



Paul E. Patton, Governor

Janie A. Miller, Secretary
Public Protection and
Regulation Cabinet

Thomas M. Dorman
Executive Director
Public Service Commission

COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION
211 SOWER BOULEVARD
POST OFFICE BOX 615
FRANKFORT, KENTUCKY 40602-0615
<http://psc.ky.gov>
(502) 564-3940
Fax (502) 564-3460

Martin J. Huelsmann
Chairman

Gary W. Gillis
Vice Chairman

Robert E. Spurlin
Commissioner

August 14, 2003

Representative Stan Lee
Vimont & Wills, P.L.L.C.
155 East Main Street, Suite 300
Lexington, Kentucky 40507

Re: Larry Critchfield Inquiry

Dear Representative Lee:

This is in response to your question regarding the legality of applying sales tax to franchise fees and gross receipts taxes on utility bills. As we discussed, the Kentucky Supreme Court unanimously ruled, in *Lockett v. Electric and Water Plant Board, Ky.*, 558 S.W.2d 611 (1977), that the application of the sales tax is lawful when applied to fees and charges that are assessed against the utility rather than against the customer.

In *Lockett*, the Court analyzed KRS 160.613's authorization of a tax on the "gross receipts derived from furnishing, within the county, of ... electric power, water, and natural, artificial, and mixed gas." *Id.* at 613, quoting KRS 160.613. The Court concluded that the license tax is "levied upon the utility company, not its customers, and the utility company is the taxpayer ultimately liable for the tax." Accordingly, even though the utility company is authorized to raise its rates to cover the tax, KRS 160.617, it is not merely a "collection agent" for the governing body assessing the tax. Accordingly, the rate increase imposed to cover the utility's tax is "no different from the remainder of the utility bill which constitutes gross receipts to the utility company." *Lockett*, 558 S.W.2d at 613. All such receipts are subject to the state's sales tax.

I have reviewed KRS 160.617, which still specifically permits a utility to "increase its rates" to cover the tax, "[n]otwithstanding the provisions of KRS 278.040(2)" (the statute that otherwise gives the PSC jurisdiction over utility rates). This is the language quoted by the *Lockett* court when it characterized the line item as a "rate" rather than a "tax." Pursuant to this reasoning, the sales tax can also be applied to franchise fees, which are also assessed against the utility and not directly against its customers. See, e.g., KRS 65.910(7) (defining the franchise fee as one "on" utilities). The utility raises its rates to cover the fee, just as it does to cover the gross receipts tax. Line items on the customer bills are for information purposes.

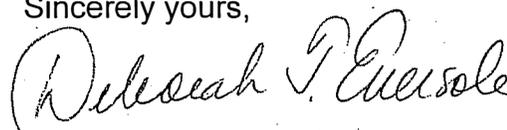


Representative Stan Lee
August 14, 2003
Page Two

The *Lockett* court concluded its analysis by stating that, "if the legislature intended receipts from the 3% permissive rate increase to be exempt from sales tax, it could easily have incorporated its desire into KRS 160.617. It did not..."

The current statute also contains no such exemption. I enclose a copy of the *Lockett* decision, along with a copy of KRS 160.617. If you have further questions, please do not hesitate to call.

Sincerely yours,



Deborah T. Eversole
Counsel to Public Service Commission

Cc: Thomas M. Dorman
Charlotte Quarles



558 S.W.2d 611.
(Cite as: 558 S.W.2d 611)

Page 1

C

Supreme Court of Kentucky.

J. E. LUCKETT, now Maurice Carpenter,
Commissioner of Revenue of the
Commonwealth of Kentucky, et al., Appellants,

v.

ELECTRIC AND WATER PLANT BOARD OF
the CITY OF FRANKFORT, Kentucky, Appellee.

Nov. 18, 1977.

