

**BOARD OF TAX APPEALS
STATE OF LOUISIANA**

**AVANTI EXPLORATION, L.L.C.
PETITIONER**

VERSUS

BTA DOCKET NO. 9608D

**LOUISIANA DEPARTMENT OF
REVENUE, STATE OF LOUISIANA
RESPONDENT**

JUDGMENT

On November 8, 2017 the Motion for Summary Judgment of Avanti Exploration, LLC (the "Taxpayer") and the Motion to Strike and Cross Motion for Summary Judgment of the Secretary of the Department of Revenue (the "Secretary") were heard by the Board, with Judge Tony Graphia (Ret.), Chairman, presiding, and Board Members Cade R. Cole and Francis "Jay" Lobrano present, and no member absent. Participating in the hearing were: Eulis Siminen, Jr., attorney for the Secretary, and Cheryl M. Kornick, attorney for Taxpayer. After the hearing the matters were taken under advisement. Considering the facts and law, and for the written reasons assigned herewith, the Board does now unanimously render its Judgment as follows:

IT IS ORDERED, ADJUDGED, AND DECREED that the Secretary's Motion to Strike is GRANTED IN PART and DENIED IN PART, and the attachments to the Taxpayer's consolidated Memorandum shall be considered for the purposes of its Opposition to the Secretary's Motion for Summary Judgment, but shall not be considered in support of its Reply Memorandum in Response to the Secretary's Opposition to Taxpayer's Motion for Summary Judgment.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Secretary's Motion for Summary Judgment BE AND IS HEREBY DENIED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Taxpayer's Motion for Summary Judgment BE AND IS HEREBY GRANTED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there shall be Judgment in favor of the Taxpayer and against the Secretary concerning the Taxpayer's Petition for Redetermination of the Secretary's assessment against it, and that this assessment shall be vacated except for the \$13,747.49 of tax stipulated by the Taxpayer, together with interest and penalty on that amount as provided by law.

Judgment Rendered and Signed at Baton Rouge, Louisiana on this 6th day of December, 2017.

FOR THE BOARD:



**JUDGE TONY GRAPHIA (RET.),
CHAIRMAN**

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WRITTEN REASONS FOR JUDGMENT

Before this Board is Petitioner Avanti Exploration, L.L.C. (“Avanti”) who, pursuant to La. R.S. 47:1565, appeals the assessment of the Secretary, Louisiana Department of Revenue and Taxation (the “Department”). On November 7, 2017, this Board heard the Department’s Motion to Strike and Cross Motions for Summary Judgment filed by the Department and Avanti. Participating in the hearings were Eulis Simien, Jr., attorney for the Department, and Cheryl M. Kornick, attorney for Avanti. After the hearings, both the Motion to Strike and the Cross Motions for Summary Judgment were taken under advisement. For the reasons stated hereinbelow, the Motion to Strike is granted in part and denied in part; the Department’s Motion for Summary Judgment is denied; and Avanti’s Motion for Summary Judgment is granted.

The material facts are not in dispute. Avanti is a Colorado company engaged in the exploration and production of oil and gas in Louisiana. Avanti produces and sells crude oil in the State and is therefore subject to the imposition of Louisiana’s severance taxes under La. R.S. 47:633(7)(a). That statute provides:

The taxes on natural resources severed from the soil or water levied by R.S. 47:631 shall be predicated on the quantity or value of the products or resources severed and shall be paid at the following rates:

On oil twelve and one-half percentum of its value at the time and place of severance. Such value shall be the higher of (1)

the gross receipts received from the first purchaser, less charges for trucking, barging and pipeline fees, or (2) the posted field price. In the absence of an arms length transaction or a posted field price, the value shall be the severer's gross income from the property as determined by R.S. 47:158(C).

