

RECEIVED

DEC 29 2014

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM
Administrative Law Court

The Honorable Deborah Brooks Durden, Administrative Law Judge

Opinion No. 5275 (S.C. Ct. App. Filed October 15, 2014)

Mitul Enterprises, L.P.....Petitioner

-vs-

Beaufort County Assessor.....Respondent

PETITION FOR A WRIT OF CERTIORARI

J. Ashley Twombly
S.C. Bar No.: 72916
Jennifer I. Campbell
S.C. Bar No.: 13581
Twenge + Twombly Law Firm
311 Carteret Street, Beaufort, SC 29902
Telephone: (843) 982-0100
Facsimile: (843) 982-0103
www.twlawfirm.com
Attorney for Petitioner

Other Counsel of Record:
J. Andrew Yoho, Esquire
Stephen P. Hughes, Esquire
Howell Gibson & Hughes, PA
P.O. Box 40, Beaufort, SC 29901
Telephone: (843) 522-2400
Facsimile: (843) 522-2429
hgpha@islc.net
Attorney for Respondent

TABLE OF CONTENTS

Table of Authorities ii, iii

Certificate of Counsel 1

Questions Presented for Review 1

Statement of the Case 1

Argument 4

I. The Court of Appeals misapprehended what “omitted property” is under property tax law..... 4

II. The Court overlooked and misapprehended In re: United AG Services, Inc., when determining that Mitul’s property was omitted property 7

III. The Court of Appeals’ Opinion will open the flood gates for South Carolina assessors..... 9

IV. The Court of Appeals misconstrued the long standing rule that taxpayers should be given the benefit of the doubt in the enforcement of tax statutes and improperly limited application of the rule to cases determining whether the taxpayer is subject to the tax 12

V. The Court of Appeals extended the authority given to county auditors to county assessors in direct contravention to the South Carolina Supreme Court’s directive.. 14

VI. The Court of Appeals improperly relied on Columbia Developers, Inc. v. Elliott when deciding that the improvements to Mitul’s property are omitted property .. 15

VII. The Court of Appeals erred in finding that Issues II, VI, and VII as stated in Appellant’s Brief to the Court of Appeals were not preserved for review 16

Conclusion 19

TABLE OF AUTHORITIES

Cases

Alltel Communications, Inc., v. S.C. Dept. of Revenue,
399 S.C. 313, 731 S.E.2d 869 (2012) 13

Atlantic Coast Lumber Corp. v. Query,
171 S.C. 441, 172 S.E. 432 (1934) 12

Columbia Developers, Inc v. Elliott,
269 S.C. 486, 238 S.E.2d 169 (1977) 1, 15

Cooper River Bridge, Inc. v. S.C. Tax Commission,
182 S.C. 72, 188 S.E. 508 (1936) 14

Gause v. Smithers,
403 S.C. 140, 742 S.E.2d 644 (2013) 16

Hadden v. S. Carolina Tax Comm’n,
183 S.C. 38, 190 S.E. 249 (1937) 14

Herron v. Century BMW,
395 S.C. 461, 719 S.E.2d 640 (2011) 16

In Re: United AG Services, Inc.,
159 P.3d 1050 (Kan. 2007)..... 1, 3, 7, 8, 9, 10

Long Cove Home Owners’ Association, Inc., v. Beaufort County Tax Equalization Board, 327 S.C. 135, 488 S.E.2d 857 (1997) 3, 5, 6, 15

Regions Bank v. Owens,
402 S.C. 642, 741 S.E.2d 51 (Ct. App. 2013) 16

S.C. Dep’t of Transp. v. First Carolina Corp. of S.C.,
372 S.C. 295, 641 S.E.2d 903 (2007) 16

South Carolina National Bank v. S.C. Tax Commission,
297 S.C. 279, 376 S.E.2d 512 (1989). 13

State v. Russell,
345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) 16

Statutes

S.C. Code Ann. § 12-4-510(3) (Supp. 1995).....10

S.C. Code Ann. § 12-4-520(3) (Supp. 1995).....10

S.C. Code Ann. § 12-35-1370.13

S.C. Code Ann. § 12-39-2204, 11, 14, 16, 17, 18

S.C. Code Ann. § 12-39-25010, 16, 17

S.C. Code Ann. § 12-54-80(2).....13

S.C. Code Ann. § 12-60-2510(A)(1)18, 19

Pursuant to Rule 242, SCACR, Petitioner Mitul Enterprises petitions this Court to issue a Writ of Certiorari to review the decision of the Court of Appeals in this matter.

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that Petitioner made a Petition for Rehearing with the Court of Appeals and that the Court of Appeals issued an Order denying the Petition for Rehearing on November 21, 2014.

QUESTIONS PRESENTED FOR REVIEW

- I. What is “omitted property” under South Carolina’s “omitted property” statute and did the Court of Appeals err in concluding that Mitul’s property was “omitted property”?
- II. Should South Carolina courts adopt or follow In re: United AG Services, Inc., in considering “omitted property,” and did the Court of Appeals misapprehend In re: United AG Services, Inc., in its analysis?
- III. Did the Court of Appeals err by arming county assessors with the “omitted property” statute as a catchall weapon to correct any mistake made by county governments in the collection of real property taxes?
- IV. Did the Court of Appeals misconstrue the long standing rule of statutory construction that gives taxpayers the benefit of the doubt in the enforcement of tax statutes and improperly limit application of the rule to cases determining whether the taxpayer is subject to the tax?
- V. Did the Court of Appeals improperly extend the authority given to county auditors to county assessors?
- VI. Did the Court of Appeals err in relying on Columbia Developers, Inc. v. Elliott when deciding that the improvements to Mitul’s property are omitted property?
- VII. Did the Court of Appeals err in finding that issues were not preserved for review?

STATEMENT OF THE CASE

Petitioner Mitul Enterprises, L.P., (hereinafter “Mitul”) owns real property in Beaufort County identified as TMS # R122 001 000 0001 0000. (R. p. 40). In 2008 and 2009, Mitul added a Holiday Inn and Suites on the property, and Respondent Beaufort

County Assessor (hereinafter the "Assessor") sent out an Assessment Notice Dated 10/15/09 that included the value of new construction in the market value of \$11,775,674.00. (R. p. 40). Mitul appealed the assessed value of \$11,775,674.00 and estimated the value of the parcel at \$9,000,000.00. (R. p. 43). The Assessor subsequently changed the value of the property to \$9,000,000.00. (R. p. 44).

The Beaufort County Treasurer Office then sent a 2009 Beaufort County Property Tax Bill to Mitul with a total tax due of \$14,290.10. (R. p. 45). After receiving the 2009 Beaufort County Property Tax Bill, Mitul timely paid the taxes due, and Beaufort County accepted the tax payment in January 2010. (R. p. 17, lines 9-25; R. p. 19, lines 22-25).

After Mitul paid its 2009 taxes, it received a desk letter dated June 23, 2010 (five months after the taxes were paid and accepted) from the Assessor stating that the taxable value was not based on the correct market value and asking for additional 2009 property taxes to be paid in the amount of \$105,282.48. (R. p. 19, lines 22-25; R. p. 46). Mitul timely appealed the attempt to assess additional 2009 property taxes first to the Assessor. (R. p. 75). The Assessor denied the appeal. (R. p. 76). Mitul then filed an appeal with the Beaufort County Tax Equalization Board. (R. p. 77). The appeal was denied, and Mitul then sought a contested case hearing before the Administrative Law Court.

A hearing was held before the Administrative Law Court on November 12, 2012. After the hearing, the Administrative Law Court filed a Final Order and Decision on December 14, 2012 that upheld the imposition of additional 2009 property taxes on the parcel. Mitul timely filed a Notice of Appeal with the Court of Appeals. (R. p. 9).

The Court of Appeals issued an Opinion affirming the decision of the Administrative Law Court. (A. p. 1). Mitul filed a timely Petition for Rehearing (A. p. 6),

and the Court of Appeals denied the Petition for Rehearing by Order dated November 21, 2014. (A. p. 33). Mitul now seeks a Writ of Certiorari from this Court.

WRIT OF CERTIORARI SHOULD BE GRANTED

This Petition for a Writ of Certiorari should be granted because the Court of Appeals' decision significantly increases the power of county assessors to use the "omitted property" statute to correct a myriad of errors that might occur during the taxation process, such that there is no limit to the county assessors' tax net. Specifically, it allows assessors to collect property taxes, and correct mistakes made in the collection of property taxes, in a manner that was never intended by the South Carolina legislature. The Court of Appeals' Opinion, if allowed to stand, paves the way for the "mischief, uncertainty and chaos" that the Kansas Supreme Court warned of in In Re United AG Services, 159 P.3d 1050 (Kan. 2007), when addressing a virtually identical issue under the Kansas "omitted property" statute. Moreover, the Court of Appeals' decision improperly limits the long standing rule that taxpayers should be given the benefit of the doubt in the enforcement of tax statutes only to cases determining whether the tax payer is subject to the tax and thus conflicts with long-standing Supreme Court decisions holding that taxpayers should be given the benefit of the doubt in the enforcement of tax statutes. In addition, the decision of the Court of Appeals relating to what constitutes omitted property is in conflict with a prior decision of this Supreme Court, namely, Long Cove Home Owners' Association, Inc., v. Beaufort County Tax Equalization Board, 327 S.C. 135, 488 S.E.2d 857 (1997). Finally, the Court of Appeals' Opinion allows county assessors to use the "omitted property" statute, in violation of the statute itself (which gives county auditors the authority to use the "omitted property" statute) and in violation

of this Court's decisions that the literal meaning of words used in the tax statutes are not to be extended.

