No. 10-890

In The Supreme Court of The United States

MIDLAND CENTRAL APPRAISAL DISTRICT,
Petitioner,

v.

BP AMERICA PRODUCTION CO., *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE 11TH DISTRICT AT EASTLAND

PETITIONER'S REPLY BRIEF

KIRK SWINNEY
McCreary, Veselka, Bragg & Allen, P.C.
700 Jeffrey Way, Suite 100
Round Rock, Texas 78665-2425
(512) 323-3200
kswinney@mvbalaw.com
Counsel for Petitioner

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ARGUMENT

Petitioner Midland Central Appraisal District (MCAD) responds to the Briefs in Opposition by Respondents Teppco Crude Oil, L.L.C. and Teppco Crude P/L, L.L.C. (Teppco), and by BP America Production Co., *et al.*, collectively referred to as BP *et al.*

I. State law grounds

A. Trial court judgment

Teppco alleges that the decision of the trial court mentions nothing about federal law issues and cites to Texas Tax Code §§ 42.24 and 11.01 as its authority. However, § 42.24 is the general jurisdictional statute for trial courts to review the administrative decisions on property tax matters in Texas. It would be cited by a trial court as its authority regardless of the nature of its underlying rationale. Furthermore, in its conclusions of law nos. 3 and 6 the trial court specifically concluded on federal constitutional issues. The decisions of Texas trial courts are not accompanied by extensive legal analyses. The wording of the judgment itself is not illuminating to the trial court's rationale.

Teppco further alleges that the decisions below were based on Texas Tax Code § 11.12. Teppco Brief at 3. That allegation MCAD admits. This section, however, only reads that if property is exempt under federal law, then it is exempt. That portion of the Texas Tax Code hardly seems to be independent of federal law.

Further, the court of appeals specifically found that the trial court had made a determination that the oil was in the stream of interstate commerce and failed to meet the "substantial nexus" requirement of *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). *Midland Central Appraisal Dist. v.*

BP America Production Co. et al., 282 S.W.3d 215, 221-24 (Tex. App.—Eastland 2009).

B. Court of appeals decision

Teppco further claims that the decision below was based primarily on state law issues and only "incidentally" addressed federal constitutional issues. That is an unlikely claim in light of the 2,484 words which the opinion devotes strictly to analysis of interstate commerce versus the 185 words which it uses to address the state law issues, inclusive of some federal analysis.

Teppco describes the discussion of the court of appeals on federal law issues as being merely necessary to address MCAD's issues on appeal. Teppco Brief at 2. However, as is pointed out by Teppco at 6, a court is required to address state law issues first and only resort to federal constitutional issues if necessary. *VanDevender v. Woods*, 222 S.W.3d 430, 432-33 (Tex. 2007). Therefore, if the court of appeals had at its disposal a singularly sufficient state law ground, it should have ruled on that issue alone without so much as "wad[ing] in to ancillary constitutional issues." *Id.* at 432. *See also, Neese v. Southern Railway Co.*, 350 U.S. 77, 78 (1955).

Furthermore, the court clearly depended its state law ruling on Texas Tax Code § 21.02 on its interstate commerce holding. It distinguished the cases of *Diamond Shamrock Refining and Marketing Co. v. Nueces County Appraisal District,* 876 S.W.2d

298 (Tex.1994) and *Exxon Corp. v. San Patricio County Appraisal District,* 822 S.W.2d 269 (Tex.App.—Corpus Christi 1991) from the instant case solely on the finding that the oil in this case was proceeding out of state whereas the oil in the other two cases was not going out of state. In each of the other cases, *Exxon* and *Diamond Shamrock*, oil in tanks was found to have situs and jurisdiction to tax in Texas under circumstances identical to the facts at issue herein, save for the fact that the oil at issue herein is in some measure traveling out of state after it leaves Midland. *Midland v. BP*, 238 S.W.3d at 221.

