Production Tax Credits/Wind Power Facility: Oklahoma Supreme Court Addresses Applicability of Ad Valorem Taxation



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10/21/2022

The Supreme Court of Oklahoma ("Court") addressed in an October 18th Opinion an issue arising out of two Oklahoma County Assessors' valuation of a wind farm for ad valorem tax assessment purposes. See *Kingfisher Wind, LLC v. Wehmuller*, 2022, OK 83.

The primary issue involved whether Production Tax Credits ("PTCs") are "property" subject to ad valorem taxation.

Kingfisher Wind, L.L.C. ("Kingfisher") constructed a wind farm in 2015. The wind farm included:

- 149 wind turbine generators
- Electrical equipment
- Maintenance facility
- Substation
- Transmission lines

Portions of the wind farm were located in both Kingfisher and Canadian Counties.

After the Canadian County Assessor and County Board of Equalization presented cash values for the Kingfisher wind farm, it filed an appeal in the District Court of Canadian County. It argued for a much lower fair cash value of the wind farm. A similar protest was filed related to a Kingfisher County Board of Equalization cash value.

Kingfisher argued in the District Court that its PTCs and certain contracts should be exempt from ad valorem taxation. PTCs are a federal tax credit per kilowatt hour for electricity generation. The PTC is found in Section 45 of the United States Tax Code.

As the Court noted:

PTCs are a federal tax equity financing concept which allowed Kingfisher Wind to finance the building of their facilities in exchange for a tax credit directly related to the kilowatt hour of electricity generated.

The Court initially notes that PTCs are not real estate/real property. It acknowledged that they are intrinsically tied to the real estate because the wind farm would "likely not be built without them."

Kingfisher argued in support of its petition:

- Okla. Const. art. 10 § 6A which provides that beginning January 1, 2013, intangible personal property shall not be subject to ad valorem tax . . .
- Stillwater Housing Associates v. Rose, 2011 OK CIV APP 51 which held that tax credits are exempt from ad valorem taxation because they are intangible personal property and not income

The Court undertook a survey of how a number of other states have addressed taxation of intangible personal property. It ultimately concluded that tax credits are intertwined with real estate, enhancing the value of real property. As a result, they may have a value for Internal Revenue Service income tax purposes.

Regardless, the Court found that under the:

. . . plain and ordinary language of the Okla. Const. art. 10, § 6A, intangible personal property is not taxable and PTCs are intangible personal property.

The Court further noted that the Oklahoma Legislature has not chosen to define PTCs so as to allow them to be taxable as part of a real property tax assessment. As a result, it found that PTCs are intangible personal property that are exempt even if they have both tangible and intangible aspects.

A copy of the Opinion can be downloaded here.