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Taxation -- Counties -- Public service tax on telecommunications access service -- Where Public Service Commission determined that telecommunications company received excess profits for its services during audit period and ordered that company refund excess profits to its subscribers during upcoming months, and company discounted monthly service fee during the appropriate months in order to offset the excess profits, company was required to collect county public service taxes only on the discounted monthly fee -- No merit to county's position that taxes should have been assessed on the amount of the service charge before the discount was figured

Circuit court order at 8 Fla. L. Weekly Supp. 553a

ORANGE COUNTY, ETC., ET AL., Appellant, v. BELLSOUTH TELECOMMUNICATIONS, INC., Appellee. 5th District. Case No. 5D01-1153. Opinion filed March 8, 2002. Appeal from the Circuit Court for Orange County, Joseph P. Baker, Judge. Counsel: Usher L. Brown and Alfred Truesdell, of Brown Ward, Salzman & Weiss, P.A., Orlando, for Appellant, Martha Haynie; C. Alan Lawson and Gary M. Glassman, of Orange County Attorney's Office, Orlando, for Appellant, Orange County. John R. Hargrove and W. Kent Brown of Heinrich, Gordon, Hargrove Weihe & James, P.A., Fort Lauderdale, for Appellee.

(HARRIS, J.) Orange County appeals the summary judgment entered in favor of BellSouth Telecommunications, Inc. (BellSouth) which held invalid certain tax assessments on the amount charged for "telecommunication service" (access fee) within the county. After an audit was conducted by the Florida Public Service Commission (Commission) of BellSouth's earnings, it was determined that BellSouth received excess profit during the audit period. Pursuant to its authority, the Commission, in order to offset the excess profit, ordered BellSouth to refund the excess profit to its subscribers during the upcoming months of June, 1997, and June and December, 1998, "based on access lines, pro rata according to rate level." Pursuant to this order, BellSouth discounted the monthly service fee during the appropriate months by the amount necessary to offset the previously received excess profit. It charged and collected taxes only on the discounted monthly fee. Orange County takes the position that taxes should have been assessed on the amount of the service charge before the discount was figured. We affirm the trial court's summary judgment.

The resolution of the issue in this case is not as difficult as it appears. Simply stated, the issue is whether the telephone subscriber must continue to pay Orange County's tax on the charge for access to local telephone service on the basis of the initial regulated rate even after the subscriber's current monthly access fee has been reduced from the regulated rate to compensate for the excess profit earned by the local server (BellSouth in this case) during the preceding audit period.

The resolution of this issue requires less of a detailed analysis of the tax code than a recognition of what the Florida Public Service Commission (the Commission) was authorized to do, what it ordered, and what BellSouth did in compliance. The Commission can and does regulate the rate charged by BellSouth for subscriber access to its service and this access charge is taxable by the County. Further, the Commission can control the amount of total profit made by BellSouth during an audit period and may require a refund if the profit is determined to be excessive. The Commission cannot and does not regulate the charge for advertising, the charge for repairs, the charge for call waiting, etc., etc., etc.

Thus, in effect, the rate first established and thereafter collected as the charge for access to BellSouth's service is conditionally approved by the Commission and may be adjusted after audit if too much profit occurs.¹ In this case, the Commission initially approved an access charge in an amount which was anticipated, along with the income from BellSouth's other services, to provide a reasonable profit to justify the investment made by the telephone server. However, it was subsequently determined that the access fee (*all of which has been taxed by Orange County*) had been set too high and an excessive profit was earned by BellSouth.

The Commission then ordered that the current regulated rate be reduced for a three-month period in an amount necessary to offset the excess income earned during the preceding audit period. This refund of excess profit is akin to a situation in which a shoe salesman inadvertently charges a customer \$10 for a \$5 pair of shoes. The customer, after being advised of the mistake, elects to purchase a new \$10 pair of shoes for \$5 instead of receiving a cash refund of \$5 (together with the associated tax) from his initial overcharge. At the end of the day, the customer had purchased \$15 worth of shoes and had paid tax on \$15 worth of purchases. A greater tax would be illegal. In this case, the Commission, by ordering a reduction of the current year's regulated rate to offset the previously collected excess profit, effectively reduced the price for the second pair of shoes and Orange County has therefore collected all of the taxes to which it is entitled.

