

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
ENVIROGAS, INC. : DECISION
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period March 1, 1977 :
through February 29, 1980.

Petitioner, Envirogas, Inc., 1 Grimsby Drive, Hamburg, New York 14075, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1977 through February 29, 1980 (File No. 37362).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on October 20, 1983 at 1:15 P.M., with all briefs to be submitted by March 9, 1984. Petitioner appeared by Moot & Sprague, Esqs. (Michael A. Brady, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly imposed sales tax on the delivery of gas, free of cost, to the lessors of petitioner's oil and gas leases.

II. Whether the Audit Division properly imposed sales and use tax on petitioner's (i) recurring purchases for three thousand dollars and over, (ii) purchases of radio equipment, (iii) purchases of plastic pipe and (iv) purchases and/or rental of machinery and equipment and purchases of repair parts to such machinery and equipment or whether petitioner is entitled to an exemption from

such sales and use taxes on the basis of the production exemption under Tax Law §1115(a)(12).

FINDINGS OF FACT

1. On December 16, 1981, the Audit Division issued a timely¹ Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Envirogas, Inc. Envirogas, alleging sales and use taxes due of \$191,232.39 plus interest for the period March 1, 1977 through February 29, 1980. This determination of tax due was based upon an audit of petitioner's records.

2. The audit was divided into the following areas: (1) free gas, tax alleged due of \$15,856.20; (2) recurring purchases under three-thousand dollars, tax alleged due of \$13,314.85²; (3) recurring purchases for three-thousand dollars and over, tax alleged due of \$4,751.58; (4) acquisition of radio equipment, tax alleged due of \$18,524.98; (5) acquisition of all other assets, tax alleged due of \$130,480.84³, and (6) purchases of plastic pipe for use from the wellhead to the sales point, tax alleged due of \$8,303.94.

3. Petitioner is involved in the exploration, extraction and production of natural oil and gas in New York, Pennsylvania, Ohio, West Virginia and

¹ Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period at issue to December 20, 1981.

² The parties have agreed that petitioner is liable for additional tax in the amount of \$10,828.06 on recurring purchases under three-thousand dollars (a reduction from \$13,314.85).

³ The alleged deficiency for the portion of the audit dealing with asset acquisitions (other than radio equipment) and the portion dealing with purchases of three-thousand dollars and over was reduced to a total of \$133,982.38. This amount is broken into various categories as detailed in Exhibit "9".

in New York and in operation on February 28, 1980 were providing the maximum 200,000 cubic feet of free gas per year for all three years of the audit period. It calculated the cost of 16,667 cubic feet of gas per month as \$56.18, the first four hundred cubic feet costing \$3.80, the remainder of 16,267 cubic feet costing \$52.38. These figures were based on the retail cost figure supplied by National Fuel Gas. Alan Laurita, supervisor of petitioner's land department, testified that the approximate value of the gas at the wellhead in the period at issue ranged from \$2.00 to \$2.60⁵, depending on the seasonal period, with higher values during the winter months. The auditor testified that he requested wellhead price information from National Fuel Gas, but that only the retail price was provided. The cost of gas for one year was determined to be \$674.18, and for three years, \$2,022.48, which multiplied by the 112 wells equalled \$226,517.76 against which the seven percent sales tax rate was applied, resulting in tax due of \$15,856.24.

6. Landowners who lease gas rights to petitioner do not always receive their contractual "free gas" by tapping into the wellhead and using the gas directly from the well. Rather, some landowners are tapped into a distribution line of National Fuel Gas, and petitioner absorbs the cost of gas up to the amount of the "free gas" it has agreed to provide the landowner⁶. According to

⁵ It appears that these values are for the first four hundred cubic feet of gas. Mr. Laurita responded to the question, "[D]id the Tax Auditor use a value of four dollars as a retail value" as follows: "That would be a retail value, yes sir." As noted above, the auditor valued the first four hundred cubic feet at \$3.80. The remainder of 16,267 cubic feet was valued at \$52.38 or approximately 32 cents per hundred cubic feet or \$1.28 per four hundred cubic feet. Petitioner did not introduce any evidence other than Mr. Laurita's testimony concerning the value of the gas at the wellhead. However, the auditor conceded that the wellhead price was substantially lower than the retail price of National Fuel Gas which he used in his calculation noted above.

⁶ National Fuel Gas reduces the royalty payment it owes to petitioner to compensate for the "free gas" provided to the landowners.

