

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Envirogas, Inc.	:	AFFIDAVIT OF MAILING
for Redetermination of Mortgage Recording Tax	:	
under Article 11 of the Tax Law with Reference to	:	
a Mortgage Recorded on July 30, 1980.	:	

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 29th day of April, 1985, he served the within notice of Decision by certified mail upon Envirogas, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Envirogas, Inc.
1 Grimsby Dr.
Hamburg, NY 14075

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
29th day of April, 1985.

David Parchuck

Conrad A. Hegmann
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

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of	:	
Envirogas, Inc.	:	
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for Redetermination of Mortgage Recording Tax	:	
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a Mortgage Recorded on July 30, 1980.	:	

State of New York :
County of Albany : ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 29th day of April, 1985, he served the within notice of Decision by certified mail upon Security Peoples Trust Company, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Security Peoples Trust Company
801 State St.
Erie, PA 16501

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
29th day of April, 1985.

David Parbeck

Carrie B. Hagedorn
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

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for Redetermination of Mortgage Recording Tax	:	
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State of New York :
County of Albany : ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 29th day of April, 1985, he served the within notice of Decision by certified mail upon Ms. Sally McCluskey, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ms. Sally McCluskey
Commissioner of Finance
Chautauqua County
Mayville, NY 14757

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
29th day of April, 1985.

David Parohuck

Connie D. Shepherd
Authorized to administer oaths
pursuant to Tax Law section 174

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Envirogas, Inc.	:	
	:	AFFIDAVIT OF MAILING
for Redetermination of Mortgage Recording Tax	:	
under Article 11 of the Tax Law with Reference to	:	
a Mortgage Recorded on July 30, 1980.	:	

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 29th day of April, 1985, he served the within notice of Decision by certified mail upon Mr. Donald L. Coe, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Donald L. Coe
Chautauqua County Clerk
Mayville, NY 14757

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
29th day of April, 1985.

David Parchuck

Connie A. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Envirogas, Inc.	:	
		AFFIDAVIT OF MAILING
for Redetermination of Mortgage Recording Tax	:	
under Article 11 of the Tax Law with Reference to	:	
a Mortgage Recorded on July 30, 1980.	:	

State of New York :
County of Albany : ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 29th day of April, 1985, he served the within notice of Decision by certified mail upon Robert Mensing, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert Mensing
Mortgage & Real Estate Transfer Tax Unit
Room 403, 4th Fl.
Building No. 9
State Campus
Albany, NY 12227

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
29th day of April, 1985.

David Paruchuk

Connie P. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

April 29, 1985

Envirogas, Inc.
1 Grimsby Dr.
Hamburg, NY 14075

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 251 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative	AND	Ms. Sally McCluskey
Paul M. Edgette		Commissioner of Finance
Moot, Sprague, Marcy, Landy, Fernbach & Smythe		Chautauqua County
2300 Main Place Tower		Mayville, NY 14757
Buffalo, NY 14202		AND
AND		Mr. Donald L. Coe
Security Peoples Trust Company		Chautauqua County Clerk
801 State St.		Mayville, NY 14757
Erie, PA 16501		AND
AND		Robert Mensing
Taxing Bureau's Representative		Mortgage & Real Estate Transfer
		Tax Unit
		Room 403, 4th Fl.
		Building No. 9, State Campus
		Albany, NY 12227

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ENVIROGAS, INC.	:	DECISION
to Review a Determination under Article 11 of	:	
the Tax Law with Reference to a Mortgage	:	
Recorded on July 30, 1980.	:	

Petitioner, Envirogas, Inc., 1 Grimsby Drive, Hamburg, New York 14075, filed a petition to review a determination under Article 11 of the Tax Law with reference to a mortgage recorded on July 30, 1980 (File No. 41500).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on October 20, 1983 at 9:15 A.M. with all briefs to be submitted by January 30, 1984. Petitioner appeared by Moot, Sprague, Marcy, Landy, Fernbach & Smythe, Esqs. (Paul M. Edgette, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether oil and gas leases are real property for purposes of the mortgage tax.

II. Whether the mortgage recorded by petitioner is for an indefinite amount, not limited to its face amount of \$2,000,000.00, and, if so, whether the Audit Division properly calculated petitioner's mortgage tax liability on the basis of New York property secured by the mortgage.

III. Whether, assuming that the mortgage is for a definite amount, petitioner may allocate to New York a portion of such definite amount because the mortgage covered property situated partly within and partly without New York State.

FINDINGS OF FACT

1. On June 3, 1980, the Security-Peoples Trust Company, Erie, Pennsylvania approved a revolving credit loan for petitioner in the amount of two million dollars for a period of two years. Petitioner could use this loan to finance equipment purchases or for general operating capital. According to the loan approval letter, equipment borrowings would be "placed on individual notes and termed out with forty-eight equal monthly payments plus interest...", and "(o)perating monies may be borrowed and paid back as desired during the two year revolver commitment". At the end of two years, operating money outstanding "will be termed out with payback over twenty-four equal monthly principal payments plus interest". Petitioner pledged as collateral for this loan "producing gas wells currently contracted to National Fuel Gas (with the number and location of wells to be agreed upon)."

