Municipal public service tax, metered natural gas

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Mr. Michael Stebbins
Counsel for City of Gulf Breeze
504 North Baylen Street
Pensacola, Florida 32501

Dear Mr. Stebbins:

On behalf of the City of Gulf Breeze ("City"), you have requested an opinion clarifying what payments are intended to be comprised by the phrase, "payments received by the seller of the taxable item from the purchaser for the purchase of such service[,]" as used in section 166.231(1)(a), Florida Statutes (2017). As applicable here, that statute authorizes the City to levy a tax on the purchase of metered natural gas service. Specifically, section 166.231(1)(a) provides, in pertinent part:

"166.231?Municipalities; public service tax.—
(1)(a) A municipality may levy a tax on the purchase of electricity, metered natural gas, liquefied petroleum gas either metered or bottled, manufactured gas either metered or bottled, and water service. Except for those municipalities in which paragraph (c) applies, the 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."

In implementing the tax authorized by this statute, the City asks whether the Public Service Tax may be imposed only on the City's "charges for the volume of natural gas purchased or consumed by its customers," or may include other charges?[1] The City also asks if it is authorized to charge a public service tax on "the amount of Gross Receipts Tax imposed per Section 203.01, Florida Statutes," or "the amount of sales taxes imposed per Chapter 212, Florida Statutes"? Attorney General Bondi has asked that I respond to your letter.

Are Payments for Transportation, Delivery, Transmission, and Distribution Potentially Included in "Payments Received by the Seller of the Taxable Item from the Purchaser for the Purchase of Such Service"?

As quoted above, section 166.231(1)(a) authorizes a municipality to levy a "public *service* tax" on "the purchase of…metered natural gas…*service*." (Emphasis added.) With certain exceptions,[2] the 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*[.]" (Emphasis added.) Except for expressly excluding "any fuel adjustment charge" from this calculation,[3] chapter 166 contains no definition of "metered natural gas service." Thus, one "must resort to…well-settled rules of statutory construction to aid in determining the definition" of "metered natural gas service," as used in section 166.231.[4]

"Legislative intent is the polestar by which a court must be guided in interpreting the provisions of

a law. In ascertaining the legislative intent, a court must consider the plain language of the statute, give effect to all statutory provisions, and construe related provisions in harmony with one another."[5]

Here, in section 166.231, the Legislature has repeatedly made clear its intent that the municipal tax may be levied on customer purchases of enumerated utility *services*. While Florida's public service tax statute does not define the various utility services, section 203.012, Florida Statutes—which provides for the state gross receipts tax—defines "utility service," in pertinent part, as follows:

"(3) 'Utility service' means…natural or manufactured gas for light, heat, or power, *including transportation, delivery, transmission, and distribution* of the…natural or manufactured gas. This subsection does not broaden the definition of utility service to include separately stated charges for tangible personal property or services *which are not charges for* the…natural or manufactured gas *or the transportation, delivery, transmission, or distribution of*…natural or manufactured gas." [6]

This definition is compatible with what appears to be a common industry understanding regarding the component parts of a utility "service." For example, again pursuant to chapter 203, Florida Statutes, the state imposes a "gross receipts tax" on the "exercise of [the] privilege" to sell natural or manufactured gas to retail consumers.[7] The statute provides that "the tax levied on the distribution company's receipts for the sale or transportation of natural or manufactured gas shall be determined by dividing the number of cubic feet delivered by 1,000, multiplying the resulting number by the index price, and applying the rate in subparagraph (b)1. to the result."[8]

The "index price," in turn, is defined as "the Florida price per 1,000 cubic feet for retail consumers in the previous calendar year as published in the United States Energy Information Administration Natural Gas Monthly and announced by the Department of Revenue on June 1 of each year to be effective for the 12-month period beginning July 1 of that year."[9] In looking more closely at this definition, Tax Information Publication No: 17B06-01 (May 26, 2017)[10] is instructive. It provides:

"Every year on July 1, the index prices used by distribution companies to calculate the gross receipts tax on the sale or transportation of natural or manufactured gas to retail consumers are adjusted as provided by law. Beginning with customer bills dated on or after July 1, 2017, distribution companies must use the index prices listed below when completing the Gross Receipts Tax Return (Form DR-133).

The source for Florida natural gas index prices is the U.S. Department of Energy Information Administration (EIA) Natural Gas Monthly. The natural gas prices were published as part of the May 2017 Natural Gas Monthly."

