

MESA OPERATING LIMITED PARTNERSHIP

IBLA 91-54

Decided December 10, 1992

Appeal from a decision of the Director, Minerals Management Service, denying an appeal from a decision of the Chief, Albuquerque Section, Royalty Management Program, rejecting a protective claim for refund of overpaid royalties. MMS-89-0165-OCS.

Affirmed.

1. Outer Continental Shelf Lands Act: Refunds

A protective claim for a refund of royalties that does not state the reasons why a refund is sought, *i.e.*, that does not state why the lessee believes royalties have been paid in excess of that required by law, is not a request for repayment within the meaning of sec. 10 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1988).

APPEARANCES: Jerry E. Rothrock, Esq., and Susan Brooks, Esq., Washington, D.C., for appellant; Howard W. Chalker, Esq., Office of the Solicitor, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Mesa Operating Limited Partnership (Mesa) has filed an appeal from a decision of the Director, Minerals Management Service (MMS), dated September 17, 1990, denying an appeal from a decision of the Chief, Albuquerque Section, Royalty Management Program (RMP), rejecting Mesa's protective claim for a refund of overpaid royalties. RMP's decision, dated March 9, 1989, acknowledged receipt of Mesa's claim, dated October 25, 1988, and denied this claim for want of "the required information needed to process the refund." The decision did not specify what information was needed.

Mesa's refund claim identified 63 oil and gas leases on the Outer Continental Shelf issued pursuant to the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 (1988). Mesa stated that it had been forced to file this protective claim because MMS had taken "the unlawful position that a royalty 'adjustment' for an offshore lease constitutes a 'refund' subject to the two year statute of limitation" set forth in section 10 of OCSLA, 43 U.S.C. § 1339 (1988). Appellant indicated that it was filing its claim to toll any statute of limitation that may be applicable to such royalty adjustments.

Royalty adjustments are necessary, Mesa stated, because of retroactive MMS orders, retroactive MMS regulations, and other reasons beyond Mesa's control. Such adjustments are made from time to time by Federal lessees, and MMS has recognized such adjustments to be a characteristic feature of oil and gas accounting, appellant urged. Mesa contended that MMS' adjustment procedures do not distinguish between adjustments that require additional royalty payments and adjustments that permit recoupment of prior royalty overpayments.

Mesa further indicated that it was vigorously challenging MMS' denial of Mesa's right to adjust its royalty payments in accordance with longstanding industry practice and accounting practices dictated by MMS' own Auditing and Financial System. Final agency action had not yet occurred, appellant noted. Under such circumstances, Mesa stated, it had filed its protective claim for refund in the event that the agency ultimately concluded that Mesa's royalty adjustments were subject to the limitations period in section 10 of OCSLA or other applicable period.

The Director's decision of September 17, 1990, after recounting many of the arguments above, posed the issue on appeal as whether Mesa's protective claim "met the requirements of notice to toll the time limitation of section 10." It answered this question in the negative, relying on Mesa Petroleum Co., 107 IBLA 184, 192 (1989), appeal dismissed, No. 89-0146-LC (W.D. La. Jan. 13, 1992). Our decision in Mesa held that refund requests filed after March 17, 1987, the date of issuance of Shell Offshore, Inc., 96 IBLA 149, 94 I.D. 69 (1987), 1/ should "at a minimum, be written, identify the claimant, the leases affected, and the reasons a refund is sought." (Emphasis added.) The Director's decision also stated that Mesa was required to provide such information within the 2-year timeframe specified by section 10.

Section 10 of OCSLA, 43 U.S.C. § 1339(a) (1988), states in part:

[W]hen it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after the making of the payment * * *. [Emphasis added.]

The Director found that the filing requirement imposed by section 10 was not satisfied by Mesa's protective claim because that claim failed to provide any reasons for seeking a refund.

Mesa recognizes, the Director stated, that in the usual case a refund request would identify the leases involved, the amount requested for refund,

1/ Aff'd, 923 F.2d 930 (Fed. Cir. 1991), cert. denied sub nom. Phillips Petroleum v. United States, 60 U.S.L.W. 3217, 3247 (U.S. Oct. 7, 1991).

the time period involved, and the reasons for which a refund is requested. In the instant case, however, Mesa admits that it cannot predict what future adjustments will be necessary, or even if there will be any adjustment at all (Director's Decision, Sept. 17, 1990, at 3). More importantly, the Director held, Mesa cannot provide the reasons for any adjustments that might justify a refund.