ARGUMENT

I. The Court of Appeals misapprehended what "omitted property" is under property tax law.

South Carolina Code § 12-39-220 (known as the "omitted property statute")

provides as follows:

If the county auditor shall at any time discover that any real estate or new structure, duly returned and appraised for taxation, has been omitted from the duplicate, he shall immediately charge it on the duplicate with the taxes of the current year and the simple taxes of each preceding year it may have escaped taxation. And if the owner of any real estate or new structure thereon, subject to taxation, has not reported it for taxation, according to the requirements of this chapter, and it has not been appraised for taxation, the auditor shall, upon discovery thereof, appraise it and, upon making return of such appraisement, shall charge it upon the duplicate, with the taxes of the then current year and the taxes of each preceding year it may have escaped taxation, with twenty per cent penalty upon such taxes of preceding years. And if any real estate shall have been omitted in any return, the auditor of the county shall appraise it immediately for taxation, file such appraisement in his office and charge it with the taxes of the current year and the simple taxes of preceding years it may have escaped taxation.

The Court of Appeals concluded that the new structure (the Holiday Inn and Suites) on Mitul's property was "omitted property" and therefore falls within South Carolina's "omitted property" statute. The new structures built on Mitul's property was not omitted from the tax rolls but was simply improperly capped by Beaufort County's computer program. Therefore, South Carolina's "omitted property" statute is simply not applicable to correct an improper capping mistake by Beaufort County.

Mitul's property was on the tax roll and had been assigned tax map numbers. (R. p. 40). It was not "omitted" from the tax rolls. In addition, the new hotel was known to and considered by Beaufort County, and was actually given a value of \$11,775,674. (R.

p. 40). It was not “omitted” from the tax rolls. The value of the new hotel was included by Beaufort County in the Assessment Notice it sent Mitul dated October 15, 2009. (R. p. 18, lines 1-14; R. p. 40). It was not “omitted” from the tax rolls. In addition, the Notice of Action – Value Change also includes the value of the new hotel building. (R. p. 18, lines 15-24; R. p. 44). Accordingly, Mitul’s property, including the value of the new hotel, was known to Beaufort County and was not “omitted” from the tax rolls.

Beaufort County concedes that it knew about the new hotel, that the real property it sits on had been assigned tax map numbers, that it had appraised the new hotel and that the value of the new hotel was included in the October 15, 2009 Assessment Notice and in the Notice of Action – Value Change. Nevertheless, Beaufort County argues that a computer error caused the value of the new hotel to be improperly capped. (Resp. Brief pp.2-3). This is simply not a case of omitted property.

Very little case law discusses what is or is not “omitted property” under South Carolina law. In Long Cove Home Owners’ Association, Inc., v. Beaufort County Tax Equalization Board, 327 S.C. 135, 488 S.E.2d 857 (1997), the Beaufort County Assessor attempted to use the “omitted property” statute to impose taxes on the common areas of a planned unit development. The common areas had been on the tax roll for prior years but had been assessed with a market value of \$0.00. The Supreme Court found that the common areas in the planned unit development were not “omitted” from the tax rolls because Beaufort County knew about them and had assigned a value to them:

this property was not omitted property as Beaufort County contends. Because the parcels were assigned tax map numbers and had been assessed a market value of zero or near zero in prior tax years, the Department found the properties were listed on the tax rolls and were not omitted property. Substantial evidence supports this finding of fact. The Department further found the power to assess omitted property does not carry with it the power to revalue property already assessed. Further, there

was no change in condition of these properties warranting a reassessment. Therefore, the Tax Assessor lacked the authority to reassess these properties.

Id. at 140, 488 S.E.2d at 860 (internal citation omitted).

Just as the value of the common area property in Long Cove was not “omitted” from the tax rolls, the value of the new hotel at issue here was not “omitted” from the tax rolls. In both cases, Beaufort County knew about the particular item at issue (common property and a new hotel building) and had placed a value on the particular item. In both cases, there was no change in the common property from the time of the assessment at issue until the time of the new assessment, just as there was no change in the new hotel building in between the time of the October 15, 2009 assessment notice and Beaufort County’s attempt to collect additional tax on June 23, 2010.

The Assessor has argued that due to a computer error, the value of Mitul’s hotel was omitted from the tax rolls and therefore Long Cove does not apply in this case. However, as discussed herein, Mitul’s hotel was not omitted from the tax rolls. Mitul’s property was on the tax roll and had been assigned tax map numbers. (R. p. 40). Beaufort County knew about the new hotel and gave it a value of \$11,775,674. (R. p. 40). The value of the new hotel was included by Beaufort County in the Assessment Notice it sent Mitul dated October 15, 2009. (R. p. 18, lines 1-14; R. p. 40). In addition, the Notice of Action – Value Change also includes the value of the new hotel building. (R. p. 18, lines 15-24; R. p. 44). Mitul’s hotel, like the property in Long Cove, simply was not omitted completely from the relevant tax rolls. Because the Court of Appeals’ Opinion is in conflict with a prior decision of this Court and for the reasons discussed herein, the Court should grant the Petition for Certiorari and issue an Opinion reversing the Court of Appeals’ decision.

II. The Court overlooked and misapprehended In re: United AG Services, Inc., when determining that Mitul's property was omitted property.

There is very little case law in South Carolina discussing or addressing the procedure for collecting property taxes under an "omitted property" statute; in fact, there are only two published appellate cases in South Carolina even mentioning the "omitted property" statute. However, most states have such a statute, and some states have well-developed case law addressing the same. Therefore, Mitul believes it is important for the Court to consider how other states handle this issue.

The opinion in In re: United AG Services, Inc., 159 P.3d 1050 (Kan. 2007), provides a detailed analysis of a situation almost identical to the instant case and provides a more thorough explanation of what, and what does not, constitute omitted property. This analysis was ignored by the Court of Appeals in the instant case.

In United AG Services, the taxpayer replaced two concrete grain elevators on his property. In 2000, three years after the grain elevators were replaced, the county appraiser discovered that the value of the grain elevators had not been added to the property valuation. The county then sent out an additional tax bill for 1998 and 1999 to tax the value of the grain elevators. In doing so, the county relied on the Kansas "omitted property" statute (K.S.A. 79-1475). Id. at 1053. Kansas' statute is substantively the same as South Carolina's statute. The taxpayer challenged the additional tax, arguing that the property at issue was not "omitted" from the tax rolls.

In its opinion, the Kansas Supreme Court noted that "whether or not property has truly escaped taxation" has been the subject of "considerable litigation." In concluding that the parcel at issue did not "escape" taxation and was not "omitted from the tax rolls," the Kansas Supreme Court explained as follows:

The county suggests that the property was subject to escaped taxation pursuant to [the Kansas “omitted property” statute], which provides: ‘Whenever the county appraiser discovers that any real property subject to taxation has been omitted from the tax rolls, such property shall immediately be listed and valued by the appraiser, and returned to the county clerk.’ Whether or not property has truly ‘escaped’ taxation, however, has been a subject of considerable litigation in Kansas. Suffice it to say that these cases focus on the phrase ‘omitted from the tax rolls’ in construing and applying the escaped tax statute.

The current version of [the Kansas “omitted property” statute] was interpreted by this court in In re Application of TV Realty. There, this court declined to apply the statute to allow belated ‘escaped’ taxation from the owner of realty where the county failed to change the name and address of the owner of recently acquired realty so that the prior owner timely received the tax bill, but the new owner did not. In refusing to apply [the Kansas “omitted property” statute], the court reasoned: ‘[the Kansas “omitted property” statute] is limited in its application to property that has been omitted from the tax rolls. Both parcels purchased by TV Realty were listed on the tax rolls; the tax statement for the one in question simply was not mailed to the new owner. We agree with BOTA that this was not ‘escaped’ property within the meaning of the statute.’

We believe that the analysis and result in TV Realty is sound, and we follow it here. **Because some improvements of UAS were assigned a parcel number, listed on the tax rolls and assessed for the tax years in question, the parcel of realty itself did not “escape” taxation within the meaning of [the Kansas “omitted property” statute] despite the absence of any value attributable to the new grain elevators.** See also In re Harry Turner and Associates, Inc., 153 B.R. 573 (Bankr.D.Kan.1993) (property on the rolls as exempt not subject to belated “escaped” taxation); Bd. of Equalization v. Nupetco Assoc., 779 P.2d 1138 (Utah 1989) (mistake in acreage within assessed parcel of realty did not “escape” taxation but rather mere undervaluation not subject to retroactive correction).

Id. at 1057-1058 (emphasis added)(internal citations removed)

Just as in United AG Services, Mitul’s property was assigned a parcel number, listed on the tax rolls and assessed for the tax years in question. Mitul also paid the taxes owed in full. Therefore, the parcel of realty itself did not “escape” taxation and was not “omitted” from the tax rolls. In addition, while in United AG Services no value at all was attributable to the new grain elevators, in this case, the value of the new hotel was known

to and considered by Beaufort County and was included in the Assessment Notice sent Mitul dated October 15, 2009. (R. p. 18, lines 1-14; R. p. 40). This simply was not omitted property, but rather a computer program error that improperly capped the value of the property.

The Assessor has attempted to distinguish the Kansas “omitted property” statute from the South Carolina “omitted property” statute by arguing that the Kansas statute refers to omission from the tax rolls of “any real property” while the South Carolina statute refers to “any real estate or new structure.” (A. p. 25). However, in United AG Services, the Kansas Supreme Court confirmed that as used in the statute, real property “shall include not only the land itself, but all buildings, fixtures, [and] improvements . . .” Id. at 907. Petitioner’s argument on this issue does not pass muster.

This Court and the Kansas Supreme Court agree that properties that are assigned tax map numbers and some improvements are assessed a value, with no change in condition to the property in between the first assessment and the would-be new assessment, are not omitted properties under each state’s “omitted property” statutes. Therefore, the Court of Appeals’ Opinion is in conflict with a prior decision of this Court. Accordingly, the Court should grant the Petition for Certiorari and issue an Opinion reversing the Court of Appeals’ decision.