2. On July 30, 1980, a mortgage between petitioner (mortgagor) and Security-Peoples Trust Company (mortgagee) was recorded in the Chautauqua County Clerk's office to secure an indebtedness of \$2,000,000.00. The mortgage noted that it was made "pursuant to a loan agreement (the 'loan agreement') dated July 29, 1980 by and between the mortgagee and mortgagor, (in which) the mortgagee has agreed to lend to mortgagor certain amounts up to two million (\$2,000,000.00) dollars...". After discussions with the recording officer for Chautauqua County concerning the apportioning of the indebtedness to New York, petitioner paid a mortgage tax of \$4,800.00 based on a principal indebtedness of \$640,000.00. This amount represented a reasonable portion of the total principal indebtedness of \$2,000,000.00 because according to Charles Jacobs (vice president - legal of petitioner), "approximately one-third of the gas wells were located within New York and two-thirds in Pennsylvania". However,

no statement as to the allocation of the property to New York was filed at the time of recording.

3. The second recital clause of the mortgage provided as follows:

"Whereas, the loans heretofore, or hereafter made by the Mortgagee to Mortgagor pursuant to the Loan Agreement are and will be evidenced by a Revolving Credit Note dated July 29, 1980 in the face amount of Two Million (\$2,000,000) Dollars, a Term Note, and certain Equipment Notes, all with interest thereon at the rates provided therein or in the Loan Agreement, to be repaid at the times therein set forth and subject to such other terms and conditions as provided by the Loan Agreement, all of which are specifically incorporated herein by reference....".

The third recital clause provided as follows:

"Whereas, under the Loan Agreement, Mortgagor has the right as set forth therein to borrow, repay and reborrow funds until July 1, 1982 and all outstanding loans shall be evidenced by the Revolving Credit Note and Equipment Notes, provided, however, that at no time shall the aggregate unpaid principal amounts evidenced by the Revolving Credit Note and Equipment Notes exceed Two Million (\$2,000,000.00) Dollars, and as set forth in the Loan Agreement, the loans evidenced by the Revolving Credit Note and not as of July 1, 1982 being amortized on Equipment Notes shall at that time be either paid in full or converted to a term loan to be evidenced by the Term Note in the principal amount equal to the unpaid principal amounts evidenced by the Revolving Credit Note, less such amounts as are then being amortized on Equipment Notes....".

4. Section 1.01 of the mortgage defined the "obligations" secured and collateralized by the mortgage to include (i) the revolving credit note dated July 29, 1980 in the principal face amount of \$2,000,000, (ii) all obligations of the mortgagor under the loan agreement dated July 29, 1980, (iii) all equipment notes contemplated by the loan agreement of July 29, 1980, (iv) the term note to be executed and delivered by the petitioner to the bank in exchange

¹ The testimony of James W. Kirk, assistant vice president of the Security-Peoples Trust Company, confirmed that the maximum loan was for \$2,000,000. Accordingly, if there was an unpaid principal for equipment loans of \$350,000, the revolving loan maximum would be \$1,650,000.

for the revolving credit note on July 1, 1982, all amendments, extensions and/or renewals of the revolving credit note, the loan agreement, the equipment notes and the term note, (vi) all advances by the bank to the petitioner pursuant to the revolving credit note, the equipment notes, the loan agreement and the term note and (vii) the performance by petitioner of all of the conditions of the mortgage.

In addition, a "dragnet clause" was included as follows:

"All other indebtedness and liabilities of all kinds of the mortgagor to the mortgagee, now existing or hereafter arising, whether fixed or contingent, joint and/or several, direct or indirect, primary or secondary, and regardless of how created or evidenced".

5. Petitioner mortgaged its "overriding royalty interest" in 213 separate oil and gas wells, seventy-one located in New York and 142 located in Pennsylvania. According to the appraisal of Robert T. Wolfe, a certified professional geologist, which was attached to the affidavit of Charles Jacobs dated October 30, 1981, the mortgage value of the wells located in New York was \$2,085,390.95 and of the wells located in Pennsylvania, \$5,122,082.93. Accordingly, 28.93% of the total value of mortgaged property (or \$7,207,473.88) was located in New York.

6. In Part II of the mortgage, "Creation of Security", petitioner granted a security interest to the bank in the 213 oil and gas wells (the borrowing base properties²) with the following condition:

² "Borrowing base properties" was defined in the mortgage as "all of mortgagor's right, title and interest in and to the Oil and Gas and/or mineral leases, subleases, farm-outs, royalties, over-riding royalties, net profits, interests, production payments, working interests and similar mineral interests...". "Oil and gas" was defined as "all gas, oil, casinghead gas, drip gasoline, natural gasoline and condensate and all other liquid and gaseous hydrocarbons". Schedule 1 attached to the mortgage identified in detail each of the 213 oil and gas wells.

