ALABAMA POWER COMPANY 600 N. 18th Street 5S-0104 P.O. Box 2641 DIVISION Birmingham, AL 35291-0001,	§ §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW
Taxpayer,	§	DOCKET NO. S. 02-245
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed Alabama Power Company ("APC") for the public utility license tax levied at Code of Ala. 1975, §40-21-53(a) for September 1996 through August 1999. APC appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on August 1, 2002. Will Sellers, Bo Lineberry, and Curt Gwathney represented APC. Assistant Counsel Margaret McNeill represented the Department.

ISSUES

Section 40-21-53(a) levies a gross receipts license tax on public utilities operating in Alabama. This case involves whether wheeling charges and pole attachment fees received by APC are subject to the tax. Wheeling charges are amounts received by APC for allowing other electric utilities to transmit electricity in bulk over its transmission lines in Alabama. Utility pole attachment fees are amounts received by APC for allowing telephone and cable television companies to attach their lines to its power poles in Alabama. Four primary issues are involved:

Issue (1). Are wheeling charges taxable?

Sub-issue (A). Is the Revenue Department prohibited from taxing all or part of the wheeling charges because they were derived from transactions in interstate commerce;

Sub-issue (B). If the Department is not prohibited from taxing all or part of the wheeling charges, should those charges be deducted from taxable gross receipts because they were derived "from the sale of electricity for resale?"

Issue (2). Are pole attachment fees taxable?

Did the attachment fees constitute taxable receipts derived from the providing of utility services within the scope of §40-21-53(a)?

Issue (3). The prospectivity issue.

If the wheeling charges and/or attachment fees are taxable, does due process require that they should be collected prospectively only?

Issue (4). Was the tax timely assessed?

Did the Department timely assess the tax within three years, as required by Code of Ala. 1975, §40-2A-7(b)(2)?

FACTS

APC is a public utility that generates electricity in Alabama through the use of nuclear energy, fossil fuels, and water power. It generally sells the electricity that it generates to customers in Alabama. APC transmits the electricity in bulk over its system or grid of transmission lines to various distribution substations in Alabama. The electricity is reduced to a usable amperage at the substations, and subsequently distributed to APC's retail customers in the area. It is undisputed that the gross receipts received by APC from the sale of electricity to retail customers in Alabama is subject to the public utility license tax.

The Federal Energy Regulatory Commission ("FERC") requires APC to transmit or wheel electricity generated by other utilities over its power grid in

Alabama. FERC also allows APC to charge a uniform fee or wheeling charge for use of its lines.[1]

All electricity wheeled over APC's power grid during the period in issue involved wholesale sales of bulk electricity by one utility to another. Some of the wheeled electricity was generated by utilities outside of Alabama, transmitted through APC's grid in Alabama, and sold to other utilities outside of Alabama. Some was generated in Alabama and sold to utilities outside of Alabama. Some was generated outside of Alabama and sold to utilities in Alabama. Finally, some was generated in Alabama and sold to other utilities in Alabama.

The Federal Communications Commission ("FCC") also requires APC to allow cable television, telephone, and other companies to attach their lines to APC's transmission poles, and also to put equipment on APC's microwave towers. The FCC allows APC to charge a rental or attachment fee for use of its poles and towers.

APC filed public utility license tax returns with the Department during the subject period. It did not include the wheeling charges or the transmission pole and microwave tower rental fees as taxable gross receipts on the returns.

The Department audited APC and included the wheeling charges and the pole and microwave tower rental fees in taxable receipts subject to the §40-21-53(a) license tax. There is no evidence the Department had previously subjected those charges and fees to the tax. The Department excluded those wheeling charges that involved the interstate transmission of electricity, and thus assessed

[1]FERC began requiring all federally regulated utilities to allow other utilities to use their transmission lines for a fixed wheeling charge pursuant to Order No. 888 in 1996. See generally, *New York v. Federal Energy Regulation Commission, et al.*, 122 S.Ct. 1012 (2002). There is no evidence indicating to what extent APC wheeled electricity for other utilities before 1996.

only those transactions involving electricity generated in Alabama and wheeled over APC's power grid to a purchaser in Alabama.