III. The Court of Appeals’ Opinion will open the flood gates for county assessors.

If a South Carolina county tax assessor can classify any “omitted value” due to any type of error, including a computer error, as “omitted property” and use the “omitted property” statute to collect taxes on the omitted value, there would be no end or limit to an assessor’s tax net. As the Kansas Supreme Court warned:

If [the Kansas “omitted property” statute applies here] where would one stop? If a county appraiser learns that an income producing property was valued using the income approach to value assuming rents of \$15 per square foot and the property is actually leased at \$16 per square foot, should the court find an 'escaped' valuation and allow the appraiser to issue an escaped assessment? What if a home is valued at \$150,000 and sells for \$175,000, should the court find an 'escaped' valuation and allow the appraiser to issue an escaped assessment? **Clearly, the answer is no as any other answer would lead to all kinds of mischief, uncertainty and chaos.**

Id. at 1058 (emphasis added).

The Assessor argues that he is entitled to use the “omitted property” statute in this matter and that allowing property to escape appropriate taxation and barring him from pursuing additional tax monies owed would “sound in absurdity.” (A. p. 26). However, the Assessor’s argument ignores the fact that the Assessor had appropriate and legal ways to fix this computer error. For example, pursuant to the statutory scheme governing the South Carolina Department of Revenue (hereinafter the “Department”), the problem could have been reported by the Assessor to the Department who had the power to direct the assessor to fix an error like the one that occurred here. S.C. Code § 12-4-520(3) (Supp.1995) (directing the Department “to take any action necessary to insure the proper assessment, equalization, and taxation” of property in each county in South Carolina); see also S.C. Code Ann. § 12-4-510(3) (Supp.1995) (granting Department power to order reassessment to insure property is assessed in compliance with the law). These statutes provide the Department with the power to correct these types of problems in non-reassessment years. County auditors also have authority to correct assessments and other errors pursuant to S.C. Code § 12-39-250. For some unknown reason, the Assessor chose not to use any of these methods to correct what it concedes was a computer error.

Importantly, the Court of Appeals' Opinion, if allowed to stand, paves the way for the "mischief, uncertainty and chaos" that the Kansas Supreme Court warned of because there would be no limitations as to what type of improvements could be considered omitted property. For example, what if a homeowner added a garage to his house and the value of the garage was overlooked by the Assessor's office? Would the garage be omitted property? What if a homeowner added a fireplace in his house and the value of the fireplace was not included in the calculation of the property taxes? Would the fireplace be omitted property? What about a new ceiling fan? Taken to its logical extreme, the Court of Appeals' decision will overhaul how a county corrects mistakes made in calculating and collecting property taxes and give assessors the power and authority to collect tax on the value of any improvement a taxpayer may make to his/her property.

Even worse, the Court of Appeals' Opinion allows South Carolina assessors to use the "omitted property" statute as a catch-all provision to correct any number of mistakes that might be made during the assessment process. Presumably, so long as the "value" of an improvement was missed, for any reason, the "omitted property" statute would apply. Nothing suggests the South Carolina Legislature intended for S.C. Code Ann. § 12-39-220 to be used to fix such problems, particularly in light of the fact that the legislature has provided other appropriate channels for taxing authorities to follow to correct mistakes, as discussed above.

The Court of Appeals' Opinion in the instant case opens Pandora's Box and allows any county assessor to reassess a parcel or property under a myriad of circumstances using the "omitted property" statute. For these reasons, the Court should

grant the Petition for a Writ of Certiorari and issue an Opinion reversing the Court of Appeals' decision.

IV. The Court of Appeals misconstrued the long standing rule that taxpayers should be given the benefit of the doubt in the enforcement of tax statutes and improperly limited application of the rule to cases determining whether the taxpayer is subject to the tax.

The Court of Appeals improperly limited the long standing rule that taxpayers should be given the benefit of the doubt in the enforcement of tax statutes only to cases determining whether the tax payer is subject to the tax. In doing so, the Court of Appeals misconstrued a fundamental tenet of tax law, as expressed by this Court.

First, the rule that tax statutes are to be construed strictly against the government and in favor of the taxpayer has been applied to cases deciding issues other than whether a taxpayer is subject to a tax. For example, in Atlantic Coast Lumber Corp. v. Query, 171 S.C. 441, 172 S.E. 432 (1934), this Court was asked to determine if an agreement between Atlantic Coast Lumber Corporation and Internal Revenue Service to waive a time limit relating to payment of taxes should also apply to the South Carolina Tax Commission. The Court's analysis had nothing to do with whether or not Atlantic Coast Lumber Corporation was "subject to" a tax. The Supreme Court held that the waiver did not apply to the South Carolina Tax Commission, stating that "[n]umerous cases hold that the taxpayer should receive the benefit in cases of doubt in the enforcement of tax statutes, and this is a typical case for the application of that rule." Id. at 444, 172 S.E. at 433 (emphasis added). Therefore, the rule that requires that the tax payer be given the benefit of the doubt has been applied when a tax statute is being "enforced" and is not limited to analyzing whether a taxpayer is subject to a tax.

Additionally, this Court has applied this rule of statutory construction to determine whether S.C. Code Ann. § 12-54-80(2) may be applied retroactively to validate an assessment which was untimely under S.C. Code Ann. § 12-35-1370. South Carolina National Bank v. S.C. Tax Commission, 297 S.C. 279, 376 S.E.2d 512 (1989). In its analysis of whether the statute of limitations should have retroactive or prospective application, the Supreme Court stated that “[i]n the **enforcement** of tax statutes, the taxpayer should receive the benefit in cases of doubt.” Id. at 281, 376 S.E.2d at 513 (emphasis added).

Second, even when addressing whether a taxpayer is subject to a tax, this Court has not limited application of the rule the way the Court of Appeals did in the instant case. For example, in Alltel Communications, Inc., v. S.C. Dept. of Revenue, 399 S.C. 313, 731 S.E.2d 869 (2012), the Supreme Court did not limit the application of the rule solely to whether a taxpayer is subject to the tax, even though the question before the Court was whether Alltel Communications was a telephone company for purposes of tax law. In this 2012 case, the court noted that “[h]ere, the ALC referenced the settled principle that any substantial doubt in the **application** of a tax statute must be resolved in favor of the taxpayer.” Id. at 318, 379 S.E.2d at 872 (emphasis added). Moreover, the court stated the issue and its result as follows: “[i]n this regard, Petitioners contend the court of appeals erred in failing to construe **any** ambiguity in the tax statute against DOR. It necessarily follows, according to Petitioners, that **such ambiguity must** be construed in the taxpayers’ favor. We agree.” Id. at 321, 379 S.E.2d at 873 (emphasis added).

Finally, the Court of Appeals stated in its Opinion that a “strict construction” of the statutes may result in Mitul avoiding the tax at issue. Whether or not Mitul might avoid the tax is of no importance and should not influence this Court’s decision or

analysis. As this Court noted in Hadden v. S. Carolina Tax Comm'n, 190 S.E. 249, 251-52 (1937), “if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.” Id. at 251-52 (internal citations and quotations omitted). In the instant case, Mitul does not fall within the letter of the law and thus should be free from the tax.

Accordingly, the opinion of the Court of Appeals in this matter conflicts with prior decisions from this Court. This Court should therefore grant the Petition for a Writ of Certiorari and issue an Opinion reversing the Court of Appeals’ decision.

V. The Court of Appeals extended the authority given to county auditors to county assessors by implication, in direct contravention to the South Carolina Supreme Court’s directive.

In Cooper River Bridge, Inc. v. S.C. Tax Commission, 182 S.C. 72, 188 S.E. 508 (1936), the South Carolina Supreme Court instructed that “the taxpayer must receive the benefits in cases of doubt in the enforcement of tax statutes” and “the **literal meaning** of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used, and if the words are doubtful, the doubt must be resolved against the government and in favor of the tax payer.” Id. at 76, 188 S.E. at 509-10 (emphasis added).

The “omitted property” statute, by its express terms, gives authority to the County Auditor. S.C. Code Ann. § 12-39-220. The “omitted property” statute is part of Title 12, Chapter 39, which is entitled “County Auditors.” In fact, the Assessor is not mentioned in the “omitted property” statute. Because South Carolina law is clear that “the literal meaning of the works employed” in a tax statute are binding and “are not to extended by implication,” a statute authorizing a county auditor to take action cannot and should not

be used by a county assessor. Therefore, this Court should grant the Petition for a Writ of Certiorari and issue an Opinion reversing the Court of Appeals' decision.

VI. The Court of Appeals improperly relied on Columbia Developers, Inc v. Elliott when deciding that the improvements to Mitul's property are omitted property.

The Court of Appeals relied on Columbia Developers v. Elliott, 269 S.C. 486, 238 S.E.2d 169 (1977). There are several reasons why Columbia Developers should not be relied upon to decide this case. First, the question decided in Columbia Developers was simply whether the taxpayer was able to file a lawsuit to challenge a property tax assessment without exhausting administrative remedies. Second, as noted in the Opinion in the instant case, the court in Columbia Developers stated in dictum that "the trial judge reached a conclusion of which the evidence is susceptible. . . ." Id. at 491, 238 S.E.2d at 171. However, the Court in Columbia Developers does not analyze or discuss any rationale or support for this conclusory dictum, and the opinion does not indicate what "evidence" the Supreme Court was even considering. Finally, there are significant factual differences between Columbia Developers and the instant case. For example, a) the arguments made by Mitul here were not raised by the taxpayer in Columbia Developers, much less considered and resolved by the Court, b) the Richland County's Assessor's office was not a party to the Columbia Developers lawsuit, and c) it is unclear from the Court's opinion who in Richland County government discovered the error, corrected the error, or how the error was corrected by Richland County.

Instead of relying upon dictum in the 1977 opinion in Columbia Developers, the Court of Appeals should have relied upon the clear directive found in Long Cove and determined that Mitul's property was not omitted property. For these reasons, this Court

should grant the Petition for a Writ of Certiorari and issue an Opinion reversing the Court of Appeals' decision.

VII. The Court of Appeals erred in finding that Issues II, VI, and VII as stated in Appellant's Brief to the Court of Appeals were not preserved for review

Mitul's Issues II, V, and VI as stated in Appellant's Brief to the Court of Appeals are all preserved for review and were properly before the Court of Appeals. In order to be preserved for review by an appellate court, an issue must be raised to and ruled upon by the lower court. E.g. Gause v. Smithers, 403 S.C. 140, 742 S.E.2d 644 (2013); Regions Bank v. Owens, 402 S.C. 642, 741 S.E.2d 51 (Ct. App. 2013). However, a party does not have to phrase an issue in the exact same terms at trial and on appeal. As long as it is clear that an issue was raised to the trial judge, then it is preserved for review. See Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011); S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007); State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001).

