

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Bigby Brothers, LLC, Bigby Enterprises,)
 LLC, and Pawley's Front Porch, LLC, on)
 behalf of themselves and all other similarly)
 situated taxpayers, businesses, and citizens,)
)
 Plaintiffs,)
)
 vs.)
)
 The City of Columbia, S.C.,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2011-CP-40-4110

FILED
 2013 MAY 15 PM 3:58
 CLERK J. E. W. HARRIS
 C.C.P. & G.S.

ORDER

This matter is before the Court on the parties' motions for summary judgment based upon Rule 56(c) of the South Carolina Rules of Civil Procedure. A hearing on these motions was held on April 18, 2013, and attended by Hank Wall, Esquire for the Plaintiffs and Dana Thyne, Esquire for the Defendant.

FACTS

Plaintiffs in this action have challenged the application of the City of Columbia's Hospitality Tax Ordinance to the purchase of alcoholic liquor drinks. The parties have stipulated to numerous facts in this case so that there is no genuine issue of material facts remaining and the matter is ripe for adjudication by summary judgment. In 1997, the South Carolina General Assembly adopted the Local Hospitality Tax Act ("the Act") which has been codified at S.C. Code Ann. Section 6-1-700 et seq. The Act allows municipalities to impose a two percent tax on "prepared meals and beverages sold in establishments or sales of prepared meals and beverages sold in establishments licensed for on-premises consumption of alcoholic beverages, beer or

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wine.” The City of Columbia, by way of an ordinance effective June 30, 2003, enacted City Code Section 20-51 which imposes a “local hospitality tax of two percent on the gross proceeds of the sale of prepared meals and beverages in establishments (hereinafter ‘vendor’) within the City of Columbia (hereinafter ‘City’). Payment of the hospitality tax established hereby shall be the liability of the customer.”

The Plaintiffs in this case are establishments that sell alcoholic liquor drinks and upon which hospitality taxes are charged. These taxes are collected by the Plaintiffs and remitted to the City periodically. The parties have stipulated that these establishments have remitted hospitality taxes to the City in excess of one hundred (\$100) dollars each of the last few years. The Plaintiffs brought an action to disgorge any and all hospitality taxes collected on the sales of alcoholic beverages in establishments that are licensed by the South Carolina Department of Revenue for on-site consumption of alcoholic beverages, as well as any damages incurred as a result of having to collect these allegedly unlawful taxes.¹ In addition, Plaintiffs also seek injunctive relief prohibiting the collection of taxes on those sales going forward. For the reasons that follow, summary judgment is hereby granted in the City’s favor as there is no prohibition against the assessment and collection of such taxes on the items at issue.

DISCUSSION

Plaintiffs, citing S.C. Code Ann. Section 12-33-20, argue that the City’s hospitality tax is an “unlawful double tax on alcoholic beverages.” This argument has previously been considered and

¹ At the hearing of these motions, counsel for the Plaintiffs withdrew his request for disgorgement and damages at this time and elected to argue the issue of injunctive relief only. Thus, it is not necessary for this Court to discuss standing as it relates to Plaintiffs’ ability to bring an action for disgorgement of a tax that Plaintiffs merely act as pass-through collection agents for. A Motion to Certify Class had also been filed in this case but was not before the

rejected by the Supreme Court of South Carolina in Hospitality Association of South Carolina, Inc. v. County of Charleston, 320 S.C. 219, 464 S.E.2d 113 (1995).

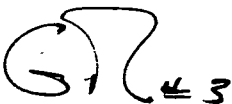
Section 12-33-20, the statute cited by Plaintiffs, provides as follows:

The license and excise taxes provided in this chapter for the privilege of engaging in the business of manufacturing and selling alcoholic liquors shall be in lieu of all other taxes and licenses, State, county and municipal, except property, State income and corporation license taxes.

In the above-cited case, Hospitality Association of South Carolina, Inc., a challenge was made to several different county and municipal ordinances, including a City of Charleston ordinance that imposed a 1% fee on the gross proceeds derived from the sale of food and beverages sold in establishments that maintained a license for the on-premises consumption of alcohol, beer or wine. Plaintiffs in that case argued, as the plaintiffs in the present case argue, that the city ordinance was pre-empted or inconsistent with certain state statutes, including those codified in Sections 12-33-10 through -630 (this range of statutes includes Section 12-33-20, on which the Plaintiffs in the present case rely.)

The Supreme Court rejected those arguments:

These statutes essentially deal with taxes to be paid by wholesalers or importers of beer and wine, or license taxes to be paid for the privilege of **selling** alcoholic liquor in this State. See S.C. Code Ann. Section 12-21-1010 to -1130 and Sections 12-33-10 to -630 (1976 and Supp.1994). The statutes do not address taxes or fees on food or beverage sales in establishments holding an on-premises beer, wine, and/or liquor license.

Handwritten signature or initials, possibly "S1" followed by a flourish and "3".

Hospitality Association, supra, 320 S.C. at 229, 464 S.E.2d at 119 (Emphasis added). The hospitality tax in the present case is, like the city ordinance in Hospitality Association, a tax on, among other things, the purchase of beverages sold in retail establishments, including those “licensed for on-premises consumption of alcoholic beverages, beer, or wine.” S.C. Code Ann. Section 6-1-710(2).

In addition, it should be pointed out that the Hospitality Association case was decided against the claimants in that case even before the General Assembly in 1997 enacted the Local Hospitality Tax Act, S.C. Code Ann. Section 6-1-700, et seq. That Act expressly authorizes counties and municipalities to charge hospitality taxes. While the Hospitality Association case correctly points out that Section 12-33-10 to -630 does not affect the power of local governments to impose the kinds of taxes involved in the present case, the enactment of the Local Hospitality Tax Act in 1997 provides an additional reason for holding Plaintiffs’ double taxation claim to be meritless, because the General Assembly has now confirmed that the Court’s decision in the Hospitality Association case was consistent with the General Assembly’s views concerning the ability of municipal corporations to impose a local tax on the sale of food and beverages, including alcoholic beverages.

When the General Assembly enacted the hospitality tax legislation in 1997, it clearly intended that alcoholic liquors would fall within the tax’s purview. The definition of the hospitality tax is found in Section 6-1-710(2):

(2) “Local hospitality tax” is a tax on the sales of prepared meals and beverages sold in establishments or sales of prepared meals and beverages sold in establishments licensed for on-premises consumption of alcoholic beverages, beer, or wine.

(Emphases added.) There can be no question that the tax was intended to reach alcoholic liquor



drinks, as well as beer and wine, because of the use of the term “alcoholic beverages” as well as beer or wine, as indicated by the highlighted disjunctive language. Stated differently, it would be counterintuitive for the General Assembly to define establishments in part by the fact that they sell liquor by the drink, if the only purpose was to impose the hospitality tax only on some other kinds of beverages, such as iced tea or soft drinks. To the contrary, the only reasonable interpretation of Section 6-1-710(2) is that it was intended to authorize counties and municipalities to impose the hospitality tax on sales of alcoholic liquor beverages.

Given that the General Assembly clearly intended to include alcoholic liquor drinks as items subject to the hospitality tax, the question then becomes whether there is anything in Section 12-33-20 which precludes the General Assembly from doing so. It goes without saying that “the powers of the General Assembly are plenary, as to all matters of legislation, unless limited by some provision of the Constitution.” Waterloo School Dist. No.14 v. Cross Hill School Dist. No. 6, 106 S.C. 292, 91 S.E. 257, 258 (1917). The General Assembly can enact general laws such as Section 12-33-20, which purport to admit of no exception, and then at a later date, in another more specific statute, create an exception. *See, e.g.,* Arbino v. Johnson & Johnson, 116 Ohio St.3d 468, 495, 880 N.E.2d 420, 447 (Ohio2007) (“the General Assembly may make amendments, or create exceptions, to previously enacted legislation”); Louisiana Associated General Contractor, Inc. v. Louisiana Dept. of Agriculture and Forestry, 924 So.2d 90 (La.2006) (same).

The hospitality tax statute is not only a later act than Section 12-33-20, enacted in 1945, it is also a specific statute, in contrast to the generality of Section 12-33-20. As such, it is a completely clear and valid exception to the general rule set forth in Section 12-33-20. As the Supreme Court has held many times,

Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.

Spectre, LLC v. South Carolina Dept. of Health and Environmental Control, 386 S.C. 357, 373, 688 S.E.2d 844, 852 (2010)(emphasis added). This is precisely what happened when the General Assembly enacted the hospitality tax legislation in 1997.

The City would also point out that the Supreme Court has made it clear that Section 12-33-20 does not in fact prohibit any or all other taxes on alcoholic liquors. As indicated in the Hospitality Association case, supra, the Court has viewed Section 12-33-20 and related statutes in its chapter of the Code as applying to “license taxes to be paid for the privilege of selling alcoholic liquor in this State.” Hospitality Association of South Carolina, Inc., supra. 320 S.C. at 229, 464 S.E.2d at 119. The Court reached this conclusion about taxes imposed under Article 12, Chapter 33, in 1995, at a time when the hospitality tax was purely a municipal creation without any express authorization by the General Assembly. The wording of Section 12-33-20 indicates that it pertains to taxes “for the privilege of engaging in the business of manufacturing and selling alcoholic liquors. . . .” The hospitality tax is a different tax entirely, and is not within the subject matter covered by Section 12-33-20. The difference in the types of taxes is clearly shown by the fact the taxes found in Article 12, Chapter 33, are imposed on sellors. The City Ordinance, on the other hand, expressly provides that the hospitality tax is “the liability of the consumer” and is a tax on the purchase of alcoholic liquors. City Code Section 20-51 (2003).

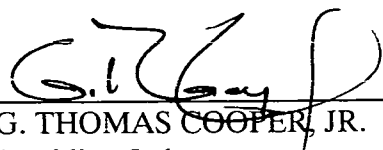
“A local government ordinance conflicts with State law when its conditions, express or implied, are inconsistent and irreconcilable with the State law.” Hospitality Association of South

Carolina, Inc., supra. 320 S.C. at 229, 464 S.E.2d at 119. Here, the City's Hospitality Tax Ordinance is not inconsistent and irreconcilable with the taxes permitted in Article 12, Chapter 33 of the State Code. The ordinance does not attempt to place an additional tax on those who would exercise the privilege of selling alcoholic liquor by the drink, instead, it taxes the purchaser or consumer. There is no attempt to circumvent or change the tax structure set out in the State Code and nothing prohibits the City from imposing a separate tax applicable to purchasers. *Cf. Arnold v. City of Spartanburg*, 201 S.C. 523, 23 S.E.2d 735 (1943) (additional regulation to that of State law does not constitute a conflict therewith).

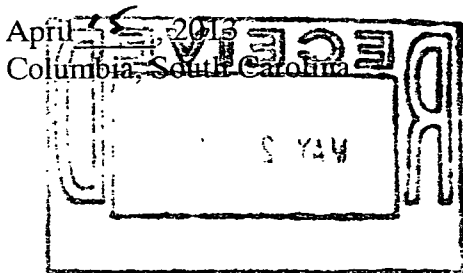
CONCLUSION

Because the Defendant clearly had the power to enact the ordinance(s) at issue and that ordinance is not inconsistent with general law of the State, the hospitality tax assessed upon the sale of alcoholic liquor drinks is not prohibited. There is no unlawful collection and no need for injunctive relief going forward. For the foregoing reasons, Defendant City's motion for summary judgment should be **GRANTED** and this action should be dismissed in favor of the City of Columbia.

AND IT IS SO ORDERED.



G. THOMAS COOPER, JR.
Presiding Judge



STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2011CP4004110

James Bigby

City Of Columbia SC

Bigby Brothers LLC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried, heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 16 day of May, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Henry Pickett Wall

Dana M. Thye

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride