

STATE OF SOUTH CAROLINA)
 COUNTY OF BERKELEY)
 Todd Olds,)
)
 Appellant-Plaintiff,)
 vs.)
 City of Goose Creek,)
)
 Respondent-Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2011-CP-08-2814

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NOV 05 2014

ORDER

CLERK OF COURT
 BERKELEY COUNTY, SC

2014 SEP -5 PM 1:29

Court of Appeals

This matter comes before me on an appeal from the City of Goose Creek City Council on the determination of the business license fee of Todd Olds and a motion for summary judgment by Goose Creek as to several causes of action which Olds filed in conjunction with the appeal to Circuit Court. Procedurally, Mr. Olds contested the determination of his 2011 business license fees and followed the appeal route set forth in Goose Creek's business license ordinance. Following the Goose Creek business license ordinance, Olds' appeal was taken from the decision of the Finance Director to the City Administrator, then to City Council and, now, to the Circuit Court. Olds alleged various civil causes of action in conjunction with his appellate paperwork. Olds has filed a cross-motion for summary judgment as well.

The essence of this dispute revolves around the proper method of calculating "gross income" pursuant to Goose Creek's municipal business license ordinance. State law allows municipalities to charge a business license fee on "gross income." S.C. Code § 5-7-30. Olds is in the business of buying residential real estate, improving it, and selling the properties, either in his name or that of his company, Prime Properties of Charleston, LLC. Olds argues federal law including Internal Revenue Code § 61 should define "gross

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income." Under federal law, only the gain or profit on sale of real estate is gross income. The City of Goose Creek argues that based on the language of the City of Goose Creek's ordinance and South Carolina law, a business license fee is based on the total sales price without deduction for the cost.

This Court does believe it proper to make a determination of the appeal first. The Court will then proceed to consider the issue of whether any remaining causes of action are valid after a determination of the appeal. This Court acting in its appellate role must accept the decision of the lower tribunal unless there is some error of law. No provision is made for any additional factual hearing of an appeal and findings of fact must be accepted by the appellate court if supported by any evidence. However, because the primary issue of the appeal is an issue of statutory construction which is strictly a legal matter, this Court is not bound by the determination of the lower tribunal.

In its business license ordinance, the City of Goose Creek has defined "gross income" as:

GROSS INCOME. The total revenue of a business, received or accrued, for one calendar year, collected or to be collected by a business within the city, excepting, therefrom, business done wholly outside of the city on which a license tax is paid to some other municipality or county and fully reported to the city or county. The term GROSS RECEIPTS means the value proceeding or accruing from the sale of tangible personal property, including merchandise and commodities of any kind and character and all receipts, by the reason of any business engaged in, including interest, dividends, discounts, rentals of real estate or royalties, without any deduction on account for the cost of the property sold, the cost of the materials used, labor or service cost, interest paid or any other expenses whatsoever and without any deductions on account of losses. The GROSS INCOME for business license purposes shall conform to the gross income reported to the State Tax Commission or the State Insurance Commission. In the case of brokers or agents, GROSS INCOME shall mean gross commissions received or retained, unless otherwise specified. GROSS INCOME for insurance companies means gross premiums collected. GROSS INCOME for business

2

license tax purposes shall not include taxes collected for a governmental entity, escrow funds or funds, which are the property of a third party. The value of bartered goods or trade-in merchandise shall be included in GROSS INCOME. The GROSS INCOME for business license purposes may be verified by inspection of returns and reports filed with the Internal Revenue Service, the South Carolina Department of Revenue, the South Carolina Insurance Commission or other government agency.

City Business License Ordinance Section 110.001.

Lawmakers' intent embodied in an ordinance "must prevail if it can be reasonably discovered in the language used." Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). In Goose Creek's ordinance, the opening line clearly states that gross income shall be the "total revenue of a business." And further states "without any deduction on account for the cost of the property sold, the cost of the materials used, labor or service cost, interest paid or any other expenses whatsoever and without any deductions on account of losses." This clearly evidences an intent to collect a business license fee on the total sales price of a property without a deduction for the cost of the property.