Mr. Laurita, petitioner does not pay sales tax on such gas to National Fuel Gas. It also appears that some landowners receive a cash payment from petitioner in lieu of the "free gas". However, petitioner provided no specific evidence concerning how many of the 112 gas wells have a landowner hookup at the wellhead for free gas. According to the audit report, "Citing confidentiality between Envirogas, Inc. and their investors, no records whatsoever were furnished concerning this area of the audit (petitioner's providing of 'free gas' to landowners)".

7. The Audit Division examined in detail petitioner's recurring purchases of three-thousand dollars and over and its acquisition of assets including radio equipment. Petitioner's Exhibit "9", herein, analyzes the recurring purchases of three-thousand dollars and over and the acquisition of assets other than the radio equipment which the Audit Division alleged was subject to sales and use tax. Attached to this decision as Appendix A is a copy of the summary sheet from Exhibit "9". Petitioner, at the hearing, conceded its tax liability on several items, and such concessions are noted in Appendix A. The items still at issue are as follows:

<u>ITEM</u>	<u>TAX ALLEGED DUE</u>
Snowmobiles and Hondas	\$ 5,802.58
Pipe installation	3,233.89
Site maintenance	2,666.18
Heavy equipment	77,189.17
Trailers	2,797.87
Parts for repairs to heavy equipment	1,974.28
Pickup truck and accessories	6,710.17
Water trucks	26,291.46
Pumps	491.69
Service rig and attachments	3,052.03
Generators	252.00
Radio equipment	18,524.98
Plastic pipe	8,303.94

8. Petitioner puts a gas well into production as follows. Its land department first surveys the drilling site which is then prepared for drilling by the construction department. The site, measuring one hundred by one hundred feet, is cleared and leveled for a rig structure to sit on, and an access road is made. Sluices and drainage ditches are dug. A drilling rig is then moved in. (Petitioner has a contract with Underwater Gas Developers Limited of Consumers Gas of Ontario, Canada for the exclusive use of seven land rigs.) Pits are dug, and drilling water and casing are hauled in to the site. The drilling operation, conducted by a sub-contractor, takes six to seven days. Initially, surface casing is set to a depth of ten percent of the well's projected total depth to protect the aquifer and potable water supply. An 8 and 5/8 inch diameter pipe, after being set in bedrock, is cemented in. A sub-contractor performs cementing operations. The rig drills twenty-four hours per day until the target formation is penetrated. Petitioner then contracts with another sub-contractor to log the well, which consists of the use of radioactive materials to determine whether there is sufficient gas to justify the completion of the well. Petitioner's geology department evaluates the situation and a decision is made whether to complete the well. If the well is to be completed, a 4 and 1/2 inch diameter production casing is run from the bottom of the hole to the surface and is cemented in by a sub-contractor. After a wait of approximately seventy-two hours for the cement to cure, the well is perforated, which consists of the lowering and detonation of charges in the well bore. Projectiles are thereby shot twelve inches through pipe and cement and into the sand body. A sub-contractor then hydrofractures the well, which consists of pumping water, nitrogen, sand and other additives down the well bore under tremendous pressure in order to fracture and stimulate the

formation so that gas contained in the fractured formation can flow to the well bore. Petitioner's completion department then cleans, tests and gauges the well and pipeline is installed and surface equipment set.

9. The distance from the wellhead⁷ to the sales point can vary from hundreds to thousands of feet and petitioner, using plastic pipe, constructs a pipeline from the wellhead to the sales point. Placed within inches of the sales point is a drip-tank which removes excess water from the gas. There may also be other drip tanks located along the pipeline. Filters may be placed at various locations on the pipeline which remove impurities such as dust and hydrogen sulfide from the gas⁸. The pressure of the gas may also be regulated, either up or down, somewhere along the pipeline⁹. Petitioner adjusts, cleans or replaces drip tanks, filters and regulators on a continual basis. After the well is completed and pipeline is in, petitioner's restoration department restores the well site and surrounding area. A well tender employed by petitioner will then visit the well daily.

10. Petitioner utilizes the following equipment, vehicles and materials for the purposes noted below which petitioner asserts entitle it to claim the production exemption from sales and use tax upon the purchase of such equipment and vehicles.

⁷ The wellhead is above the surface of the ground.

⁸ Drying the gas, by use of a drip tank, is performed on every well. However, filtration of the gas is performed on approximately one-half of the wells. The gas lines of gas distribution companies also have in-line drip tanks to remove fluid accumulation.

⁹ For distribution lines that run directly to retail users, the pressure must be reduced by use of regulator valves. If the gas is to be placed into the transmission lines of National Fuel Gas, a major natural gas distributor, pressure must be increased by use of compressors.

