BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF
***PITTSBURGH & MIDWAY COAL MINING COMPANY***,
I.D. NO. 01-765016-00, PROTEST TO DENIAL
OF CLAIMS FOR REFUND. No. 95-03

## DECISION AND ORDER

This matter came on for hearing on December 15, 1994 before Gerald B. Richardson, Hearing Officer. Pittsburgh & Midway Coal Mining Company (hereinafter "Taxpayer") was represented by Mark F. Sheridan, Esq. and Michael B. Campbell, Esq. of Campbell, Carr, Berge & Sheridan, P.A. The Taxation and Revenue Department (hereinafter "Department") was represented by Frank D. Katz, Chief Counsel, and Margaret B. Alcock, Special Assistant Attorney General. At the close of the hearing, a briefing schedule was set and the final briefs were filed on March 24, 1995 and the matter was considered submitted for decision at that time. The parties have agreed that the Hearing Officer may have 60 days to render his decision in this matter.

Based upon the evidence and arguments presented, IT IS **DECIDED AND ORDERED** as follows:

## FINDINGS OF FACT

1. In 1990, the New Mexico legislature passed Senate Bill 208, enacted as Laws 1990, Ch. 84 § 1, codified now as § 7-26-6.2 NMSA 1978, providing for an exemption from the coal severance surtax for coal sold under contracts that meet certain conditions.

2. During the legislative process, the Department submitted a Bill Analysis and Fiscal Impact Report to the legislature concerning Senate Bill 208, which stated that, "[I]t will be necessary to require coal producers to register qualifying contracts with the Taxation and Revenue Department in advance of claiming the lower tax rate." In submitting this comment to the legislature, the Department was expressing its concern that it have sufficient information from a

taxpayer claiming the surtax exemption to determine whether the coal for which the exemption was claimed was sold under contracts which qualified the coal for the exemption. Department personnel then participated in drafting the language of an amendment to Senate Bill 208 which became Subsection D of § 7-26-6.2 which addresses the registration of contracts for the sale of coal for which exemption from the surtax is claimed.

3. The Taxpayer was also involved in the legislative process resulting in the enactment of § 7-26-6.2. Prior to the 1990 legislative session the Taxpayer had acquired the York Canyon Mine near Raton, New Mexico. The mine was not operating, and because the coal market was so highly competitive, the Taxpayer had sought legislation providing for an exemption from the coal severance surtax so as to be able to compete more effectively with coal from other states by lowering the price it charged. To accomplish this goal, the Taxpayer had assisted in drafting Senate Bill 208 as it was originally introduced.

4. The coal surtax exemption became effective July 1, 1990. In order for coal sales to qualify for the exemption, certain criteria had to be met. The coal had to be sold and delivered either pursuant to a contract entered into on or after July 1, 1990 under which deliveries began after July 1, 1990 and before June 30, 1994 (provided the contract was not the result of renegotiation or other action designed to make sales under existing contracts eligible for the exemption) or; pursuant to a contract in effect on July 1, 1990 if the coal delivered was in excess of the average calendar year deliveries under the contract during years 1987, 1988 and 1989 or in excess of the contract minimum, whichever was greater. Additionally, prior to taking the exemption, the contract under which the coal was sold had to be registered with the Department.

5. The Taxpayer entered into a letter of intent, dated November 24, 1992, for a proposed supply contract with Arizona Electric Power Cooperative, Inc. ("AEPCO"). The Taxpayer began making deliveries of coal to AEPCO pursuant to the letter of intent in December, 1992. There ensued a lengthy negotiation period between the Taxpayer and AEPCO to work out the

final terms of the contract for the sale and delivery of coal. During those negotiations the letter of intent was amended on February 25, 1993, April 23, 1993 and June 2, 1993. The contract was finalized and entered into effective June 11, 1993.

6. Pursuant to Section 3.1 of the AEPCO contract, all coal purchased by AEPCO from the Taxpayer prior to the effective date of the contract pursuant to the November 24, 1992 letter of intent and its amendments was deemed to be coal purchased during the first contract year of the contract. It was the intent of the parties to the contract that by this provision, that all of the tonnage that had been sold prior to the effective date of the contract under the letter of intent would be subject to the terms and conditions of the contract and would be included within the contract.

7. Until the AEPCO contract was finalized, the Taxpayer reported and paid the Department the coal severance surtax each month from December 1992 through June, 1993 on all of the coal sold and delivered to AEPCO.

8. The Taxpayer never sought to have the November 24, 1992 letter or intent or its amendments registered with the Department for purposes of claiming the coal severance surtax exemption.

9. On July 21, 1993, the Taxpayer filed an application for registration of its contract of June 11, 1993 with AEPCO with the Department for purposes of claiming the coal severance surtax exemption.

10. On July 27, 1993, the Department approved for registration the Taxpayer's contract with AEPCO.

11. On September 17, 1993, the Taxpayer submitted to the Department amended coal severance tax returns for the period of December 1992 through June, 1993, together with the Department's application form for tax refund, Form RP-16, requesting refunds totaling $889,938.80 based upon the Taxpayer's claim of exemption from coal severance surtax for coal sold pursuant to its contracts with AEPCO and Arizona Public Service Company.

12. On September 29, 1993, the Department denied the Taxpayer's claims for refund on the basis that coal deliveries prior to the contract date of June 11, 1993 were not tax exempt from coal severance surtax.

13. On October 26, 1993, the Taxpayer filed a written protest with the Department protesting the Department's denial of its claims for refund of coal severance surtax.

14. On December 30, 1993, the Department wrote the Taxpayer informing it that based upon additional information submitted in the Taxpayer's protest letter, it had determined that the Taxpayer was entitled to a refund of $437,635.73, attributable to coal sales to the Arizona Public Service Company based upon the fact that contract had been accepted for registration by the Department in November, 1990, prior to the date of the coal deliveries at issue. The Department's letter further informed the Taxpayer that the remaining portion of its refund claim, in the amount of $452,303.07 based upon the Taxpayer's claim of the coal surtax exemption for sales under the AEPCO contract remained denied on the basis that the right to claim the coal surtax exemption runs from the date the contract is registered with the Department and no contract or letter of agreement was registered with the Department until July, 1993.

15. On a number of occasions subsequent to July 1, 1990, the Taxpayer, by letter, requested that the Department accept for registration various coal sales contracts for the purposes of claiming the coal surtax exemption. The Taxpayer's letters, in addition to requesting registration, informed the Department that the Taxpayer intended to file its severance tax returns for periods prior in month to the date of the letter requesting registration at the tax rate which excludes the coal severance surtax. In responding to the Taxpayer's requests for registration, the Department approved the registration of the contracts and indicated under the column "Amount Approved", "All". The Department's letters approving the contracts did not respond directly to the Taxpayer's statement of its intent to claim the coal severance surtax exemption for periods which would necessarily have occurred prior to the date of the Department's registration of the contracts.

## DISCUSSION

The issue presented herein, upon which the Taxpayer's entitlement to the coal severance surtax exemption turns, is the proper interpretation of Section 7-26-6.2(D) NMSA 1978, which provides:

> [T]he taxpayer, *prior to taking the exemption provided by this section,* shall register any contract for the sale of coal that qualifies for the exemption from the surtax under the provisions of this section with the taxation and revenue department on forms provided by the secretary. If upon examination of the contract or upon audit or inspection of transactions occurring under the contract the secretary or the secretary's delegate determines that any person who is a party to the contract has taken any action to circumvent the intent and purpose of this section, the exemption shall be disallowed. (emphasis added).

The Department interprets the provision requiring contract registration, "prior to taking the exemption", as an absolute bar in the nature of a statute of limitations applying to any claim for exemption for coal sold pursuant to a contract which is accepted for registration with the Department if the coal was sold and delivered prior to the date the Department actually registers the contract. The Taxpayer interprets the provision more broadly, as being a provision designed to ensure that the coal for which the surtax exemption is claimed was sold under a contract which meets the qualifying conditions of the statute, but once the contract is determined to qualify, coal sold under the contract may be exempted, even if it was sold before the Department accepted the contract for registration. The Taxpayer argues that it complied with the statute in this case because it did not claim the exemption when it filed its original coal severance tax returns, but only claimed it after the contract was registered, by filing amended coal severance tax returns and the claims for refund that are at issue herein.

Before resolving the issue of the interpretation of the statute, a preliminary issue to be determined is whether the coal sales for which exemption is claimed were sales pursuant to the AEPCO contract which the Department later accepted for registration. The Department contends that the letter of intent, with its binding provisions concerning confidentiality and test burning of the

coal, amounted to a contract which could have been registered to cover the sales of coal made under the letter of intent. While this may be true[1], it is immaterial if the former letters of intent become merged into the final contract, in which case, the final contract would cover the sales under the letter of intent. The doctrine of merger is a contract principle which establishes that prior agreements between the same parties on the same subject matter are presumed to be included in, or merged into the final contract, especially when it appears to be the intent of the parties to do so. ***Superior Concrete Pumping, Inc. v. David Montoya Construction, Inc.***, 108 N.M. 401, 773 P.2d 346 (1989). In this case, the "approval" portion of the letter of intent clearly references the parties obligation to negotiate in good faith a comprehensive coal supply contract and makes clear that the letter of intent is but preliminary to a final agreement on the sale of coal. Similarly, Section 3.1 of the final agreement makes reference to coal sold under the November 24, 1992 letter of agreement and its amendments and includes such coal in the tonnage covered during the first year of the contract. Additionally, there was uncontroverted testimony from Mr. Gardner, Senior Counsel for the Taxpayer who was very involved in the contract negotiations, that the Taxpayer and AEPCO intended that the coal sold prior to the effective date of the AEPCO contract pursuant to the letter of intent would be subject to and included in the final contract. Given that the contract and the letter of intent clearly refer to each other and concern the same subject matter and parties and given the testimony concerning the intent of the parties, it is concluded that the letter of intent and the final contract should be merged. Thus, any coal sold under the letter of intent is considered to be sold under the final contract. Since the final contract was accepted for registration by the Department, the coal sold pursuant to the letter of intent otherwise qualifies for exemption from the coal severance surtax, if the other conditions of § 7-26-6.2 are met.

We turn now to the construction of § 7-26-6.2(D). The fact that the two parties have come up with plausible but inconsistent interpretations of the provision amply demonstrates that there is

[1] Since the Taxpayer never sought registration of the letter of intent, no opinion on this issue is intended, nor is it necessary for purposes of this decision.

an ambiguity in the statute which requires that the statute be construed. It is a fundamental principle of statutory construction that a statute should be interpreted to mean that which the legislature intended it to mean and to accomplish the ends sought to be accomplished by it. ***State ex rel. Newsome v. Alarid,*** 90 N.M. 790, 568 P.2d 1236 (1977). Thus, the exercise of statutory construction is one of attempting to discern the legislative intent. In ascertaining legislative intent, courts will look not only to the language used in the statute, but also to the object sought to be accomplished and the wrong to be remedied. ***Schmick v. State Farm Mutual Automobile Insurance Co.***, 103 N.M. 216, 704 P.2d 1092 (1985). In looking at § 7-26-6.2 NMSA 1978 (1990 Repl. Pamp.) itself, it creates, until July 1, 2009, an exemption from the coal surtax for coal sold under certain coal sales contracts. Subsection A describes the contracts which are eligible:

> (1) coal sold and delivered pursuant to coal sales contracts that are entered into on or after July 1, 1990, under which deliveries start after July 1, 1990, and before June 30, 1994, if the sales contracts are not the result of:
>
> (a) a producer and purchaser mutually rescinding an existing contract and negotiating a revised contract under substantially similar terms and conditions;
>
> (b) a purchaser establishing an affiliated company to purchase coal on behalf of the purchaser; or
>
> (c) a purchaser independently abrogating a contract that was in effect on July 1, 1990, with a producer for the purpose of securing the benefits of the exemption granted by this section; and
>
> (2) coal sold pursuant to a contract in effect on July 1, 1990, that exceeds the average calendar year deliveries under the contract during production years 1987, 1988 and 1989 or the contract minimum, whichever is greater.

Thus, the exemption would be available only for coal sold under new contracts which are truly new contracts and not merely the result of the parties renegotiating or rescinding existing contracts in order to avail themselves of the tax break. Additionally it is available for coal sold under existing contracts if the coal sold exceeds the greater of the average deliveries in years prior to the enactment of the surtax exemption, or the contract minimum.

Subsection B applies similar limitations on claiming the exemption. If a contract existing on July 1, 1990 is renegotiated prior to the end of its term, the surtax applies to the remainder of the contract term. Additionally if the contract would have expired during the period between July 1, 1990 and June 30, 1994, the exemption would only apply after the last date that the contract would have been in effect.

Subsection C of the statute also contains limitations which operate to ensure that there is no abuse of the allowance of the exemption for sales under existing contracts in excess of the amounts qualified under Subsection A(2).

An examination of the limitations imposed upon which coal is eligible for the surtax exemption leads one to conclude that the legislature intended that only coal sold under new contracts, or coal sold in excess of average deliveries under existing contracts would be eligible for the deduction. This construction is consistent with the intent urged by the Taxpayer (who assisted in drafting this legislation) that the purpose of the surtax exemption was to encourage the sales (and mining) of new coal which would not otherwise be mined under existing contracts and which would not be sold under new contracts unless the seller could offer a more competitive price because of the exemption from the surtax. The operation of the statute also served to preserve existing surtax revenue streams for the state. Thus, by creating the exemption, the state was preserving its expected surtax revenues, but was forgoing new surtax revenues on new coal production. Because the exemption only applied to the coal severance surtax, and not to the coal severance tax itself[2], by encouraging new coal production, the state would still stand to gain by the severance taxes collected on the new coal mined.

Thus, it would appear that the legislature's purpose in enacting § 7-26-6.2 was to encourage the production of new coal in New Mexico by allowing coal producers to offer lower prices on such coal by exempting such coal sales from the coal severance surtax. In granting the exemption the

[2] Both the coal severance tax and the coal severance surtax may be found at § 7-26-6 NMSA 1978.

legislature was careful to protect its existing revenue stream and to word the exemption very carefully to ensure that the exemption would only apply to coal which was mined under entirely new contracts which were not subterfuges representing renegotiated old contracts or contracts involving related parties to existing contracts; or if the coal was sold under an existing contract, the exemption would only apply to amounts in excess of what would have reasonably been expected to be sold under the existing contract. This interpretation finds further support in the second sentence of Subsection D, which provides:

> If upon examination of the [registered] contract or upon audit or inspection of transactions occurring under the contract the secretary or the secretary's delegate determines that any person who is a party to the contract has taken any action to circumvent the intent and purpose of this section, the exemption shall be disallowed.

It is in the context of this legislative intent that the first sentence of Subsection D, which requires a taxpayer, "prior to taking the exemption" to register the contract for the sale of qualifying coal, must be construed. In this context, it would appear that the legislature's overriding concern in requiring the registration of contracts was with ensuring that the coal for which the exemption is claimed qualified for the exemption, rather than with the timing of the claim for the exemption. Although the legislature was obviously concerned with the time periods for which the exemption could be claimed, those concerns are expressed in Subsection A, which provides a 4 year window to commence shipments of coal sold under new contracts, and in the sunset provision limiting the exemption until July 1, 2009.

In construing Subsection D, it is also noteworthy that the provision was added during the legislative process at the Department's behest, as reflected in the Bill Analysis and Fiscal Impact Report submitted to the legislature during its consideration of the proposed legislation. The Department participated in drafting subsection D, and according to Mr. White, who was part of the Department's legislative team, the Department's concern in suggesting the need for registration of the contracts in advance of claiming the exemption was that the department have sufficient

information from a taxpayer to determine whether the coal for which the exemption was being claimed was, in fact, being sold under contracts which were exempt from the surtax. This concern goes to the qualification issue rather than to a concern about the actual timing of a taxpayer's claim of the exemption vis-a-vis when the actual shipments for which the exemption is claimed were made, and supports the Taxpayer's interpretation of the statute.

From the record, it also appears that the Department may not have always applied the interpretation it now urges. On several occasions, when writing to request the registration of other coal sales contracts, the Taxpayer's letters, in addition to requesting registration, informed the Department that the Taxpayer intended to file its severance tax returns claiming the surtax exemption for periods prior in month to the date of the letter requesting registration. The Taxpayer's letters only referred to severance tax for a particular month, and the letters were not clear as to whether the reference to month indicated the month for which the report would be filed or the month in which the report would be due. Under the severance tax statutes, the taxes for a month in which sales occur must be reported and paid by the 25th day of the following month. ***See,*** Section 7-26-8 NMSA 1978. Thus, there is some ambiguity in the Taxpayer's letters. Even so, at least with respect to the Taxpayer's letter of January 23, 1991, which informed the Department that it intended to claim the exemption for November, the return would be due, at the latest, on December 25, 1991, and even if the return would be filed late, it would reflect sales occurring prior to any conceivable date by which the Department could have given approval to the contract.

In responding to the Taxpayer's letter, the Department made no direct response to the Taxpayer's statement informing the Department of its intent to claim the exemption for periods prior to registration of the contract, but merely informed the Taxpayer of its registration of the contract and under the column "Amount Approved," indicated "All."

The Department urges that it is not now estopped from denying the Taxpayer's claims for prior exemption based upon its failure to inform the taxpayer that claims for coal delivered in

periods prior to contract approval would be improper. I agree that the Department's letter does not amount to a ruling or regulation as required for estoppel under the terms of § 7-1-60 NMSA 1978. I also agree that equitable estoppel should not be applied against the Department in this instance, because it is only applied against the state in the limited circumstances where "right and justice demand it," ***Taxation & Revenue Department v. Bien Mur Indian Market Center, Inc.***, 108 N.M. 228, 230, 770 P.2d 873 (1989). Here, because of the ambiguity of the Taxpayer's letter concerning whether the month referenced indicated a reporting period or a filing month, right and justice do not demand the application of equitable estoppel. Furthermore, although as a matter of good tax policy, it behooves the Department to inform a taxpayer to the contrary when it appears the taxpayer would be making an unauthorized claim for exemption, there is no requirement that it do so. It should be recognized that not every Department employee will always be aware of matters of legal interpretation or statutory construction.

Even though estoppel does not apply against the Department in this instance, however, the Department's letters approving for registration the full contract amounts under these circumstances may indicate that the Department's interpretation of the provisions of § 7-26-6.2 had not yet been determined. Additionally, it lends some support to the reasonableness of the interpretation urged by the Taxpayer in this instance.

From all of the above, I am persuaded that Section 7-26-6.2(D) should be construed to only require that the Taxpayer secure the Department's approval of the contract prior to claiming the exemption, which criteria the Taxpayer has met in this case by submitting its claim of exemption within the statutory time limits for filing amended returns, and it should not be construed as the Department contends, as an absolute bar to any claim of exemption for time periods occurring prior to the date of the registration of the contract by the Department. This construction is consistent with the legislature's concern that only qualifying coal be exempted, but it does not impose requirements which would exclude from exemption coal sales which would otherwise qualify

except for the timing of a taxpayer's securing of registration. I also believe that the Taxpayer has met the letter of the law by awaiting its claim of exemption until after it received registration of the contracts by the Department. In this regard, the Taxpayer has also fulfilled the Department's procedural requirements for claiming its exemption, by filing the Department's form RP-16 applying for a refund of the coal severance surtax paid and filing amended returns, all within the statute of limitations for filing such refund claims pursuant to Section 7-1-26 NMSA 1978. Thus, even if the exemption is construed strictly, the Taxpayer has proven itself to fall within the express language of the exemption. In arriving at this construction I have not attempted to determine whether the requirement is "procedural" or "substantive" because I, too, find the distinction to be elusive, difficult to characterize and generally unhelpful to this analysis.

I am also unpersuaded by the Department's concerns that the construction urged by the Taxpayer is contrary to public policy because it makes it difficult for the Department to accurately predict revenue streams for the legislature. Although it is conceded that the granting of this refund will impact upon revenue streams already accounted for, this result is no different than any other instance where taxpayers file refund claims within the statute of limitations provided in Section 7-1-26. Refund claims can be generated by changes in the law as interpreted by the courts of this and other jurisdictions, and other somewhat unpredictable events. Nonetheless, the legislature has provided for a three year time frame in which such claims may be made. In doing so, the legislature has acknowledged a degree of uncertainty in counting on revenue already collected, but it has determined to strike a balance between its need for certainty and fairness to taxpayers by providing a limited time frame within the provision for claiming refunds, for making such claims. Thus, the legislature has stated its public policy and it made no explicit exception to that policy with respect to a taxpayer's ability to claim refunds of the coal severance surtax in either §§ 7-1-26 or in 7-26-6.2.

## CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to the Department's denial of its claims for refund, pursuant to Sections 7-1-24 and 7-1-26 NMSA 1978 and jurisdiction lies over both the parties and the subject matter of this protest.

2. The letter of intent between the Taxpayer and AEPCO, and its subsequent amendments was merged into the final contract between those parties. Thus, the coal sold pursuant to the terms of the letter of intent and its amendments was coal sold under the final contract.

3. The Department is not estopped from arguing the interpretation of § 7-26-6.2 urged herein by its responses to the Taxpayer's requests for the registration of other coal sales contracts.

4. The legislative intent in enacting Subsection D of Section 7-26-6.2 was to ensure that the coal surtax exemption could only be claimed for coal sales made pursuant to contracts which the Department had reviewed and approved as qualifying contracts.

5. The Taxpayer obtained the Department's approval and registration of its contract with AEPCO prior to claiming the coal surtax exemption for its sales pursuant to that contract and therefore the Taxpayer met the requirements of Section 7-26-6.2(D) and was entitled to claim the coal severance surtax exemption on such sales by filing a claim for refund of the coal severance surtax.

For the foregoing reasons, the Taxpayer's protest **IS HEREBY GRANTED.** The Department **IS HEREBY ORDERED TO GRANT THE TAXPAYER'S REFUND CLAIM.**

**DONE**, this 23rd day of May, 1995.