The same argument addresses the issue BP *et al.* raise concerning a three part analysis to determine whether a Texas jurisdiction may assess a property tax on a property: 1) Is there jurisdiction to tax under Tex. Tax Code § 11.01; 2) Is the property exempt; and, 3) Does the property have situs under Tex. Tax Code § 21.02? BP *et al.* at 13-14. MCAD does not fundamentally disagree. BP *et al.* fail to note two things, however. One, the test for jurisdiction to tax and situs are essentially the same, that is whether the property is located in the state and locality for more than a temporary period of time, and, two, that, as noted above, those issues have been determined adversely to the Respondents in *Diamond Shamrock* and *Exxon*. The court of appeals distinguished this case from those by the interstate destination of the oil. *Midland v. BP*, 238 S.W.3d at 221-22. I.e., the court's ruling on §§ 11.01 and 21.02 was dependent on its finding of the protected interstate transit of the oil. If the

interstate transit does not shield the oil from taxation, BP's analysis fails. That segues into and leaves only the federal exemption issue on which the court of appeals based its decision.

C. Allocation

Teppco raises the red herring issue of the trial court's findings regarding the allocation of the oil in question. That issue is irrelevant and certainly does not preclude jurisdiction in this Court because it has nothing to do with whether the oil is taxable. It has only to do with how much oil is taxable to what oil company. The court of appeals did not reach the issue. If it had, it would have and should have remanded the issue back to the trial court for determination of how much oil was specifically taxable to each oil company. The amount of oil in the tanks, the amount of oil owned by each of the Respondents in the system, and the amount each had ordered shipped to the Midland tank farms are known quantities. From that information, the trial court should not have excessive difficulty determining how much oil each Respondent owned in the tank farms any more than the courts in *In re Assessment of Personal Property Taxes Against Missouri Gas Energy*, 234 P.3d 938 (Okla. 2008), *cert. denied*, 130 S.Ct. 1685 and *Peoples Gas, Light, & Coke Co. v Harrison Central Appraisal District*, 270 S.W.3d 208 (Tex. App.—Texarkana 2008) had in determining how much gas each gas owner had in the respective storage field. The issue before this Court, as was before the courts below, is whether the

oil is taxable, not how much is taxable to any particular oil company.

Besides, this Court's jurisdiction is not thwarted by the possibility that a state court may sometime in the future pronounce another state law reason to affirm. *See, e.g., Pennhurst St. School & Hosp. v Halderman*, 451 U.S. 1, 9, 30-31 (1981). It is only thwarted by the plain statement of the state court that its ruling is based on independent, adequate, bona fide state law ground not interwoven with federal law, a statement not present here. *Michigan v. Long*, 463 U.S. 1032 (1981).

D. State limitations on taxability

BP *et al.* claim that Texas has limited its ability to tax beyond federal restrictions. BP *et al.* Brief at 12. However, they cite no authority to establish that Texas has so limited its power in this incident, or indeed in any case, other than the opinion below which is here challenged. Indeed, by the Texas Constitution, Art. VIII, § 2, the state's power to tax is coextensive with federal limitations. The state legislature cannot further restrict that power by exemption or by definition of its jurisdiction to tax. *Dallas Cty. Appraisal Dist. v. L.D. Brinkman & Co., Inc.*, 701 S.W.2d 20, 23 (Tex. App. – Dallas 1985).

II. Commerce Clause issues

A. Ownership of oil

Although BP *et al.* disparage several of the facts as recited by MCAD, and MCAD asserts the accuracy of all its fact recitations, only one deserves comment: They allege that they do not own large quantities of oil in the Midland tank farms but that the location of their oil is undeterminable. That is misleading, to phrase the reply courteously.