The parties executed a waiver during the audit extending the statute of limitations for assessing the tax until the last day of September 2001. The Department entered a preliminary assessment for the tax in issue on October 3, 2001. Before entering the preliminary assessment, the Department determined that the microwave tower rental fees were not taxable, and thus deleted them from the taxable measure. The Department entered the final assessment in issue on February 19, 2002. APC timely appealed.

ANALYSIS

Issue (1). The wheeling charges.

Sub-issue (A). The interstate commerce issue.

Under current Commerce Clause[2] jurisprudence, a state may tax a transaction in interstate commerce if (1) there is substantial nexus between the activity and the taxing state; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is reasonably related to services and protections provided by the taxing state. *Complete Auto Transit, Inc. v.* Brady, 97 S.Ct. 1076 (1977). Before the Supreme Court's 1977 decision in *Complete Auto*, states were generally prohibited from taxing interstate transactions. *Spector Motor Svc., Inc. v. O'Connor*, 71 S.Ct. 508 (1951).

The public utility license tax in issue was enacted in 1935, when the taxation of interstate commerce was prohibited. The Alabama Supreme Court has held that in construing the scope of a statute, a court must look to the intent and understanding of the Legislature when the statute was enacted. Specifically,

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[2]The Commerce Clause is found at Art. 1, §8, cl. 3, of the United States Constitution.

the Court has held that if the U.S. Constitution prohibited Alabama from taxing interstate commerce when a tax levy statute was enacted, the statute must be construed as not applying to such transactions, notwithstanding a subsequent change in Commerce Clause jurisprudence, i.e. *Complete Auto*.[3] *Siegelman v. Chase Manhattan Bank (USA), N.A.*, 575 So.2d 1041 (Ala. 1991); *Ex parte Dixie Tool and Die Co., Inc.*, 537 So.2d 923 (Ala. 1988); *Ex parte Louisville & Nashville* R.R., 398 So.2d 291 (Ala. 1981). See also, *Archer Daniels Midland Co., et al. v. Seven Up Bottling Co. of Jasper, Inc.*, 746 So.2d 966 (Ala. 1999), and cases cited therein.

Without deciding if wheeling charges relating to interstate transactions may otherwise be taxed post-*Complete Auto*, I agree that based on the above cases, receipts from wheeling transactions involving interstate commerce cannot be taxed because the Alabama Legislature did not intend to include them within the scope of the §40-21-53(a) levy. See also, *State v. Southern Electric Generating Co.*, 151 So.2d 216 (Ala. 1963).

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[3]The approach adopted by the Alabama Supreme Court is known as the "static" approach. The alternative "ambulatory" approach requires that a statute must be interpreted in light of evolving or current federal constitutional jurisprudence. For a good discussion of the static versus ambulatory approaches, see *Pomp and Oldman, State and Local Taxation, 4th Ed.*, at 1-54, para. 20.

The Department concedes that interstate wheeling cannot be taxed, but argues that wheeling receipts from purely intrastate transactions are taxable. The Department contends that taxable intrastate wheeling occurs when a utility generates electricity in Alabama and the electricity is wheeled over APC's grid to another utility in Alabama.

APC argues that because its power grid is an integral part of a national power grid, all electricity wheeled over its grid moves in interstate commerce, and thus cannot be taxed, citing *New York v. FERC*, *supra*. I disagree.

APC's transmission grid is part of a national grid. Also, because electricity is in a sense fungible, "any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce." *New York v. FERC*, 122 S.Ct. at 1018.

It does not follow, however, that all sales of electricity that are transmitted over APC's grid are sales in interstate commerce, and thus not subject to the §40-21-53(a) tax. If that was the case, all electricity generated and sold by APC to customers in Alabama would involve non-taxable sales in interstate commerce because the electricity is transmitted over APC"s "interstate" grid in Alabama. APC concedes that the receipts from such intrastate sales are taxable. If they were not, neither APC nor any other electric utility in Alabama would be liable for the §40-21-53(a) tax.