For its part, the EIA describes its natural gas price data as follows:

"Notes: Prices are in nominal dollars. Data for 2013 through 2015 are final. All other data are preliminary unless otherwise indicated. Geographic coverage is the 50 states and the District of Columbia. Published residential, commercial, and industrial prices are considered to be *total*

prices paid by end-users per thousand cubic feet of natural gas in the respective sectors, *inclusive of all tax, delivery, commodity, demand and other charges*."[11]

This interpretation of utility service is not narrowed by the City's ordinance implementing its public service tax (which, like section 166.231, contains no definitions),[12] and is consistent with the terms of the franchise agreement between the City and Escambia County. Section 2 of Escambia County Ordinance No. 2013-23 (reflecting the franchise agreement) authorizes the City—in providing "natural gas utility services"—to transport, distribute, and sell natural gas to the County, its inhabitants, and the public.[13]

Based on the foregoing, it appears that (subject to the circumstances described herein) the City's municipal public service tax may be imposed based on payments the City receives from its utility service customers for natural gas used for light, heat, or power, including, as applicable, transportation, delivery, transmission, and distribution of
the natural gas.

Are Gross Receipts Tax, Sales Tax, and Franchise Fee Payments Made by the Customer Included in "Payments Received" for the "Purchase of Such Service"?

To determine whether the gross receipts tax, sales tax, and franchise fee payments made by the natural gas service customer to the City may be included in calculating the "payments received by the seller of the taxable item from the purchaser for the purchase of such service[,]" it is necessary to consider the character of these charges. Looking by analogy at how the gross receipts tax is calculated, if the charge is imposed *on the City* as a prerequisite to its sale of natural gas service to its customers, then, when itemized on the customer's bill, it may properly be considered part of the payments received to purchase such service. Applying that logic, the gross receipts tax and pro rata franchise fee payments may potentially be included in calculating the basis for the municipal public service tax. The sales tax (and the municipal public service tax, itself) would not.

These conclusions find support in the statutory framework of the two taxes. The gross receipts tax on "gross receipts from utility services that are delivered to a retail consumer in this state" is imposed "*upon every person for the privilege of conducting a utility or communications services business*, and each provider of the taxable services remains fully and completely liable for the tax, even if the tax is separately stated as a line item or component of the total bill."[14] Thus, even though the service provider may include the tax as a line item on the customer's bill, by law, the legal incidence of the tax falls on the service provider, and not on the purchaser.[15]

In contrast, the sales tax, which is "measured by retail sales," "*shall be collected* by the dealers *from the purchaser or consumer*."[16] Even though the service provider will be liable for payment of the sales tax if it fails to collect that tax from the purchaser or consumer,[17] by law, the legal incidence of the tax falls not on the service provider, but on the purchaser or consumer.[18] The service provider essentially acts as a conduit between the consumer and the state, collecting and holding the sales tax funds in trust until they are remitted to the state as required by law.[19]

The franchise fee is another charge *to the service provider* which is prerequisite to its right to provide utility service. It is unsurprising, then, that, where a pro rata fee is included in the

consumer's bill as an itemized part of the total charge for taxable services, it is included in the calculation of the gross receipts tax.[20] By analogy, it would be equally reasonable to include such charge in calculating the municipal public service tax.

In sum, subject to the circumstances described herein, consumer payments for natural gas service (comprising natural gas and, as applicable, its transportation, delivery, transmission, and distribution) may be included in calculating a customer's municipal public service tax liability. Where included as line items on the customer's bill, the gross receipts tax and the *pro rata* franchise fee may also be included. However, state sales tax (and the municipal public service tax, itself) would *not* be included. I trust that these informal comments will be helpful.

Sincerely,

Teresa L. Mussetto
Senior Assistant Attorney General

TLM/tsh

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[1] In these informal comments, no attempt is made to ascertain the character or correct classification of specific charges reflected in the City's itemized billing practices. *See generally* Frequently Asked Questions About Attorney General Opinions ("General Nature and Purpose of Opinions") ("Attorney General Opinions are intended to address only questions of law, not questions of fact, mixed questions of fact and law, or questions of executive, legislative or administrative policy.") (available at: http://myfloridalegal.com/pages.nsf/Main/dd177569f8fb.0f1a85256cc6007b70ad) (last visited April 24, 2018)). For this reason, the City's questions have been revised slightly to make them more "generic."

[2] The statute enumerates certain exceptions to and exemptions from imposition of the tax. These are not addressed by this analysis.

[3] *See* § 166.231(1)(b), Fla. Stat. (2017).

[4] *Cf. Dade Cty. v. AT & T Info. Sys.*, 485 So. 2d 1302, 1304 (Fla. 3d DCA 1986) (applying settled rules of statutory construction in determining the definition of "telephone service" as used in § 166.231).

[5] *Fla. Dep't of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So. 2d 954, 957 (Fla. 2005) (quoting *Hechtman v. Nations Title Ins. of New York*, 840 So. 2d 993, 996 (Fla. 2003) (citation omitted)); *accord, Jones v. ETS of New Orleans, Inc.*, 793 So. 2d 912, 914–15 (Fla. 2001). Tax statutes must be construed "in favor of taxpayers where an ambiguity may exist." *Harbor Ventures, Inc. v. Hutches*, 366 So. 2d 1173, 1174 (Fla. 1979).