The Midland tank farms are the only significant tankage and terminal collecting point of the Midland Pipeline System. The evidence below indisputably established that: 1) all of the Respondents placed into that system immense quantities of oil during all of the years in question: 2) that the Respondents paid the pipeline operators to transport that oil to the Midland tank farms: and 3) that as of each valuation date in question, as with every date between, the tanks. farms were able, willing and contractually obligated to deliver as the Respondent's directed every drop of that oil at the Midland tank farms. The evidence further indicated that the Respondents usually sold that oil at the Midland tank farms to third parties. The oil in the tank farms is at least as locatable and its ownership attributable as the Oklahoma Supreme Court and Texarkana Court of Appeals found the gas to be in the respective gas fields. RR 2:69-70; 3:18, 30-34, 118-19; 4:47; 5:18-19, 68-72, 86-87, 95; 6:79-81; 6:57, 61, 73; 7:27-30, 40-46, 54-56, 75-86, 96; 9:48-65;

11:11-50; 12:13-14; 13:28-32, 59, 113-118; DX 7, 16, 27, 33-55, 75-94.

What BP *et al.* mean when they claim that no one can determine the location of a specific barrel of oil in the system is that once oil is placed in the pipelines or tank farm it loses its identity and can no longer be specifically located. However, the tank farms deliver quantities from a fungible mass, not specific drops of oil.

B. Constant presence of substantial quantities establishes nexus

The ownership of the oil at the tank farms leads to the next point. BP *et al.* assail MCAD's position that the constant presence of large quantities of oil is in itself sufficient to establish nexus. BP *et al.* Brief at 24-31.

On the one hand, BP *et al.* are simply wrong. *Missouri Gas* explicitly cited the large quantities of gas stored for a substantial portion of the year as the basis for nexus. *Missouri Gas,* 234 P.3d at 954-55. The Solicitor General noted that in Brief of U.S. as *Amicus Curiae* in *Missouri Gas Energy v. Schmidt,* No. 08-1458 at 21. Further, the court in *Diamond Shamrock* likewise explicitly held the year round presence of large quantities of oil in the taxing jurisdiction as the basis for nexus. 876 S.W.2d at 303. There is nothing in that case to indicate that the court therein found that the 12-25 days out of a year which specific drops of oil were "stored" amounted to a sufficient portion of the year to

amount to either nexus or situs. Also, *Exxon* patently turns on the constant presence of large quantities of the oil. *Exxon*, 822 S.W.2d 273-73.

But, on the other hand, the fact that there is not a case from this Court specifically holding that the constant presence of a large quantity of an inventory, though constantly changing, is part of MCAD's point. The question begs for a ruling to resolve this issue.

BP *et al.* also misstate MCAD's position by claiming the MCAD contends that the constant presence of the massive quantities of oil is the sole factor for determining nexus. BP *et al.* Brief at 24. MCAD does not dispute that other factors can lead to a finding of nexus. But, MCAD does contend that the constant presence of massive quantities of oil does in itself establish nexus notwithstanding that the individual units of the oil come and go quickly. Indeed, that issue is the heart of this case. One barrel of oil is just as flammable, just as toxic, just as in need of labor and services, and just as draining on local resources as the previous or next barrel. The fact of constant movement or exchange of barrels of oil or mcfs of gas or pallets of widgets does not alter the imposition on the locality of a constantly present inventory.

C. In transit analysis is erroneous

BP *et al.* allege that the court of appeals properly considered the continuity of transit doctrine and applied it, and that the court did not utilize

continuity of transit concepts in determining that the tax failed the nexus prong of the *Complete Auto* test. *Complete Auto*, 430 U.S. at 279. But, the language of the case indicates otherwise. Note that the court in finding failure of nexus distinguishes *Diamond Shamrock* and *Exxon* on the basis that the oil was "in transit on January 1 in a tank farm that constituted an integral part of an interstate, common carrier pipeline system." *Midland v. BP*, 282 S.W.3d at 224. The court went on to worry that if it found nexus in this case, then "in transit" oil in the pipeline would also be taxed. *Id.*

BP *et al.* attempt to convert *Diamond Shamrock* into a case that supports their "in transit" theories, quoting language that oil merely passing through the county such as on trucks or in pipelines would be "in transit" in such as way as not to support nexus. But, the whole point of *Diamond Shamrock* is that oil in tanks, even though "in transit," is *not* like oil in pipelines. In the tanks it accumulates in massive quantities. *Diamond Shamrock*, 876 S.W.2d at 303.

