BALDWIN COUNTY ELECTRIC MEMBERSHIP CORP. 19600 HWY. 59 S SUMMERDALE, AL 36580-0220, Taxpayer, v. STATE OF ALABAMA DEPARTMENT OF REVENUE	§ § § § § §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION DOCKET NO. S. 10-859

FINAL ORDER

The Department assessed the Baldwin County Electric Membership Corporation ("Taxpayer") for the 2.2 percent utility gross receipts license tax for October 2004 through September 2008, and for the 4 percent utility gross receipts tax for July 2005 through September 2008. The Taxpayer appealed the final assessments to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. The case was submitted on a joint stipulation of facts. Assistant Counsel Duncan Crow represented the Department. Ted Jackson and Rick McBride represented the Taxpayer.

FACTS

The Taxpayer is headquartered in Summerdale, Alabama, and is a member-owned cooperative that supplies electricity to its members in Baldwin County and Monroe County in Alabama. The Taxpayer's utility services are subject to the 2.2 percent utility gross receipts license tax levied at Code of Ala. 1975, §40-21-53(a), and also the 4 percent utility gross receipts tax levied at Code of Ala. 1975, §40-21-82.

The cities of Orange Beach and Gulf Shores required the Taxpayer to bury certain of its existing utility lines within the cities' jurisdictions, and to also make certain equipment additions and adjustments in the jurisdictions that the Taxpayer would not have normally

made. The above work did not improve or otherwise change the quality, character, or volume of electric services provided by the Taxpayer to the cities' residents.

The Taxpayer charged each of its members within the city limits of Gulf Shores and the police jurisdiction of Orange Beach a monthly charge of $5.25 during the periods in issue. The charge was included as a separate line item on each member's monthly bill, and was (and is) intended to recoup the costs incurred by the Taxpayer in burying the utility lines and making the equipment additions/adjustments in Gulf Shores and Orange Beach. The monthly charges will stop once the Taxpayer recoups its cost of the work.

ANALYSIS

The 4 percent utility gross receipts tax levied at §40-21-82 imposes "a privilege or license tax against every utility furnishing electricity . . . in the State of Alabama. The amount of the tax shall be determined by the application of rates against gross sales or gross receipts, as the case may be, for the furnishing of such services. . . ." The 2.2 percent utility license tax levied at §40-21-53(a) imposes the tax "on each $1 of gross receipts of such public utility. . . ."

The terms "gross receipts" and "gross sales" are defined for purposes of the §40-21-82 tax at Code of Ala. 1975, §§40-21-80(a)(3) and (4), respectively, to include "[t]he value proceeding or accruing from the furnishing of utility services . . . without any deduction on account of the cost of the utility services sold, the cost of materials used, labor or service cost, interest paid, or any other expense whatsoever, and without any deductions on account of losses."[1]

[1] The term "gross receipts" is not specifically defined for purposes of the §40-21-53(a)

In *State v. Mobile Gas Service Corporation*, Docket Misc. 90-145 (Admin. Law Div. 9/20/1990), the Administrative Law Division addressed the issue of whether collection and reconnect fees charged by Mobile Gas were subject to the §40-21-82 utility gross receipts tax. The Division held that the fees were only incidental to the sale of the utility services, and thus not subject to the tax.

> The utility gross receipts tax is levied on utility services and is measured by the gross receipts or gross sales derived from such services. See §40-21-82. The definitions of "gross receipts", "gross sales" and "utility services" found at §§40-21-80(a)(2), (3) and (8), respectively, are broad and add little insight into whether reconnect and collection fees should be taxed. However, an overall reading of the utility tax law indicates that the legislature intended for the tax to apply only to the amount derived from the sale of the utility service, i.e. natural gas, electricity, water, etc. Collection, tap-on reconnect, meter reading and other incidental fees should not be taxed.
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> Section 40-21-85 ties the administration of the utility tax law to the sales tax law, §40-23-1 et seq. The sales tax definitions of "gross proceeds of sales" and "gross receipts" found at §40-23-1(a)(6) and (8) are almost identical in substance to the utility tax definitions at §40-21-80. The sales tax law has been construed to apply only to the proceeds derived from the sale of tangible personal property. All incidental charges for transportation or installation are not taxed if they are charged separately and can be distinguished from the amount received for the property. See Department Regs. 810-6-1-.81(b) and 810-6-1-.178(2). Likewise, collection fees and reconnect fees only incidental to the sale of natural gas should also be excluded from gross receipts or gross sales in computing the utility gross receipts tax.
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> Further, every utility is required to add the tax as a charge "to every purchaser" and "shall collect said amount from every purchaser of such utility services". See §40-21-86. The use of the word "purchaser" indicates that the tax is based on the amount charged for the purchase of natural gas

