

CITY OF GAINESVILLE §166.231(1) PUBLIC SERVICE TAXATION OF GAINESVILLE REGIONAL UTILITY (GRU) ELECTRIC, GAS AND WATER SERVICES

INTRODUCTION: This memorandum will explore three (3) issues regarding City of Gainesville taxation of GRU electric, gas and water utility services within the City of Gainesville geographical limits. These issues are (1) §166.231 taxation of the GRU “customer charge” for electric, gas and water utility services as a “purchase”; (2) §166.231 local taxation of the State of Florida’s §203.01 Gross Receipts Tax applicable to GRU electric and gas but not water utility services, and (3) the “not to exceed cap” of 10% on the §166.231 Public Service Tax (hereinafter referred to as a utility tax).

BACKGROUND: As explained in a legal memorandum from the Gainesville Office of City Attorney to Mr. John Caravella, Seniors vs. Crime, dated May 28, 2014, page 1, beginning of paragraph 2, “In summary, GRU (as a seller of utility services) applies and collects the Public Service Tax from all purchasers (sic) of utility services and remits it to the city as required by Florida law and the City of Gainesville code of ordinances”. (1) In fact, churches, governmental entities and others are exempt. (2)

The City of Gainesville and GRU has prepared annually-updated flow charts explaining how the §166.231 local utility tax is applied and calculated on GRU electric, gas and water utility bills. (3) In a response to a **PROPOSED STIPULATION AS TO MATERIAL FACTS**, the City of Gainesville and GRU acknowledge that the §166.231 utility tax is applied to the “customer charges” for

electric, gas and water, and that the same tax is also applied to the §203.01 State of Florida Gross Receipts tax on electric but not gas utility services - until September 2014. The assertion is made that upon discovering what is described as an “undercollection”, the §166.231 utility tax was thereafter likewise applied to the state §203.01 Gross Receipts tax on GRU gas utility services as well as of September 2014 – after the filing of the the instant legal challenge. (4) The City of Gainesville and GRU curiously decline to stipulate to the accuracy of their own flow charts in the last line of paragraph 4 of the aforementioned **RESPONSE**.

CONSTITUTIONAL AUTHORITY: Article VII, Section 9, Local Taxes – Provides:

“Counties, school districts and municipalities shall, and special districts may, levy ad valorem taxes and may be authorized by general law to levy other taxes....(emphasis added) (5)

A Florida Attorney General’s opinion dated June 7, 2013, on page 3, paragraph 3 explains, except for ad valorem taxes, a municipality has no inherent power to tax:

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. In the exercise of it’s taxing power, a municipality is limited to that taxing

power conferred expressly, or by necessary implication. (emphasis added) (6)

Absent express statutory authority, a municipality has no inherent power to impose taxes or to provide exemptions from such taxes.

STATUTORY AUTHORITY: §166.231 (1) (c) provides:

“§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....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) Purchase of electricity means the purchase of electric power by a person who will consume it within the municipality.

(b) The tax imposed by paragraph (a) shall not be applied against any fuel adjustment charge, and such charge shall be separately started on each bill. The term “fuel adjustment charge” means all increases in the cost of utility services to the ultimate consumer resulting from an increase in the cost of fuel to the utility subsequent to October 1, 1973. (emphasis added) (7)

By defining the purchase of electricity, and by implication the purchase of gas and water, as an actual “purchase”, and the fuel adjustment charge as “all

increases in cost” “to the ultimate consumer resulting from an increase in the cost of fuel”, the legislature has imposed substantial limits on §166.231 local utility taxation as follows:

- 1) The §166.231 utility tax shall not exceed 10% of the payments received by the seller from the purchaser.
- 2) The §166.231 utility tax is only applicable to the actual purchase of electricity, gas or water utility services.
- 3) The fuel adjustment charge includes all increases in the cost of utility services to the ultimate consumer, is not subject to §166.231 local taxation, and must be separately stated on the bill.

GAINESVILLE MUNICIPAL CODE OF ORDINANCES. Chapter 25, Article II of the City of Gainesville Code of Ordinances, Section 25-16. – Definitions provides:

Purchaser shall include any person, firm, corporation, partnership, society, club or association of persons acting together as a unit who purchase or cause to be purchased for consumption utility service within the corporate limits of the city. (emphasis added) (8)

Section 25-17. - Levy provides:

(a) “There is hereby levied by the city on each and every purchase....a tax of ten percent of the charge made by the seller of such service or commodity”. (emphasis added) (9)

Related Statutory Provision: For all electric and gas utility customers of GRU, both residential and nonresidential, but not for water, the State of Florida also

imposes a §203.01 Gross Receipts Tax on “utility services”. (10) Pursuant to §203.01(1)(c)(1), the §203.01 utility tax is on the “distribution company”.

This state utility tax is administered by the Florida Department of Revenue (DOR) according to the rules found in the Florida Administrative Code (FAC) Chapter 12B-6 (11)

The state DOR is without jurisdiction over the §166.231 local utility tax thus municipalities, unlike with ad valorem taxation, operate without any supervision from the state. (12)

The City of Gainesville utility tax, and the identical, companion surcharge on GRU electric and gas utility services provided outside the Gainesville City limits, brought in around 15 million dollars in 2014. (13) In addition, GRU imposed an identical 10% local utility tax on GRU customers outside the Gainesville city limits on behalf of Alachua County.

A comparison between the basis for the unsupervised §166.231 local utility tax and the basis for the companion, broader state §203.01 gross receipts tax on only electric and gas utility services reveals:

1) The mandatory state §203.01 utility tax applies only to electric and gas “utility services” and “shall be 2.5 percent”. The discretionary §166.231 local utility tax applies to “purchases” of electric, gas and water utility services and “shall not exceed 10 percent of the payments received by the seller....from the purchaser.” In §166.231(1)(a) and (b), the words “purchase” or “purchases” are used five (5) times, and the word “purchasers” is used once.

2) The state §203.01 utility tax is expressly made inapplicable to “any like tax lawfully imposed” §203.01(4). (14)

3) The state §203.01 utility tax is also expressly made inapplicable to the companion §166.231 local utility tax, and a number of expressly specified other charges, DOR Rule 12B-6.0015(2)(a)(b)(c) and (4). (15)

4) The state §203.01 utility tax is expressly made applicable to “monthly customer charges or monthly facilities charges”. §203.01(7) (16)

5) There are no exemptions from the broader state §203.01 utility tax, and the “fuel adjustment charge” is taxed. Contrariwise, the narrower §166.231 local utility tax does not apply to the fuel adjustment charge, or purchases by churches, governmental entities and others in whole or part by virtue of §166.231(3), (4), (5) and (6) exemptions, and the City of Gainesville Code of Ordinances Section 25-18. – Exemptions (17)

GRU FACT SHEET: A GRU “FACT SHEET” defines “customer charge” as follows:

Bill Definitions

Utilities

Customer Charge – Each utility service has a fixed customer charge to recover those costs that GRU must incur to provide service whether or not any consumption is used. Meter repair and replacement expenses, monthly meter reading expenses and the costs of producing and mailing the utility bill are examples of such costs. (emphasis added) (18)

JURISDICTION OVER CHALLENGES: §166.235 (1)(a) and (2) require that a purchaser request a refund administratively as a condition precedent to the filing

of an “action” to contest §166.231 taxation. (19) In paragraph 6 of its
aforementioned **RESPONSE TO PLAINTIFF’S PROPOSED STIPULATION AS
TO MATERIAL FACTS**, the proper exhaustion of administrative remedies in the
case at bar was acknowledged, although GRU denials of requests for refunds
were untimely or not given at all, and gave no reasons beyond ascertaining
physical location within the City of Gainesville limits. (20)

STATUTORY CONSTRUCTION: The outcome of this case turns on the
construction of four (4) sentences in §166.231 (1)(a) and (b) which
unambiguously define two (2) key phrases: “purchase of electricity” and “fuel
adjustment charge”.

It is axiomatic that a taxing statute is a penal provision to be strictly
construed in favor of the taxpayer (21). The mention of one thing implies
exclusion of another (22). Related provisions must be construed in para materia
(23).

Legislative intent is the polestar, and is determined from the plain
language of the statute. (24) A common sense approach is utilized. (25)
Extrinsic evidence is not referred to when there is clear and unambiguous
language. (26) Plain and unambiguous language need not be construed. (27) A
definition of a statutory term is controlling. (28) A ridiculous result is necessarily
erroneous. (29) While an agency construction is entitled to great weight, the
City of Gainesville is neither an agency nor a political subdivision of the state,
and also has demonstrated a lack of competence in administering §166.231.

(30) Construction of a taxing statute is ultimately the providence of the judiciary.

(31)

Applying these principles to the case at bar, it is obvious that the City of Gainesville and GRU, exploiting the absence of state supervision, has abused §166.231 locally in order to augment city revenues illegally as follows:

(1) The City of Gainesville and GRU ignore the clear limitation of §166.231(1)(a) to local utility taxation of only “purchases”, as is also codified in the city’s own ordinances Sec. 25-16 and 25-17, and erroneously taxes the “customer charge” for electric, gas and water utility services as a “purchase”. The customer charge is in no way, means, shape or form a part of an actual purchase. As explained on the GRU “Fact Sheet”, the customer charge is imposed “whether or not any consumption is used”, i.e., even if there is no purchase whatsoever.

The customer charge, also by the city’s own statements, goes beyond the cost of reading the meter and sending a bill to also capture fixed costs of GRU generally incurs in order to provide service to both exempt and nonexempt customers. GRU customer charges are high and going higher as overpriced biomass electric overcapacity that cannot be sold must be off-loaded on to ratepayers. (32)

(2) The City of Gainesville and GRU likewise ignore both the §166.231(1)(a) definitions of “purchase” and §166.231(2) definition of “fuel adjustment charge” and, without any authorization whatsoever, pyramid the §166.231(1) local utility tax on the §203.01 state gross receipts tax, a practice

expressly prohibited pursuant to §203.01 (4) and DOR Rule 12B-6.001(4) for the broader state gross receipts tax.

Even worse, since the §203.01 state gross receipts tax applies to the fuel adjustment charge, when the §166.231(1) local utility tax is also applied to the state §203.01 utility tax, .025641 percent of the fuel adjustment charge is taxed by the City of Gainesville in direct violation of the statutory prohibition found in §166.231(2).

Finally, by taxing GRU utility services at the maximum not to exceed rate of 10%, and impermissibly taxing both the “customer charge” on electric, gas and water utility services, and the gross receipts tax on electric only, until September 2014, and then on gas also, the City of Gainesville doubles down on the exceedance of the not to exceed rate of 10% thereby necessitating a refund going three (3) years back.

If the City of Gainesville and GRU had chosen a lower tax rate, the results might not require a refund pursuant to the Topsy Coachman Doctrine, which provides that a correct result reached for the wrong reasons must be upheld.

(33)

Respectfully Submitted,

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