During the relevant time period of January 1, 2012 through December 31, 2014, Avanti sold oil to two purchasers: Cokinos Energy Corporation ("Cokinos") and Phillips 66 Company ("Phillips") (collectively sometimes referred to together as the "Purchasers") pursuant to purchase contracts (the "Purchase Contract(s)"). Counsel for both parties indicated that the Purchasers took possession of the crude oil sold by Avanti via tanker truck supplied by the Purchasers. Both of Purchase Contracts provided that the Purchasers took possession, title and risk of loss upon the Purchaser's loading of the crude oil in its tankers at the field.

In the Cokinos contract, Avanti was paid "Phillips 66 WTI Posting plus Platts P-Plus plus Platts LLS less \$2.60/BBL" for crude oil sold to Cokinos (the "Contract Price"). Similarly, in the Phillips contract, for crude sold to Phillips (the "Contract Price") Avanti was paid:

Phillips 66 '2 West Texas Intermediate Sweet crude oil posted price deemed 40 degrees API gravity for pricing purposes for the moth of delivery plus the mean of the daily average of Platt's posting plus WTI prices quoted in Platt's Oilgram from the 26th of the month two months prior to the month of delivery through the 25th of the month one month prior to delivery (excluding weekends and holidays) plus/minus the mean of the Platt's daily average WTI Cushing versus Platt's daily average LLS differential for the same trading period - \$2.25 per barrel differential.

Simply put, the contract price paid by the Purchasers to Avanti is a negotiated price that follows and tracks certain averages of the daily index price as reported on certain indices (the "Market Center Price") but reduces the Market Center Price by a specified amount per barrel to take into consideration the distance of the oil in the field from the Market Center where it could be traded at those Market Center prices. This reduction from the market center price takes into

account the risk of loss together with the costs incurred by the Purchasers in transporting purchased crude oil from Avanti's field location to the Purchasers' final destination, typically a terminal or a refinery. Neither the Department nor Avanti question the calculation of the price per the contracts or use of the indices in the formulas.

For the period January 1, 2012 through December 31, 2014, Avanti reported and paid severance taxes on its actual gross cash receipts from the Purchaser pursuant to its Purchase Contracts. Subsequently, the Department audited Avanti's severance tax returns for that same period and assessed Avanti additional severance tax, plus penalties and interest, on the basis that the severance tax base used by Avanti (its gross receipts) should have been increased by the \$2.60 per barrel and \$2.25 per barrel differentials in the Cokinos and Phillips contracts, respectively. The Department is arguing that the gross receipts for severance tax purposes are amounts that are higher than the amount of money actually received by Avanti; i.e., they should be higher than the amount of the Avanti Contract Price under its agreements. Avanti disagreed and timely filed the current appeal of the Department's assessment of \$79,783.73 plus interest and penalties.

MOTION TO STRIKE

The Department filed two separate Motions to Strike. The first appears to request that this Board strike certain portions of Avanti's memoranda both in support and in opposition to the cross motions for summary judgment filed by the parties which argue that the severance tax value asserted by the Department based on the Market Center Price is not the "posted field price" as that term is used in La.

R.S. 47:633(7)(a).¹ Essentially, the Department's Motion to Strike on the "posted field price" issue is predicated on its assertion that it is only contending in the present case, which is one of many dozens of cases before the Board with practically identical issues, that the increase in Avanti's severance tax is due to its argument as applied to the "gross receipts" factor, and that it declines to make an argument on the "posted field price" factor of La. R.S. 47:633(7)(a).

The Department argues that Avanti's "gross receipts" from the sale of its oil to the Purchasers include a deemed "in kind" payment of some sort for the stated differential from the index oriented Market Center Price pursuant to the the Purchase Contracts. The Department further argues that this Board should not rule on whether the severance tax value asserted by the Department is or is not the "posted field price," and therefore this Board should strike those portions of Avanti's pleadings which argue that the value asserted by the Department is not posted field price.

