Office of the Attorney General
State of North Dakota

Opinion No. 85-33

Date Issued: August 29, 1985

Requested by: Lt. Governor Ruth Meiers

--QUESTIONS PRESENTED--

I.

Whether the United States Department of Energy is now the operator of the Great Plains Coal Gasification Plant at Beulah, North Dakota, within the meaning of N.D.C.C. Ch. 57-60 which provides for a privilege tax on the operator of a coal conversion facility.

II.

Whether the supremacy clause of the United States Constitution, Article 6, Clause 2, prohibits the State of North Dakota from applying the coal conversion tax imposed by N.D.C.C. Ch. 57-60 on the operator of the coal gasification plant at Beulah, North Dakota, while that plant is operated by the federal government through the Department of Energy.

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that the United States Department of Energy is now the operator of the Great Plains Coal Gasification Plant at Beulah, North Dakota, within the meaning of N.D.C.C. Ch. 57-60 which provides for a privilege tax on the operator of a coal conversion facility.

II.

It is my further opinion that the supremacy clause of the United States Constitution, Article 6, Clause 2, prohibits the State of North Dakota from applying the coal conversion tax imposed by N.D.C.C. Ch. 57-60 on the operator of the coal gasification plant at Beulah, North Dakota, while that plant is operated by the federal government through the Department of Energy.

--ANALYSES--

I.

Prior to August 1, 1985, Great Plains Gasification Associates (hereinafter referred to as 'GPGA'), a consortium of five companies as partners, operated the coal gasification plant at Beulah, North Dakota, through its project administrator ANG Coal Gasification Company (hereinafter referred to as 'ANG') pursuant to the project administration agreement between those parties. Under the terms of another agreement between ANG and the United States Department of Energy, the Secretary of the United States Department of Energy was empowered to exercise various rights with respect to ANG in the event of a default by GPGA on its guaranteed loan agreement with the Department of Energy. The construction of the plant was funded through loans made to GPGA by the Federal Financing Bank. These loans were guaranteed by the United States Department of Energy (hereinafter referred to as 'DOE').

On August 1, 1985, GPGA notified DOE that it was abandoning the coal gasification plant project and defaulting on its loan that was guaranteed by DOE. By letter dated August 1, 1985, to Mr. Michael Carmichael, Chief Operating Officer of the ANG Gasification Company, DOE, through Assistant Secretary for Management and Administration Martha Hesse Dolan, advised ANG that 'in light of today's termination by the Partners of GPGA and the resulting Event of Default under the Loan Agreement' the Secretary of DOE was requesting ANG, in its capacity as Project Administrator, to provide certain specified information concerning the coal gasification plan project. In that letter Assistant Secretary Dolan stated that:

While the Secretary has not yet determined to what extent the Department will exercise various rights with respect to ANG which, under the ANG Agreement, have become exercisable as a result of today's Event of Default, the Secretary directs ANG, in accordance with Section 3.05(a) of the ANG Agreement, to act as follows with respect to the Project:

1. Take such steps as are necessary to maintain the security of the Project site and to protect the facilities from damage;

2. Continue operation of the facility until further notified. No expenses shall be incurred for any capital improvements. A separate accounting shall be established for these operations with reporting to the Secretary every fourteen (14) days as to financial status;

3. Take such steps as are necessary to cause an orderly transaction of Project operations from the current level of production to such reduced levels as may be directed by the Secretary; and

4. Otherwise, follow the instructions of the representative of the Secretary with respect to the Project.

Letter from Martha Dolan to Michael Carmichael (August 1, 1985).

Reference is made in the above quotation to Section 3.05(a) of the ANG Agreement. That section provides, in pertinent part, as follows:

SECTION 3.05. SERVICES TO CONTINUE. Upon the occurrence of an Event of Default, at the option of the Secretary, or his designees, successors or assigns, ANG will (a) continue to act as the administrator of the Facilities pursuant to an agreement substantially in the form of the Project Administration Agreement with such changes therein as are necessary to reflect the operation of the Facilities by the Secretary, or his designees, successors or assigns . . . provided, however, that if the Secretary exercises one or more of the foregoing options, the Secretary shall pay or reimburse ANG for its actual costs incurred in meeting its obligations pursuant thereto, such costs not to include any provision for profit to ANG or for profit to or the general or administrative expense of any other Person which directly or indirectly owns the common stock of ANG. After the occurrence of an Event of Default, ANG will, upon the request of the Secretary, or its designees, successors or assigns, cease to serve as Project Administrator without penalty or cost to the Secretary, its designees, successors or assigns.

It is clear from the August 1, 1985 letter to ANG from DOE, and from Section 3.05(a) of the ANG Agreement, that DOE assumed responsibility for operation of the coal gasification plant by placing ANG under its direction and control as of that date. By that action, DOE became the operator of the plant within the meaning of the North Dakota law that provides for a privilege tax with respect to the operation of coal conversion facilities in this state.

In 1975, the North Dakota Legislature enacted an annual tax that was payable by each coal conversion facility for the privilege of producing products of such coal conversion facility. 1975 N.D. Sess. Laws 562, § 2. In 1979, the Legislature amended that law by enacting House Bill No. 1485, which added a definition of 'operator' and which further amended the section that imposed the tax to provide that: 'There is hereby imposed upon the operator of each coal conversion facility an annual tax for the privilege of producing products of such coal conversion facility.' 1979 N.D. Sess. Laws. 625, §§ 2, 3, amending N.D.C.C. §§ 57-60-01 and 57-60-02. In 1985, the Legislature again amended the section imposing the tax by providing that: 'There is hereby imposed upon the operator of each coal conversion facility a tax paid monthly for the privilege of producing products of such coal conversion facility.' 1985 N.D. Sess. Laws 604, § 20, amending N.D.C.C. § 57-60-02.

The definition of 'operator', as noted above, was added to the coal conversion tax law in 1979. This definition appears as N.D.C.C. § 57-60-01(5) and states as follows:

5. 'Operator' means any person owning, holding, or leasing a coal conversion facility and conducting the conversion of coal into the products of such facility.

It is clear from the minutes of the House and the Senate Finance and Taxation Committees of the 1979 Legislature, relating to House Bill No. 1485, that by adding the above definition of 'operator' and changing the tax imposition section, the Legislature intended to impose the tax on the operator of the coal conversion facility 'for the privilege of producing products of that coal conversion facility' regardless of who the owner of the facility might be. As the minutes of the Senate Finance & Taxation Committee show, the principal witness for the bill said that the amendments will provide for payment of the tax by the operator rather than by the person owning the plant where the operator is not the owner. Coal Conversion Facility Tax On Operator: Hearings on H.B. 1485 Before the Senate Committee on Finance and Taxation, 46th Legislative Assembly (1979).

On August 1, 1985, GPGA partners notified DOE that they were abandoning the Beulah plant and defaulting on their loan that was guaranteed by DOE. By exercising its rights of supervision and control over the plant, as noted above in its letter of August 1, 1985, to ANG, and directing the plant administrator, ANG, to take the actions specified in that letter, DOE became the operator of that plant. Since that time, August 1, 1985, it is clear that DOE has been the 'operator' of the plant within the meaning of the provisions of N.D.C.C. Ch. 57-60, which imposes a tax on operators of coal conversion facilities for the privilege of producing products of such facilities. ANG, as plant administrator, is in effect the agent of DOE.

II.

Article 6, Clause 2, of the United States Constitution provides that:

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; and all the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

This supremacy clause gives to the United States and its instrumentalities immunity from taxes imposed by any state. McCulloch v. Maryland, 4 Wheat. 316, 436 (1819); United States v.

New Mexico, 455 U.S. 720, 733-735, 102 S.Ct. 1373, 1382-1383, 71 L.Ed.2d 580 (1982); The Boeing Company v. Omdahl, 169 N.W.2d 696, 701 (N.D. 1969).

This federal immunity from state taxation is implied and can only be waived by express provision made by the United States Congress. As stated in Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 122, 74 S.Ct. 403, 411 (1954):

The doctrine of sovereign immunity is so embedded in constitutional history and practice that this Court cannot subject the government or its official agencies to state taxation without a clear congressional mandate.

See also United States v. City of Adair, 539 F.2d 1185, 1189, (8th Cir. 1976), (a listing of United States Supreme Court cases relating to this implied immunity and the necessity for clear and express provision by the Congress in order for that immunity to be waived).

No provision has been found in the laws establishing the United States Department of Energy or in any other act of Congress that purports in any way to waive the immunity of the Department of Energy or its agents from any state tax imposed on or in reference to the activities of that Department or its agents.

As shown above, the coal conversion facilities tax imposed by N.D.C.C. Ch. 57-60 is a tax imposed on the operator of a coal conversion facility 'for the privilege of producing products of such coal conversion facility.' Also, as shown above, DOE has been operating the plant since August 1, 1985, by exercising complete supervision and control over ANG, the plant administrator. Any attempt to apply the coal conversion tax with respect to the operation of the Beulah plant while that plant is being operated by the Department of Energy would violate the supremacy clause of the United States Constitution.

--EFFECT--

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until the question presented is decided by the courts.

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