

GENON MID-ATLANTIC, LLC

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IN THE

vs.

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MARYLAND TAX COURT

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Nos. 14-MF-OO-0093

MONTGOMERY COUNTY,  
DEPARTMENT OF FINANCE

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## MEMORANDUM AND ORDER

GenOn Mid-Atlantic, LLC (“Petitioner”) operates the Dickerson electric generating facility located in Montgomery County, Maryland (the “Dickerson Facility”). The Montgomery County Department of Finance (“Respondent”) by letter dated December 20, 2013 assessed an excise tax in the amount of \$14,640,669.57 for the years 2010-2013 against the Petitioner under its authority to tax fuel and energy as provided in the Montgomery County Code, Section 52-14 (Fuel/Energy Tax “or” Tax). Petitioner has appealed the assessment to this Court.

The facts in the present case are generally not in dispute. Montgomery County implemented the Energy Tax in 1975 well after the Dickerson Facility began operating in Montgomery County in 1959. In May 2010, Montgomery County Council passed a Carbon Tax that was designed to apply only to the Dickerson Facility which was projected to collect more than \$16,000,000 a year. The County repealed the Carbon Tax after a Federal Appellate Court found that the tax was invalid. In June 2013, the County, relying on the 40-year old Energy Tax ordinance, began taxing the electricity necessary to generate electricity for consumption at the Dickerson Facility. At the same time, Montgomery County began taking steps to exempt from the Energy Tax the primary group

of taxpayers impacted by the Energy Tax Ordinance (taxpayers generating electricity for their own use through renewable sources). Consequently, Montgomery County attempted to subject only one taxpayer to the 40-year old Energy Tax, the owner of the Dickerson Facility.

The County has acknowledged that the County has not historically taxed the production and consumption of station power. Station power is necessary for the Dickerson Facility to generate electricity for the sale by Petitioner in the wholesale energy markets administered by PJM Interconnection, LLC. The County claims that its failure for not taxing station power was an omission and not a policy change or new interpretation of the Energy Tax.

The Petitioner contends that the County for 40 years applied the clear language of the statutes by not applying the Energy Tax to the Dickerson Facility's self-supplied station power. The Energy Tax statute in effect in 2013 states:

- (a) A tax is levied and imposed on every person transmitting, distributing, manufacturing, producing, or supplying electricity, gas, steam, coal, fuel oil, or liquefied petroleum gas in the County.

The County Council must set the rates for various forms of fuel and energy by resolution adopted according to the requirements of Section 52-17(c). The Council may, from time to time, revise, amend, increase, or decrease the rates, including establishing different rates for fuel or energy delivered for different categories of final consumption, such as residential or agricultural use. The rates must be based on a weight or other unit of measure regularly used by such persons in the conduct of their business. The rate for each form of fuel or energy should impose an equal or substantially equal tax on the equivalent energy content of each form of fuel or energy for a particular category of use. The tax does not apply to the transmission or distribution of electricity, gas, steam, coal, fuel oil, or liquefied petroleum gas in interstate commerce through the County if the tax would exceed the taxing power of the County under the United States Constitution. The tax

does not apply to fuel or energy converted to another form of energy that will be subject to a tax under this Section. The tax must not be imposed at more than one point in the transmission, distribution, manufacture, production, or supply system. The rates of tax apply to the quantities measured at the point of delivery for final consumption in the County.

Although "production" is not defined by the Energy Tax section, the language of the statute indicates that the Energy Tax is designed to tax only net production of energy and not energy used to produce energy. An examination of the statute as a whole with specific reference to the fuel or energy "delivered for different categories of final consumption" suggest that the legislature only intended to tax energy sold to consumers in Montgomery County. Moreover, other parts of the statute support Petitioner's position that Montgomery County only intended to tax the net production of energy.

The language of the statute does not provide that the Energy Tax was a tax on gross production. The legislative history of the statute indicates that Montgomery County never considered "station power" and it could not have been the County's intent to tax self-supplied station power. In fact, if the Court accepted the County's argument, the County would be taxing a production loss of electricity because the Dickerson Facility suffers a production loss by using electricity to produce electricity available for wholesale sales. Such a construction of the Energy Tax statute would result in "...a meaning not evident from either its language or the statutory purpose". *Abington Ctr. Assocs. Ltd. Ptr. v. Baltimore County*, 115 Md. App 580, 694 A. 2d 165 (1997).

In light of the factual and legal findings of the Maryland Tax Court, it is unnecessary to address the remaining arguments of the parties. Therefore, it is this

9<sup>th</sup> day of December, 2015, by the Maryland Tax Court ORDERED that the assessment of the Montgomery County Department of Finance is hereby **REVERSED**.

cc: Robert C. Park Esq.  
Michael R. Engleman, Esq.  
Charles Schaller, Esq.  
Scott R. Fonncannon, Esq.

**CERTIFIED TRUE COPY**  
**TEST:** John T. Hearn, Clerk

**NOTICE:** You have the right of appeal from the above Order to the Circuit Court of any County or Baltimore City, wherein the property or subject of the assessment may be situated. The Petition for Judicial Review **MUST** be filed in the proper Court within thirty (30) days from the date of the above Order of the Maryland Tax Court. Please refer to Rule 7-200 et seq. of the Maryland Rules of Court, which can be found in most public libraries.