The Board finds that Avanti's discussion and analysis of La. R.S. 47:633(7)(a) and its discussion of the term "posted field price" is intertwined and an integral part of its legal argument in support of its Motion for Summary Judgment and of its opposition to the Department's Motion for Summary Judgment. It does not constitute "redundant, immaterial, impertinent, or scandalous matter" as set forth in La. Code Civ. Pro. Art. 964, and for that reason the Motion to Strike is DENIED on this issue.

Secondly, the Department filed another Motion to Strike asking this Board to strike certain exhibits attached to a pleading filed by Avanti styled "Opposition to the Department of Revenue's Motion for Summary Judgment and Motion to

¹ The Department argues that it was not arguing for a Market Center Price, but its calculation adds the \$2.60 and \$2.25 per barrel differentials back to the Contract Price actually received, thereby increasing the oil value that was used in the audit back to the full Market Center Price.

Strike Portions of Avanti's Motion for Summary Judgment; Memorandum in Support of Avanti Exploration, L.L.C.'s Motion for Summary Judgment" where Avanti incorporated both (1) an Opposition to the Department's Motion for Summary Judgment; (2) a reply to the Department's Opposition to Avanti's Motion for Summary Judgment; and (3) an Opposition to the Department's original Motion to Strike. These three distinct responses were combined into one memoranda together with several exhibits attached. The Department filed a Motion to Strike requesting this Board to strike from the record certain of the Exhibits attached to Avanti's pleading. The Department argued that La. Code Civ. Pro. Art. 966(B)(3) prohibits the filing of any additional documents with a memorandum in reply to an opposition to summary judgment.

The Board agrees with the Department on this issue and GRANTS the Motion to Strike these Exhibits but ONLY insofar as that they will NOT be considered as evidentiary attachments to Avanti's Reply Brief to the Department's Opposition of Avanti's Motion for Summary Judgment. These Exhibits are also attached and submitted in support of Avanti's Opposition to the Motion for Summary Judgment filed by the Department and for that purpose, the Motion to Strike is DENIED.

CROSS MOTIONS FOR SUMMARY JUDGMENT

Both the Department and Avanti filed Motions for Summary Judgment. Avanti argues that it properly computed the severance tax pursuant to La. R.S. 47:633(7)(a) using its "gross receipts" from its "first purchaser," Cokinos or Phillips respectively, to compute the monthly severance tax due as set forth by the clear meaning of the statute. The Department argues that Avanti failed to add to its gross cash receipts, the "benefit" it received when its Purchasers transported the crude oil from Avanti's storage facility in the field to its ultimate destination, and

therefore understated the severance tax due. The Department calculates this “in kind” benefit to Avanti to be either the \$2.60 a barrel or the \$2.25 a barrel (the stated downward adjustments in the respective Purchase Contracts from the Market Center Price). This question presented for our determination is whether the term “gross receipts” includes the amount the seller actually was paid, or whether it should also include the fixed downward adjustment/differential from the Market Center Price that the Department considers and improper transportation deduction in the Contract Price.²

The Board agrees with Avanti that this statute is clear and unambiguous, and clearly should be applied in the manner that Avanti originally paid its tax. Under the plain language of La. R.S. 47:633(7)(a), Avanti properly computed its severance taxes on the actual amounts that it paid and received from its Purchasers – its “gross receipts” from its “first purchasers.” The Department does not dispute that the contracts and thus the Contract Prices were arm’s length. Further, no evidence was submitted by the Department that there was a “posted field price” applicable to Avanti that would have been higher than the contract price.

The Department’s sole argument in support of its Motion for Summary Judgment is that Avanti’s gross receipts include an “in kind” payment from its Purchasers in the form of the expense incurred by the Purchasers in transporting the crude it had purchased to the Purchasers’ final destination, which in kind payment should be valued at the “transportation differential” in each of the contracts (\$2.60/bbl in the Conikos Purchase Contract and \$2.25/bbl in the Phillips 66 Purchase Contract). The Board rejects this novel approach.