But the County insists it is not that easy. It urges that since the income earned by BellSouth from all of its income sources during the audit period was merged, we cannot tell which actual dollars, taxed or untaxed, are now being restored to the subscribers. This argument assumes that income from the various profit sources is like the water from three streams which flow together to form a river making it impossible to tell which drop of water came from which stream. But while the dollars in the bank may look the same, the amount of income derived from each source is readily determinable. And there is no requirement that the excess profit must be returned to the subscriber or to the advertiser or to the one who had repairs performed, etc., in proportion to the individual income components which contributed to the total profit which was deemed excessive². If there were such a requirement, then the excess profits assigned to advertising income would have to be returned only to advertisers; excess repair income would have to be returned only to those who required repairs during the audit period. BellSouth, consistent with the Commission's order, treated the entire excess as having come from the income produced from its access fee, a source readily identifiable and the only fee charged uniformly to its subscribers. This was the most reasonable, and the fairest, way to treat the excess profit and the resulting impact on the County's tax base was both coincidental and legal.

The fact that the previous period's income was merged is totally irrelevant. The return of excess profit is not being made from previous income; it is being made from reducing the current charge for access to BellSouth's service. And, under the law, this return of excess access service revenue previously collected may be made in two ways. BellSouth can simply reduce the charge of its current access charge by an amount that will exhaust the excess profit and thus automatically reduce the amount subject to the County tax or, if the subscriber chooses, BellSouth can collect its normal monthly charge and immediately refund the appropriate portion of it to the subscriber in cash. Since this would be a reduction (a refund) from the current charge for services, taxes would be due only on the resulting actual charge for services.³

Orange County has no control over the amount the Commission permits BellSouth to charge for access

to its service. It can only levy its tax against the amount actually charged and collected from the subscriber. It does not matter as far as Orange County is concerned whether the Commission requires a low rate up front or subsequently requires a reduction of the rate which creates the excess profit. It is only the amount ultimately charged to the subscriber for the access service which is subject to the County's tax.⁴ A tax based on a charge greater than the subscriber is actually required to pay is simply illegal. This is because the statutory authorization for the tax limits the tax to the purchases of local telephone service. If for any given month the customer is permitted to purchase the service for less, for any reason, it is only that purchase price which is subject to the tax.

Suppose BellSouth had complete discretion in how best to reimburse its subscribers for actual or anticipated excess profit. Could it not, consistent with law, choose to reduce its charge for access to its service in order not only to give its subscribers the benefit derived from its extraordinarily good year but also to reduce its subscribers' tax liability? Since Orange County has no control over the actual charge for this service, how can it complain if BellSouth elects to reduce such charge? And why should it matter if it is the Commission, and not BellSouth, which decides to reduce the regulated rate regardless of its consequence on Orange County's taxes?

AFFIRMED. (COBB, J., concurs. ORFINGER, R.B., J., dissents with opinion.)

¹The access fee is similar to an admission fee to a charity auction at which the auctioneer agrees that if the auction brings more than a certain amount, the surplus will be returned to those attending by returning a portion of their admission fee.

²Although it may sound metaphysical, the problem in this case is not that the subscribers paid too much; it is simply that the telephone server, because of extraordinarily good business during the audit period, made too much. The subscribers only paid the regulated rate for access and a contracted amount for the other services. But for the extraordinary profit made by BellSouth during the audit period there would be no contention that these individual charges were excessive. But excessive profit was realized and it must be returned to those subscribers whose payments generated this excess. Since there is no showing in this record that the contract services were excessive, the Commission was justified in determining that the excess profit occurred only because the regulated rate generated too much income. Otherwise, if the contract services were deemed to be too high, relief should have been given to the advertisers or to those who had repairs made during the audit period or to others who paid for contract services deemed to be excessive and not to the general subscriber.