Relying on Chevron U.S.A. Inc., 105 IBLA 21, 27 (1988), the Director distinguished the notice necessary to satisfy the 2-year provision of section 10 and the proof necessary to establish the right to a refund. Mesa has not satisfied the initial notice requirements, the Director held, and hence the 2-year period is not tolled by Mesa's protective claim.

In its statement of reasons on appeal (SOR), Mesa restates its position that MMS wrongly regards a royalty "adjustment" to constitute a "refund" subject to the 2-year statute of limitation in section 10. By way of explanation, Mesa refers to an MMS audit letter, dated April 19, 1988, wherein MMS charged that Mesa had taken unauthorized unilateral credit adjustments by improperly reducing current months' royalty payments to recoup royalties allegedly overpaid in prior months. Of the \$3,193,581.41 in unauthorized credits at issue, MMS determined that \$2,943,944.05 were recouped more than 2 years after the date of the original overpayment and the remaining \$249,637.36 in unauthorized credits were taken within 2 years of the date of the original overpayment.

In Mesa Operating Limited Partnership, 98 I.D. 193 (1990), Secretary Lujan rejected Mesa's argument that it could unilaterally make credit adjustments on Form MMS-2014 and recoup prior royalty overpayments thereby. The Secretary characterized Mesa's overpayments and underpayments as related and held that to grant Mesa's argument would be to allow a payor to effect a refund without satisfying the statutory preconditions of section 10. The timing of Mesa's credit adjustments was irrelevant to the Secretary's decision.

Mesa states that it first filed a protective claim on June 22, 1988, and filed a second protective claim on October 25, 1988. The second claim differed from the first only in the time period covered by the claim. In its first claim, Mesa states, it recognized that in the normal case a tolling notice typically advises MMS of the approximate amount of the potential royalty refund. The claim also pointed out that Mesa "cannot predict the future and, accordingly, does not know what future adjustments will be required for which leases during which prior time periods for changes in MMS policy or other reasons" (SOR at 6). MMS' assertedly unlawful position required Mesa to advise MMS that "the potential refund liability might include each royalty payment made on each offshore federal lease during each prior month," appellant states. Id.

In its arguments to the Director, Mesa states, it demonstrated that MMS had mischaracterized the purpose of the protective claim for refund. "That protective claim was filed not to receive a decision on the merits," Mesa states, "but rather to preserve Mesa's rights to receive a refund

should MMS' interpretation of Section 10 be upheld" (SOR at 8). Even assuming a decision on the merits was sought, Mesa states, it had demonstrated that it was clear error for MMS to deny the claim, as Mesa had already provided MMS with all the information in its possession concerning possible future adjustments. This information clearly met the minimum requirements for refund requests set forth in Shell Offshore, Inc., supra, appellant argues. Id.

In its SOR, appellant contends that its protective claim satisfies both the tolling and refund requirements of section 10, as identified in Shell Offshore, Inc., supra, and Solicitor's Opinion M-36942, 88 I.D. 1090 (1981). ^{2/} This protective claim, Mesa contends, "clearly articulated" appellant's reasons for filing: Mesa's right to a refund would, under MMS' position, be forever barred by the agency's interpretation of the 2-year statute of limitations (SOR at 11).

[1] To begin, we note that in Chevron U.S.A., Inc. v. United States, 923 F.2d 830, 834 (Fed. Cir. 1991), the Court of Appeals for the Federal Circuit stated that "technically speaking" section 10 is not a statute of limitations. The court pointed out that the phrase "statute of limitations" conventionally refers to temporal limits on a judicial, rather than an administrative, claim.

The Circuit Court's opinion in Chevron is important because it clearly defined the events that determine the timeliness of any refund request:

To qualify for a refund, a lessee must make a timely request. The phrase "within two years after the making of the payment" defines the timeliness of a refund request. By its terms, this phrase requires a request within two years from the time a lessee makes its original royalty payment.

The statute did not authorize the Secretary to pay, nor a producer to receive, any refund requested after the 2-year limit. 923 F.2d at 833.

