STATE OF ALABAMA, DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE
	§	ADMINISTRATIVE LAW DIVISION
v.	§	
MOBILE GAS SERVICE CORP., 2828 Dauphin Street Mobile, AL 36606,	§	Docket No. Misc. 90-149
Taxpayer.	§	

FINAL ORDER

The Revenue Department assessed utility tax against Mobile Gas Service Corp. (Taxpayer) for the period July 1, 1986 through. June 30, 1989. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on August 14, 1990. James C. Johnston, Esq. appeared for-the Taxpayer. Assistant counsel Dan Schmaeling represented the Department. This Final Order is based on the evidence and arguments presented by the parties.

FINDINGS OF FACT

The issue in dispute is whether collection fees and reconnect fees received by the Taxpayer from its customers are subject to the utility gross receipts tax levied at Code of Ala. 1975, §40-21-80, et seq. The facts are undisputed.

The Taxpayer is in the business of providing natural gas services in the Mobile area. The Taxpayer reported and paid the utility gross receipts tax on all revenues derived from the sale of natural gas during the subject period.

The Department audited the Taxpayer and taxed the collection fees and reconnect fees charged by the Taxpayer to its customers. The collection fee is a flat $4.00 fee charged if the Taxpayer

sends an employee to collect a delinquent bill from a customer. The reconnect fee is a standard $20.00 charge for reconnecting service.

The Department examiner that conducted the audit included the collection and reconnect fees as taxable based on his own reading of the applicable law and also on a Department training manual which listed those fees as taxable. That same manual listed the initial connection or tap-on fees and also meter reading fees as exempt. Those fees were thus excluded from the audit.

The utility gross receipts tax was enacted in 1969 and the Department promulgated Utility Tax Rule No. 1 in July, 1969 which provided that installation, meter reading, collection and other fees were taxable. However, the regulation was amended in September, 1969 and the section specifically including such fees as taxable was deleted. Subsequent amended regulations also did not specify collection, connection and other fees as taxable, although the current regulation provides that "where an additional amount is added for failure to make payment within a prescribed period, the tax applies to the amount actually paid". See Reg. 810-6-5-.26(6)(1).

The Department concedes that collection fees and reconnect fees were not previously taxed but argues that such fees should be included as "gross receipts" or "gross sales" as defined in §§40-21-80(a)(2) and (3), respectively. The Department further argues that it cannot be estopped from collecting on the fees because of an earlier, erroneous position that the fees were not subject to tax.

CONCLUSIONS OF LAW

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.

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.

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

Section 40-21-82 is a levy section and must be construed in favor of the taxpayer and against the Department. State v. Harrison, 386 So.2d 460. Also, the Department for years never attempted to tax collection and reconnect fees and in fact the regulation governing the utility tax was amended in 1969 and that section stating that such fees were taxable was deleted. The long-standing interpretation by Department officials that such fees were not taxable must be given weight, especially where the interpretation is common knowledge and is left unchanged by the legislature. East Brewton Materials, Inc. v. State, 198 So.2d 782.

The Department cannot be estopped from taxing the subject fees if in fact the fees should be taxed. State v. Maddox Trac. and Equip. Co., 69 So.2d 426. However, the above considered, the fees are not subject to the utility tax and the preliminary assessment in issue should be reduced and made final showing no additional tax due.

Entered this 20th day of September, 1990.

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BILL THOMPSON
Chief Administrative Law Judge