³The County argues that since the reduction of the current monthly charge is to compensate for the subscribers' overpayment made during the audit period, the actual "charge" for the monthly service includes both the current billing and the forgiveness of the "debt" owed to the subscribers because of the overcharge. This logic, applied to the shoe analogy, would mean that the subscriber could never get a refund of the excess taxes paid. The recognition of the overcharge is not additional consideration; it is the reason for the discounted charge for current service. But even assuming that recognition of the previous overcharge must be counted as consideration for current service, it is irrelevant. The taxes on the "debt" owed to the subscribers *have previously been paid*.

⁴There is no significant difference from what was done in this case and a situation in which BellSouth, realizing that its profit for a given period was unusually high, even before an audit, simply decided to reduce its charge for access in order to bring its profit in line. Here there would be no reimbursement to the subscribers, only an adjustment of its charge for access in order to meet its profit limitation.

(ORFINGER, R. B., J., dissents.) I respectfully dissent. In my view, the majority's analysis is flawed in that it assumes, without proof, that the public service tax was paid on all of the over-earnings refunded to BellSouth's Orange County customers. That assumption not only lacks record support, but also fails to take into account the regulatory scheme to which BellSouth is subject.

BellSouth provides local telephone service to residents of Orange County. Under Florida law, BellSouth is required to collect and remit to Orange County a seven percent "public service" tax on "the total amount charged" for "each purchase of telecommunication service" within the county.¹ Orange County, Fla., Code 17-236(c); § 166.231(9), Fla. Stat. (1999).² As a Florida provider of telecommunication service, BellSouth is subject to regulation by the Florida Public Service Commission ("PSC"). See § 364.01, Fla. Stat. (1999). The PSC sets BellSouth's rates for certain services and is authorized to limit its earnings to a "reasonable rate of return." §§ 364.035, 364.05, 364.051, Fla. Stat. (1999).

Significant to an understanding of the issues presented by this case is that only certain of BellSouth's revenues, primarily those coming from local telephone service, are subject to Orange County's public service tax, while other BellSouth services are not taxed. However, all of BellSouth's earnings, whether subject to Orange County's tax or not, are included if the PSC orders an over-earnings refund, as it did in this case.

In 1992, as part of its regulatory oversight, the PSC initiated a review of BellSouth's earnings. The Office of Public Counsel ("OPC") intervened, and ultimately, BellSouth and OPC entered into a settlement agreement, the terms of which were incorporated into three separate PSC orders. Those orders required BellSouth to refund approximately \$210 million in excess earnings to its Florida customers, including those in Orange County. Pursuant to the PSC orders, BellSouth refunded: (1) \$ 50.1 million in June, 1997; (2) \$ 123 million together with interest in June, 1998; and (3) \$ 38 million in December, 1998.

As required by rule 25-4.114, Florida Administrative Code, the refunds were made based on "access lines, pro rata according to rate level."³ In the three relevant months, BellSouth applied the refunds as a credit on its customers' bills and assessed the public service tax on the remaining balance. Realizing that the public service tax remitted in those months was substantially less than the amounts normally remitted by BellSouth, Martha Haynie, the Comptroller of Orange County, issued a determination that BellSouth should have applied the public service tax to the gross amount of BellSouth's customers' bills before the application of the over-earnings refund, and concluded that the public service tax on the refunded sums remained due. As a result, the Comptroller assessed BellSouth for the tax amounts credited to the customers' bills in June, 1997, June, 1998, and December, 1998.

BellSouth disagreed with the Comptroller's assessments and utilized the protest and appeal procedure available to contest the assessments. After the Comptroller denied the protest, BellSouth instituted two separate actions against the Comptroller and Orange County for declaratory relief, challenging the

assessments of the public service tax. In its lawsuits, BellSouth asked the circuit court to declare the assessments void and unenforceable, and award BellSouth costs and attorney's fees pursuant to Orange County Ordinance 91-17 (1991), and section 57.105, Florida Statutes (1999). Orange County counterclaimed for the taxes it claimed were owed, demanding a total amount of \$654,921.69, plus interest. Orange County also sought attorney's fees and costs under Orange County Ordinances 91-17 and 98-33, and section 57.105. The two actions were consolidated for disposition in the trial court and on appeal.