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license tax. As previously held by the Administrative Law Division in *Alabama Power Corporation v. State of Alabama*, Docket S. 02-245 (Admin. Law Div. 10/9/2002), the §40-21-53(a) utility license tax is similar in substance to the §40-21-82 utility gross receipts tax. Consequently, the definition of “gross receipts” for purposes of the §40-21-82 tax also applies to the §40-21-53(a) tax.

> by the customer. Collection fees and reconnect fees are not "purchased" by a customer.

The Department appealed *Mobile Gas* to the Montgomery County Circuit Court, which affirmed. The Court of Civil Appeals also affirmed, holding that the fees were not taxable "because the reconnect fees and collection fees are not part of the sales price of the (utility service), but, rather, are incidental charges that have no relevance to the completion of the sale of the product." *State v. Mobile Gas Service Corporation*, 621 So.2d 1333, 1335 (Ala. Civ. App. 1993).

The Administrative Law Division subsequently addressed similar issues in two other cases. In *State of Alabama v. Muscle Shoals Electric Board*, Docket S. 93-286 (Admin. Law Div. 11/4/1993), the issue was whether a $5 fee charged by the utility for sending delinquent billing letters constituted taxable gross receipts subject to the §40-21-82 tax. The Division held that the fee was not taxable. "I see no substantive difference between the incidental collection and reconnect fees in *Mobile Gas* and the standard $5.00 fee charged for a collection letter in this case. The $5.00 charge is an administrative charge to cover the cost of sending the 5 day collection letter and is unrelated to the amount of electric service provided by the (utility) to a customer. The same $5.00 collection fee is charged whether the customer's overdue bill is $10.00 or $1,000.00." *Muscle Shoals Electric Board* at 2.

In *Alabama Power Company v. State of Alabama*, Docket S. 02-245 (Admin. Law Div. 10/9/2002), one of the issues was whether pole attachment fees received by Alabama Power Company constituted taxable gross receipts for purposes of the §40-21-53(a) utility license tax. Citing the Court of Civil Appeals' holding in *Mobile Gas Service Corporation*,

the Division held that the attachment fees were not taxable. "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. . . Likewise, fees received for allowing other companies to use its utility poles are not related to APC's core business of providing electricity services, and thus are not subject to the §40-21-53(a) license tax." *Alabama Power Company* at 2 – 3.

Applying the rationale of *Mobile Gas Service Corporation*, *Muscle Shoals Electric Board*, and *Alabama Power Company* to this case, the $5.25 monthly fee in issue is not subject to either of the utility taxes in issue. The charge is not based on or derived from the sale or furnishing of utility services by the Taxpayer, as necessary for the §40-21-53(a) and §40-21-82 levies to apply. The fee is a separately stated, fixed amount, regardless of the amount of utility services provided to the customer in the month, which further illustrates that the fee is unrelated to the sale or furnishing of the utility service to the customer.

The above finding is supported by the rule of statutory construction that a tax levy statute must be narrowly construed in favor of the taxpayer and against the government. *Alabama Farm Bureau Mutual Cas. Ins. Co. v. City of Hartselle*, 460 So.2d 1219 (Ala. 1984). The holding is further supported by cases from other states, which are cited and discussed in the Taxpayer's Brief at 4, 5, and 8. I agree with the Taxpayer that *City of Seattle v. State*, 12 Wash. App. 91, 527 P.2d 1404 (1974), is particularly persuasive.

The final assessments in issue are voided.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of

Ala. 1975, §40-2A-9(g).

Entered February 22, 2012.

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BILL THOMPSON
Chief Administrative Law Judge

bt:dr
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