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County Assessor's Retroactive Property Tax Assessment against Kinder Morgan Upheld

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On June 19, 2017, the Colorado Supreme Court upheld a county assessor's retroactive property tax assessment against an operator for its 2008 annual property taxes.

In 2008, Kinder Morgan, as the operator of the McElmo Dome CO_2 Unit in Montezuma County, Colorado, self-reported its annual property tax statement on its oil and gas leaseholds comprising the Unit. Kinder Morgan correctly self-reported the volume of oil and gas sold and self-reported the "wellhead" selling price of CO_2 to the County as 52 cents per MCF, using the "unrelated-party" netback method in the Assessor's Reference Manual. Kinder Morgan arrived at the 52 cents per MCF wellhead selling price by deducting the entirety of its costs for gathering, processing, and transportation services. In 2007, the Cortex Pipeline Company's CO_2 transportation services were charged to Kinder Morgan and all shippers at 22 cents per MCF.

The County assessor audited Kinder Morgan's 2008 annual property tax statement and determined that Kinder Morgan was entitled to deduct only a portion of the 22 cents per MCF Cortez Pipeline tariff because Kinder Morgan was a "related-party" to the Cortez Pipeline Company; thus, it must use the related-party netback method to calculate the wellhead selling price to complete its annual property tax statement. Under the auditor's assessment, Kinder Morgan had an additional retroactive tax liability for 2008 of over $2,000,000.

Kinder Morgan paid this retroactive 2008 tax liability under protest. Kinder Morgan argued to the Board of Assessment Appeals (the "Board") that the County assessor lacked the authority to issue its retroactive tax assessment for two reasons: (1) C.R.S. § 39-5-125 only authorizes a retroactive tax assessment when "taxable property has been omitted from the assessment rolls," and it was undisputed that the sales volumes were properly reported in Kinder Morgan's tax statement; and (2) even if the County assessor had the authority to submit the retroactive tax assessment, Kinder Morgan's deduction of the full 22 cents per MCF transportation tariff was proper. After a two day hearing, the Board affirmed the County's retroactive tax liability assessment. Kinder Morgan appealed the Board's decision to the Colorado Court of Appeals, which affirmed the Board's decision in favor of the County, and to the Colorado Supreme Court, which affirmed the decision of the Court of Appeals. *Kinder Morgan CO_2 Co., L.P. v. Montezuma Cty. Bd. of Comm'rs*, 2017CO72. A full copy of the Supreme Court's opinion is available here.

The first issue decided by the Colorado Supreme Court was that the underreporting of the wellhead selling price, even though Kinder Morgan correctly reported the sales volumes of carbon dioxide, was a form of "omitted property" such that the County assessor had the statutory authority to make the retroactive corrective assessment. The Court reached its conclusion by review and interpretation of the 1990 amendments to the oil and gas taxation scheme in HB 90-1018 and the self-reporting procedure for tax valuation as set forth in the statute.

The Court concluded that an audit would be incomplete if a retroactive assessment could not be made by the County assessor as a result of that audit, and as such the "statutory scheme governing property taxation of oil and gas leaseholds and lands authorizes the retroactive assessment of property taxes when an operator underreports the volumes or selling price of the oil and gas it produces." In essence, the Court was not about to sanction Kinder Morgan's tax windfall which it created by its own property value underreporting error.

Second, the Court found evidence in the record to support the Board's determination that Kinder Morgan underreported the wellhead selling price because it was a related-party to Cortez Pipeline Company due to its 50% ownership interest in the Cortez Pipeline Company partnership. As a related-party, the Court confirmed that Kinder Morgan was only permitted to deduct a portion of the 22 cents per MCF transportation tariff and not the entirety of the tariff, as it had done when it incorrectly utilized the unrelated-party netback method to calculate its 2008 wellhead sales price.

Please contact Karen Spaulding with any questions.