



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**WILL WILSON
ATTORNEY GENERAL**

July 28, 1958

Honorable Robert S. Calvert
Comptroller of Public Accounts
Capitol Station
Austin, Texas

Opinion No. WW-477

Re: Proper interpretation to be placed on Sub-section 2 of Section 2a of Article 7047b relating to the amount of taxes to be paid on gas where the seller has an escalator clause in their contract--when the final decision of the Federal Power Commission is pending.

Dear Mr. Calvert:

You request the opinion of this office upon the questions presented in your letter of June 12, 1958. For a better understanding of the questions and the factual basis upon which they are predicated, we quote the pertinent part of your letter as follows:

"Article 7047b, V.A.C.S. levies a tax on the business and occupation of producing gas within this State based on the market value of the gas as and when produced.

"Section 2 of Article 7047b, V.A.C.S. reads as follows:

'The market value of gas produced in this State shall be the value thereof at the mouth of the well; however, in case gas is sold for cash only, the tax shall be computed on the producer's gross cash receipts. Payments made by purchasers to producers for the purpose of reimbursing such producers for taxes due hereunder shall not be considered a part of the producer's gross cash receipts. In all cases where the whole or a part of the consideration for the sale of gas is a portion of the products extracted from the producer's gas or a portion of the residue gas, or both, the tax shall be computed on the gross value of all things of value received by the producer, including any bonus or premium;'

"Sub-section 2 of Section 2a of Article 7047b, V.A.C.S. reads as follows:

'When it shall appear that a taxpayer to whom the provisions of this Article shall apply has erroneously paid more taxes than were due during any taxpaying period either on account of a mistake of fact or law, it shall be the duty of the State Comptroller to credit the total amount of taxes due by such taxpayer for the current period with the total amount of taxes so erroneously paid.'

"The Federal Power Commission has suspended various applications for scheduled contract rate increases on gas sales subject to Federal Power Commission regulation. The Natural Gas Act provides that if a final decision has not been rendered within five months following the proposed effective date of the increased rate on motion of the filing producer, the proposed rate change shall go into effect. In this event, where increased rates become effective, the Commission may require the producing company to furnish a bond or file under 'Corporate Undertaking' (in lieu of bond) to refund any amounts ordered by the Commission, pending a hearing and final decision. In the event the Commission in its final decision disallows the rate increase, the amounts collected under 'Corporate Undertaking' or under bond plus interest at six per cent per annum must be refunded to the purchaser of the gas.

"Gas sales affected by this procedure fall into two categories; (1) sale from leases and (2) residue sales from gasoline plants.

"A question has arisen as to whether the gas production tax provided for by Article 7047b, V.A.C.S. is due on the increased rates received under bond or under 'Corporate Undertaking' at the time that the amounts are collected or whether the tax becomes due at the time the Federal Power Commission reaches a final decision. It is my understanding that it may be as long as five years before a final decision is reached in some of the cases now pending.

"A number of the taxpayers are currently remitting the tax on the rate increases received under bond

or under 'Corporate Undertaking' and have indicated that should the Federal Power Commission in its final decision require that part or all of the increased rates be refunded that credit will be taken against future gas production taxes for the amount of tax previously paid on that part of the rate increase refunded."

You asked two questions, as follows:

QUESTION NUMBER ONE:

"Please advise me whether or not the tax becomes due at the time the increased rate is received under bond or 'Corporate Undertaking' on sales from leases and residue sales from gasoline plants or whether it is due at the time the Federal Power Commission reaches a final decision."

QUESTION NUMBER TWO:

"If your answer is that the tax becomes due at the time the increases are received under bond or 'Corporate Undertaking', please advise me whether or not the taxpayer will be entitled to take credit against future gas production taxes for the tax paid on any part or all of the rate increase required to be refunded by the Federal Power Commission in its final decision."

The pertinent portion of Article 7047b, Vernon's Civil Statutes, which levies this tax, is as follows:

"Section 1(1). There is hereby levied an occupation tax on the business or occupation of producing gas within this State, computed as follows:

- "(a) From the effective date of this Act until September 1, 1955, a tax shall be paid by each producer on the amount of gas produced and saved within this State equivalent to nine per cent (9%) of the market value thereof as and when produced;
- "(b) From September 1, 1955, until September 1, 1956, the rate of said tax shall be eight per cent (8%) of the market value of the gas as and when produced.

"(c) From and after September 1, 1956, the rate of said tax shall be seven per cent (7%) of the market value of the gas as and when produced."

You will observe that under sub-section (a) the tax is levied upon the market value of the gas "as and when produced," and the same language is used in sub-section (b) and (c). Therefore, under the plain terms of the statute, the tax accrues as and when produced and is payable at the time and in the manner prescribed by sub-section (c) of Article 7047b, V.C.S.

You will also observe that the tax is calculated upon the market value of the gas. The Supreme Court has said that the term "market value" is the price for which the producer sells his gas. *W.R. Davis, Inc., v, State* 142 Tex. 637 180 S.W. 2d 429. It is quite apparent that the producer sells the gas not only at the permissible rate prior to the rate increase but in addition to the increased rate effective under a bond or Corporate Undertaking. Stated another way, the producer sells the gas at the permissible rate and in addition thereto the increased rate or both combined and the tax accrues on the combined rates "as and when produced" and is payable at the time and in the manner prescribed by the statute.

Therefore, in answer to your question Number One, you are advised that the tax should be calculated by taking into account the increased rate which the producer may receive under a bond or Corporate Undertaking, and this, regardless of whether the increased rate is from leases or residue gas from gasoline plants. Payment of the tax may not be postponed until the final determination by the Federal Power Commission of the validity of producer's application for the increased rate.

In answer to question Number Two, you are advised that if the increased rate should finally be disallowed by the Federal Power Commission and the producer required to refund to its customers the increased rate, the producer or taxpayer would be entitled to take credit on its subsequent reports for the taxes paid upon the increased rate as provided in sub-section (2) of Section 2a of Article 7047b, V.C.S. The length of time taken by the Power Commission to finally determine the validity of the producer's application for an increased rate is not material.

SUMMARY

A producer should pay the gas production tax imposed by Article 7047b, V.C.S., taking into account any increased rate put into effect by a bond or Corporate Undertaking in lieu of a bond. If the increased rate is denied by the Federal Power Commission and the producer is required to refund the increased rate to its customers, the tax so paid by reason of the increased rate should be allowed as a credit on subsequent reports as provided by the taxing statute.

Yours very truly,

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APPROVED:

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REVIEWED FOR THE ATTORNEY GENERAL

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