TALLAPOOSA RIVER ELECTRIC COOPERATIVE, INC. Post Office Box 675 LaFayette, Alabama 36862, Taxpayer, v. STATE OF ALABAMA DEPARTMENT OF REVENUE.	§ § § § § § §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION DOCKET NO. S. 95-340

FINAL ORDER

Tallapoosa River Electric Cooperative, Inc. ("Taxpayer") filed a direct petition for refund of utility gross receipts tax with the Department for the period December 1990 through February 1993. The Department denied the refund, and the Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(c)(5)a. A hearing was conducted on November 14, 1995. Chris Simmons represented the Taxpayer. Assistant Counsel Margaret McNeill represented the Department.

The Department concedes that the Taxpayer overpaid the tax in question. However, the Department denied the direct petition filed by the Taxpayer because it argues that the Taxpayer collected the tax from its customers. A taxpayer may file a direct petition for refund of any public utility tax only if the taxpayer never collected the tax from its customers. Code of Ala. 1975, §40-2A-7(c)(1). This case thus turns on whether the Taxpayer collected the utility tax in question from its customers.

The Taxpayer is a non-profit electric cooperative that provides electric utility services to its customers. The utility service charges are subject to the utility gross receipts tax levied at Code of Ala. 1975, §40-21-80 et seq. As required, the

Taxpayer charges and collects the utility tax from its customers, and remits the tax to the Department. The tax is computed on the total utility service charge, and is stated as a separate item on the customer's bill.

If a customer fails to pay within 15 days after billing, the Taxpayer issues a delinquent notice and charges the customer a $2.00 fee. The Taxpayer's operating rules require that "The (delinquent notice) charge shall not be less than $2.00." The $2.00 fee is separately stated as a specific item on the customer's next bill.

In the early 1980s, the Taxpayer was not paying the utility gross receipts tax on the $2.00 delinquent charge. The Department notified the Taxpayer pursuant to an audit that the $2.00 fee was taxable. As directed by the Department, the Taxpayer began backing the tax out of the $2.00 fee, and computing and paying tax on the discounted amount. The Taxpayer continued charging a lump-sum $2.00 fee without breaking out the tax on the customer's bill.

The Administrative Law Division ruled in State of Alabama v. Mobile Gas Services Corp., Admin. Law Docket S. 90-149, decided September 20, 1990, that reconnect and collection fees charged by a utility provider were incidental charges not subject to the utility gross receipts tax. That holding was affirmed by the Alabama Court of Civil Appeals in State v. Mobile Gas Service Corp., 621 So.2d 1333 (Ala.Civ.App. 1993).

After the Mobile Gas case, the Taxpayer filed a direct

petition for refund of the utility tax it had paid on the delinquent fees during the period in issue. The Department denied the direct petition because it claims that the Taxpayer had collected the tax from its customers. If so, the Taxpayer would be required to file joint petitions with its customers pursuant to Code of Ala. 1975, §40-2A-7(c)(1).

The utility gross receipts tax is a direct tax on the consumer. The utility provider is required to add the tax to the utility service charge, collect if from the customer, and remit it to the Department. Code of Ala. 1975, §40-21-86 further provides in part as follows:

> It shall be unlawful for any person furnishing utility services to fail or to refuse to collect from the purchaser the amount required by this section to be collected, and it shall be likewise unlawful to refund or offer to refund all or any part of the amount collected or to absorb or advertise directly or indirectly the absorption or refund of said amount or any portion thereof.

The Taxpayer, after being notified that the $2.00 fee was subject to tax, failed to add the tax to the fee and collect it from the customer. The Taxpayer thus illegally absorbed the tax by including it within the $2.00 charge. The Taxpayer should have either (1) added the tax to the $2.00 fee and billed and collected it from the customer as a separate item, or (2) separately identified the tax as a part of the $2.00 charge. Only then would the tax have been collected from the customer.

An analogous situation involves the gross receipts sales tax

levied at Code of Ala. 1975, §40-23-2(2). Like the utility tax, the sales tax must be added to and stated separately from the taxable gross receipts. For example, admission to a football game is subject to the gross receipts sales tax. The ticket must specify the amount of tax included in the lump-sum charge. Otherwise, the entire lump-sum price is taxable. Where admission tickets are not required or practical, a sign showing the admission charge and the tax as separate items must be posted. See, Department Reg. 810-6-2-.86.[1] See also, Department of Revenue v. Huntsville Baseball Club, Inc. and Department of Revenue v. Birmingham Baseball Club, Inc., Admin. Law Dockets S. 92-208 and S. 92-170, Opinion and Preliminary Order entered February 23, 1994

[1] Department Reg. 810-6-2-.86 reads as follows:

> (1) The sales tax due on an admission fee must be collected as a separate item. Where the tax is not stated and collected separately the total amount of the admission price will be used as the measure of the tax to be paid to the State. Where the tax is stated and collected separately, only the amount of the admission price (not including tax) will be used as the measure of the tax.
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> (2) This rule will have been complied with where a sign showing the admission price and amount or amounts of tax due thereon is permanently displayed within view of persons paying such admissions or where the tickets used in connection with such transactions have plainly printed on the face thereof the admission price and, as a separate item, the amount of sales tax due thereon. (Readopted through APA Code effective October 1, 1982).

(Sign at gate of baseball stadium stating that "Price includes tax" held insufficient because the amount of tax was not specified. The entire lump-sum admission was held to be taxable).

The same rationale applies to the utility gross receipts tax. The tax must be added to or at least separately stated from the taxable charge. Otherwise, tax is owed on the full lump-sum amount.

The Taxpayer failed to collect the tax in issue from its customers because the tax was not specified on the customer's bill. If the Department's position is accepted, the Taxpayer and all other utilities could stop adding the tax as a separate item to the utility service charge, and instead claim that the tax was included in the base charge. To be consistent, the Department would have to agree. Taxpayers subject to the gross receipts sales tax could make the same argument, which clearly is contrary to the Department's longstanding position that unless the tax is broken out as a separate item, the entire charge is taxable, i.e. does not include the tax.

In summary, by not separately stating the tax on the customer's bill, the Taxpayer illegally absorbed the tax in the $2.00 fee. The tax was not added to and collected by the Taxpayer in addition to the delinquent fee. Consequently, the Taxpayer's direct petition for refund should be granted, plus applicable interest.

This Final Order may be appealed to circuit court within 30

days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered June 14, 1996.

BILL THOMPSON
Chief Administrative Law Judge