

Property Taxes

Tax on Stored Natural Gas Constitutional: Texas High Court

BNA Snapshot

- Tax doesn't violate federal commerce clause, Texas law
- Dissenting judge sees storage as "necessary part of transmission"



By Paul Stinson

A property tax levied on natural gas stored in Texas while awaiting future resale and shipment to out-of-state consumers survived a state Supreme Court challenge (*ETC Marketing, Ltd. v. Harris* , 2017 BL 140750, Tex., No. 15-0687, 4/28/17).

A largely unified Texas high court held April 28 that the tax is valid under the federal commerce clause and Section 11.12 of the Texas Tax Code, which provides a state-law exemption for taxes that would otherwise violate federal law.

ETC Marketing Ltd, a subsidiary of Energy Transfer Partners L.P., stored natural gas through the Houston Pipeline Company in Harris County. The County Appraisal District (HCAD) appraised and taxed the value of approximately 33 billion cubic feet of gas allocated to ETC and stored in the Bammel reservoir for the 2010 tax year. ETC protested the tax to the Harris County Appraisal Review Board on the basis that the stored gas was in the stream of interstate commerce and therefore immune from taxation.

"To be clear, our holding does not constitute blanket approval of any taxation of stored natural gas," Justice John Devine wrote on behalf of the 7-1 majority.

"As is the case with all property, there may be circumstances in which taxation of gas runs afoul of the Commerce Clause. This scenario—nondiscriminatory taxation of surplus gas held without a destination for future resale—is just not one of them," he wrote.

The Texas high court isn't the first to address the question, Devine noted. Both the Oklahoma and Kansas supreme courts found taxation of stored gas constitutional under similar circumstances.

Renn Neilson, a state and local tax partner at Baker Botts LLP, told Bloomberg BNA May 1 it is unclear whether there will be an appeal to the U.S. Supreme Court.

'Necessary' for Transmission

"The majority looks at the storage of gas as ETC's business decision so that it can be ready to capitalize on higher demand when it occurs," he said.

In the dissenting opinion, however, Chief Justice Nathan L. Hecht "looks at the storage as a necessary part of gas transmission," Neilson said, adding that he found the chief justice's opinion "more persuasive."

"He focused on the particulars of the natural gas business," said Nielson, and "distinguished it from the sort of warehousing of inventory that the majority was worried about."

Hecht made the point "that unlike most other things that you could store and then claim that is still in commerce, natural gas is

different because it's not just a business decision to have a storage facility," according to Neilson.

"You don't just keep gas in storage to let it sit there and until you get a better price and decide to ship it. It's necessary to store gas in order for the pipelines to function," Neilson said.

"The question then becomes: 'Does Harris County have the right to tax any kind of storage? What about gas that's in the pipelines (PAD gas)?"

"Should out-of-state customers be responsible for this extra cost because the gas is being shipped through pipelines in Texas as opposed to out of Oklahoma or Louisiana? And how does that impact the markets? Ultimately that's where the impact will be felt," Nielson said.

Temporary Period

Although the state supreme court focused on the commerce clause, the court said "another issue at play" is whether the Texas Tax Code provides an independent shield against taxation.

Central to that issue are provisions saying the state can tax only personal property "located in this state for longer than a temporary period" (Tex. Tax Code Section 11.01(c)(1)). Additionally, a taxing unit may tax only property "located in the unit on January 1 for more than a temporary period" (Section § 21.02(a)(1)).

The court rejected the ETC subsidiary's argument that because the company's stored gas isn't located in Texas for longer than a "temporary period," neither Texas nor the Harris County Appraisal District can tax the gas.

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