"To the extent this conveyance and grant of realty collateral shall be considered as creating a mortgage lien on a real property interest of mortgagor in the State of New York, the maximum principal amount of the lien and effect hereof on such real property interest shall be restricted to the sum of \$640,000.00".

7. In a letter dated August 6, 1980, the Audit Division advised petitioner that insufficient mortgage tax was paid upon recording the mortgage and that it was directing the recording officer of Chautauqua County to place an "estoppel notation" pursuant to Tax Law section 258 on the mortgage. The Audit Division alleged that the principal indebtedness secured could not be determined from the terms of the mortgage and that mortgage tax was due on the value of the property covered by the mortgage. Accordingly, the Audit Division requested that petitioner supply it with additional information so it could determine the value of the New York property covered by the mortgage.

8. The Audit Division accepted the geologist's valuation of \$2,085,390.00 for New York oil and gas wells secured by the mortgage, and calculated mortgage tax due of \$10,833.00 plus penalty (under Tax Law §258) as follows:

Basic Tax	\$10,422.00
(50¢ for each \$100)	
Special additional tax	<u>5,211.00</u>
(25¢ for each \$100)	
Total tax due on recording	\$15,633.00
Tax paid at recording	<u>4,800.00</u>
Balance of Tax Due	\$10,833.00

9. In a letter dated January 27, 1982, petitioner requested a refund of \$465.00 of the mortgage tax paid on recording of \$4,800.00 because "(b)ased upon the information submitted (the geologist's appraisal), the value of the properties located within New York represents 28.9% of the total value of the properties covered by the mortgage (while tax was computed as if 32% of the total value of the properties were in New York)".

10. In its petition dated October 24, 1980, petitioner requested a refund of the entire \$4,800.00 mortgage tax paid at recording because the "property which was mortgaged ... does not constitute real property situated in the State for the purpose of Article 11 of the Tax Law".

CONCLUSIONS OF LAW

A. That the term "mortgage" is defined in Tax Law §250 for purposes of Article 11, Tax on Mortgages, as including "every mortgage or deed of trust which imposes a lien on or affects the title to real property".

In its petition, the petitioner argued that the recording of the mortgage at issue was not taxable because it did not impose a lien on real property. However, this Commission in the past has held that oil and gas leaseholds are leaseholds of real property. Matter of The Atlantic Refining Company, State Tax Commission, July 22, 1963. In addition, pursuant to General Construction Law §39, oil and gas leases are properly considered real property for tax purposes.

B. That pursuant to Tax Law §253, the taxable amount for purposes of the mortgage tax is the maximum amount of principal indebtedness that can be secured by the mortgage under any circumstances.

C. That pursuant to Tax Law §256, if the maximum amount secured by the mortgage is not set forth in the mortgage or a sworn statement at the time the mortgage is recorded, the value of the property covered by the mortgage is the basis of the tax.

D. That a mortgage "which, in addition to reciting that the mortgage is to secure an indebtedness of a stated amount, contains a general clause indicating that it is also to extend to other debts not specifically mentioned... may create a problem of construction in determining what debts the parties intended

to be secured by the mortgage... The question whether a 'dragnet' clause in a mortgage covers the secondary liabilities of the mortgagor to the mortgagee... is one of intention to be determined by the wording of the mortgage". 38 NY Jur, Mortgages and Deeds of Trust §58.

The third recital clause noted in Finding of Fact "3", shows the intention of the petitioner and the mortgagee to limit the principal indebtedness to an amount not in excess of \$2,000,000.00 and thereby confines the operation of the dragnet clause, noted in Finding of Fact "4", supra, to such amount. Accordingly, the mortgage is for the definite amount of \$2,000,000.00. However, it should be noted, any additional advances to the petitioner made pursuant to the revolving credit note, and made after a partial payment reduced the aggregate unpaid principal below the \$2,000,000 maximum indebtedness secured by the mortgage, are subject to the mortgage tax upon recording.

Furthermore, as noted in Finding of Fact "6", herein, the mortgage expressly provided that "the maximum principal amount of the lien and effect hereof on such real property interest (oil and gas wells located in New York) shall be restricted to the sum of \$640,000".

E. That pursuant to Tax Law §253, petitioner properly paid mortgage tax in the amount of \$4,800.00 on a principal indebtedness of \$640,000.00, which was the maximum amount expressly secured by the mortgage on real property situated within New York.


F. That the petition of Envirogas, Inc. is granted to the extent noted herein, but, in all other respects, is denied.

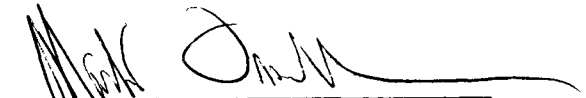
DATED: Albany, New York

APR 29 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER