

unconstitutional a municipal license tax based on gross sales, is in my opinion distinguishable. The municipality there lacked specific general law authorization for the tax, which apparently would have been ample justification for sustaining the tax:

Thus, the question presented is whether the tax imposed by the City of Tampa is authorized by general law. Any tax not authorized by general law must necessarily fall by virtue of the preemption clause of Fla. Const. Art. VII, §1 (1968).

In accord with this rationale, my earlier opinion, AGO 071-303, indicated that the essential sustaining factor would be the existence of general law authorization. Assuming compliance with all requirements of law otherwise applicable, the tax about which you inquire appears to me to be within the constitutional perimeters of the *Birdsong* decision and therefore presumptively valid.

073-65—March 21, 1973

### TAXATION

#### UTILITY TAX ON FUEL OIL PURCHASES

To: Harvey W. Matthews, Representative, 39th District, Orlando

Prepared by: Winifred L. Wentworth, Assistant Attorney General and James D. Whisenand, Legal Intern

#### QUESTION:

May a municipality lawfully impose a 10 percent utility tax on the sale of fuel oil?

#### SUMMARY:

A municipality has authority to impose a tax on purchases of specified utilities pursuant to §167.431, F. S. 1971, and may impose such a tax, consequent to its factual determination, on a "competitive utility service."

Your letter inquires as to the legality of a municipality imposing a 10 percent utility tax on purchases.

Section 167.431(1), F. S. 1971, authorizes municipalities to impose a utility tax, not to exceed 10 percent, on the purchase of enumerated utility services and of competitive utility services:

The several cities and towns in this state are hereby given the right, power, and authority, by nonemergency ordinance, to impose, levy and collect on each and every purchase of electricity, metered or bottled gas (natural liquefied petroleum gas or manufactured), water service, telephone service and telegraph service in their corporate limits, a tax . . . . In the event any such ordinance imposes such a tax on the purchase of one of the utility services described herein and a competitive utility service or services are purchased in the city or town, then *such ordinance shall impose a tax in like amount on the purchase of the competitive utility service or services* whether privately or publicly owned or distributed . . . . (Emphasis supplied.)

In the case of *Owen v. Cheney*, 238 So.2d 650 (2 D.C.A. Fla., 1970), *writ discharged* Central Oil Co. v. *Cheney*, 253 So.2d 869 (Fla. 1971), the court held that fuel oil service might be found competitive with utility services named in §167.431(1), *supra*, and remanded the cause for that determination after concluding

that the statute permitted a municipal tax on specified utility purchases only on condition that competitive services were also taxed. The latter conclusion, however, has now been altered by the decision in *Belcher Oil Co. v. Dade County*, 271 So.2d 118 (Fla. 1972), holding that the statute *permits but does not require* a tax on competitive services when specified utility purchases are taxed:

[W]e cannot agree that Dade County was compelled or mandated by the statute to tax competitive services, but, in our opinion, municipalities *are merely authorized or empowered* by Fla. Stat. §167.431, F.S.A., to levy taxes on public utilities. Whether they choose to enact an ordinance imposing such a tax is within the legislative discretion of the municipality. . . . (Emphasis supplied.)

In *Belcher*, the normally mandatory terminology used in §167.431, F. S. 1971, was construed as permissive in view of the constitutional language in Art. VII, §§1 and 9, and Art. VIII, §2, State Const. 1968. When a municipality has exercised its legislative discretion to impose such a tax, it must then still make a critical factual determination, *vel non*, as to whether fuel oil service is "a competitive utility service," subject to appropriate judicial review. *Owen v. Cheney*, *supra*, as modified by *Belcher Oil Company v. Dade County*, *supra*. *Belcher* further considered the taxation of a competitive utility service to be discretionary. It is assumed, as indicated in the dissent to *Belcher*, that such discretion is ultimately controlled by constitutional equal protection principles. In any event, the attorney general cannot resolve factual questions, nor legally make any legislative or judicial findings of fact. Cf. AGO 072-6.

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#### PROBATE

#### WITH WHOM CLAIMS OF CREDITORS TO BE FILED

To: Robert M. Johnson, Representative, 74th District, Sarasota

Prepared by: Rebecca Bowles Hawkins, Assistant Attorney General

#### QUESTION:

Should claims of creditors against the estate of a decedent be filed in the office of the circuit court clerk inasmuch as the circuit courts now exercise jurisdiction over decedents' estates under revised Art. V?

#### SUMMARY:

Claims of creditors against a decedent's estate should be filed in the office of the clerk of the circuit court in which the administration of the estate is pending.

Your question is answered in the affirmative.

Section 733.16, F. S. 1971, presently requires creditors' claims to be filed "in the office of the county judge granting letters." Now that the circuit court has jurisdiction of the administration of decedents' estates under revised Art. V, this requirement can no longer be given effect, as written. It goes without saying that creditors' claims must be filed in the estate proceedings pending in the circuit court; and in view of the fact that the records of the circuit court and the progress dockets of pending cases, including estates of decedents, are required by law to be kept by the clerk of the circuit court (*see* §28.211, F. S.), it is reasonable to construe §733.16 as now requiring creditors' claims to be filed with the clerk of the circuit court rather than with the circuit judge himself. This