Taxability of municipal sale of gas outside city

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Subject:
Taxability of municipal sale of gas outside city

Mr. Fred A. Morrison
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RE: MUNICIPALITIES – TAXATION – PUBLIC SERVICE TAX – NATURAL GAS – whether sale of natural gas outside municipal boundaries is taxable under s. 166.231, Fla. Stat.

Dear Mr. Morrison:

On behalf of the City of Leesburg and as the City Attorney, you have asked for an opinion on the following questions:

1. May a municipality in Florida impose the Public Service Tax authorized by section 166.231, Florida Statutes, against the charge levied by the city for the transportation of metered natural gas to a customer within the municipal limits, if the natural gas is purchased from a provider of natural gas located outside the municipality which is not affiliated in any way with the municipality, the gas is transported from the seller to the municipality's gate station through pipelines owned by others, and the sole role of the municipality is to provide transportation of the natural gas from its gate station to the premises of the customer?

2. Under the same set of facts, may a municipality impose the Public Service Tax on the sale of the natural gas itself, independently of whether the service of transporting the gas is deemed taxable?

In sum:

1. The City of Leesburg is not authorized by section 166.231, Florida Statutes, to impose the public service tax authorized by that section against the charge levied by the city for the transportation of metered natural gas to a customer within the municipal limits, if the natural gas is purchased from a provider of natural gas located outside the municipality which is not affiliated in any way with the municipality, the gas is transported from the seller to the municipality's gate station through pipelines owned by others, and the sole role of the municipality is to provide transportation of the natural gas from its gate station to the premises of the customer.

2. Based on a determination of the nature of the contract for sale of the natural gas, that is, whether the contract for the natural gas is a shipment contract or a destination contract, the

purchase of natural gas may be subject to the provisions of section 166.231, Florida Statutes. This office has no authority to review contracts on behalf of local governments and must rely on your assertion that the purchaser "takes title to the gas at the point of purchase" outside the municipality to conclude that no taxable event has taken place within the scope of section 166.231, Florida Statutes.

Question One

According to your letter, the City of Leesburg has a contract with an industrial customer to transport natural gas to that customer and charges the customer for the transportation service rendered. The customer purchases the gas from a supplier located outside the city, unrelated either to the customer or the city, and takes title to the gas at the point of purchase. The gas is then transported through pipelines owned by other unrelated entities, to the point where those pipelines intersect with Leesburg's own natural gas gate station. At that point, Leesburg assumes responsibility for transporting the gas from its gate station to the customer's location within the municipal limits. Although Leesburg does operate its own natural gas utility, Leesburg is not a seller of the gas itself in this situation, either directly or indirectly, it only transports the gas and imposes a charge on the customer for that service.

You ask whether the city may impose the Public Service Tax authorized by section 166.231, Florida Statutes, against the charge the city levies for transportation of natural gas to the customer under the facts set out above.

Section 166.231, Florida Statutes, authorizes municipalities to levy a public service tax on purchases within the municipality of electricity, metered natural gas, liquefied petroleum gas (either metered or bottled), manufactured gas (either metered or bottled), and water service.[1] The statute provides in part:

"[T]he tax shall be levied *only upon purchases within the municipality* and shall not exceed 10 percent of the payments received by the seller of the taxable item from the purchaser for the purchase of such service."[2] (e.s.)

Section 2, Article VIII, Florida Constitution, gives municipalities "home rule powers" which may be exercised for any valid municipal purpose, "except as otherwise provided by law[,]" however, the taxing power of municipalities is not derived from this constitutional provision. The origin of municipal taxing power and the limitations on its exercise are found in sections 1(a) and 9(a), Article VII, Florida Constitution, and such general or special laws relating to other taxes as the Legislature may enact.[3] In the exercise of its taxing power, a municipality is limited to that taxing power conferred expressly, or by necessary implication.[4] Generally, therefore, absent statutory authority, a municipality has no inherent power to impose taxes or to provide exemptions from such taxes.[5]

The statutory provision authorizes a municipality to levy the public service tax only "upon purchases within the municipality" and in the absence of any ambiguity in this language, it must be construed to mean exactly what it says.[6] The power to tax by municipalities is limited by the Florida Constitution and section 166.231, Florida Statutes, provides an explicit limitation upon the public service tax. You have advised this office that the customer purchases the gas from a

supplier located outside the city, unrelated either to the customer or the city, and takes title to the gas at the point of purchase.[7] Thus, the transaction does not constitute a "purchase within the municipality" and I cannot conclude that the municipality has the authority under section 166.231, Florida Statutes, to tax this transaction. The statute does not authorize the municipality to impose a tax on the charge it currently imposes for transportation[8] and the general rule of construction is that tax laws are to be construed strongly in favor of taxpayers and against government.[9]

You suggest that "[s]ince transportation of the gas is a service inseparable from the purchase of the gas," section 166.231, Florida Statutes, should be read to include the transportation service as an element of purchase. To read the statute in this fashion would make the language of the statue requiring levies "only upon purchase within the municipality" meaningless as each of the services in section 166.231(1), Florida Statutes, requires transportation or delivery, whether that takes place within or outside the municipal limits.[10]

Therefore, it is my opinion that the City of Leesburg is not authorized by section 166.231, Florida Statutes, to impose the public service tax authorized by that section against the charge levied by the city for the transportation of metered natural gas to a customer within the municipal limits, if the natural gas is purchased from a provider of natural gas located outside the municipality which is not affiliated in any way with the municipality, the gas is transported from the seller to the municipality's gate station through pipelines owned by others, and the sole role of the municipality is to provide transportation of the natural gas from its gate station to the premises of the customer.

Question Two

You have also asked whether the City of Leesburg may impose a public service tax on the sale of the natural gas. As related in your letter, the industrial customer involved in this matter purchases natural gas from a supplier located outside the city, unrelated either to the customer or the city, and takes title to the gas at the point of purchase. Although the city operates its own natural gas utility, Leesburg is not the seller of the gas itself in this situation, either directly or indirectly, it only transports the gas and it currently imposes a charge on the customer for that service.

This office, in Attorney General Opinion 82-06, considered the nature of the contract for sale and the point at which title passes in a particular transaction in determining whether fuel oil ordered from and shipped by common carrier by a fuel oil dealer or distributor within the City of Tampa to a purchaser located outside the corporate limits of the city was taxable as a "purchase" within the city under section 166.231, Florida Statutes. That opinion relied on provisions of the Uniform Commercial Code (Chapter 672, Florida Statutes, "Uniform Commercial Code – Sales") to differentiate between a shipment contract and a destination contract and advised that the answer to the question of taxability rested on the type of contract entered into in this transaction. The opinion concludes:

"[I]f the contract for the fuel oil is a shipment contract, then the purchase takes place at the point of shipment within the corporate limits of the municipality and as such the purchase will be subject to the tax imposed by s. 166.231, F.S. However, if the contract is a destination contract (

i.e., F.O.B. Buyer's plant or specifically styled a destination contract), then the purchase takes place at the point the fuel oil is duly tendered at the destination which is specified in the contract, which may or may not be within the corporate limits of the municipality. In that case, the purchase may or may not be subject to the tax imposed by s. 166.231, F.S. If the destination specified in the contract is within the corporate limits of the municipality, then the purchase would be subject to the provisions of s. 166.231, F.S. Likewise, if the destination specified in the contract is outside the corporate limits of the municipality, then the purchase would not be subject to the provisions of s. 166.231, F.S."

In order to determine whether a shipment contract or a destination contract may be involved in your situation, a review of the terms of the particular contract for purchase of the natural gas will be required. This office is not authorized to review contracts to make such a determination, but provides this discussion for your consideration. A review of the statutory provisions cited in Attorney General Opinion 82-06 indicates that the language of these statutes is substantially similar to that relied upon in the opinion.

