

TCEQ DOCKET NO. 2016-0613-MIS-U

APPEAL OF THE USE DETERMINATION	§	BEFORE THE
ISSUED BY THE EXECUTIVE	§	
DIRECTOR REGARDING ELG METALS,	§	TEXAS COMMISSION ON
INC.'S USE DETERMINATION	§	
APPLICATION NO. 19451	§	ENVIRONMENTAL QUALITY

**HARRIS COUNTY APPRAISAL DISTRICT'S RESPONSE BRIEF TO ELG METALS, INC.'S APPEAL OF THE EXECUTIVE DIRECTOR'S NEGATIVE USE DETERMINATIONS FOR APPLICATION NO. 19451**

TO THE HONORABLE COMMISSIONERS:

Harris County Appraisal District ("HCAD") files this Response Brief to ELG Metals, Inc.'s (the "Appellant") appeal of the Executive Director's Negative Use Determinations issued for the roofs, walls, foundations and floors of the Turnings Facility and for the qualifying land on the Appellant's Use Determination for Pollution Control Property Application No. 19451.

**I. Background**

On or around September 8, 2015, the Appellant applied to the Executive Director of the Texas Commission on Environmental Quality (the "Executive Director") for a use determination on a new Turnings Facility and all qualifying land located at 15135 Jacintoport Blvd., Houston, Texas 77015. On September 21, 2015, the Executive Director determined that the Appellant's use determination application lacked sufficient information to conduct a technical review and requested the Appellant to revise its application. The Appellant replied to the Executive Director's Notice of Administrative Completeness and Technical Deficiency on or around November 19, 2015 by submitting its first revised application. On December 15, 2015, the Executive Director sent the Appellant a Notice of Technical Deficiency and requested that the Appellant revise its application again. The Appellant replied to the Executive Director's Notice of Technical Deficiency on or around March 4, 2016 by submitting its second revised

application. On March 30, 2016, the Executive Director issued a one hundred percent (100%) positive use determination for the “[t]anks, piping, and pumps used [to] contain cutting fluids from metal turnings” and negative use determinations for the “roofs, walls, foundations and floors of the Turnings Facility” and the qualifying land.<sup>1</sup> In response to the Executive Director’s negative use determinations, the Appellant filed this appeal.

## **II. Argument and Authorities**

### **A. The Executive Director’s Negative Use Determination issued for the roofs, walls, foundations and floors of the Turnings Facility**

#### **1. The roofs, walls, foundations, and floors of the Turnings Facility do not 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 prevention, monitoring, control, or reduction of air, water, or land pollution**

In his Notice of Technical Deficiency dated December 15, 2015 the Executive Director informed the Appellant thusly:

Please note 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.<sup>2</sup>

Subsequently, the Executive Director issued his negative use determination for the roofs, walls, foundations and floors of the Turnings Facility. Presumably then, the Appellant did not cite to an adopted environmental rule or regulation requiring the activity to occur within the Turnings Facility.

Section 11.31 of the Texas Tax Code provides for the “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.”<sup>3</sup> This section of the Tax Code was passed by the Seventy-Third Texas Legislature in 1993 and became effective on

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<sup>1</sup> Executive Director’s Notice of Use Determinations, March 30, 2016.

<sup>2</sup> Executive Director’s Notice of Technical Deficiency, December 15, 2015.

<sup>3</sup> Tex. Prop. Tax Code § 11.31(a) (WESTLAW current through 2015).

January 1, 1994 after the voters approved an amendment to the Texas Constitution authorizing the exemption.<sup>4</sup> Subsection 11.31(b) defines a 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 prevention, monitoring, control, or reduction of air, water, or land pollution.*<sup>5</sup>

Since the Appellant could not establish that the roofs, walls, foundations and floors of the Turnings Facility were “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 prevention, monitoring, control, or reduction of air, water, or land pollution”<sup>6</sup> then by definition it is not a facility, device, or method for the control of air, water, or land pollution and therefore not entitled to an exemption from taxation as pollution control property.

**2. The Turnings Facility is used as part of the production process at this facility and is not a pollution control device**

In his Notice of Use Determinations dated March 30, 2016, the Executive Director stated that the Turnings Facility is used as part of the production process at this facility and is not a pollution control device. In accordance with Subsection 11.31(g) of the Texas Tax Code, “[t]he commission shall adopt rules to implement [Section 11.31].”<sup>7</sup> These rules are found in Title 30, Part 1, Chapter 17 of the Texas Administrative Code (“TAC”). Additionally, the Executive Director “may not make a determination that property is pollution control property unless the

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<sup>4</sup> Tex. Const. art. VIII, § 1-l.

<sup>5</sup> Tex. Prop. Tax Code § 11.31(b) (WESTLAW current through 2015) (emphasis added).

<sup>6</sup> *Id.*

<sup>7</sup> Tex. Prop. Tax Code. § 11.31(g) (WESTLAW current through 2015).

property meets the standards established under [those rules].”<sup>8</sup> Section 17.6 of the TAC establishes which property is ineligible for an exemption from taxation:

The following are not exempt from taxation and are not entitled to a positive use determination under this chapter:

(1) property is not entitled to an exemption from taxation:

(A) solely on the basis that the property is used to manufacture or produce a product or provide a service that prevents, monitors, controls, or reduces air, water, or land pollution;

(B) if the property is used, constructed, acquired or installed wholly to produce a good or provide a service;

(C) if the property is not wholly or partly used, constructed, acquired or installed to meet or exceed law, rule, or regulation adopted by any environmental protection agency of the United States, Texas, or a political subdivision of Texas for the prevention, monitoring, control, or reduction of air, water, or land pollution; or

(D) if the environmental benefit is derived from the use or characteristics of the good or service produced or provided...<sup>9</sup>

Because the Turnings Facility is used as part of the production process at this facility it is ineligible for an exemption from taxation under Section 17.6(1)(B) of the TAC and the Executive Director is prohibited from making a ruling to the contrary under Subsection 11.31(h) of the Tax Code.

### **3. The buildings are not included under Item S-20 of the Tier I Table**

In its applications, the Appellant claims that the Turnings Facility is a type of property listed under No. S-20 on the Tier I Table. In his Notice of Use Determinations,<sup>10</sup> the Executive Director states that the buildings are in fact not included under No. S-20 of the Tier I Table. The Tier I Table, adopted by the Texas Commission on Environmental Quality (“TCEQ”) pursuant to its rule making authority discussed above, is a list of property that the Executive Director “has determined is used wholly for pollution control purposes when used as shown in the Description section of the table and when no marketable product arises from using the property.”<sup>11</sup> Since the buildings are not included under No. S-20 of the Tier I Table, or any other number on the Tier I

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<sup>8</sup> Tex. Prop. Tax Code § 11.31(h) (WESTLAW current through 2015).

<sup>9</sup> 30 TAC § 17.6(1) (2010).

<sup>10</sup> Executive Director’s Notice of Use Determinations, March 30, 2016.

<sup>11</sup> Figure: 30 TAC § 17.14(a) (2014).

Table, then the buildings are not a type of property that the Executive Director has determined is used wholly for pollution control purposes and therefore is not entitled to a 100% positive use determination and, as discussed in Section A, Part 1 of this brief above, the buildings are not even eligible for a positive use determination because there is no adopted environmental rule or regulation requiring the activity to occur within them and therefore they are not entitled to an exemption from taxation as pollution control property.

#### B. The Executive Director's Negative Use Determination issued for the qualifying land

##### **1. Section 11.31, Tex. Tax Code**

The Executive Director correctly held that the since the qualifying land was acquired prior to January 1, 1994, it is not eligible for a 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.*”<sup>12</sup> 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 ...”<sup>13</sup> According to its first and second revised applications, the Appellant acquired the qualifying land in 1989. Since the Appellant acquired the qualifying land before January 1, 1994, by definition, it is not a “facility, device, or method for the control of air, water, or land pollution” and is not entitled to an exemption from taxation as pollution control property.

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<sup>12</sup> Tex. Prop. Tax Code § 11.31(a) (WESTLAW current through 2015) (emphasis added).

<sup>13</sup> Tex. Prop. Tax Code § 11.31(b) (WESTLAW current through 2015) (emphasis added).

## 2. Section 17.4, Texas Administrative Code

As mentioned previously, Section 11.31 requires the TCEQ to establish rules to provide for the implementation of the pollution control property exemption,<sup>14</sup> and “the executive director may not make a determination that property is pollution control property unless the property meets the standards established under [those rules].”<sup>15</sup> Section 17.4 of the TAC, entitled “Applicability”, states in pertinent part:

- (a) *To obtain a positive use determination...pollution control property must meet the following conditions.*
- (1) Property must have been...*acquired...after* January 1, 1994.
  - (2) *Land* must include *only the portion of the land acquired after January 1, 1994*, that actually contains pollution control property.
  - (3) Equipment, structures, buildings, or devices must not have been taxable by any taxing unit in Texas on or before January 1, 1994, except that if construction of pollution control property was in progress on January 1, 1994, that portion of the property constructed, acquired, or installed after January 1, 1994, is eligible for a positive use determination.
  - (4) Property purchased from another owner is eligible for a positive use determination if it is acquired, constructed, or installed by the new owner after January 1, 1994, will be used as pollution control property, and was not taxable by any taxing unit in which the property is located on or before that date.
- (b) The executive director shall determine the portion of the pollution control property eligible for a positive use determination.
- (c) The executive director *may not* make a determination that property is pollution control property unless *all* requirements of this section...have been met.<sup>16</sup>

Since the Appellant acquired the qualifying land before January 1, 1994, the land does not meet the conditions listed under Sections 17.4(a)(1) or (a)(2) and so according to Section 17.4(c), the land cannot be pollution control property, and therefore, it is not entitled to an exemption from taxation as such.

### C. 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

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<sup>14</sup> Tex. Prop. Tax Code. § 11.31(g) (WESTLAW current through 2015).

<sup>15</sup> Tex. Prop. Tax Code § 11.31(h) (WESTLAW current through 2015).

<sup>16</sup> 30 TAC § 17.4 (2014) (emphasis added).

equally.”<sup>17</sup> 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.”<sup>18</sup> HCAD strongly urges this Commission to adhere to these principles in deciding this appeal.

### III. Conclusion

Based on the foregoing and for the reasons stated herein, Harris County Appraisal District respectfully requests that the Commission deny ELG Metals, Inc.’s appeal, and affirm the Executive Director’s Negative Use Determinations issued for the roofs, walls, foundations and floors of the Turnings Facility and the qualifying land in Application No. 19451.

Respectfully submitted,

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<sup>17</sup> *North Alamo Water Supply Corporation v. Willacy County Appraisal District, et al*, 804 S.W. 2d 894, 899 (Tex. 1991).

<sup>18</sup> *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).

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 18, 2016, 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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Robert "Bobby" Preisler