THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Administrative Law Court
The Honorable Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2014-001170

South Carolina Department of Motor Vehicles . . . . . Appellant,

v.

Russo Dumpster, Inc. . . . . Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE ALC ERR IN UPHOLDING THE HEARING OFFICER'S RESCISSION OF RESPONDENT TAXPAYER'S IFTA AUDIT SUSPENSION ON THE GROUND THAT THE DEPARTMENT ALLEGEDLY HAD NOT ADVISED THE TAXPAYER OF THE NECESSARY RECORDS TO MAINTAIN?

The Respondent's Brief in this case is noteworthy by what it does not address as much as what it does address. Respondent's Brief does not cite a case to the effect that a government tax authority of any sort forfeits the opportunity to collect an audited and correctly calculated tax liability because it has insufficiently informed the taxpayer of what records to keep. The Department again submits there is no such case. There is no discussion of the case cited by the Department holding that ITFA compliance is mandatory on motor carriers as soon as the carrier crosses state boundaries. *In re Fagan*, 465 B.R. 472, 476 (2012); *see also*, *Senex Explosives, Inc. v. Commonwealth of Pa.*, 568 A. 3d 131, 138 (Pa. Commw. Ct. 2012). The Respondent has not addressed how the ALC's holding that the Respondent had the burden of proof impacted the case or was irrelevant to it.

The only citations to authority, other than references to the various provisions of the IFTA Articles of Agreement and a single reference to the IFTA Procedures Manual, is two cases: *Tanner v. Florence County Treasurer*, 336 S.C. 552, 563, 521 S.E. 2d 153, 158 (1999), and *South Carolina National Bank v. South Carolina Tax Commission,* 297 S.C.279, 280, 376 S.E. 2d 512, 513 (1989). Neither case has any bearing on the current dispute. *Tanner* involved the attempted redemption of property subjected by the county to tax sale while the landowner had been incarcerated. The property involved land and a mobile home subject to the tax sale. The landowner first sued on a cause of action

declaring the sale of the land void. The land was later redeemed by the landowner's father, but the mobile home apparently was taxed separately. The landowner alleged that he also never received the required statutory notice for the mobile home despite having given the county his prison address for correspondence. The County answered the complaint alleging that the redemption of the land had made moot that claim and that the mobile home could still be redeemed. The redemption period subsequently passed, however, and the landowner moved to supplement his pleadings to allege a negligence cause of action. *Tanner* at 556, 521 S.E.2d at 155. Although the Supreme Court later found that the motion to supplement should have been granted in the absence of prejudice to the county, the county at the motion hearing convinced the Court to rule the first cause of action was moot and the Court refused to grant leave on the negligence cause of action finding that the Tort Claims Act immunized the county from such negligence claims. *Id.* at 556. 557, 521 S.E 2d at 155. The Supreme Court held that the court should have allowed the supplemented pleadings, because the standard for the granting leave to supplement was the absence of prejudice to the non-moving party, and that summary judgment was premature at the pleading stage.

There was no issue in *Tanner* of whether the landowner was liable for the tax or should have been subject to the tax. There is no issue in the present case whether Respondent got an opportunity to contest the assessment. Contrary to the Respondent's characterization of *Tanner* that where the taxing authority's notice was untimely the taxing authority was barred from collecting taxes, in fact the Supreme Court's strict construction analysis only applied to the tax sale proceeding by which the landowner's

mobile home had been forfeited. There is no indication in the case that it forgave the underlying tax liability.

The *South Carolina National Bank* case is a statute of limitations case in which the retroactivity of an amendment that potentially extended the limitations period was in issue. The Supreme Court observed that statutes should generally be construed against retroactive application in the absence of clear legislative intent to the contrary, and in favor of the taxpayer in doubtful tax enforcement cases. *South Carolina National Bank* at 281, 376 S.E. 2d at 513. But as this Court has observed in *Mitul Enterprises, L.P. v. Beaufort County Assessor*, Op. No. 5275 (S. C. Ct. App. Filed October 15, 2014), Davis Advance Sheets No. 41, 20 at 22, 23, a case in which there is legitimate doubt about the whether the person should be subject to the tax at all presents a different case from one in which the person is clearly subject to the tax.

In any case, the *Tanner* and *South Carolina National Bank* cases were at base notice cases, in which a statute provides for a particular notice to be made within the limitation period or as a precursor to property forfeiture. In both cases there were statutory remedies that could be cited for the failure to comply. That is a far sight from a contractual requirement between and among compact states, in which remedies are provided for state non-compliance which make no mention of invalidating the tax liability.

In fact, the present case is more analogous to those cases analyzing exemptions from tax, for which our Supreme Court has ruled that exemptions are to be strictly construed against the taxpayer [*Chronicle Publishers, Inc. v. South Carolina Tax Commission*, 244 S.C. 192, 194, 136 S.E. 2d 261, 262 (1964)] and that the burden is on

claimants asserting a tax exemption by bringing themselves clearly within the conditions imposed by a statute [*TNS Mills v. South Carolina Department of Revenue*, 331 S.C. 611, 618, 503 S.E.2d 471, 475 (1998)]. The Respondent clearly seeks an exemption for what would otherwise be clear tax liability imposed from the review of its own records. The only thing missing is language in the statute that could be construed to create an exemption. Nothing in *S.C. Code Ann.* §§ 56-11-10 *et seq.* that suggests that a motor carrier may be excused from tax liability because it claims it has not been informed of what records to keep. Nothing in the record suggests that the statutory law of any other State in which the Respondent was required to pay motor fuel taxes provides an exemption for taxpayers insufficiently informed. The IFTA Articles of Agreement, Art. III, R. 360 do include a duty to disclose requirements for complying with ITFA, including recordkeeping requirements, as a matter of the IFTA contract among compact states. But no provision of the Articles or other Manuals even hint that a state's ability to collect its own motor fuel taxes and that of other compact states is contingent on a determination that record keeping requirements have been adequately explained. The exemption from tax liability in this matter is entirely court made.