The Board of Tax Appeals found that 3% additional charge imposed by utility, pursuant to county's levy, for the benefit of schools, of utility gross receipts license tax of 3%, was a rate increase and constituted gross receipts subject to 5% state sales tax, and utility appealed. The Franklin Circuit Court, Squire N. Williams, J., found that 3% additional charge was not to be included in utility's gross receipts so that 5% gross receipts sales tax did not apply to the 3% additional charge, and appeal was taken. The Supreme Court held that 3% utility gross receipts license tax was levied upon utility company, not its customers, as statute which permitted utility company to raise its rates to alleviate burden on utility company did not convert tax into one levied upon customers in which utility company merely acted as collection agent, and thus 3% rate increase constituted additional gross receipts which were subject to 5% sales tax.

Reversed.

West Headnotes

Taxation ⚡1284
371k1284 Most Cited Cases

Under statutes permitting county to impose, for the benefit of schools, utility gross receipts license tax of 3% and providing that utility could increase its rates by 3% in any county in which utility was required to pay school tax, 3% utility gross receipts license tax was levied upon utility company, not its customers, and fact that statute permitted utility to raise its rates to alleviate burden on utility did not convert tax into one levied upon customers in which utility merely acted as collection agent, and thus 3% rate increase was to be included in gross receipts to

the utility company which were subject to 5% state sales tax. KRS 139.210, 160.613, 160.617.

*612 William S. Riley, Asst. Atty. Gen., Kentucky Dept. of Revenue, Frankfort, Glenn McDonald, Louisville, for appellants.

Marion Rider, Frankfort, for appellee.

REVERSING

PER CURIAM.

In 1969 the Fiscal Court of Franklin County levied, for the benefit of schools, a utility gross receipts license tax of 3% pursuant to authority granted the fiscal court in KRS 160.613. In conjunction with the enactment in 1966 of KRS 160.613, the General Assembly enacted KRS 160.617 which provided that a utility could increase its rates by 3% in any county in which the utility was required to pay the school tax. If the utility did raise its rates by 3%, the statute required that the bills sent to customers set forth the amount of the increase and identify it as "Rate increase for school tax."

Appellee availed itself of the provisions of KRS 160.617 and increased its customers' bills by 3%, designating the increase simply as "school tax." The additional 3% was not included by appellee in computing its gross receipts upon which the state levies a 5% sales tax and herein lies the controversy.

Appellee contends that it did not increase its rates by 3%. On the contrary, appellee maintains that it was merely collecting the 3% tax from its customers and sending it directly to the proper authorities. In no way did the money constitute gross receipts or provide any benefit to the utility company appellee argues.

It is the position of the Department of Revenue that the 3% additional charge is in fact a rate increase and as such constitutes gross receipts to the utility company. As a result the Department of Revenue sought to recover sales tax from the utility company in an amount equal to 5% of the 3% rate increase for the taxable period. The utility company was ordered to pay the amount by the Kentucky Board of Tax Appeals which supported the Department of Revenue's interpretation. The board's order was appealed to the Franklin Circuit Court which adjudged the board's assessment erroneous and

Copr. © West 2003 No Claim to Orig. U.S. Govt. Works

558 S.W.2d 611.
 (Cite as: 558 S.W.2d 611)

Page 2

vacated the board's Court found specifically, "The three (3%) percent school tax levied by the Franklin County Fiscal Court pursuant to KRS 160.613, which the Electric and Water Plant Board collects and turns over to the School Board, is not a portion of the gross receipts of sales on utilities and the five *613 (5%) percent gross receipts sales tax does not apply to this three (3%) percent." We have examined the applicable statutes and cannot agree.

KRS 160.613 authorizes a 3% utility gross receipts license tax on "the gross receipts derived from the furnishing, within the county, of . . . electric power, water, and natural, artificial, and mixed gas." The only exception is that gross receipts are not to include amounts received for furnishing energy used in manufacturing, processing, mining or refining or utilities which are to be resold. This license tax is levied upon the utility company, not its customers, and the utility company is the taxpayer ultimately liable for the tax. Further evidence of this fact is seen in KRS 160.617 which is quoted in full as follows:

"The fiscal court may promulgate such regulations as may be necessary for the collection of the tax authorized by KRS 160.613. Notwithstanding the provisions of KRS 278.040(2), any utility required to pay the tax authorized by KRS 160.613 may increase its rates in any county in which it is required to pay the school tax by three per cent (3%). Any utility so increasing its rates shall separately state on the bills sent to its customers the amount of such increase and shall identify such amount as: 'Rate increase for school tax.' "

FN* The first sentence of this statute was deleted by the General Assembly in 1976.