[6] § 203.012, Fla. Stat. (2017). Consistent with this definition, § 212.02, Fla. Stat. (regarding state sales tax), defines "sales price" to mean "the total amount paid for tangible personal property, including any services that are a part of the sale." Rule 12A-1.045 of the Florida Administrative Code further clarifies that transportation charges are not subject to sales tax only

when both of the following conditions are met: (1) the charge is separately stated on an invoice or bill of sale; and (2) the charge *can be avoided by a decision or action solely on the part of the purchaser*.

[7] § 203.01(e)1., Fla. Stat. (2017).

[8] *Id.*

[9] § 203.01(e)2., Fla. Stat. (2017).

[10] Available at: https://revenuelaw.floridarevenue.com/LawLibraryDocuments/2017/05/TIP-121141_TIP%2017B06-01%20FINAL%20RLL.pdf (last visited April 24, 2018).

[11] (Emphasis added.) Available at: https://www.eia.gov/naturalgas/monthly/pdf/ngm_all.pdf. *See also Dominion Retail, Inc. v. Pennsylvania Pub. Util. Comm'n*, 831 A.2d 810, 812 (Pa. Commw. Ct. 2003) (identifying the three main parts of natural gas service as "Commodity, Transmission and Distribution"); Carl W. Ulrich, *Unbundling Natural Gas Sales Services - Is the FERC Throwing the Baby Out with the Bath Water?*, Pub. Util. Fort., October 13 1988, at 19 (describing the components of traditional gas sales service which may potentially be "unbundled" as including "at least" "gas cost, transmission capacity, gathering capacity, storage, and at the local level, distribution capacity.").

[12] A copy of Ordinance No. 07-15 was included with your opinion request. It reflects, simply, that a "Municipal Public Service Tax authorized under Section 166.231(1)(a), Florida Statutes, for the City of Gulf Breeze is hereby established at a rate of 7.5%."

[13] A copy of Ordinance No. 2013-23 was included with your opinion request.

[14] § 203.01(5), Fla. Stat. (2017).

[15] § 203.01(5), Fla. Stat. (2017). Further, § 203.01(4) specifies that the gross receipts tax may be added as a component part of the total charge for taxable services, and that, if such charge is unpaid, it is "recoverable at law in the same manner as any other part of the charge for such taxable services." For this reason, such charge is included as part of the utility's gross receipts in the Department of Revenue's calculation of the gross receipts tax. *See P.R. Mktg. Grp., Inc. v. GTE Fla. Inc.*, 806 So. 2d 597, 598 (Fla. 2d DCA 2002) (noting "that for years these administrative methods and interpretations have been used to implement the applicable statutes" whereby, inter alia, "the 2.5 percent gross receipt tax charged to the customer became part of the gross receipts of the utility which was then once again taxed at 2.5 percent[,]" and that, if "the DOR administrative interpretation of the legislative mandate is not what the legislature intended, it is up to our legislature to investigate and change or clarify the statutes").

[16] § 212.07(1)(a), Fla. Stat. (2017).

[17] *See* § 212.07(3)(a), Fla. Stat. (2017). Additionally, any dealer who "fails, neglects, or refuses" to collect the tax "commits a misdemeanor of the first degree." *Id.*

[18] “A clear declaration of legal incidence or a mandatory ‘pass through’ provision requiring a tax to be passed on to the consumer is ‘dispositive language’ of legal incidence.” *Seminole Tribe of Fla. v. Stranburg*, 799 F.3d 1324, 1346 (11th Cir. 2015) (quoting *Commission v. Chickasaw Nation*, 515 U.S. 450, 451 (1995)).

[19] *Cf. Cash v. State*, 628 So. 2d 1100, 1101 (Fla. 1993) (finding that the gasoline retailer served as the state’s “agent” in collecting the local option fuel tax from purchasers and remitting the tax funds to the state for transfer to the Local Option Fuel Tax Trust Fund). Consistent with this rationale, rule 12B-6.0015(4) of the Florida Administrative Code provides that “any sales tax imposed…on the sale…of…energy is not included in the charge upon which the gross receipts tax is computed when the…sales tax is separately itemized on a customer's bill, invoice, statement, or other evidence of sale.” The same rule applies to “municipal public service tax” charges. Fla. Admin. Code R. 12B-6.0015.

[20] *See* Fla. Admin. Code R. 12B-6.0015(2)(a)3. (“Each and every fee imposed by a political subdivision of the State of Florida on the distribution company, such as a franchise fee, is included in the charge upon which the gross receipts tax is computed, when the fees are passed on to the customer and separately itemized on a customer's bill, invoice, statement, or other evidence of sale.”).