All of the parties filed motions for summary judgment. At the summary judgment hearing, the court narrowed the issue to the question of "whether BellSouth should have calculated the tax to the customer on the total amount of the access charge for that month, or whether it should have calculated, as it did, on the amount the customer had to pay after receiving the credit." The trial court entered a summary final judgment in favor of BellSouth, and against Orange County and the Comptroller. In pertinent part, the trial court concluded:

The facts giving rise to this controversy are relatively straightforward. Under *Florida Statutes* § 166.231(9)[,] a local government may levy a tax -- known as a "public service tax" -- on the purchase of telecommunication services. The tax is imposed directly on the customers of such services and is collected for the benefit of the local government by the seller thereof -- in this case BELLSOUTH. To this extent the tax is analogous to a sales tax.

Pursuant to its exclusive jurisdiction in all matters relating to the regulation of telecommunications companies in this state, *see Florida Statutes* Chapter 364, the Public Service Commission ("Commission") ordered BELLSOUTH to make certain refunds to its customers "based on access lines, pro rata according to rate level." In doing so, the Commission intended for BellSouth to credit local telephone charges to its customers on their June 1997, June 1998 and December 1998 bills. Since the customers were being credited for local telephone charges, BELLSOUTH likewise credited its customers for the public service taxes applicable to such charges. In essence, BellSouth collected and remitted public service taxes on the net amount of local telephone charges billed to customers in the respective months.

Defendants, however, have taken the position the public service taxes were due based on the amounts that would have been charged for local telephone service had the credits not been ordered by the Commission and made by BellSouth. Accordingly, in February of 1999, HAYNIE, as Comptroller, issued an assessment claiming that BELLSOUTH owed ORANGE COUNTY \$358,769.46 plus interest for unpaid public service taxes for June 1998. Then in July of 1999, she issued a similar assessment claiming that BELLSOUTH owed ORANGE COUNTY public service taxes in the amount of \$122,598.00 for June 1997 and \$88,674.00 for December 1998.

The court determines that the actions of HAYNIE and ORANGE COUNTY in making these assessments were contrary to Florida law. Florida's Constitution provides that "[n]o tax can be levied except in pursuance of law." Art. VII, § 1(a), *Fla. Const.* Thus, public service taxes are purely statutory in nature. Under a plain meaning construction of *Florida Statutes* § 166.231(9)(a)(2), once the credits were ordered by the Commission, public service tax was due only the net amount of local telephone charges billed to customers, after applying the

credits ordered by the Commission. The court finds that BELLSOUTH properly implemented the Commission orders and properly collected and paid public service taxes on the net amounts charged for local telephone service after applying such credits. Accordingly, it is ORDERED and ADJUDGED as follows:

1. The motion for summary judgment of plaintiff BELLSOUTH is hereby GRANTED.
2. The motions for summary judgment of defendants ORANGE COUNTY and HAYNIE are hereby DENIED.
3. A final judgment consistent with this order will be entered forthwith.

The court subsequently entered a final declaratory judgment in favor of BellSouth, concluding that the determinations/assessments and notices of decision issued by the Comptroller on behalf of Orange County for unpaid public service taxes for June, 1997, June, 1998, and December, 1998, were void and unenforceable. The court also dismissed with prejudice the counterclaims filed by Orange County and the Comptroller.

The fundamental disagreement among the parties concerns the proper application of the over-earnings credit to BellSouth's customers' bills and the tax consequences that flow therefrom. To illustrate how the parties contend the refund credits should be applied along with the resulting tax consequences, assume that an Orange County customer pays \$20 per month for basic telephone service and that the PSC over-earnings refund credit for this customer is \$10.