The City of Goose Creek's definition of "gross income" is generally consistent with the ordinances of other South Carolina municipalities which equate "gross income" to the total revenue or total income of a business. The Court was provided with the ordinances of numerous municipalities including Abbeville, Aiken, Anderson, Beaufort, Camden, Cayce, Charleston, Chester, Columbia, Conway, Dillon, Florence, Georgetown, Greenville, Greer, Hartsville, Hilton Head, Isle of Palms, Mount Pleasant, Summerville, Myrtle Beach, North Charleston, Simpsonville, Spartanburg, Sumter, Union, and Walterboro. All of these municipalities rely on a "total revenue" type definition of "gross income."

The City of Goose Creek's ordinance and interpretation is also consistent with the

position taken by the South Carolina Municipal Association which provides in its handbook: "A business license fee is an excise tax levied on the privilege of doing business, and the value of the privilege extended is measured by the business's gross receipts." Municipal Association Business License Handbook, page 2. The Handbook goes on to state "Gross income may be defined by the license ordinance and generally means all revenue received from the business operation without any deductions for such things as the cost of goods, overhead, salaries or cost of sales." Handbook, page 14.

Courts should afford substantial deference to the decisions of those charged with interpreting and applying local ordinances. Purdy v. Moise, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953). Likewise "where the construction of the statute has been uniform for many years in administrative practice, and has been acquiesced in by the General Assembly for a long period of time, such construction is entitled to weight, and should not be overruled without cogent reasons" Etiwan Fertilizer Company v. South Carolina Tax Commission, 217 S.C. 354, 60 S.E.2d 682 (1950).

Olds makes the point that "gross income" cannot be defined by municipalities more expansively than the grant of authority from the statute authorizing such fees. While this is correct, it does not necessarily follow that the use of the term "gross income" in S.C. Code § 5-7-30 was meant to follow federal law. In Bogan v. Bogan, 298 S.C. 139, 378 S.E.2d 606 (Ct. App. 1989) the Court of Appeals held that "the term 'gross income' does not carry the same definite and inflexible meaning under all circumstances and wherever used. Its meaning depends upon the subject under consideration, the connection in which it was used, and the results intended to be accomplished."

In Carter v. Linder, 303 S.C. 119, 399 S.E.2d 423 (1990), the Supreme Court

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considered a county business license ordinance derives its authority from a substantially similar authorization at S.C. Code § 4-9-30 authorizing business license fees on "gross income." The South Carolina Supreme Court noted, "A license tax upon persons and businesses is an excise tax on the privilege of doing business, and no prohibition against the utilization of excise taxes exists. . . . The tax is not on the property itself, it is on the privilege of dealing with it. The value of such privilege is measured by the gross receipts therefrom and this is a familiar and valid method of ascertaining such value." Id. (citing, Hay v. Leonard, 212 S.C. 81, 46 S.E.2d 653 (1948)).

South Carolina has a long history of license taxes (also sometimes known as privilege taxes) based on the total revenue of a business. South Carolina had privilege taxes based on "gross income" before the enactment of any income tax and before the 1913 ratification of the 16th Amendment to the Constitution of the United States authorizing income taxes. As noted in Columbia Rwy Gas & Elect. Co. v. Jones, 119 S.C. 480; 112 S.E. 267 (S.C. 1921)

The tax imposed by Section 269, Vol. 1, Code 1912, therein called a "license fee," is manifestly an excise tax, laid under the benefit theory of taxation upon the public service corporation named for the privilege of exercising their corporate franchise and carrying on their business within the State. 26 R. C. L., p. 36, § 19; Ware Shoals Mfg. Co. v. Jones, 78 S.C. 211, 58 S.E. 811. The measure of the tax is volume of business or "gross income for business done." Gross income means the total receipts from a business before deducting expenditures for any purpose. Black's Law Dictionary; German Alliance Ins. Co. v. Van. Cleave, 191 Ill. 410, 61 N.E. 94, 96.