Likewise, BP *et al.* attempt to convert to a supporting case *D.H. Holmes* in which this Court held that whether a good is in transit is "largely irrelevant" to the analysis of the tax under *Complete Auto*. *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 30-31 (1988). The Court's language indicating that whether a good is in transit may bear on whether a "taxable moment" has occurred is inapplicable here. "Taxable moments" occur in transaction or activities based taxes, such as a sales tax. At issue here is a

property tax which is assessed based on the presence and value of property, not a transaction.

Unavailing also is BP *et al.*'s cite to *Maryland v. Louisiana*, 451 U.S. 725 (1981) wherein the Court noted the uninterrupted passage of offshore gas through Louisiana to customers beyond that state and struck down a Louisiana tax that patently discriminated against gas in interstate commerce. Other than that discriminatory nature of the tax, the case is distinguishable in that it did not involve any constant presence of significant quantities of gas.

D. Activities analysis

BP *et al.* argue both that the court below did not base its analysis on the activities of the Respondents and that it is entirely appropriate to analyze the activities of the owners in considering nexus for a property tax. BP Brief *et al.* at 36-38.

That the court below did look at activities of the owners seems beyond doubt when one considers the specific language of the opinion holding that, "The activity essentially being taxed in this case was the ownership of oil that was present but in transit on January 1 . . ." Apparently, the court below did not examine the activities extensively though. Otherwise it would have found that the Respondents trade oil extensively in Midland, own leases and transportation contracts to Midland, own tank farms, and have employees in Midland. RR 4:91; 5:51-52; 6:81-83; 7:61-62, 99.

But, that is not the point. A property tax is a tax on property that is present for more than a temporary period of time, not a tax on the activities of an owner such as a franchise or sales tax. The cases cited by BP *et al.* for the proposition of examining activities concern other types of taxes.

E. Distinguishing *Missouri Gas*

BP *et al.* attempt to distinguish *Missouri Gas*. Trusting that the issue was addressed in its Petition, MCAD only notes that if *Missouri Gas* is so distinguishable, BP *et al.* should have no fear of a grant of certiorari in the petition in *Harrison Central Appraisal Dist. v. Peoples Gas Light & Coke Co.*, No. 10-896 (U.S. Dec. 30, 2010), a case by all accounts factually indistinguishable from *Missouri Gas*.

III. An inconsequential case driven by facts?

BP *et al.* spend much of their brief minimizing the importance of this case and claiming it is highly fact driven. Every case that comes before this Court comes with a set of facts. It is the application of the law to a set of facts that seems highly repeatable as noted in the Petition and the several briefs by *amici*. Similar facts in *Missouri Gas* lead this Court to seek the opinion of the Solicitor General. The same issue, though involving gas, is now pending in Kansas. In the Matter of the Appeals of *Various Applicants* from an Order of the Director of Property Valuation of the State of Kansas for the Year 2009, Nos. 2009-8554-PV, *et al.*, Court of Tax Appeals. Of course, the

concurrent petition of Harrison CAD accentuates the issue.

Further, this Court often reviews final decisions of intermediate courts on important issues. *See, e.g., Lawrence v.* Texas, 539 U.S. 538 (2003).

When the Solicitor General in her brief in the *Missouri Gas* petition cited the below decision as aberrant, she recommended denial of Missouri Gas' petition not because the opinion below was inconsequential or because it was of an appellate court only, but because the Texas Supreme Court still had opportunity to bring Texas into national harmony. Brief of U.S. as *Amicus Curiae* in *Missouri Gas Energy v. Schmidt*, No. 08-1458 at 7-8. That opportunity has passed.

BP *et al.* suggest this Court continue to let contradictory opinions on an issue involving hundreds of millions of tax dollars to accumulate. But, the issues are already framed and the diversity of results has occurred. The time for resolution is now.

Respectfully submitted,

Kirk Swinney
McCREARY VESELKA
BRAGG & ALLEN, P.C.
700 Jeffrey Way, Suite 100
Round Rock, Texas 78665
Telephone: (512) 323-3200
Telecopier: (512) 323-3294
kswinney@mvbalaw.com