(a) Issue II

Mitul's Issue II addresses whether the Administrative Law Court erred in using the "omitted property" statute (S.C. Code Ann. § 12-39-220) to correct a mistake on Mitul's Assessment and 2009 tax bill caused by a computer error. In its Appellant's Brief to the Court of Appeals, Mitul contends that at any time prior to the payment of the tax, S.C. Code Ann. § 12-39-250 could have been used to correct the computer error but that once the tax was paid, no one had the ability to assess additional 2009 property taxes based on the computer error.

At the hearing, Mitul raised this issue in closing arguments:

Your Honor, there is a statute that not only -- I pointed it out to you that this statute deals with auditors, but **there's another statute, and that is**

12-39-250. And I've got a -- it deals with the circumstances under . . . **which the auditor can correct errors.** And if you see, the title of this statute -- first of all, it's under Chapter 39 that deals with county auditors, and it says the duty to correct assessments and other errors. And so this statute deals with the circumstances under which a county auditor could go back and apply the omitted tax statute. And if you read this statute, **every one of the exceptions say at any time before the tax is paid. At any time before the tax is paid. Every one of these deal with situations before the tax is paid.** And here, the respondent concedes we had already paid these taxes, **we paid the full amount that they wanted us to pay, and, you know, we heard from them six months later that they wanted \$100,000 more.**

(R. p. 37, line 5-R. p. 38, line 2) (emphasis added).

In the Order, the Administrative Law Court framed the issue as “[w]hether the Assessor properly imposed taxes on the value of a newly constructed inn on the subject property for the 2009 tax year via a tax notice correction issued after the original tax bill was paid.” (R. p. 2) (underline added). The Administrative Law Court then concluded that the Assessor had the authority to levy \$105,282.48 in additional taxes. (R. p. 8). Accordingly, Mitul’s Issue II was raised to and ruled upon by the Administrative Law Court and is preserved for review.

(b) Issue V

In Issue V, Mitul argues that if the Beaufort County Assessor can exercise the authority of S.C. Code Ann. § 12-39-220, such authority cannot be exercised when the Beaufort County Assessor testified that there is no duplicate as required by S.C. Code Ann. § 12-39-220.

Ed Hughes, the Beaufort County Assessor, testified Beaufort County does not maintain a duplicate and that the Beaufort County tax roll is now produced electronically. (R. p. 21, lines 17-22). Mr. Hughes also testified that he believes the reference to a duplicate is obsolete. (R. p. 32, line 24-R. p. 34, line 3). During closing arguments,

Mitul stated that S.C. Code Ann. § 12-39-220, a statute that should be strictly construed against the taxing authority, states “if the county auditor discovers that any real estate or new structure, then they shall immediately charge it on the duplicate.” (R. p. 35, lines 11-14). Mitul also argued that the statute is antiquated and does not make sense given today’s technology and that it therefore cannot be applied under these circumstances. (R. p. 35, line 1-R. p. 36, line 3).

In the Order, the Administrative Law Court determined that the Assessor no longer had a duplicate. (R. 6). The Administrative Law Court then held that the Assessor had the authority to impose additional taxes under S.C. Code Ann. § 12-39-220: “Therefore, I must conclude that the Assessor had the authority under Section 220 to discover that property was omitted, to appraise the omitted property, and to assess the tax on any omitted property.” (R. p. 7). Therefore, Mitul’s Issue V was raised to and ruled upon by the Administrative Law Court and is preserved for review.

(c) Issue VI

Finally, Mitul’s Issue VI is also preserved for review. Mitul argues in Issue VI that the Administrative Law Court erred in allowing the Assessor to collect additional taxes from Mitul when Mitul never received a proper and correct Assessment Notice for those taxes as required by S.C. Code Ann. § 12-60-2510(A)(1).

In its closing argument, Mitul raised this issue to the Administrative Law Court:

And as you would suspect, there’s a statute that says before you go collect tax on property you’ve got to do certain things. And one of the things they have to do, and they have to mail it prior to October 1st, is they have to mail the tax holder an assessment notice, which they did that here. That included the assessment that was \$64,190. They were required to do that under the law. **That assessment notice was required under 12-60-2510**, it was required to state what the property tax assessment was, and it did, 69,000 -- or 65,190. And the assessment notice under this section, it must be in writing and it must include those things. **There is not a single --**

there is no assessment notice in the record anywhere, and that's because one doesn't exist, that includes an assessment of the \$540,000. If you go back and look through all the evidence that were admitted in, all the documents that were admitted into evidence, in June of 2010 when they found this out, Mr. Hughes sent a little one-page letter, and he attached to that one-page letter a property tax bill, but **he never sent and [sic] assessment.** And under 12-60-2510, the notice must include the property tax assessment. So what we've got here, Your Honor, and what it boils down to is they're trying to collect – **they're trying to assess this property for an assessment of \$540,000 with no assessment notice, none whatsoever. They absolutely cannot do that. You have -- you are required to send this out to a taxpayer before you go collect the taxes on it, and there's not even one here today.** (R. p. 38, line 9- R. p. 39, line 19) (emphasis added).