Orange County contends the customer's bill should be calculated as follows:

Monthly Access Line Charge \$ 20.00

7% Public Service Tax \$ 1.40

SUBTOTAL: \$ 21.40

Refund Credit: (\$ 10.00)

AMOUNT DUE \$ 11.40

BellSouth argues the bill should be calculated as follows:

Monthly Access Line Charge \$ 20.00

Refund Credit: (\$ 10.00)

SUBTOTAL: \$ 10.00

7% Public Service Tax \$.70

AMOUNT DUE \$ 10.70

The actual bills sent by BellSouth reflected the refund credits as follows:

Monthly Access Line Charge \$ 20.00

7% Public Service Tax \$ 1.40

SUBTOTAL: \$ 21.40

Refund Credit: (\$ 10.00)

7% Public Service Tax Credit \$ (.70)

NET AMOUNT DUE \$ 10.70

The issue on appeal is whether the public service tax levied by Orange County should be applied to the gross (total) amount charged by BellSouth to its Orange County customers before applying the over-earnings refund credit, or on the net amount of the bill after applying the over-earnings refund credit. Because this issue presents a pure question of law, we review the matter *de novo*. See *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000). To properly analyze this issue, I believe it must be determined if the public service tax was already paid on the refunded earnings (in whole or in part) or not.

While the PSC has exclusive jurisdiction to regulate telecommunication companies, it has no jurisdiction regarding public service taxes, a position conceded by the PSC in its amicus memorandum filed in the trial court. Section 364.01 provides the PSC with broad regulatory powers regarding the telecommunications industry but also limits the PSC's authority regarding public service taxes. Specifically, section 364.01(2) provides:

It is the legislative intent to give exclusive jurisdiction in all matters set forth in this chapter to the Florida Public Service Commission in regulating telecommunications companies, and such preemptions shall supersede any local or special act or municipal charter where any conflict of authority may exist. *However the provisions of this chapter shall not affect the authority and powers granted in s. 166.231(9)[4]. . . .*

(Emphasis added). Equally clear is the PSC's exclusive authority to determine a reasonable rate of return for BellSouth and the method and basis for making refunds, when any such refunds are ordered.⁵ §§ 364.035, 364.05, 364.051, Fla. Stat. (1999). When a "refund is not related to specific rate changes, such as a refund for overearnings," (as is the case here) refunds are made based on access lines, pro-rata according to rate levels. See Fla. Admin. Code R. 25-4.114(3).⁶ The PSC orders that required BellSouth to make over-earnings refunds did not (and could not, based on the limiting language in section 364.01(2)), address BellSouth's treatment of the public service tax on the over-earnings refunded to BellSouth customers.

BellSouth does not dispute Orange County's ability to impose a public service tax on telecommunications services; rather, BellSouth takes the position that it refunded taxes that had already been paid to its Orange County customers. As was shown previously, the customer bills BellSouth utilized actually showed a credit for the public service tax applicable to the over-earnings refund. Obviously, that presupposes that the tax had previously been paid. The record does not support that supposition. While BellSouth argues that the bills showed this credit simply because of the limitations of its billing system, that does not change the result. "To permit the true nature of a transaction to be disguised by mere

formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies [in this country]." *Comm'r of Internal Rev. v. Court Holding Co.*, 324 U.S. 331, 334 (1945).