The Department suggests the proper construction is that adopted by the various other ITFA jurisdictions with regard to exemptions, burden of proof or the challenge of audit assessments in the IFTA cases the Department has cited on pages 14 and 15 of its Initial Brief. In no event should the construction be more favorable to the Respondent than the construction made "reasonably" and "as a whole with the view of carrying out its purpose and intent." *Mitul supra*, at 23, citing *Fuller v. S. C. Tax Commission*, 128 S.C.14, 21, 121 S.E. 2d 478, 481 (1924).

What the holdings below do, in effect, is to make the responsibility to pay a tax liability dependent on the subjective mindset of the taxpayer. Needless to say, some taxpayers will likely have an incentive to confirm that they are aware of and compliant with the applicable regulations when they are required to so state on a yearly application in order to be credentialed, but also deny such knowledge when the taxpayer is audited and found to have inadequate records resulting in a tax liability.

In its initial Brief, the Department pointed out evidence that Respondent already had the Department's IFTA Manual as of the time of the Audit, which the Hearing Officer disagreed with, discounted or ignored (Appellants Brief at 10-12). Aside from that, there was no indication in the record before the Hearing Officer regarding the Department's efforts to comply with Articles of Agreement, Art. III, R. 360, precisely because the issue had never been raised in any IFTA other case of which the Department is aware. Indeed, in this case, the issue of a duty under that particular provision was not apparent until the ALC's ruling. Therefore, although the Department steadfastly maintains that the R. 360 disclosures are not an element in an IFTA Audit case, the Department filed a Motion to Present Additional Evidence under *S.C. Code Ann.* §1-23-380 (3) to show what had actually happened with regard to the issue. With the Motion the Department attempted to show that:

1.) there was a Department prepared IFTA Manual available at all times relevant to the current case (R. Affidavits of Feggans and Meares);

2.) the Manual explained in detail the record keeping requirements of IFTA, and provided a phone number for Motor Carrier Services for inquiries (R. DMV IFTA Manual 11-13);

3.) the Department's standard practice was to give all IFTA licensees a copy when they received the license (R. Feggans Affidavit);

4.) the Manual provided report charts for daily entries of record keeping (R. DMV IFTA Manual 25, 26);

5.) the form application, which IFTA carriers must sign each year, contains a statement under penalties of perjury that the applicant agrees to comply with the record keeping requirements of IFTA (*Id.* 24); and

6.) from and after May 5, 2008, the likewise contained a form application containing web addresses to the Department's website and that of IFTA, Inc., by which the manuals could be viewed (R. Affidavit of Meares).

The Department's motion was dismissed summarily with no discussion of whether the submission was or was not sufficient to meet the requirements of Art. III, R. 360, or met the requirements or failed to meet the requirements of Section 1-23-380 (3).

The Court summarily concluded that the word "shall" in the notification requirements creates a duty on the part of the Department to inform taxpayers of the recordkeeping requirements." No authority was cited for this assertion, and there was no discussion of whether the compact, as a contractual agreement between the various states, accrues to the benefit of the taxpayer as a defense to tax liability when the law of no state is cited to require that result. Then the Court determined that there is an apparent "conflict" with the extensive provisions of IFTA providing for tax liability, and that the only way the "conflict" can be reconciled is for the "duty" to trump the tax liability. These holdings of the ALC and of the OMVH which it upheld are clearly erroneous in view of the reliable, probative ad substantial evidence on the whole record, or are

arbitrary or capricious or characterized by an abuse of discretion, or affected by other error of law.

CONCLUSION

For all of the above cited reasons and grounds, the Department requests that this Court issue its Order reversing the Order of March 24, 2014. Since the Respondent has not produced any evidence questioning the accuracy of the audit assessment, the audit assessment and resulting Order of Suspension should be reinstated.

Respectfully submitted,

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October 16, 2014
Blythewood, South Carolina

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CERTIFICATE OF SERVICE

PURSUANT TO SCACR, I HEREBY CERTIFY that today, October 16, 2014, I served one (1) copy of the Initial Reply Brief of Appellant by depositing with the United States Postal Service, correct postage prepaid, and via facsimile to the Respondent at the addresses indicated below:

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Jeannine (Nina) Moore, Paralegal
Office of General Counsel

October 16, 2014
Blythewood, South Carolina

Nikki R. Haley
Governor

Kevin A. Shwedo
Director

State of South Carolina

Department of Motor Vehicles

October 16, 2014

The Honorable Jenny Abbott Kitchings
Clerk, The South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: ***South Carolina Department of Motor Vehicles v. Russo Dumpster, Inc.***
Appellate Case No: 2014-001170

Dear Ms. Kitchings:

Enclosed for filing please find the unbound original and one copy of the Reply Brief of Appellant South Carolina Department of Motor Vehicles. Please file the original and return the extra copy to me with an affixed clerk's date of filing in the enclosed self-addressed stamped envelope.

Thank you for your cooperation in this matter.

In kind regards,

Jeannine Moore

Jeannine (Nina) Moore, Paralegal
Office of General Counsel

Enclosures

cc: Kenneth R. Raynor, Esquire

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Form 103

Forwarding Service Requested

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