This same question was in issue in *Ohio Paper Co. v. Tracy*, 2000 WL 529458 (Ohio Bd.Tax.App.). The Ohio Board of Tax Appeals held that the intrastate wheeling of electricity did not involve interstate commerce.

> Although the power being transmitted in this case may have moved in interstate commerce, we do not consider the receipts excludable since they arise out of services rendered intrastate. Appellant owns and used transmission lines within Ohio and used these lines to deliver the electricity purchased by AMP-Ohio from PSI and CE. Merely because the electricity which was ultimately delivered to customers in Ohio may have originated at points outside the state does not necessarily render the transmission services rendered by appellant within the state interstate. Therefore, the receipts would not be excludable as having been "derived wholly from interstate business."

Ohio Power Co., 2000 WL 529458 at 6.

Wheeling involves interstate commerce only if the electricity is generated in one state and transmitted to a buyer in another state. Consequently, the electricity generated in Alabama and wheeled over APC's power grid to another utility in Alabama does not involve interstate commerce. The wheeling receipts from those intrastate transactions thus are subject to the §40-21-53(a) tax, unless deductible pursuant to sub-issue (B) below.

Sub-issue (B). Are the wheeling charges deductible as receipts derived from wholesale sales.

Section 40-21-53(a) provides in part "that gross receipts from the sale of electricity for resale by such electric or hydroelectric public utilities . . . shall be deducted in computing the amount of tax due hereunder."

The Department argues that the sale for resale deduction does not apply in this case because APC was not the utility that sold the wheeled electricity at wholesale.

APC counters that the generation and transmission of electricity "is an inseparable part of the wholesale sale of electricity." It thus concludes "that Alabama's sale for resale exclusion must exclude gross receipts from transmission (of electricity being sold at wholesale) in order to be consistent with

the nature of electricity and the economic substance of such wholesale activities." APC Brief at 7. APC cites two Ohio cases in support of its position on this point. *Ohio Power*, *supra*; *Cincinnati Gas & Electric Co. v. Limbach*, (March 27, 1990), Franklin App. No. 89AP-883.

I do not fully agree with the rationale of the two Ohio cases cited above. I do agree, however, that the Alabama Legislature intended that gross receipts derived from the transmission of electricity being sold at wholesale in Alabama should not be subject to the public utility license tax.

The primary rule of statutory construction is that the intent of the Legislature must be followed. *Gulf Coast Media, Inc. v. The Mobile Press Register, Inc.*, 470 So.2d 1211 (Ala. 1985). Also, as discussed above, a statute must be construed in view of circumstances that existed when the statute was enacted. *Archer Daniels*, *supra*.

The sale for resale deduction was added to §40-21-53(a) in 1971, Acts 1971, No. 1412. At that time, the utility services provided by APC included the generation, bulk transmission, and subsequent distribution of electricity to the ultimate customers. APC charged a lump-sum for its bundled services. By allowing a statutory deduction for gross receipts derived from wholesale sales for resale, the Legislature clearly intended that all charges relating to the wholesale sale of electricity in Alabama would be nontaxable.

As the electric utility industry matured and a national grid of transmission lines evolved, it became economically feasible for utilities to transmit electricity over areas controlled by other utility providers. To facilitate that transmission, in 1996 FERC ordered the unbundling of electric generation and transmission services. See generally, *New York v. FERC*, 122 S.Ct. at 1019, 1020. Consequently, as discussed, APC and all other federally regulated electric

utilities must now transmit or wheel another utility's electricity over its power grid for a uniform, fixed tariff.

With unbundling, electricity is now commonly generated and sold at wholesale by one utility and wheeled over another utility's power grid to the wholesale purchaser. However, the transmission of the electricity is still an integral part of the wholesale sale. Applying the intent of the Legislature that gross receipts derived from the wholesale sale of electricity should not be subject to the §40-21-53(a) license tax, it follows that wheeling charges received by one utility for the transmission of electricity being sold at wholesale by another utility in Alabama are not subject to the tax.