The public service tax applies to basic telecommunication services as defined by section 203.012, Florida Statutes (1999). Section 203.012(5)(a) defines telecommunications services, in relevant part, as local telephone service. The tax does not apply to other sources of BellSouth's revenue such as equipment rental, service and installation charges, interest income, Internet access fees, some Yellow Page advertising, etc. See § 203.012(5)(b), Fla. Stat. (1999). The parties agree that some of the excess revenue refunded to BellSouth customers is attributable to revenue previously subject to the public service tax, while some other undetermined portion of the refund is attributable to excess earnings not subject to the tax, and therefore, not previously taxed. The record contains no evidence demonstrating what portion, if any, of the excess earnings refunded is attributable to services already taxed, and what portion is attributable to services not previously taxed. BellSouth contends that the source of the over-earnings is irrelevant. I disagree. If the refunded over-earnings were already taxed, such sums cannot be taxed again. That would constitute double taxation. However, if the over-earnings were not previously taxed, then the tax should be applied to the total amount charged the customers as required by law.⁷ To refund the taxes, as BellSouth has done, gives BellSouth's customers a refund of taxes they may never have paid, on at least some portion of the refund credit. Before the customers can receive a credit or refund for those taxes, BellSouth, or its affected customers, have the burden of proving that the public service tax had already been paid on the refunded amounts or on some portion thereof. See generally *State v. Ex Rel Liggett Drug Co. v. Gay*, 29 So. 2d 623 (Fla. 1947); *Ves Carpenter Contractors, Inc. v. City of Dania*, 422 So. 2d 342 (Fla. 4th DCA 1982). To do otherwise may refund taxes that had not been paid. In construing tax statutes, exceptions, exemptions and tax credits are strictly construed against the taxpayer. *Dep't of Rev. v. Kemper Investors Life Ins. Co.*, 660 So. 2d 1124, 1127 (Fla. 1st DCA 1995). See *State Ex Rel Szabo Food Serv., Inc. of N. C. v. Dickinson*, 286 So. 2d 529 (Fla. 1973); *Dep't of Rev. v. Skop*, 383 So. 2d 678 (Fla. 5th DCA 1980). If the authority to tax is clear, as I believe it is here, the burden to show that tax has been paid on taxable transactions falls to the taxpayer, or in this case, BellSouth.

There are, however, other pillars that support Orange County's position. It is axiomatic that the authority to tax is strictly construed against the taxing authority, and in favor of the taxpayer, and any ambiguities or doubts are to be strictly construed against the taxing authority and in favor of the taxpayer. *Maas Bros. v. Dickinson*, 195 So. 2d 193 (Fla. 1967); *Warning Safety Lights of Georgia, Inc. v. State, Dep't of Revenue*, 678 So. 2d 1377 (Fla. 4th DCA 1996). "This salutary principle is found in the reason that the duty to pay taxes, while necessary to the business of the sovereign, is still a duty of pure statutory creation and taxes may be collected only within the clear definite boundaries recited by statute." *Maas Bros.*, 195 So. 2d at 198. In construing tax statutes, the primary consideration is to ascertain and give effect to legislative intent, determined primarily from the language of the statute. *Miele v. Prudential-Bache Secs.*, 656 So. 2d 470 (Fla. 1995). "A court's function is to interpret statutes as they are written and give effect to each word in the statute." *Fla. Dep't of Rev. v. Fla. Mun. Power Agency*, 789 So. 2d 320, 324 (Fla. 2001). Accordingly, "[w]hen the language of a statute is clear and unambiguous, the statute must be given its plain and ordinary meaning." *Metro. Dade County v. Milton*, 707 So. 2d 913 (Fla. 3d DCA 1998) (quoting *Comerica Bank & Trust, F.S.B. v. SDI Operating Partners, L.P.*, 673 So. 2d 163, 167 (Fla. 4th DCA 1996)). "Words of common usage, when employed in a statute, should be construed in their plain and ordinary sense." *Zuckerman v. Alter*, 615 So. 2d 661,

663 (Fla. 1993).

Section 166.231(9)(a)2., Florida Statutes (1999) provides in relevant part:

(9) A municipality may levy a tax on the purchase of telecommunication services as defined in s. 203.012 as follows:

* * *

2. Only upon purchases within the municipality of telecommunications service that originates and terminates in this state at a rate not to exceed 7 percent of the *total amount charged* for any telecommunications service provided within the municipality or, if the location of the telecommunications service provided cannot be determined as part of the billing process, the total amount billed for such telecommunications service to a telephone or telephone number, a telecommunications number or device, a service address, or a customers' billing address located within the municipality. . . .

