

Application of Gross Receipts Tax to Oil & Gas Waste

A.C.A. § 26-52-316 Services Subject to Tax

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(2) Collection and disposal of solid wastes;

Act 107 of 2nd Extraordinary Session of 2003.

History of Law

- **Part of expansion of tax base during 2003 “Lakeview” special session.**
- **Permitted solid waste landfills began collecting sales tax on solid wastes delivered to landfills.**

The Problem

- Sometime in the past year or two, DF&A has decided that transportation of liquid oil & gas wastes constitutes the “collection” of solid waste and that charges for this service are subject to the gross receipts tax.
- DF&A has conducted audits and assessed back taxes, penalties and interest going back as much as five years in certain instances.
- Fluid haulers were unaware of DF&A’s position prior to audits.

Our View

- Liquid oil & gas wastes like drilling fluids and salt water are not “solid wastes.”
- Merely transporting oil & gas waste does not fit within the meaning of “collecting and disposing of solid wastes.”
- Permitted solid waste landfills collect and dispose of solid wastes and they collect sales taxes when oil & gas wastes are disposed of in landfills.

Our View (cont'd)

- DF&A's position is unfair because traditionally wastes from oil & gas production had not been regulated as solid wastes and the industry was never notified that DF&A had determined that the transportation of these wastes constituted the "collection of solid wastes."

Potential Implications

- Devastating to small businesses that transport fluids.
- Royalty owners will see reduction in royalty payments.
- Others that handle or dispose of oil & gas wastes such as salt water injection wells (or disposal wells) and land farms will be subject to back taxes, penalties and interest.

DF&A's Rule and Guidance

- GR-9.6 is DF&A's rule on application of statute to collection and disposal of solid waste.
- It adopts ADEQ's statutory definition of solid waste (but not its definition of "industrial solid waste.")
- At one point, DF&A's guidance states that when waste collection occurs in Arkansas and disposal occurs out of state, "only waste collection service is taxable."
- This indicates that DF&A views merely transporting waste (versus collecting and disposing solid waste) as subject to the tax.

Exceptions for Certain Wastes

- When developing its regulation, DF&A made exceptions for certain materials such as waste tires, solid wastes that are considered hazardous and certain recycling activities.
- Since oil & gas wastes were not an issue at that time, no consideration was given to specifically excepting these wastes from the definition of solid wastes.

Impact on Operators

- They don't like DF&A's position.
- To avoid risk of penalties and interest, some operators have begun paying sales tax on invoices from fluid haulers.
- Taxes have not been paid during entire period covered by audits – (2008 to 2012).
- Operators have not agreed to hold all transporters harmless from assessments.

ADEQ's Original Position

- Historically, ADEQ has not regulated oil & gas wastes as solid wastes.
- In connection with permitting a facility to dispose of oil & gas wastes by land application, ADEQ argued that these wastes are not solid wastes.
- ADEQ does not require solid waste division permits for injection or disposal wells, landfarms and other oil & gas waste disposal sites.

Basis for ADEQ's Position

- Under ADEQ's solid waste regulation, the term "Industrial Solid Waste," which is solid waste generated as a result industrial activities but which is not considered a hazardous waste, does not include oil & gas waste.

ADEQ Regulation Requires Persons Hauling Solid Wastes to be Licensed

- Under ADEQ's solid waste regulation, those in the business of hauling solid wastes must obtain a license from the regional solid waste management boards.
- To our knowledge, no regional board has required businesses transporting oil & gas wastes to be licensed under this requirement.
- Instead, these businesses are permitted as fluid transportation systems by the Arkansas Oil & Gas Commission.

Has ADEQ's Position Changed?

- In a letter dated April 15, 2013, ADEQ's chief legal counsel advised DF&A's chief legal counsel that wastes associated with oil & gas production “would be considered solid wastes” even though ADEQ does not regulate these wastes as solid wastes unless they are disposed of at a permitted solid waste landfill.

Relief Requested

- If Arkansas wants to apply the gross receipts tax to transportation and disposal of liquid oil & gas wastes, the Legislature should expressly approve this.
- It is unfair for DF&A to expand Act 107 to these activities without legislative approval and notice to the taxpayer.
- Thus, legislation should be enacted to clarify the scope of Act 107.