of our State Supreme Court have established that an interest in minerals in place and an interest in royalty are separate and distinct estates in land. Pich v. Lankford, 157 Tex. 335, 302 S.W.2d 645 (1957).

Under both the relevant constitutional provisions and the three tax statutes under consideration the royalty payable to the United States is exempt from the taxes under consideration. Group No. 1 Oil Corporation v. Sheppard, supra; Theison v. Roblson, 117 Tex. 489, 8 S.W.2d 646 (1928); Group No. 1 Oil Corporation v. Bass, 283 U.S. 279 (1931).

It is the conclusion of this office that the oil and gas produced which is allocable to the lessee is subject to the taxes under consideration. Under the cession deed by the State of Texas, the lands remained tax exempt only "so long as the same are held, owned, used, and occupied by the United States of America." It is clear from the lease by the Federal government to Humble, the mineral lands are not in legal contemplation of law either "held" or "owned" or "used" or "occupied" by the government, whose only interest is in the royalty aforesaid. When the mineral lands are no longer used for a federal purpose or there has been an occurrence of the circumstances specified in the state cession, exclusive jurisdiction is terminated.

In S.R.A. Inc. v. Minnesota, 327 U.S. 558 (1946), the Supreme Court held that when a purchaser entered into possession of real estate under its contract of purchase of the fee title that the property became subject to the territorial jurisdiction of the state wherein it was located and was subject to a direct tax by the state on the realty. Under the contract of sale, legal title was retained in the United States until payment of the balance of the purchase price in installments. The contract contained no express provision retaining sovereignty in the United States; there was no express retrocession by Congress to the state; and the original act of cession of sovereignty over the property to the United States contained no requirement for return of sovereignty to the state when the property was no longer used for federal purposes. This case cites and follows New Brunswick v. United States, 276 U.S. 547 (1928). In both cases, the Court held that the equity situation was one wherein the United States had conveyed title to the purchasers, as owners, and they had mortgaged the real estate to the United States to secure the unpaid purchase money.

Two other cases by the Supreme Court of the United States have directly held that the estates granted by oil and gas leases were subject to taxation by the states. The first, Oklahoma Tax Commission v. Texas Company, 336 U.S. 342 (1949), considered whether a lessee of mineral rights in certain Indian lands in the

State of Oklahoma was subject to the payment of nondiscriminatory state gross production taxes and state excise taxes on petroleum produced from such lands. The excise tax was very similar to the Texas gross production taxes under consideration. It was at the rate of one mill per barrel on every barrel of petroleum produced in Oklahoma. The Oklahoma Supreme Court construed it as an excise tax on the production of oil. The Court held that under Oklahoma law the lessees became the owners of all the right, title and interest in the minerals in their leases, subject only to the royalty interest reserved to the Indian lessors and that they were liable for the taxes. The Court said:

" . . . it is well established that property purchased by a private person from the Federal Government becomes a part of the general mass of property in the state and must bear its fair share of the expenses of local government. . . ." (at page 353).

In the second case, Group No. 1 Oil Corporation v. Bass, supra, the Court had under consideration oil and gas leases granted by the State of Texas to a private corporation for a term of years, with the right to enter on the lands of the state public domain for the purpose of drilling and operating for oil and gas and to erect and maintain all necessary structures for the production, transportation and storage of these products, and which required the lessee or owner of these rights conveyed to pay the State the value of a certain percentage of the oil and gas produced and sold. The Supreme Court recognized and followed the construction of the Texas Supreme Court to the effect that such leases had effected present sales to the lessee of the oil and gas in place. The Court held:

"This Court has consistently held that where property or any interest in it has completely passed from the government to the purchaser, he can claim no immunity from taxation with respect to it, merely because it was once government-owned or because the sale of it effected some government purpose. New Brunswick v. United States, supra; Forbes v. Gracey, supra; Tucker v. Ferguson, supra; see Gromer v. Standard Dredging Co., 224 U.S. 362, 371; Choctaw, O. & G. R. Co. v. Mackey, 256 U.S. 531, 537; Central Pacific R. Co. v. California, 162 U.S. 91, 125; Railroad Co. v. Peniston, 18 Wall. 5, 35-37; Weston v. Charleston, supra. p. 468.

"Property which has thus passed from either the national or a state government to private ownership becomes a part of the common mass of property and subject to its common burdens. Denial to either government of the power to tax it, or income derived from it, in order to insure some remote and indirect antecedent benefit to the other, would be an encroachment of the sovereign power to tax, not justified by the implied constitutional restriction. See *Weston v. Charleston*, supra, p. 468. The interest which passed to petitioner here, as defined by the laws of the State, is not distinguishable from the mining claims, acquired in lands of the United States under its statutes, which, together with minerals and ores derived from them, were held subject to state taxation in *Forbes v. Gracey*, supra." (at pages 282-283)

Humble, as lessee, has accepted from the Federal government the conveyance of a present determinable fee in the oil and gas and mineral estate in the lands. Under the foregoing cases, the sovereign power of the State of Texas to impose the taxes under consideration seems to be established.