<u>ITEM</u>	<u>PURPOSE(S)</u>
Snowmobiles and Hondas	Used for access to the site of the regulators, filters and drip tanks.
Heavy equipment: ¹⁰	
(i) Bulldozers	Used to haul the equipment of the various contractors that are involved in the drilling process to the well site, to construct the access road and to put the pipe in from the wellhead to the sales point.
(ii) Backhoes	Used predominantly to construct the access road to the well site and for excavating the mud pits which are used for storage and recycling of the drilling fluid and handling waste and to install the pipeline.
(iii) Ditch witches	Used for installation of the pipeline.
(iv) Stone rake	Used primarily for restoration of well sites.
(v) Heavy duty loader	Used for loading gravel for building the access roads.
(vi) Tractors	Used with box scrapers attached to remove mud from heavy equipment before travelling on public roads.
(vii) Posthole digger	Used to reconstruct fences taken down during the construction of access road.
(viii) Highboy trailers	Used to transport heavy equipment, materials and pipe.

¹⁰ Separately itemized on page 4 of Exhibit "9" are various pieces of heavy equipment including a pipe pusher, trencher, ditch witch, flatbed truck and trailers which are noted as being used for pipe installation.

(ix) Wheel dump	Used as a dump truck in construction of site and to haul gravel or stone for access roads or construction of pumping stations.
Trailers	Used to carry equipment, to haul materials including pipe and brine storage tanks and specially built trailers used for hauling the frack tanks used in the fracking process. ¹¹
Pickup trucks and accessories	Used to bring materials and employees to the production site.
Water trucks	Used to haul water to the production site for the drilling and hydrofracture procedures when there is no available water at the well site, to remove waste water and fluids used in the drilling and hydrofracture procedures, and to collect production brine water and other impurities removed from the gas.
Pumps	Used during the production process to provide water on location for the drilling and hydrofracture, to remove waste water from pits on location and to remove waste water from the location after drilling.
Stone and gravel	Used for construction of access roads or pipeline placement.
Service rig and attachments	Used for swabbing (the procedure used to remove excess water from the well), pumping (another process to remove excess fluid from the well bore) and sand removal (removal of the sand

¹¹ The frack tanks and fracking process were referred to by James Perkins, petitioner's construction supervisor, in his testimony. It is unclear whether "fracking process" is shorthand for "hydrofracture process".

that was forced down the well during the hydrofracture process as well as the removal of sand from the underground formation from which the gas is being extracted).

Generators

Used to cut and fuse plastic pipe which is installed from the wellhead to the sales point.

Radio equipment

Used for communication purposes among petitioner's employees

Equipment used for site maintenance including tractors, snowblowers and mowers

Used to keep the well site and pipeline sites accessible.

11. Petitioner asserts that the purchase of various parts, with a useful life expectancy of one year or more, used to repair the heavy equipment noted in Finding of Fact "10", supra, are exempt from sales and use tax. It conceded liability on parts with a useful life expectancy of less than one year as noted in Appendix B attached to this decision.

CONCLUSIONS OF LAW

A. That the provision of free gas to landowner-lessors (who have leased their oil and gas rights) by a lessee-gas company (which has developed and put into production gas wells and which has brought the gas to the surface) is a transaction subject to the imposition of sales and use tax. Matter of National Fuel Gas Supply Corporation and National Fuel Gas Distribution Corporation As Successors to Iroquois Gas Corporation and Matter of National Fuel Gas Distribution Corporation, State Tax Commission, April 6, 1984. Petitioners took title to and possession of the gas at the time they brought it to the surface. See 37 NY Jur, Mines and Minerals §9. Therefore, when the petitioner provided free gas to the landowner-lessors, there was a transfer of title or possession to

the gas by the petitioner for a consideration (the right to go on the landowner's land and drill for gas and the exclusive right to any gas found therein subject to the provision of free gas to the landowner). Such transfer of title for a consideration is deemed a taxable sale under Tax Law §1101(b)(5) which encompasses any transfer of title or possession or both in any manner or by any means whatsoever for a consideration.

B. That, therefore, the Audit Division may properly impose sales and use tax on petitioner's provision of free gas from its 112 gas wells to the landowner-lessors. It is noted that the Audit Division properly calculated the tax due on free gas by estimating that all 112 of petitioner's gas wells, located in New York and in operation on February 28, 1980, were providing the maximum 200,000 cubic feet of free gas per year for all three years of the audit period. Petitioner failed to introduce any evidence to show the specific number of wells from which free gas was not provided via landowners hookups at the wellhead¹² and the specific number of wells from which free gas was provided in amounts less than the maximum amount per year. However, the Audit Division is directed to recompute the tax due on the provision of free gas by calculating the cost of the first four hundred cubic feet per month to be \$2.30 which is the average of the approximate seasonal values of the gas at the wellhead according to the testimony of Alan Laurita as noted in Finding of Fact "5", supra. Petitioner failed to provide any further evidence concerning the value

¹² As noted in Finding of Fact "6", supra, some of the landowners receive their "free gas" from National Fuel Gas which reduces the royalty payments it owes to petitioner to compensate for such "free gas". However, no specific evidence was introduced by petitioner to show the number of wells where this is the case. Furthermore, petitioner noted that it did not pay sales tax on such free gas to National Fuel Gas. Therefore, calculating the tax due on free gas by using all 112 gas wells does not subject petitioner to double payment of sales and use tax on such free gas.

of the gas at the wellhead, and therefore, the retail cost figure supplied by National Fuel Gas for gas in excess of four hundred cubic feet may be used in the recalculation.

C. That Tax Law §1115, as effective during the years at issue, provided in part as follows:

"Sec. 1115. *** (a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(12) Machinery or equipment for use or consumption directly and predominantly in the production of... gas... by manufacturing, processing, generating, assembling, refining, mining or extracting, or telephone central office equipment or station apparatus or comparable telegraph equipment for use directly and predominantly in receiving at destination or initiating and switching telephone or telegraph communication, but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery equipment or apparatus. This exemption shall include all pipe, pipeline, drilling rigs, service rigs, vehicles and associated equipment used in the drilling, production and operation of oil, gas, and solution mining activities to the point of sale to the first commercial purchaser" (T.L. §1115(a)(12); added L. 1965, c. 94; amended L. 1974, c. 851 substituting "predominantly" for "exclusively"; amended L. 1981, c. 846, adding the final sentence beginning "This exemption shall include..." eff. August 26, 1981).

D. That the extension of this so-called "production exemption" to include "all pipe, pipeline, drilling rigs, service rigs, vehicles and associated equipment used in the drilling, production and operation of oil, gas, and solution mining activities to the point of sale to the first commercial purchaser" became effective on August 26, 1981 (L. 1981, c. 846 §27). This amendment was not applicable to the period at issue because its effect was prospective only. See 56 NY Jur, Statutes §265 which notes that, generally speaking, an act of the

legislature operates prospectively. The limitations upon such general rule noted in 56 NY Jur, Statutes §267 do not encompass the type of amendment at issue because an examination of the legislative history concerning this amendment reveals that the purpose of this amendment was not "remedial". In fact, the Governor's Office, the Budget Division and Department of Taxation and Finance all noted their concern that this amendment unduly extended the existing "production exemption". Therefore, this amendment did not merely serve "to clarify the scope and extent of the exemption already existing" as petitioner argued in its brief.

Some relevant legislative history is as follows:

"I also am advised that the sales tax exemption in the bill may inadvertently extend beyond existing production exemptions and be inconsistent with the State's fiscal plan". Memorandum dated July 27, 1981, Executive Chamber.

"The amendment proposed by this bill, which would exempt pipe, pipeline, vehicles and certain other equipment used in the distribution of products of oil, gas and solution mining industries to the point of sale to the first commercial purchaser, would grant a select group of industries special treatment. By granting this special exemption to the oil and gas industries, other New York industries would be treated unfairly. Therefore, this amendment will almost certainly lead other industries to seek similar exemptions from the sales and use taxes for the purchase and use of equipment used in their particular mode of distribution of their products". Letter dated July 27, 1981, from Commissioner James H. Tully, Jr., of the Department of Taxation and Finance to Governor Hugh L. Carey.

"The amendment made by section 24 of the bill, to Tax Law section 1115(a)(12), represents a unique and questionable expansion of the sales tax production exemption". Budget Report On Bills, dated July 28, 1981.

E. That the regulations, at 20 NYCRR 528.13(b)(1), distinguish "production" from "administration" or "distribution" as follows:

"(i) 'Administration' includes activities such as sales promotion, general office work, credit and collection, purchasing, maintenance, transporting, receiving and testing of raw materials and clerical work in production such as preparation of work, production and time records.

(ii) 'Production' includes the production line of the plant starting with the handling and storage of raw materials at the plant site and continuing through the last step of production where the product is finished and packaged for sale.

(iii) 'Distribution' includes all operations subsequent to production, such as storing, displaying, selling, loading and shipping finished products.