The fact that KRS 160.617 permits the utility company to raise its rates to alleviate the burden on the utility company does not convert the tax into one levied upon the customers in which the utility company merely acts as collection agent. Therefore, the 3% rate increase is no different from the remainder of the utility bill which constitutes gross receipts to the utility company. And as in other cases where a retailer is liable for sales tax upon the sale of goods or services, the utility company could have collected the amount of the tax

from its customers. KRS 139.210. If the legislature intended receipts from the 3% permissive rate increase to be exempt from sales tax, it could easily have incorporated its desire into KRS 160.617. It did not and it is not the function of this court to do so.

The judgment is reversed for further proceedings consistent with this opinion.

All concur.

558 S.W.2d 611

END OF DOCUMENT

KY ST § 160.617
KRS § 160.617

Page 1

C

**BALDWIN'S KENTUCKY REVISED STATUTES ANNOTATED
TITLE XIII. EDUCATION
CHAPTER 160. SCHOOL DISTRICTS
UTILITY GROSS RECEIPTS LICENSE TAX FOR SCHOOLS**

Copyright © 1988-2003 by West, A Thomson business

Current through End of 2002 Reg. Sess.

160.617 Utility rate increase

Notwithstanding the provisions of KRS 278.040(2), any utility required to pay the tax authorized by KRS 160.613 may increase its rates in any county in which it is required to pay the school tax by three percent (3%). Any utility so increasing its rates shall separately state on the bills sent to its customers the amount of such increase and shall identify such amount as: "Rate increase for school tax."

HISTORY: 1990 c 476, § 464, eff. 7-13-90

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

2003 Main Volume

Note: Former 160.617 repealed and reenacted by 1990 c 476, § 464, eff. 7-13-90; 1976 c 127, § 13; 1966 c 24, Pt III, § 11.

CROSS REFERENCES

2003 Main Volume

Computation of tax equivalents based on book value by municipal board of public utilities under T.V.A. Act, 96.820

LIBRARY REFERENCES

2003 Main Volume

Copr. © West 2003 No Claim to Orig. U.S. Govt. Works

KY ST § 160.617
KRS § 160.617

Page 2

Taxation for school purposes. 68 Am Jur 2d, Schools § 44 to 51

NOTES OF DECISIONS AND OPINIONS

In general 1 Procedures 2

1. In general

Under statutes permitting county to impose, for the benefit of schools, utility gross receipts license tax of 3% and providing that utility could increase its rates by 3% in any county in which utility was required to pay school tax, 3% utility gross receipts license tax was levied upon utility company, not its customers, and fact that statute permitted utility to raise its rates to alleviate burden on utility did not convert tax into one levied upon customers in which utility merely acted as collection agent, and thus 3% rate increase was to be included in gross receipts to the utility company which were subject to 5% state sales tax. *Lockett v. Electric and Water Plant Bd. of City of Frankfort* (Ky. 1977) 558 S.W.2d 611.

KRS 160.617 does not create an arbitrary classification and is not confiscatory. *Lamar v. Board of Ed. of Hancock County School Dist.* (Ky. 1971) 467 S.W.2d 143.

The three per cent utility gross receipts license tax for schools is a rate increase for schools subject to the five per cent sales tax. OAG 76-709.

The three per cent utility gross receipts license tax for schools, being a rate increase, is not a tax deductible item on federal and state income tax returns. OAG 74-814.

Rural electric cooperative is liable for payment of utility gross receipts license tax for schools since such tax is a rate increase. OAG 74-507.

2. Procedures

The local taxing units merely have the authority to provide the details for the collecting of the tax. *Texas Gas Transmission Corp. v. Board of Ed. of Ballard County* (Ky. 1973) 502 S.W.2d 82.

Real property taxes are to be paid in the county in which the property is located, and this cannot be altered by agreement between the property valuation administrators. Gross receipt utility tax is on the utility but may be passed on to the consumer. There are no exemptions for consumers. OAG 84-70.

KRS § 160.617

KY ST § 160.617

Copr. © West 2003 No Claim to Orig. U.S. Govt. Works