² Avanti cites two district court cases (*Mantle Oil & Gas, LLC v. LA, State Revenue Department*, Docket No. 646215, 19th J.D.C. and *Bridges v. Swift Energy*, Docket No. 597828, 19th J.D.C.) and a bankruptcy court case from Texas, all of which addressed the issue, where the courts adopted Avanti’s position. The Board acknowledges the rulings and agrees with the results in those cases, but notes that no written reasons for judgment were rendered in those matters, so there is little to rely upon.

Firstly, the severance tax is levied “at the time and place of severance.” The time and place of severance is in the field, the value at a Market Center is irrelevant to the gross receipts actually received for oil in the field. The value in the field is obviously different than the value at a Market Center trading hub.

Secondly, the severance tax is levied upon the higher of gross receipts or posted field price. In the present case, the dispute is over the meaning of “gross receipts”, and the Board finds no legal basis to impute amounts that are larger than what Avanti actually received.

Thirdly, Avanti did not take any transportation deduction in the computation of its severance tax. It sold its oil in the field at the well, and the cost of transportation was borne by the Purchaser. The Department’s advice that you cannot take a transportation deduction AFTER the first sale makes logical sense, and IF Avanti had attempted to take a transportation deduction from its Contract Price, then the Department would have had a case. However, the first purchaser limitation is a red herring since Avanti did not debit any transportation expense at all.³

In *McLane Southern, Inc. v. Bridges*, 2011–1141, p.5 (La.1/24/12), 84 So. 3d 479, 483 the Louisiana Supreme Court succinctly stated the requirements for the judicial interpretation of statutes:

It is a fundamental principle of statutory interpretation that when a ‘law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied [as] written, and no further interpretation may be made in search of the intent of the legislature.’ This principle applies to tax statutes.

In *Goudchaux/Maison Blanche, Inc. v. Broussard*, the Court also reiterated that:

³ If Avanti had trucked its oil via its own contractor to a Market Center, then it would be entitled by law to a full deduction for the entire cost of that transportation. The Board struggles to follow the Department’s approach to these cases since in that scenario you end up with the exact same tax that Avanti paid under these facts.

Taxing statutes must be strictly construed against the taxing authority; where a tax statute is susceptible of more than one reasonable interpretation, the construction favorable to the taxpayer is to be adopted.

590 So. 2d 1159, 1161 (La. 1991)

The Department's argument relies in part on a Revenue Information Bulletin No. 08-015 where it states that "Transportation Costs" means the reasonable, actual costs incurred for moving the oil or condensate by truck, barge, or pipeline to a point of sale or delivery off the lease after gathering."⁴ The Board does not necessarily disagree with this general principle, but it is a distortion of the undisputed facts of this case to characterize the formula in the Contract Price as a deduction. Avanti was not paid the amount of the differential, there was no post sale deduction, it simply never received the amount in question, and there is no logical construction of this RIB that requires addition of this phantom amount to the severance tax base.

Even if this RIB actually negatively impacted Avanti's case, we would point out that a RIB is not subject to the normal rulemaking process and it explicitly states on the face of the document that "A RIB is an informal statement of information....does not have the force and effect of law and is not binding on the public or the Department." Furthermore, even if the Department's position were based on a regulation, our Courts have long recognized that, "it is well-settled law in Louisiana that a tax regulation cannot extend the taxing jurisdiction of the statute, as taxes are imposed by the legislature, not the Department." *UTELCOM, Inc. v. Bridges*, 2010-0654, p. 9 (La. App. 1 Cir. 9/12/11), 77 So.3d 39, 49, writ

⁴ The Collector cites to the general principle that exemptions from tax are construed in favor of the Collector. In the present case, the Board finds no ambiguity at all, and furthermore this principle is inapplicable since Avanti was not claiming an exemption (or even a deduction). It is the Department which is trying to turn a deduction provision a provision that is not even being used by the Taxpayer, into an argument about expanding the meaning of gross receipts. The meaning of 'gross receipts' is clearly a component of the imposition of the tax--not anything related to an exemption from the severance tax.

denied, 2011-2632 (La. 3/2/12), 83 So.3d 1046.