Other states also have similar notions of taxes based on "gross income." As noted in 2-29 Bender's State Taxation: Principles and Practice § 29.03

Gross receipts taxes may be imposed on the "gross income of the business," "gross receipts," "gross proceeds of sales" or any other term that suggests total business revenues before deductions. Consequently, the term is used

in a different context than as it relates to federal tax law which defines "gross income" as income net of "cost of goods sold" and similar expenses related to producing the income.

Finally, this court must consider the meaning of the word "gross income" in South Carolina Code § 5-7-30 taking into consideration how the words are used by each code and the results sought to be accomplished. The federal income tax system is a tax on net income or profit. A merchant in goods other than real estate lists his total sales as "gross income" and deducts his cost of goods and other necessary and proper business expenses before application of the federal tax rate. Due to the wording of I.R.C § 61, a real estate entrepreneur may list the difference between the purchase price and sales price on the gross income line of the return. However, both get to deduct the costs of what is sold once. And both merchant and real estate entrepreneur ultimately pay a federal income tax on the net income, not the gross income.

In contrast, Mr. Olds advocates an interpretation for local taxes which would result in the merchant paying a municipal business license fee on gross receipts without deduction for the costs of goods sold while the real estate entrepreneur business pays a business license fee only on its net receipts. Mr. Olds' argument that I.R.C. § 61 defines the outer limits of taxation under S.C. Code § 5-7-30 and to Goose Creek's ordinances would produce an absurdly disparate result between real estate businesses and non-real estate businesses.

For the reasons stated above, I conclude federal law including I.R.C. § 61 does not provide the definition of "gross income" for the purposes of S.C. Code § 5-7-30 or the City of Goose Creek's Business License Ordinance. I believe that Goose Creek's method of calculating Olds' business license fee and the decision of City Council should be affirmed.

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Olds has joined with his appeal a variety of causes of action. The Court will address each cause of action listed in the complaint.

A. Equal Protection

Olds claims a violation of Equal Protection on the basis that the City of Goose Creek has "adopted a deliberately tortured interpretation of its ordinance in an effort to single out the plaintiff for disparate treatment . . ." The deposition testimony in this case establishes that the City of Goose Creek is applying its interpretation uniformly and that there is no person known to be paying a business license fee in any manner different than Mr. Olds. See Althoff Deposition p. 19. (Q: Are you aware of anybody who is buying and selling homes for business purposes in the City of Goose Creek that is not paying based on the total amount of the home sale? A: No. Q: . . . as far as you know, everybody is paying the way you are asking Mr. Olds to pay. A: Yes.) "The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." Town of Hollywood v. Floyd, 403 S.C. 466, 744 S.E.2d 161 (2013). Accordingly, there is no basis for an equal protection claim.

B. Abuse of Process

Olds complains that the City threatened to withhold water service if he did not pay his business license fee and in fact refused to open a new account until his business license was paid. The City's policy is that it will not turn on a new water connection for a business that does not have a proper business license or that is in arrears on its business license payments. But this policy is not abuse of process nor is it in any way illegal. Abuse of process is some misuse of the processes of the courts. A denial of water service is not an abuse of process. Further Mr. Olds has always had the ability to pay the sum

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under protest and to pursue an appeal of the same. As to the additional sum that was calculated to be due, he has not done so.

C. Procedural Due Process

Plaintiff complains that due process requires that he have been afforded an opportunity to be heard. Although Mr. Olds was allowed to appear (with or without counsel) at the hearing before the City Administrator who acted as the finder of fact/hearing officer, City Ordinance provides that at the next level of appeal " City Council shall review the records and without further oral argument or presentation of evidence will affirm, modify or deny the appeal." On its face, this section of the ordinance is not unfair or illegal. However, when the Court examined the record of the appeal, it appears that the appeal was held at a City Council meeting where the City Administrator and the City Finance Director were present. City Council called on the City Administrator and City Finance Director to explain the appeal and the City's position to Council. The City employees obliged. I find that this system is not fair. Either City Council should hear from no one or from both sides, but not just one side. In the City's defense, it invited Mr. Olds or his counsel to appear prior to the meeting, but Mr. Olds' counsel declined citing the language of the statute preventing him from arguing the case before Council. Whether Olds was included or excluded, explicitly or implicitly, is irrelevant under the facts of this case. Mr. Olds concedes the issue of interpretation of the ordinance is an issue for the Court to decide as a matter of law. Therefore, neither the appearance of Mr. Olds or his exclusion would have any impact on this appeal. Indeed, Mr. Olds did submit a memorandum setting forth his position that was provided to the City Administrator and the City Council. Because this is strictly a legal issue of statutory construction and because the appellant's

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position was fully preserved and protected as to preservation of appellate issues by the filing of his brief, I find there are no damages here from the absence of Mr. Olds from the hearing. However, in the future, I would suggest City Council allow litigants to be heard or allow no one to be heard.

D. Substantive Due Process

Mr. Olds complains that there is a substantive due process violation in the City misapplying its ordinance. Because this court agrees with the City, there is no substantive due process claim.

E. Violation of Freedom of Information Act

Mr. Olds states in his appeal/complaint that there was a violation of the Freedom of Information Act. This is incorrect. The appellate record shows the agenda for the City Council Meeting. At the bottom of the agenda, it reveals that it was posted at least 24 hours in advance and it was sent to local media sources. The agenda identifies the subjects to be heard including the business license appeal hearing of Todd Olds. This complies with the South Carolina Freedom of Information Act in every respect. S.C. Code § 30-4-80.

F. Damages and Attorneys Fees

Plaintiff's last cause of action is for attorney's fees pursuant to South Carolina Code § 15-77-300 and § 30-4-100. The latter is the Freedom of Information Act which is addressed above. The former is the provision which allows for attorneys fees against government entities if the government entities position is not "substantially justified." The ruling of this court is that the City's interpretation of "gross income" is correct. Even if this court were to disagree, there is substantial justification for the position the City has taken.

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G... 42 U.S.C. § 1983 and S.C. Constitution Article I, §22

These are actually two entirely different causes of action. As it relates to 42 U.S.C. 1983, plaintiff can show no deprivation of a constitutionally protected right. The closest he comes is that the City refused him new water service. However, there is no known constitutional right to new water service.

The South Carolina Constitution Article I, Section 22 provides "No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review." There is no known case law suggesting violation of this section creates a private right of action. However, by its terms this section of the South Carolina Constitution is inapplicable. Olds did not appear before an "administrative agency." Further, Olds was granted a right of judicial review.

H. Civil Conspiracy

Plaintiff alleges in an amended complaint that Ron Faretra and Jennifer Althoff conspired to do certain things including miscalculating his business license fee and inspecting for a possible violation of the business license ordinance. As noted in the affidavit of City Administrator, Dennis Harmon, these actions were taken in the official capacity of Faretra and Althoff. Therefore, this action against them individually is barred by S.C. Code § 15-78-70. Furthermore, employees of a business acting together in furtherance of the business are not two or more persons acting in a conspiracy. McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 626 S.E.2d 884 (2006).

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I. Breach of Contract

Plaintiff attempts to argue that he is entitled to sue the Department of Public Works of the City of Goose Creek. The City responds that the Public Works Department is simply a department of the City. Further, the evidence in this case shows that the City turned water off for the prior customer and would not turn on a new account in Olds' name as he had delinquent business license fee account. Olds makes the point that he was denied service even after he paid a water turn-on fee. This misses the point that the City is not required to turn on new water service to a business account which does not have the proper license due to non-payment of license fees. Nothing requires a municipality to provide water service simply because it has accepted a deposit. The turn-on fee has since been returned to Mr. Olds by the City.

J. Tort Claims Act Immunities

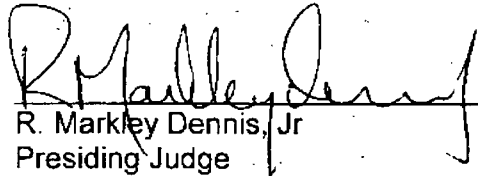
Finally, the City of Goose Creek raises that all or some of the causes of action both alleged and proposed to be amended are barred by various provisions of the South Carolina Tort Claims Act. South Carolina Code § 15-78-60 has various subsections where sovereign immunity was retained. The City submits that multiple subsections are applicable including (1), (2), (3), (4), (11), (12), and (13).

I do note that subsection (11) prevents an action based on assessment or collection of a tax or enforcement of tax laws. A business license fee is a type of tax that is collected. Tort claims relating to assessment or collection of a tax would be barred by the retained sovereign immunities of the South Carolina Tort Claims Act. It would be unreasonable to interpret this as apply to only those taxes that were properly calculated and collected. There is no need for tort immunity for properly calculated and collected

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taxes. Of course, there is a mechanism for contesting the calculation of taxes of all types including payment under protest. In the view of this Court there is no tort remedy for an improperly calculated tax or fee. The City concedes that if it has incorrectly calculated a tax, it will refund any sums paid under protest with interest.

For the reasons stated above, the appeal in this case is AFFIRMED. The Motion for Summary Judgment of the City of Goose Creek is GRANTED. The Motion for Summary Judgment of Todd Olds is DENIED.


R. Markley Dennis, Jr
Presiding Judge

Charleston, S.C.

Sept 3, 2014

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STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
Case No. 2011-CP-08-2814

TODD OLDS,

PLAINTIFF,

CITY OF GOOSE CREEK,

DEFENDANT.

ORDER

CLERK OF COURT
BERKELEY COUNTY, SC

2014 OCT -8 PM 1:25

FILED

This matter comes before me upon Motion for Reconsideration filed by Plaintiff, TODD OLDS, by and through his attorney, Thomas R. Goldstein, Esquire. Based on the pleadings, submissions and memorandums in this matter, the Motion for Reconsideration is denied without oral argument;

AND IT IS SO ORDERED!


R. MARKLEY DENNIS, JR.
Presiding Judge

Moncks Corner, South Carolina

October 3, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals.

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2011-CP-08-2814

Todd Olds..... Plaintiff,

vs.

City of Goose Creek Respondent,

of whom

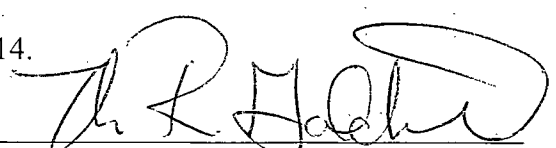
Todd Olds is the..... Appellant.

NOTICE OF APPEAL

Todd Olds appeals the Final Order of the Honorable R. Markley Dennis, Jr., granting summary judgment, filed September 5, 2014, and thereafter the Order denying Reconsideration filed October 8, and received by counsel on October 20, 2014.

November 3, 2014

Other counsel of Record:
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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
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R. Markley Dennis, Jr., Circuit Court Judge

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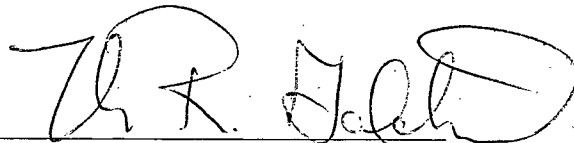
of whom

Todd Olds is the..... Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Respondent, City of Goose Creek, by depositing a copy of it in the United States Mail, postage prepaid, on November 3, 2014, addressed to its attorney of record, Timothy A. Domin, 126 Seven Farms Drive, Suite 200, Daniel Island, S. C. 29492.

November 3, 2014



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SC Court of Appeals