TCEQ DOCKET NO. 2015-0368-MIS-U

APPEAL OF THE USE DETERMINATION ISSUED BY THE EXECUTIVE DIRECTOR REGARDING DERICHEBOURG RECYCLING USA, INC.'S USE DETERMINATION APPLICATION NO. 18145	**§ § § § §**	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

HARRIS COUNTY APPRAISAL DISTRICT'S RESPONSE BRIEF TO DERICHEBOURG RECYCLING USA, INC.'S APPEAL OF THE EXECUTIVE DIRECTOR'S NEGATIVE USE DETERMINATION ON APPLICATION NO. 18145

TO THE HONORABLE COMMISSIONERS:

Harris County Appraisal District ("HCAD") files this Response Brief to the appeal of the Executive Director's Negative Use Determination on Application No. 18145, as submitted by Derichebourg Recycling USA, Inc. (the "Appellant"), for the Turnings Facility located at 7501 Wallisville Road, Houston, Harris County, Texas 77020.

I. Background

On or around June 5, 2014, the Appellant applied to the Executive Director of the Texas Commission on Environmental Quality (the "Executive Director") for a use determination on a building, containment walls, tanks, piping and pumps used to contain cutting fluids and water from incoming loads. On December 11, 2014, the Executive Director determined that the Appellant's use determination application was incomplete and requested additional information, specifically a description of the business operations that occur within the building including an explanation of how the oils and grease are separated from the turnings. The Executive Director's request for additional information also noted that roofs, walls, foundations, and floors of buildings are eligible for a positive use determination only when there is an adopted environmental rule or regulation requiring the activity to occur within an enclosed structure. The

Appellant replied to the Executive Director's Notice of Technical Deficiency on January 27, 2015. On February 11, 2015, the Executive Director issued a one hundred percent (100%) positive use determination for the containment walls, sump, tanks, piping, and pumps used to collect cutting fluids and water and a negative use determination for the roofs, walls, foundations and floors of the Turnings Facility (the "Building"), a scrap metal recycling facility. In response to the Executive Director's negative use determination, the Appellant filed this appeal on the basis that all of the property that was the subject of its use determination application "is used, constructed, acquired and installed wholly to meet or exceed an adopted environmental regulation and that it is used wholly as a facility, device and/or method for the control of pollution." Appellant's Appeal Letter, March 3, 2015, p. 1.

II. Response to Appeal

A. Statutes and Rules

The Executive Director correctly held that the since the Building is used as part of the production process it is not pollution control property and therefore not entitled to a 100% positive use determination. Section 11.31 of the Tax Code provides that "[a] person is entitled to an exemption from taxation of all or part of real and personal property that the person owns and that is used wholly or partly as a facility, device, or method for the control of air, water, or land pollution."[1] Subsection 11.31(b) defines "facility, device, or method for the control of air, water, or land pollution" as "land that is acquired after January 1, 1994, or any structure, building, installation, excavation, machinery, equipment, or device, and any attachment or addition to or reconstruction, replacement, or improvement of that property, that is used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States, this state, or a political subdivision of this state for the

[1] Tex. Prop. Tax Code § 11.31(a) (WESTLAW current through 2013).

prevention, monitoring, control, or reduction of air, water, or land pollution."[2] The Appellant contends that the Building meets the definition of Subsection 11.31(b) and is therefore entitled to the exemption allowed by Subsection 11.31(a). The Appellant's contention, however, overlooks several authorities that require a contrary determination.

In 2000, the Texas Commission on Environmental Quality (the "TCEQ') submitted a request to the Attorney General inquiring about the scope of the exemption allowed for by Section 11.31, specifically whether it extended to "equipment used to make a product that limits pollution by its design," or "pollution-reducing production equipment." Tex. Atty. Gen. Op. JC-0372 (2001) at 3. In his response, the Attorney General opined that the language of Section 11.31 extended the exemption to property "used to make a product [as well as] by its design limits pollution." *Id.* at 5. However, the Attorney General stressed that "under section 11.31 the owner of pollution-reducing production equipment, property that serves both a production and a pollution-reduction purpose, is not entitled to a tax exemption on the *total* value of the property." *Id.* at 5 (emphasis added).

In 2001, the 77th Texas Legislature, echoing the Attorney General's position, amended Section 11.31 by adding Subsection 11.31(g). Subsection 11.31(g) required the TCEQ to adopt rules that were required to, *inter alia*, "...distinguish the proportion of property that is used to control, monitor, prevent, or reduce pollution from the proportion of property that is used to produce goods or services."[3] The statute was further amended so that the "the executive director [could] not make a determination that property [was] pollution control property unless the property [met] the standards established under rules adopted under [Section 11.31]."[4] The TCEQ adopted the rules mandated by Subsection 11.31(g) and they are codified in Title 30, Part

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[2] Tex. Prop. Tax Code § 11.31(b) (WESTLAW current through 2013).
[3] Tex. Prop. Tax Code. § 11.31(g)(3) (WESTLAW current through 2013).
[4] Tex. Prop. Tax Code § 11.31(h) (WESTLAW current through 2013).

