INTERIOR BOARD OF LAND APPEALS

Taylor Energy Co.

139 IBLA 395 (July 31, 1997)

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TAYLOR ENERGY CO.

IBLA 94-480 Decided July 31, 1997

Appeal from a decision of the Deputy Director, Minerals Management Service, denying a refund request. MMS-93-0038-OCS.

Affirmed.

1. Outer Continental Shelf Lands Act: Refunds--Rules of Practice: Generally

A royalty payor may claim a refund of excess royalty payments by filing a written request within 2 years of the date payments were made in accordance with procedures prescribed by Congress in section 10 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1994). While a lessee may offset overpayments found on a lease during an audit against underpayments discovered on that same lease, a payor may not intentionally create an underpayment by taking an unauthorized credit adjustment to recoup an overpayment made in a previous month because the payor would have effected a refund without satisfying the preconditions of section 10. The MMS therefore may properly reject a request to refund a payment required by it to remedy an unauthorized underpayment as detected during its audit.

APPEARANCES: Timothy C. Woods, Chief Financial Officer, Taylor Energy Company, New Orleans, Louisiana, for Appellant; Howard W. Chalker, Esq., Peter J. Schaumberg, Esq., and Geoffrey Heath, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Taylor Energy Company (Taylor) has appealed from a Decision of the Deputy Director, Minerals Management Service (MMS), dated March 17, 1994, declining to refund a payment billed to Taylor for an unauthorized recoupment, by way of a unilateral credit adjustment it took to compensate for an alleged overpayment on production from certain offshore oil and

gas leases. The MMS denied the appeal on the grounds that Taylor's royalty refund request was filed after the 2-year limit established by section 10(a) of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1339(a) (1994).

On April 14, 1992, MMS billed Taylor (Bill No. 76920081) in the amount of $96,686.54 for underpayment of royalties paid in April and May 1986 on leases 054-003086-0, 054-003087-0, and 054-003467-0. Taylor paid the proper amount to MMS on May 20, 1992, but reported that the underpayment represented a recoupment of $96,686.54 in excess royalty payments submitted for January and February 1986. 1/ By letter received July 6, 1992, Taylor requested refund of the excess payment pursuant to section 10 of OCSLA, supra.

On July 16, 1992, MMS denied the refund request, stating that the request related to payments made in March and April 1986, and was well beyond the 2-year limit prescribed by Congress. Taylor then appealed to the Director, MMS, pursuant to 30 C.F.R. Part 290 (1993). In affirming the MMS' denial, the Deputy Director observed that permitting an unauthorized unilateral credit adjustment violates section 10 of OCSLA and refunding a payment made after 2 years to rectify an unauthorized recoupment renders section 10 meaningless.

Appellant seeks reversal of the Director's Decision on the theory that, within the specific meaning of section 10, it has properly requested refund of an excess payment of royalties. Taylor does not dispute it acted improperly in unilaterally crediting the overpayments made in previous months by underpaying in April and May 1986. It, however, questions MMS' action to collect both the amount underpaid and a "penalty" (in this case, $84,602.94 in interest) without considering whether the net amount of royalties collected is excessive:

> By interpreting the words "within two years after the making of the payment" to mean within two years from which the liability arose, the MMS is able to collect interest from the time the overpayment was recouped without permission, until the unauthorized recoupment is repaid, and still claim the books are

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1/ The overpayments were itemized as follows:

Lease Number	Sales Month	Amount	
054-003086-0	01-86	$41,839.33	
054-003086-0	02-86	37,875.66	
054-003087-0	01-86	1,163.87	
054-003087-0	02-86	1,064.46	
054-003467-0	01-86	844.17	
054-003467-0	02-86	13,899.05	
		TOTAL	$96,686.54

(MMS Reference No. 2-1299.)

> closed. In the immediate instance, they're reopening our 1986 accounting period during 1992 with an invoice, and then saying the books are closed because the invoice relates to 1986. They did not invoice us in 1986. Had they done so, we would not have paid interest almost equivalent to the original overpayment. The result is punitive damages on top of a lost refund for royalty overpayment * * * excess funds that the government never had a legal right to, but none the less forfeited by laches.