The case of *Oklahoma Tax Commission v. Texas Company*, supra, is conclusive against any immunity of the lessee. In that case, the Court said,

" . . . The taxes here are nondiscriminatory. The respondents are 'private persons' who seek immunity 'for their property or gains because they are engaged in operations under a government contract or lease.' The functions they perform in operating the leases are hardly more governmental in character than those performed by lessees of school lands or, indeed, by many contractors with the Government. . . . "

(at page 363)

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" But, so far as concerns private persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain exemption. . . . " (at page 365)

It is also pertinent that the Court could find no statutory immunity to imposition of the taxes.

We are aware of that line of decisions represented by the case of Humble Pipeline Co. v. Waggoner, 376 U.S. 369 (1964), which would deny imposition of the taxes because of the continuing exclusive jurisdiction of the United States over the lands covered by this oil and gas lease. This last mentioned case considered an oil and gas lease on lands in Louisiana. It denied authority to the State of Louisiana to levy ad valorem taxes upon pipelines and other personal property equipment used by a private person who was lessee under an oil and gas lease covering lands on which Barksdale Air Force Base was located and on which lands the State of Louisiana had ceded to the United States exclusive jurisdiction, except for right to execute certain civil and criminal processes. The deed to the United States was for a fee simple estate in the lands. This case and our holding in this opinion are distinguished on the basis of the nature of the estate granted to a mineral lessee under an oil and gas lease in Louisiana and in Texas.

In Louisiana, a mineral lease is held to be merely a contract which permits the lessee to explore for minerals on the land of the lessor in consideration of the payment of a rental and/or bonuses. It is well settled that it is not in essence a real right; it does not create substantive real rights in the land leased. Tinsley v. Seismic Explorations, Inc., 117 So.2d 897 (La. Sup. 1960); see also Summers, Oil and Gas, Permanent Edition, Vol. 1A, p. 470-485, sec. 167, also at pages 209-303, sec. 132-136.

The distinction between the cases relied upon to support our opinion and the case of Humble Pipeline Co. v. Waggoner, supra, is well stated in Kingwood Oil Company v. Henderson County Board of Supervisors, 367 S.W.2d 129 (Ky. Ct. of App. -- Court of last

resort -- 1963), wherein the Court in considering S.R.A., Inc. v. Minnesota, supra, said:

"We think there is sound reason for saying that if the United States conveys away a portion of the territory over which it has jurisdiction there can be no reason for the jurisdiction to continue over that portion. But the same is not true where the United States conveys some right less than a fee. In that case valid reason may exist for a continued exercise of federal jurisdiction over the territory." (Emphasis by the court.) (at p. 132)

In that case, the mineral lease under the law of Kentucky is held not to convey the equivalent of a fee to the minerals with a complete severance as in Texas. See 1A, Summers, Oil and Gas, 410, Sec. 160. The distinction above drawn seems to be the basis on which the United States Supreme Court distinguished its holding in S.R.A., Inc. v. Minnesota, supra, and its holding in Humble Pipeline Co. v. Waggoner, supra, made in the latter case at pages 372 and 373, wherein the court distinguished between a sale of land over which the United States had exclusive jurisdiction and the lease of that property for commercial purposes, or for farming, or for the conveyance of a mere right of way.

The recent case of Adams v. Calvert, 396 S.W.2d 948 (Tex. Sup. 1965) is also distinguishable in that the government had in no way terminated its jurisdiction over the real estate, and under the terms of the cession deed by the State, the State remained powerless to impose the taxes there involved.

S U M M A R Y

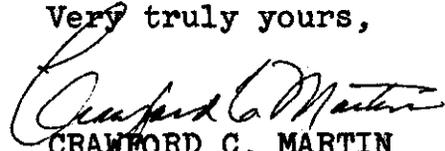
The oil and gas lease executed by the United States covering lands over which it had exclusive jurisdiction, except for the right of Texas to execute civil and criminal process, to a private party lessee, subjected the oil and gas produced, other than the royalty payable to the United States as lessor, to the oil and gas production taxes imposed by Articles 3.01 and 4.02,

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respectively, Title 122A, Taxation-General, Vernon's Civil Statutes, and the regulation pipeline tax imposed by Article 6032 of said statutes.

The royalty interest payable to the United States is exempt from these taxes.

Very truly yours,


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