1, Chapter 17 of the Texas Administrative Code ("TAC"). These rules delineate which property is eligible for an exemption, which property is ineligible for an exemption and the procedure for making partial determinations.[5]

The Building that is the subject of this appeal, is used by the Appellant in the process of producing its marketable product and therefore not entitled to a 100% positive use determination. Vehicles are delivered to the Building to be crushed and shredded. Before that can be done, however, all of the combustible liquid (i.e., oil and gas) must be removed. These liquids are removed from the vehicles' tanks and then the vehicles are crushed and shredded, and the recaptured waste liquids are transferred to storage tanks. The crushed vehicles and recycled liquids are then sold by the Appellant. The Building is not used solely for the control of pollution, but rather is a structure in which the Appellant prepares its products for sale, similar to any other factory manufacturing a product.

B. *Mont Belvieu v. TCEQ*

The situation presented here is analogous to the situation in *Mont Belvieu Caverns, LLC v. Texas Commission on Environmental Quality, et al*, 382 S.W.3d 472 (Tex. App.–Austin 2012, no pet.). In that case, Mont Belvieu Caverns, LLC ("Mont Belvieu") applied for a 100% positive use determination under Section 11.31 on its brine-pond system. Mont Belvieu stored natural gas for customers in underground salt dome caverns. To remove the gas, brine was pumped into the caverns. This displaced the natural gas and allowed it to be collected. Later, when Mont Belvieu had a need to store additional natural gas, it would inject it into the cavern, which would displace the previously injected brine. The used brine was then stored in large "ponds" to be reused. The TCEQ determined that since the brine-pond system was used to manage the levels

[5] *See* 30 TAC § 17.4 (2008), § 17.6 (2010), § 17.14 (2010), and § 17.17 (2010).

of natural gas in the caverns, it was production equipment and not entitled to a 100% positive use determination.

Mont Belvieu's primary argument on appeal was that the brine-pond system was 100% pollution-control property regardless of its contribution to the productive process. The Court disagreed however because the Legislature obviously intended to "*distinguish* the proportion of property that is used to control, monitor, prevent, or reduce pollution *from* the proportion of property that is used to produce goods or services"[6] when it enacted Subsection 11.31(g)(3). Subsection 11.31(g)(3), the Court said, qualified and limited Subsections 11.31(a) and (b)'s definition of pollution control property. "And it follows from [those] limitations and qualifications that property cannot qualify as 100% pollution-control property if any portion of its value is attributable to its capacity to produce goods and services."[7]

Similarly, the Appellant in this case is seeking a 100% positive use determination on property that is used as production property. Also, the Appellant's reasoning "overlooks the significance of subsection (g)(3) of section 11.31"[8] as Mont Belvieu's did, and that subsection shows the Legislature's intent to "distinguish pollution-control property—property qualifying for the tax exemption—from 'property that is used to produce goods and services.'"[9] Since the Building is used to produce the Appellants goods for sale, it is not entitled to a 100% positive use determination. The Building is simply a factory used to produce and prepare the Appellant's goods for market.

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[6] *Mont Belvieu Caverns, LLC v. Texas Commission on Environmental Quality, et al*, 382 S.W.3d 472, 488-489 (Tex.App.–Austin 2012, no pet.) (citing Tex. Prop. Tax Code. § 11.31(g)(3)).
[7] *Id.*, 489.
[8] *Id.*, 488.
[9] *Id.*, 490 (citing Tex. Prop. Tax Code. § 11.31(g)(3)).

III. Analysis of Property Tax Exemption Statutes

It is well established in Texas that "[s]tatutory exemptions from taxation are subject to strict construction because they undermine equality and uniformity by placing a greater burden on some taxpaying businesses and individuals rather than placing the burden on all taxpayers equally."[10] Consequently, the burden to establish that one qualifies for an exemption is on the claimant and "[a]ll doubts are resolved *against* the granting of [the] exemption."[11] HCAD strongly urges this Commission to adhere to these principles in deciding this appeal.

IV. Conclusion

Based on the foregoing and for the reasons stated herein, Harris County Appraisal District respectfully requests that the Commission deny Derichebourg Recycling USA, Inc.'s appeal, and affirm the Executive Director's Negative Use Determination issued for Application No. 18145.

Respectfully submitted,

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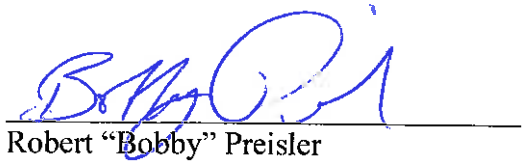
[10] *North Alamo Water Supply Corporation v. Willacy County Appraisal District, et al*, 804 S.W. 2d 894, 899 (Tex. 1991).

[11] *Mont Belvieu Caverns, LLC v. Texas Commission on Environmental Quality, et al*, 382 S.W.3d 472, 487 (Tex.App.–Austin 2012, no pet.) (emphasis added).

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2015, an original of the Harris County Appraisal District's Response Brief was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk, electronically at http://www14.tceq.texas.gov/epic/eFiling/, and that copies were also mailed to all other persons on the attached mailing list on the same day.



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