Chevron reversed a decision of the U.S. Claims Court, Chevron U.S.A., Inc. v. United States, 17 Cl. Ct. 537 (1989), which had overturned this

^{2/} Solicitor's Opinion M-36942, "Refunds and Credits Under the Outer Continental Shelf Lands Act," supra, stated that a lessee, in order to claim a refund or credit, must file a request for repayment which "must be in writing, must ask for a specific amount, and must explain why the lessee considers the amount to have been excessive." 88 I.D. at 1099. In Conoco, Inc., 96 IBLA 384, 388 (1987), appeal docketed sub nom. Mobil Oil Exploration & Producing Southeast v. United States, No. 553-87-L (Cl. Ct. Sept. 3, 1987), the Board held that MMS could not deny a refund request for failure to specify either the amount sought or the dates payments had been made. In a subsequent case, Chevron U.S.A. Inc., 105 IBLA 21, 26 (1988), the Board held that a request that fails to correctly identify the overpaid lease is sufficient so long as it indicates that a person is seeking a refund.

Board's decision in Shell Offshore, Inc., *supra*. Chevron concluded that this Board's decision was well-reasoned and did not violate the intent of Congress.

Our decision in Shell Offshore, Inc. set forth the requirements for a refund request initiated after March 17, 1987. These requirements are: a request should, at a minimum, be written, identify the claimant, the leases affected, and the reasons a refund is sought. 96 IBLA at 174, 94 I.D. at 84. In setting forth the reasons a refund is sought, a party seeking a refund can be reasonably expected to indicate why it believes its royalty payment is in excess of that required by law. Thus, a party may indicate, inter alia, that it has transposed figures on a prior report (royalty value was reported as \$9,876, rather than \$8,976), reported incorrect volumes, or applied an incorrect royalty rate. In the instant case, Mesa does not indicate why its royalty payments are in excess of that required by law. Its claim identifies 63 OCS leases, but none is singled out as being overpaid. Mesa's claim at most indicates why it believes tolling the 2-year limitation is prudent. This, however, is not sufficient to satisfy Shell Offshore, Inc.

The frailty of Mesa's claim is most apparent when Mesa acknowledges in its SOR at page 6 that it does not know "what future adjustments will be required for which leases during which prior time periods for changes in MMS policy or other reasons." Mesa's solution, therefore, is to advise MMS that the agency's "potential refund liability might include each royalty payment made on each offshore lease during each prior month." (Emphasis added.) So phrased, there is virtually no data in Mesa's refund claim. Mesa is, in effect, stating "I want a refund" and leaving the details to some indeterminate time later. Such a request clearly does not satisfy Shell Offshore, Inc., 96 IBLA at 174, 94 I. D. at 84, and is easily distinguished from the situation where proof of a claim is submitted after a sufficient request (notice) is filed. 3/

Mesa suggests that it is the retroactive nature of unidentified MMS orders and regulations that causes it to file the instant claim. Any adverse effects caused by retroactivity are the product of section 10, which measures the timeliness of a refund request by the date of payment

3/ A protective claim similar to Mesa's was considered and found improper in Solicitor's Opinion M-36942, *supra* at 1099:

"One lessee has recently provided a good illustration of what is not a proper request. In August 1980, the company filed 144 'requests for refunds' for each of its 144 offshore leases. Each letter said: 'You are respectfully asked to consider this letter as such a request for any refund, which may be determined to belong rightfully to [the company] and its co-lessees of the subject lease, as to any payment made in excess of the amount required.'"

Solicitor Coldiron characterized these letters in this way: "The letters do not ask for specific amounts or give reasons why the payments are excessive. They are not requests within the meaning of sec. 10."

and the date of filing a request for refund. Mesa's protective claim of October 25, 1988, does not constitute a request under section 10. 4/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Director is affirmed.

David L. Hughes
Administrative Judge

I concur:

James L. Burski
Administrative Judge

4/ In its SOR, Mesa includes a motion for discovery and hearing. Specifically, Mesa seeks certain correspondence, dated Dec. 6, 1967, from Solicitor General Griswold to Solicitor Barry and a memorandum, dated May 30, 1978, from Assistant Solicitor Elliott to the Director, Geological Survey. Mesa also asks for all documents that form the basis of a statement appearing in a field report, dated June 1, 1989, indicating that the Solicitor General agreed with the Department's view of section 10.

Counsel for MMS has included in the agency's Answer the correspondence and memorandum sought by Mesa and states that the agency has furnished Mesa in other litigation "all other available documents that discuss the requirements of section 10" (Answer, Mar. 15, 1991, at 6). Mesa has not disputed this statement. Its motion for discovery appears, therefore, to have been rendered moot by MMS' cooperation.

There being no material fact at issue in the instant appeal, Mesa's motion for a hearing is denied.