(Emphasis added). The statute clearly imposes the public service tax on the "*total amount charged*" for telecommunications services. See §166.231(9)(a)2., Fla. Stat. (1999) (emphasis added). We assume that the Legislature knew the plain and ordinary meaning of the words "total" and "charged" when it included these terms in the statute. *Hankey v. Yarian*, 755 So. 2d 93, 96 (Fla. 2000). See *Aetna Cas. & Surety Co. v. Huntington Nat'l Bank*, 609 So. 2d 1315, 1317 (Fla. 1992). Reference to a dictionary is permissible, if necessary, to determine such meaning. See *L.B. v. State*, 700 So. 2d 370, 372 (Fla. 1997); *Green v. State*, 604 So. 2d 471, 473 (Fla. 1992). The dictionary defines the term "total" as "[a] whole quantity; entirety" and "[c]onstituting or pertaining to the whole; entire." The American Heritage College Dictionary 1280 (2d ed. 1985). Further, the dictionary defines the term "charged" as "[t]o set or ask (a given amount) as a price" or "[t]o hold financially liable; demand payment from." The American Heritage College Dictionary 259 (2d ed. 1985). Applying the plain and ordinary meaning of the terms "total" and "charged," we conclude that the statute requires the tax to apply to the gross amount (the total amount charged) billed for telecommunication services, and not the net amount as argued by BellSouth. Cf. § 212.02(16), Fla. Stat. (1999) (providing that sales price means the total amount paid for tangible personal property, including any services that are a part of the sale and any amount for which credit is given to the purchaser by the seller, without any deduction).

The total amount *charged* by BellSouth to its customers in the relevant months remained unchanged. The only change was in the *net amount due* because of the application of the over-earnings refund credit. These refunds were not made as a result of an overall rate reduction; rather, the refunds were made due to BellSouth's excess earnings.

Based on the foregoing, I would conclude that the total amount charged for the telecommunications service, and consequently the amount subject to the public service tax, is the gross amount charged and not the net amount due after credits and/or refunds are applied, in the absence of proof that the tax had previously been paid on all, or some portion, of the credited or refunded amount.

Accordingly, I would reverse the judgment of the trial court and direct that judgment be entered in favor of Orange County and Haynie.

¹As a charter county, Orange County has the authority to enact and enforce any tax that a municipality may impose, including the public service tax. *McLeod v. Orange County*, 645 So. 2d 411, 413 (Fla. 1994).

²The 1999 version of section 166.231(9) is applicable to the instant case. Section 166.231(9) has since been repealed and replaced with the Communications Services Tax Simplification Law, codified in Chapter 202, Florida Statutes. The new law took effect October 1, 2001. *See* §§ 202.10-.41, Fla. Stat. (2002).

³In its Amicus Curiae Memorandum of Law, filed with the trial court, the PSC explained that the customer's share of the refund was based on the amount of local service that the customer used. The PSC explained:

An access line is the phone line to the customer. Most residential customers have one access line. The state is divided geographically into rate groups, based on the total number of access lines in a geographical area. Each rate group has a specific rate level, which is the basic charge for local service in that rate group. Thus the cost for local service varies throughout the state.

⁴Section 166.231(9), Florida Statutes (1999) authorizes local governments to levy the public service tax.

⁵Rule 25-114(5), Florida Administrative Code provides the following:

(5) Method of Refund Distribution. For those customers still on the system, a credit shall be made on the bill. In the event the refund is for a greater amount than the bill, the remainder of the credit shall be carried forward until the refund is completed. If the customer so requests, a check for any negative balance must be sent to the customer within ten (10) days of the request. For customers entitled to a refund but no longer on the system, the company shall mail a refund check to the last known billing address except that no refund for less than \$1.00 will be made to these customers.

⁶Rule 25-4.114(3) of the Florida Administrative Code provides:

(3) Basis of Refund. Where the refund is the result of a specific rate change, including interim rate increases, and the refund can be computed on a per customer basis, that will be the basis of the refund. *However, where the refund is not related to specific rate changes, such as a refund for overearnings, the refund shall be made to customers of record as of a date specified by the Commission. In such case, refunds shall be made on the basis of access lines.* Per customer refund refers to a refund to every customer receiving service during the refund period. Customer of record refund refers to a refund to every customer receiving service as of a date specified by the Commission.

(Emphasis added).

⁷For example, if BellSouth proved that half of the refunded over-earnings came from previously taxed transactions and half did not, Orange County's assessment would then be reduced by half (excluding interest and penalties).

* * *