In sum, based on a determination of the nature of the contract for sale of the natural gas, that is, whether the contract for the natural gas is a shipment contract or a destination contract, the purchase of natural gas may be subject to the provisions of section 166.231, Florida Statutes. However, this office has no authority to review contracts on behalf of local governments and must rely on your assertion that the purchaser "takes title to the gas at the point of purchase" outside the municipality. In reliance thereon, this office must conclude that no taxable event has taken place within the scope of section 166.231, Florida Statutes.

Sincerely,

Pam Bondi
Attorney General

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[1] *See* s. 166.231(1)(a), Fla. Stat.

[2] *Id.*

[3] *See* Ops. Att'y Gen. Fla. 93-35 (1999), 87-45 (1987), 80-87 (1980), and 79-26 (1979), concluding that a municipality has no home rule powers with respect to the levy of excise or non-ad valorem taxes and exemptions therefrom, as the exercise of all such taxing power must be authorized by general law.

[4] *See* Op. Att'y Gen. Fla. 79-26 (1979).

[5] *See also* Ops. Att'y Gen. Fla. 94-76 (1994) (statute does not permit town to place cap on dollar amount that may be taxed, creating an exemption from taxation) and 89-11 (1989) (municipality not authorized to establish a cap which would exempt from taxation that portion of the service generating tax revenue in excess of a maximum monetary cap).

[6] *See, e.g., M.W. v. Davis*, 756 So. 2d 90 (Fla. 2000) (when language of statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to rules of statutory interpretation and construction as statute must be given its plain and obvious meaning); *McLaughlin v. State*, 721 So. 2d 1170 (Fla. 1998); *Osborne v. Simpson*, 114 So. 543 (Fla. 1927) (where statute's language is plain, without ambiguity, it fixes legislative intention and interpretation and construction are not needed); *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984); Ops. Att'y Gen. Fla. 00-46 (2000) (where language of statute is plain and definite in meaning without ambiguity, it fixes the legislative intention such that interpretation and construction are not needed); 99-44 (1999); and 97-81 (1997).

[7] *See also* Op. Att'y Gen. Fla. 82-06 (1982), concluding that "if the contract for the fuel oil is a shipment contract, then the purchase takes place at the point of shipment within the corporate limits of the municipality and as such the purchase will be subject to the tax imposed by s. 166.231, F.S. However, if the contract is a destination contract . . . then the purchase takes place at the point the fuel oil is duly tendered at the destination which is specified in the contract, which may or may not be within the corporate limits of the municipality. In that case, the purchase may or may not be subject to the tax imposed by s. 166.231, F.S. If the destination specified in the contract is within the corporate limits of the municipality, then the purchase would be subject to the provisions of s. 166.231, F.S. Likewise, if the destination specified in the contract is outside the corporate limits of the municipality, the purchase would not be subject to the provisions of s. 166.231, F.S."

[8] *Compare* s. 203.01(1)(e)1., Fla. Stat., subjecting every distribution company that receives payment for the sale or transportation of natural or manufactured gas to a retail consumer in this statute to a tax on the exercise of this privilege.

[9] *See Harbor Ventures, Inc. v. Hutches*, 366 So. 2d 1173 (Fla. 1979) (tax statutes must be construed in favor of taxpayers where any ambiguity exists); *State, Department of Revenue v. Ray Construction of Okaloosa County*, 667 So. 2d 859 (Fla. 1st DCA 1996) (tax laws are to be construed strongly in favor of taxpayers and against government); *Mikos v. Ringling Brothers - Barnum & Bailey Combined Shows, Inc.*, 475 So. 2d 292 (Fla. 2d DCA 1985), *opinion approved*, 497 So. 2d 630 (Fla. 1986) (taxing statute should be construed in favor of taxpayer and against government seeking to impose tax).

[10] *Compare* s. 180.191, Fla. Stat., authorizing municipalities to furnish water service outside the boundaries of the municipality. And see Op. Att'y Gen. Fla. 75-20 (1975) (concluding that "[t]he point of sale for metered service, unless otherwise explicitly agreed, is the meter itself[;] [t]hus, if the meter is outside the corporate limits, there can be no tax imposed under s. 166.231, F.S." You have specifically stated that the title to this natural gas passes outside the municipal limits and it is the "purchase" of the gas which is the taxable activity.