In its Order, the Administrative Law Court specifically held that the Assessor had the ability to assess the taxes on any omitted property: “Therefore, I must conclude that the Assessor had the authority under Section 220 . . . to assess the tax on any omitted property.” (R. p. 7) (emphasis added). Thus, Mitul’s Issue VI was raised to and ruled upon by the Administrative Law Court and is preserved for review.

In addition, for the reasons contained in Mitul’s Final Brief to the Court of Appeals, a consideration of the merits of these issues establishes that the Administrative Law Court erred in its ruling. For these reasons, the Court should grant the Petition for a Writ of Certiorari and issue an Opinion reversing the Court of Appeals’ decision.


CONCLUSION

For the reasons contained herein, the Petition for a Writ of Certiorari should be granted and this Court should issue an Opinion reversing the Court of Appeals’ decision.

Respectfully Submitted,

TWENGE + TWOMBLEY LAW FIRM

BY:



J. ASHLEY TWOMBLEY
S.C. Bar No. 72916
JENNIFER I. CAMPBELL
S.C. Bar No. 13581
311 Carteret Street, Beaufort, SC 29902
Telephone: (843) 982-0100
Facsimile: (843) 982-0103
Attorneys for Petitioner

Beaufort, South Carolina

December 23, 2014

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM
Administrative Law Court

The Honorable Deborah Brooks Durden, Administrative Law Judge

Opinion No. 5275 (S.C. Ct. App. Filed October 15, 2014)

Mitul Enterprises, L.P.....Petitioner

-vs-

Beaufort County Assessor.....Respondent

CERTIFICATE OF SERVICE

The undersigned, Andrea Smith, hereby avers that she is a Paralegal with TWENGE + TWOMBLEY LAW FIRM, Attorneys for Petitioner, and that on the 23rd day of December 2014 a true and accurate copy of the attached Petitioner's Petition for a Writ of Certiorari was placed in an envelope with first class postage thereon prepaid through the United States Postal Service and mailed to the following:

Stephen P. Hughes, Esquire
J. Andrew Yoho, Esquire
Howell Gibson & Hughes, PA
P.O. Box 40
Beaufort, SC 29901
Telephone: (843) 522-2400
Facsimile: (843) 522-2429
hgpha@islc.net
Attorneys for Respondent

BY:



Andrea Smith, Paralegal to
TWENGE + TWOMBLEY LAW FIRM

TWENGE + TWOMBLEY LAW FIRM LLC

311 CARTERET STREET
BEAUFORT, SOUTH CAROLINA 29902
PH: 843.982.0100 + FX: 843.982.0103

WEB: TWLAWFIRM.COM

J. ASHLEY TWOMBLEY+
KARL D. TWENGE
JENNIFER I. CAMPBELL+

:+ LICENSED IN SC + GA
:+ OF COUNSEL

December 23, 2014

Via U.S. Mail

The Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

**RE: Mitul Enterprises, L.P. v. Beaufort County Assessor
Appellate Case No.: 2013-000106**

Dear Mr. Shearouse:

Please find enclosed the original and seven (7) copies of Petitioner's Petition for a Writ of Certiorari and Certificate of Service in the referenced matter, as well as two (2) copies of the Appendix, Record on Appeal, Appendix to the Record on Appeal, Appellant's Final Brief, Respondent's Final Brief and Appellant's Final Reply Brief, each of which one is bound and one is unbound. I would appreciate it if you would file the original and six copies of the Petitioner's Petition for a Writ of Certiorari and return a clocked copy to me in the enclosed self-addressed stamped envelope. Additionally, enclosed is my firm's check in the amount of \$100.00, which represents the required filing fee.

By copy of this letter, I am serving the Petition for a Writ of Certiorari upon The Honorable Jenny Abbott Kitchings, Clerk for the Court of Appeals, and all counsel of record.

Thank you for your assistance in this matter. If you have any questions, please do not hesitate to contact me.

With kindest regards, I remain,

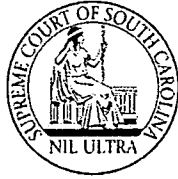
Cordially,



J. Ashley Twombley

cc: The Honorable Jenny Abbott Kitchings
J. Andrew Yoho, Esquire
Stephen P. Hughes, Esquire
Mitul Enterprises, Inc.

Pm 12-23-14
RECEIVED
DEC 29 2014
S.C. Supreme Court



The Supreme Court of South Carolina

Twenge & Twombly, LLC

12/29/2014

RECEIPT #74596

Fee Type:	Case Initiation Fee
Amount:	\$100.00
Payment Type:	Check
Reference No:	5308
Check/Money Order Date:	12/18/2014
Comments:	Mitul Enterprises v. Beaufort County Assessor