It is undisputed that title to the crude oil passed from Avanti to the Purchasers upon the loading of the crude oil from Avanti's wellhead storage facility into the Purchasers' tanker trucks. At that point, it is undisputed that the Purchasers were obligated to pay Avanti the Contract Price for the crude oil. Under the Department's theory, the severance tax base would include value added to the crude by the first purchaser that brings a higher price for the crude to the first purchaser because of the indirect benefit of making a market to the producer/first seller. Taking the argument to its illogical conclusion, the Department could expand the severance tax base to include ANY value added by the subsequent purchasers AFTER the first purchase, a result that is clearly contrary to the plain language of the statute.

La. R.S. 47:633(7)(a) specifically excludes from the tax base charges for trucking, barging and pipeline fees. The Department argues that the statutory deduction only applies when the first seller of the crude pays such transportation charges, and that the deduction would not apply when the Purchasers took these costs in consideration in computing the Contract Price. The Department's argument is misplaced. The Board finds that there was no taking of a deduction under these contracts, and there is nothing to add to the Contract Price. What Avanti was paid is what it was paid.

La. R.S. 47:633(7)(a) provides that the value of oil for purposes of the severance tax is the higher of the gross receipts received from the first purchaser, **less charges for trucking, barging, and pipeline fees**, or (2) the posted field price [emphasis supplied]. Thus, even if we were to assume that the transportation expenses incurred by the first purchaser should somehow be artificially included in the "gross receipts received from the first purchaser" for purposes of the severance

tax base, the statute would nonetheless grant a deduction from Avanti's gross receipts for a like amount as a "charge for trucking, barging and pipeline fees." The Department's interpretation of its RIB cannot override the plain language of the statute.⁵

Conclusion

The Board finds that under these undisputed facts, that the gross receipts received from the first purchaser equaled the amount actually paid under the Contract Price. The Board also finds that the undisputed evidence established that there was no posted field price, as the term is used in statute, so the higher price was the Contract Price.⁶ Therefore, Avanti's correctly calculated and remitted the severance tax.⁷

The severance tax is levied upon the value of oil "at the time and place of severance." This means that the tax is owed upon the value in the field. It is axiomatic that oil will be worth more at a major trading hub than it is in the field at the well-head. The risk of loss, cost of transportation, and timing/market risk are all taken into consideration when someone makes an offer to buy oil in the field. The Department's construction has the effect of attempting to tax at a Market Center Price in lieu of the actual gross receipts at the actual place of severance—ie. the actual price in the field.

⁵ While a longstanding regulatory construction of the Department, particularly those adopted contemporaneously with the passage of a statute, can be helpful in interpreting an ambiguous statute, the current interpretation is novel and new, is based on recent informal guidance, and the current statute is not ambiguous on the issue of the meaning of gross receipts.

⁶ The Board finds that the evidence offered supports the Taxpayer's position that posted field price cannot mean a Market Center Price. In the modern economy there is generally no posted price in a field, and a Market Center Price would necessarily be higher than a price in the field.

⁷ The Board recognizes that Avanti conceded that it owed a portion of the assessment on an unrelated issue, and the Board will issue a Judgment in favor of the Department in the stipulated amount of \$13,747.49.

For the reasons set forth above, the petition for redetermination filed by Avanti is granted. Except as to the Inventory calculation issue previously conceded by the Taxpayer, the Department's assessment is vacated.

Baton Rouge, Louisiana, this 6 day of December, 2017.

FOR THE BOARD:


VICE-CHAIRMAN CADE R. COLE