(May 20, 1994, Supplemental Statement of Reasons at 2.) Taylor argues that the intent of the statute is to bar royalty payors from disputing an accounting after a 2-year period, and since MMS reopened the issue when it invoiced Taylor in 1992, it should not be allowed to regard the 1992 payment as an excess payment attributed to 1986. Rather, Taylor avers, MMS should consider the net payments rendered and deem the interest paid penalty enough for the failure to follow procedure when Taylor took the unilateral credit. Appellant contends that the 1992 payment was indeed in excess of what was owed as royalty, and therefore its request for recoupment was in accordance with section 10. The MMS disputes all of Taylor's contentions, arguing that the 1992 payment does not constitute a payment in excess of that required by law.

[1] Section 10(a) of OCSLA, 43 U.S.C. § 1339(a) (1994), authorizes reimbursement of overpayments, "if a request for repayment of such excess is filed with the Secretary within 2 years after the making of the payment." 2/ The scope of this authority and the limitations imposed upon

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2/ In relevant part, § 10(a) of OCSLA, 30 U.S.C. § 1339(a) (1994), provides:

"[W]hen it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after making of the payment * * *."

This provision confers authority upon the Secretary of the Interior to approve refunds for overpayment arising from OCS leases and also authorizes the Secretary of the Treasury to make the payments. Section 10(a) does not operate to extinguish a lessee's claim to moneys overpaid, but merely establishes authority for repayment of funds deposited in the Treasury upon the timely filing of a refund request. See Shell Offshore, 96 IBLA at 165-67, 94 Interior Dec. at 78-79.

Section 10 of OCSLA was repealed, effective Aug. 13, 1996, by § 8(b) of the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996, Pub. L. No. 104-85, 110 Stat. 1700, 1716. However, Congress specified in § 11, 110 Stat. 1716, that the "amendments made by this Act, shall apply with respect to the production of oil and gas after the first day of the month following the date of the enactment of this Act." Thus, Congress reported:

the Department's exercise thereof was explored both by this Board in Shell Offshore, Inc., 96 IBLA 149, 94 Interior Dec. 69 (1987) and by Solicitor Coldiron in Refunds and Credits Under the Outer Continental Shelf Lands Act, M-36942, 88 Interior Dec. 1090 (1981). Both the Board and the Solicitor concluded that this section meant literally what it said, that the request for repayment of excess royalties must be made within 2 years after "the making of the payment." 3/

The Board's decision in Shell Offshore was subsequently upheld by the Court of Appeals for the Federal Circuit in Chevron U.S.A., Inc. v. United States, 923 F.2d 830 (Fed. Cir. 1991). 4/ The Court concluded that, to qualify for a refund under section 10, a royalty payor must make a timely request and that the phrase "within two years after the making of the payment" defines the timeliness of a refund request. Id. at 833. In Chevron, the payors made a refund request after litigation required MMS to retroactively apply rules reducing the royalties owed to the Federal Government. The Court held that such "discovery" of excessive payments does not constitute the "making" of a payment and ruled that the request was outside the 2-year limitation. Id. at 833-34.

The specific issue brought before the Board here is whether "making of the payment" in this case should be construed as those excess royalty payments recouped in 1986 by the unauthorized credit adjustment or the payment in May 1992 tendered in response to MMS' invoice. Taylor, in its

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fn. 2 (continued)
"With respect to the repeal of section 10 of [OCSLA], the committee intends the prospective elimination of the OCSLA-imposed bar to lessees seeking refunds of overpayments more than two years later and the establishment of the same limitations period for OCS leases as for onshore Federal leases. Therefore, royalties which may have been overpaid for OCSLA lease production prior to enactment of this Act are not affected by this section."
H.R. Rep. No. 104-667, 104th Cong., 2d Sess., reprinted in 1996 U.S.C.C.A.N. 1442, 1450-51; accord, 142 Cong. Rec. H7606 (daily ed. July 16, 1996) (statement of Rep. Maloney).

3/ It is well established that a refund claimant may not circumvent the refund procedures prescribed by Congress in § 10 by "offsetting" prior alleged overpayments against future payment obligations. Santa Fe Energy Co., 107 IBLA 121 (1989); Santa Fe Energy Co., 107 IBLA 32 (1989); Santa Fe Energy Co., 106 IBLA 333 (1989). The Department's authority to assess late payment charges or interest on royalty underpayments is also well established. Santa Fe Energy Co., 107 IBLA at 124.