The regulations, at 20 NYCRR 528.13(c)(1), also define the term "directly" as follows:

"(1) 'Directly' means the machinery or equipment must, during the production phase of a process,

(i) act upon or effect a change in material to form the product to be sold, or

(ii) have an active causal relationship in the production of the product to be sold, or

(iii) be used in the handling, storage or conveyance of materials or the product to be sold, or

(iv) be used to place the product to be sold in the package in which it will enter the stream of commerce.

(2) Usage in activities collateral to the actual production process is not deemed to be used directly in production."

F. That of the items in dispute, as described in Findings of Fact "7" and "10", supra, only the service rig and attachments constitute machinery and equipment used directly and predominantly in production within the meaning and intent of Tax Law §1115(a)(12) (as effective during the years at issue) and 20 NYCRR 528.13. The other items are either not machinery or equipment (the plastic pipe and stone gravel) or not used directly in production within the meaning of the law and regulations (although they may be considered essential

thereto). Many of the items are used predominantly for the transportation of workers and/or equipment and materials to the production site (such as snowmobiles, Hondas, bulldozers, trailers, pickup trucks and water trucks) or are part of petitioner's distribution operations (such as the pipeline which is predominantly used to transport gas and not to process it). In sum, they lack a sufficient intimate nexus with the production process to qualify for the production exemption. See Rochester Independent Packer, Inc. v. Heckelman, 83 Misc 2d 1064 and Matter of Niagara Mohawk Power Corp. v. Wanamaker, 286 AD 446. In addition, the water trucks are not "waste treatment equipment" encompassed by the production exemption because they do not meet the requirement of the regulations, 20 NYCRR 528.13(d), that they be used to "actually treat, bury, or store waste materials...".

G. That since the machinery and equipment referred to above are not exempt, the repair parts for such items are subject to tax, regardless of the length of their useful lives.

H. That the purchase of the radio equipment is not exempt from the imposition of sales and use tax because it is not "telephone central office equipment or station apparatus or comparable telegraph equipment". See Matter of Coradian Corporation f/k/a United Telecommunications Corp., State Tax Commission, May 27, 1983.

I. That the petition of Envirogas, Inc. is granted to the extent noted in Conclusions of Law "B" and "F", but, in all other respects, is denied.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 23 1984

Rochester W. Chan
PRESIDENT

Francis P. Koelm
COMMISSIONER

[Signature]
COMMISSIONER

APPENDIX A

	<u>Tax Alleged Due</u>	
(1) Snowmobiles and Hondas	\$ 5,802.58	
(2) Items reimbursed to Clarey	197.35	tax conceded
(3) Office items	221.45	tax conceded
(4) Pipe installation	3,233.89	
(5) Maps, etc.	288.68	tax conceded
(6) Site maintenance	2,666.18	
(7) Heavy equipment	77,189.17	
(8) Trailers	2,797.87	
(9) Repairs (labor)	611.47	tax conceded
(9) Repairs (parts)	1,974.28	
(10) Equipment for effecting repairs	1,189.28	tax conceded
(11) Pickup trucks and accessories (net)	6,710.17	
(12) Water trucks	26,291.46	
(13) Pumps	491.69	
(14) Service rig and attachment	3,052.03	
(15) Generators	252.00	
(16) L-2-L-6 (various supplies)	580.59	tax conceded
(17) Miscellaneous	437.24	tax conceded
	<u>\$133,982.38*</u>	
Schedules A & L	\$133,982.38	
Landowner Gas	15,856.20	
Radios	18,524.98	
Plastic Pipe	8,303.94	
Stat Sample	13,314.85**	
	<u>\$189,982.35***</u>	

* The parties agreed to this amount which is a reduction from \$135,232.42 which the Audit Division had initially asserted.

** Parties agreed tax should be reduced to \$10,828.06 as noted in Finding of Fact "2", supra.

*** The parties stipulated to this figure which is a reduction from \$191,232.39 which the Audit Division alleged was due in the Notice of Determination and Demand, as noted in Finding of Fact "1", supra.

APPENDIX B

<u>Exhibit "9" page number</u>	<u>Item(s)</u>
Page 9a(1)	Fuel, air filters, transmission and hydraulic fluids, fuel filters
Page 9(a)(2)	Fuel filters
Page 9(a)(3)	Fuel filters
Page 9a(4)	Oil filter
Page 9a(5)	Washer solvent, oil filter windshield wash, transmission fluid
Page 9a(6)	Air and oil filters
Page 9a(7)	Air filters
Page 9a(8)	Filters