Taxing wholesale wheeling charges may also result in double taxation because when the electricity is ultimately sold to the retail customers in Alabama, the wheeling charge would be included in the retail price, and thus again be subject to the §40-21-53(a) tax. While double taxation is not strictly prohibited, it is to be avoided if it "results in an unreasonable pyramiding of taxes." *Starlite Lanes v. State*, 214 So.2d 324, 326 (Ala. 1968). The intent of the sale for resale deduction in §40-21-53(a) was to avoid such double taxation.

Finally, in interpreting the scope of a statute, courts should give substantial weight to a long-standing interpretation of the statute by the agency charged with its administration, assuming, of course, that the agency interpretation is reasonable and not contrary to the language of the statute. *Reynolds Metals Co. v. State, Dept. of Industrial Relations*, 792 So.2d 419 (Ala.Civ.App. 2000); *State v. Tri-State Pharmaceuticals*, 371

So.2d 910 (Ala.Civ.App. 1979).

There is no evidence the Department has ever before taxed or attempted to tax wholesale wheeling charges. It is unclear to what extent APC wheeled electricity before FERC mandated the practice in 1996. But presumably, APC wheeled electricity before that time. Consequently, the fact that the Department never taxed wheeling charges before this case indicates that it at least tacitly interpreted §40-21-53(a) as not applying to wheeling charges.

Issue (2). The pole attachment fees.

Sub-issue (A). Are the fees taxable under §40-21-53(a).

The §40-21-53(a) license tax is levied on every public utility, and is measured by the "gross receipts of such public utility . . . ." The license levy is similar in substance to the utility gross receipts tax levy at Code of Ala. 1975, §40-21-82, which is on the gross receipts from the furnishing of utility services in Alabama.

The scope of §40-21-82 was addressed in *State, Dept. of Revenue v. Mobile Gas Service Corp.*, 621 So.2d 1333 (Ala.Civ.App. 1993). The specific issue in *Mobile Gas* was whether reconnect and collection fees charged by the utility constituted gross receipts subject to the tax. The Court of Civil Appeals held that the fees were not taxable because they were only incidental charges, and not directly derived from the providing of utility services, i.e. the sale of the gas. In reaching that conclusion, the Court relied on the rule of statutory construction that a tax levy must be strictly construed against the taxing authority and for the taxpayer. *Mobile Gas*, 621 So.2d at 1334. The Court also relied on the rule discussed in Issue (1), *supra*, that the interpretation of a statute by the agency

charged with administering the statute must be given weight. The Department had not previously taxed reconnect and collection fees.

Strictly construing the scope of §40-21-53(a) and applying the rationale of *Mobile Gas*, the utility license tax applies only to receipts derived from a utility's core business activity, in this case the generation, transmission, and distribution of electricity.[4] The Department concedes that APC's receipts from its appliance sales, office and lake cabin rentals, and even its microwave tower attachment fees, are not subject to the tax because they are not directly related to APC's electric utility services. Likewise, fees received for allowing other companies to use its utility poles is not related to APC's core business of providing electricity services, and thus are not subject to the §40-21-53(a) license tax.

APC has received pole attachment fees for at least 50 years, yet the Department has never taxed or attempted to tax those fees. Consequently, the conclusion that such fees are not taxable is supported by the above discussed rule of construction that the long-standing interpretation of a statute by the agency charged with administering the statute must be given great weight.

Issue (3). The prospectivity issue.

This issue is pretermitted by the above holding that the wheeling and attachment fees are not subject to the §40-21-53(a) tax.

[4]Transmitting or wheeling electricity is directly related to APC's core business activity, i.e. the generation, *transmission*, and distribution of electricity. Consequently, wheeling charges are subject to the §40-21-53(a) tax if they do not involve interstate commerce. The intrastate wheeling charges in issue in this case are not taxable only because they involved wholesale sales of electricity.

Issue (4). The statute of limitations issue.

This issue is also moot.

The final assessment in issue is dismissed.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered October 9, 2002.