4/ A discussion is found in Conoco, 114 IBLA 28, 32-36 (1990).

written plea for refund, identified the excess payment as the one proffered in 1992 in response to MMS' invoice and explained that any underpayments identified by MMS in its audit had already been offset by the antecedent overpayments, which resulted in no net amount owed, and that a penalty for the failure to follow procedures in recovering the overpayments had been exacted. However, we find that the Secretary, in Mesa Operating Limited Partnership, 98 Interior Dec. 193, 199 (1990), has specifically overruled a refund request under such circumstances:

> Mesa took a series of unauthorized credit adjustments on its royalty reports (Form MMS-2014) to recoup $3,193,581.41 in royalty overpayments made in previous months for gas production from the Lease. This Department has consistently held that the unauthorized taking of such credit adjustments violates the requirements of §10 of the OCSLA, and I reaffirm that conclusion. Therefore, each credit adjustment Mesa took on its royalty reports created an underpayment for that month which is subject to repayment.
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> Mesa's credit adjustment was discovered as a result of a MMS audit of Mesa's royalty payment procedures. The IBLA has established a general principle that a lessee may offset overpayments found on a lease during an audit period against underpayments discovered on that same lease during the same audit period. Shell Oil Co., [52 IBLA 74 (1981)]; Mobil, [65 IBLA 295 (1982)]. That principle was established in situations where the overpayments and underpayments were not related. However, in situations where a payor, like Mesa, intentionally creates an underpayment by taking a credit adjustment to recoup an overpayment made in a previous month, the overpayment always will completely offset the corresponding underpayment. Thus, the payor will have effected a refund without satisfying the statutory preconditions to receiving a refund. Therefore, the principle established in Shell and Mobil cannot be applied to underpayments caused by unauthorized credit adjustments because to do so would render both §10(a) and §10(b) meaningless. [5/] I therefore hold that to the extent that the decisions in Forest

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5/ In those cases, the Board did not consider whether a recoupment taken on Form MMS-2014 might be sufficiently stated and itemized as to constitute a request for refund which might be allowable to the extent it was filed within 2 years of the overpayment. See Forest Oil Corp. (On Reconsideration), 116 IBLA 176, 183 n.3, 97 Interior Dec. 239, 243 n.3 (1990).

Oil Corp., 113 IBLA 30 (1990), and Forest Oil Corp. (On Reconsideration), 116 IBLA 176 (1990), authorize such offsetting, those decisions are overruled. [6/]

Likewise, in Forest Oil, 9 OHA 68, 70 (1991),

[an MMS audit] disclosed that Forest had made overpayments of royalty in several months which were offset by underpayments in other months. The Director, MMS, held that Forest could not recover overpayments in such a manner but was required to apply for a refund within 2 years after making the overpayment as provided in 43 U.S.C. § 1339 (1988). Ruling that Forest had failed to apply for the refunds, the Director required Forest to repay those overpayments plus late payment charges. The Board set aside this ruling and held that the overpayments may be credited against underpayments for the same lease because the overpayments and underpayments were disclosed during the same audit.

In reversing the Board, the Director held that "overpayments cannot be used as offsets because they were related to attempts to recover them without complying with the procedures required by 43 U.S.C. § 1339." 9 OHA at 75.

Thus, the manifest policy of the Department dictates that in this situation there is no merit to Taylor's arguments. Both the Secretary in Mesa, 98 Interior Dec. at 199, and the Director, Office of Hearings and Appeals, in Forest Oil, 9 OHA at 75, disallowed any offset to recover overpayments without first complying with section 10 and approved separate repayment of the underpaid amount, with the collection of interest. Without an offset to recognize the overpayment in 1986, Taylor's 1992

6/ Secretary Lujan's decision was reported by the Director, Office of Hearings and Appeals, in response to a petition to reconsider the Forest Oil cases:
"Pursuant to 43 CFR 4.5, the Secretary assumed jurisdiction of that appeal and issued a decision on November 30, 1990, that affirmed the MMS order requiring Mesa to pay for the overpayments and expressly overruled the Board's Forest Oil decisions. Mesa Operating Limited Partnership, MMS-88-0182-OCS, 98 I.D. 193 (1990)."
Forest Oil Corp., 9 OHA 68, 70 (1991). The Secretary explicitly overruled the Board's approach in Shell Oil, 52 IBLA at 78, to the extent that underpayments in the form of unauthorized recoupments were taken to offset overpayments, holding that such an offset would contravene the intent of Congress in establishing the procedures found in § 10. 98 Interior Dec. at 197-98.

payment cannot be deemed excessive, and therefore its refund request for that payment does not comply with the statute. Thus, the only excessive royalty payments outstanding with respect to the leases at issue are those royalty payments made for production in January and February 1986, and it is obvious the 2-year limitation of section 10 has been exceeded for those payments.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision of the Deputy Director, MMS, is affirmed.

James P. Terry
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge