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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
In a Contested Case Hearing before the South Carolina Department of Revenue

Deborah Brooks Durden, Administrative Law Judge

Docket No. 15-ALJ-17-0105-CC

Hock RH, LLC and York Preparatory Academy,

Appellants,

v.

South Carolina Department of Revenue,

Respondent.

FINAL REPLY BRIEF OF APPELLANTS

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I. ARGUMENT

In response to Appellants' arguments urging a refund of their 2013 property taxes, the SCDOR relies heavily on a rule of statutory construction that holds that statutes are presumed to apply only prospectively. *See, e.g., SCDOR Br.,* at pp. 7-9. The SCDOR's position, however, ignores an equally powerful competing rule: that curative or clarifying statutes are presumed to act retroactively. That is because a clarifying statute does not change the law, but simply illuminates the law as it existed prior to enactment of the statute. *See App. Init. Br.,* at pp. 6-8.

The question for this Court, then, is which of these two competing presumptions to apply here. To resolve that question, the Court must determine whether Act 208 of 2014 (codified at S.C. Code Ann. § 59-40-140(K)) was a "clarifying" enactment. If so, the presumption of retroactivity applies. To make that determination, the Court need look no further than the title of the Act itself, which declared that its purpose was "to clarify that property of charter schools exempt from taxation includes owned or leased property." Act 208, S.C. Acts 2014 (hereafter, "Act 208").

The SCDOR all but dismisses the title of Act 208, offering no plausible interpretation or construction of the critical word "clarify." Indeed, the Department appears to believe that this Court should ignore the title of Act 208 altogether. *See SCDOR Br.,* at p. 11. Such disregard would be at odds, however, with the teaching of our Supreme Court, which has repeatedly indicated that the title of a statute is a useful aid to discerning legislative intent. *See infra,* at p. 2.

And once one gives the title of Act 208 any attention at all, the Department's position crumbles. For it is impossible to conclude that the word "clarify" means anything other than what it actually says. Act 208 is, quite obviously, a "clarifying" statute. It is, therefore, entitled to the presumption of retroactivity that the law demands.

A. WHEN CONSIDERED AS A WHOLE, AS GOVERNING PRECEDENT DEMANDS, BOTH THE TEXT AND TITLE OF ACT 208 INDICATE THAT THE ENACTMENT MERELY CLARIFIED EXISTING LAW AND DID NOT CREATE A NEW EXEMPTION FOR PROPERTY LEASED BY CHARTER SCHOOLS.

Our Supreme Court has repeatedly observed that "it is proper to consider the title or caption of an act in aid of construction to show the intent of the legislature[.]" *Univ. of S.C. v. Elliott,* 248 S.C. 218, 221, 149 S.E.2d 433, 434 (1966), quoted in *Lindsay v. S.C. Farm Bureau Cas. Ins. Co.,* 258 S.C. 272, 277, 188 S.E.2d 374, 376 (1972), cited in *Rhame v. Chas. Cty. Sch. Dist.,* 421 S.C. 273, 277, 772 S.E.2d 159, 161 (2015). This is especially so because our State Constitution provides that every Act of the General Assembly "shall relate to but one subject . . . expressed in the title," S.C. Const. art. III, § 17—a prescription intended, in part, "to apprise the people of the subject of proposed legislation." *Westvaco Corp. v. S.C. Dept. of Rev.,* 321 S.C. 59, 63, 467 S.E.2d 739, 741 (1995). Indeed, as the Supreme Court of South Carolina observed when construing an identically worded predecessor to art. III, § 17, "if properly observed [this constitutional provision] would tend greatly to prevent confusion and doubt as to the exact meaning and intent of legislative enactments[.]" *State of S.C. ex rel. Coleman v. Town Council of Chester,* 18 S.C. 464, 466 (1882).

Resisting these interpretive principles, the Department of Revenue has made no attempt to consider what the title of Act 208 might mean, much less to offer an

interpretation that is consistent with the text of the statute. Instead, the Department tries create a forensic straw man, suggesting that Appellants have argued that the title of the Act "holds more weight than the plain unambiguous language of the statute[.]" *SCDOR Br.,* at p. 11. Appellants argue nothing of the kind. Rather, it is Appellants' position that the title of the statute is a useful interpretive aid—to be read in conjunction with (but not in place of) the text of the statute to determine both the statute's meaning and the General Assembly's intent in drafting the Act. The Department's contrary approach—to ignore the title entirely—cannot be squared with governing Supreme Court precedent.

The title of Act 208 clearly and unambiguously states its purpose: "TO AMEND SECTION 59-40-140 . . . SO AS TO CLARIFY THAT PROPERTY OF CHARTER SCHOOLS EXEMPT FROM [STATE OR LOCAL] TAXATION INCLUDES OWNED OR LEASED PROPERTY." Act No. 208. Consistent with its "clarifying" purpose, the Act makes only two minor changes to the text of the statute it amends—(i) removing the word "all" before the phrase "state and local taxation" and (ii) adding the phrase "whether owned or leased" after the word "property." The effect of these amendments is shown below:

> Charter schools are exempt from ~~all~~ state and local taxation, except the sales tax, on their earnings or property <u>whether owned or leased</u>.

Id, codified at S.C. Code Ann. § 59-40-140(K). Read in conjunction with the title of the statute, the purpose of these minor edits is obvious: to emphasize that the scope of charter school "property" that is exempt from taxation includes both leased and owned property.

For whatever reason, the General Assembly apparently concluded that it was necessary to make the broad scope of a charter school's property exemption more clear.[1]

The Department of Revenue rejects this sensible interpretation. It argues strenuously that, prior to the passage of Act 208, S.C. Code § 54-40-140 exempted only property *owned* by a charter school, but not *leased* property, from property tax. *See SCDOR Br.,* at pp. 17-19. According to the Department, Act 208 represented a substantive change in the law and created an entirely new property tax exemption for property "leased" by a charter school. *Id.,* at p. 19.

The problem with this interpretation is that it completely ignores the General Assembly's stated purpose in enacting Act 208: "to clarify" S.C. Code Ann. § 59-40-140. If the legislature had been creating an entirely new property tax exemption, it would have so indicated in the title to Act 208. Instead, however, it declared that it was clarifying an existing statute rather than creating a new exemption. One does not "clarify" a rule that has not been created yet. The only reasonable interpretation that reconciles both the title and text of Act 208 is one that maintains that § 59-40-140 had always exempted leased property from property taxation. Act 208 simply clarified and emphasized that exemption.

In support of its position that the pre-Act 208 version of § 59-40-140(K) did *not* exempt leased property, the Department points to a host of *other* property tax exemptions, in an entirely different part of the Code (S.C. Code Ann. § 12-37-220), that

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[1] As Appellants noted in their Initial Brief, part of the impetus for Act 208 may have come from a special November 2013 study noting that many South Carolina charter schools lease rather than own their campus facilities. *See generally* Public Charter School Alliance of South Carolina, "An Analysis of the Charter School Facility Landscape in South Carolina," Nov. 2013, at p. 6, available at http://www.sccharterschools.org/assets/Facilities/csfi_southcarolina-reportfnl.pdf.

distinguish between owned and leased property. *See SCDOR Br.*, at pp. 18-19. If there is any lesson that one may draw about the dozens of tax exemptions sprinkled throughout South Carolina law, however, it is that they are highly fact-specific and driven by particular economic exigencies. In some of the non-charter school exemptions collected at § 12-37-220, the General Assembly chose to include leased property explicitly. *See, e.g.*, § 12-37-220(B)(26) (exempting vehicles "owned or leased" by Medal of Honor recipients). In others, it simply exempted "all property" of a particular taxpayer, without specifying whether that exemption included leased property. *See, e.g.*, S.C. Code Ann. § 12-37-220(B)(24) (exempting "all property of nonprofit or eleemosynary community theater companies, symphony orchestras [and other arts organizations]") The Department reviews this disparate collection of statutes and assumes that, that unless leased property is specifically mentioned in an exemption, it is not exempt. *See SCDOR Br.*, at p. 18. This is an aggressive interpretation, perhaps to be expected from an agency that is in the business of collecting taxes. One might just as reasonably conclude that, when the General Assembly has exempted "all property" of a taxpayer (such as a community theater group) from taxation, it means just what it says: "all" property—whether owned, leased or held in some other form.

Fortunately, however, this Court need not determine whether a host of other property tax exemptions contained in § 12-37-220 includes both leased and owned property. What matters here is only charter school leased property and its treatment under § 54-40-140(K). And what is clear is that the legislature has always intended such property to be exempt from taxation. Had that not been the case, the General Assembly

would not have seen fit "to clarify" the law (via Act 208) to make the point even more forcefully.

B. BECAUSE ACT 208 WAS A CLARIFYING ENACTMENT, IT IS PRESUMPTIVELY ENTITLED TO RETROACTIVE APPLICATION.

In its initial brief, Appellants surveyed cases from across the country holding that a statute that merely clarifies existing law should be presumed to operate retroactively. *See App. Init. Br.,* at p. 6-8. This rule represents nothing more than common sense, for when a legislature "clarifies" a law, it is interpreting that law as *originally* enacted, not creating a new obligation or liability for the future. *See id.* Thus, the clarifying statute should be retroactively applied.

The Department does not take issue with this general principle or with the common sense behind it. Instead, it suggests that South Carolina, apparently alone among its sister jurisdictions, would deny retroactive force to a clarifying law. In particular, the Department intimates that *Merchants Mut. Ins. Co. v. S.C. Second Injury Fund,* 277 S.C. 604, 291 S.E.2d 669 (1982) sets forth exclusive conditions for retroactive application which, in the Department's view, do not include clarifying enactments.

Here, the Department is mistaken. South Carolina law is fully consistent with the uniformly observed principle that corrective statutes are to be given retroactive effect. As Appellants observed in their initial brief, that is the lesson of *Green v. City of Rock Hill,* 149 S.C. 234, 147 S.E. 346 (1929)—which gave retroactive effect to a "curative" statute, and to *Merchants, supra*, which, in *dicta*, noted that remedial and procedural statutes are entitled to retroactive application. Curative and remedial statutes are part of the same kind of statutes as clarifying enactments. All three are statutes intended to give full force

to a prior enactment of the legislature rather than to create a new rule of law. As such, they must be applied retroactively to give force to the legislature's original legislative intent.

The Department rejects this reconciliation of South Carolina's jurisprudence with the common-sense principles of our neighbors—in two ways. First, after discussing *Green* in some detail, *SCDOR Br.,* at 20-23, the Department declares that *Green* has been superseded by *Merchants.*[2] The Department then reads *Merchants* in a crabbed and narrow fashion, concluding that because Act 208 is neither remedial nor procedural—and because the General Assembly did not make the Act expressly retroactive, it must be applied prospectively.

The Department's reading of *Merchants* to deny retroactive effect to a statute that is merely clarifying in nature cannot be sustained. First, it is important to note that *Merchants* did not declare that the *only* statutes that could be given retroactive application were remedial or procedural statutes; instead, the Supreme Court observed simply that "a remedial or procedural statute is generally held to be retroactive." 277 S.C. at 608, 291 S.E.2d at 669. And the statute at issue in *Merchants,* the court concluded, was not even remedial or procedural—much less clarifying—so any relevant observations the *Merchants* court offered would be *dicta,* at best. There is nothing in *Merchants* to suggest that our Supreme Court would disregard the common-sense reasoning of its sister jurisdictions and hold that a purely clarifying statute (like Act 208) is *not* to be applied retroactively.

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[2] The Department cites no legal authority for its suggestion that *Green's* retroactive treatment of curative statutes is no longer good law.

Notably, albeit again in *dicta*, the *Merchants* court observed that evidence of "clear legislative intent" would also cause a court to apply a statute retroactively. *Id.*[3] In the Department's view, such intent can apparently be expressed *only* by an explicit statement of retroactive application contained in the statute itself. *See SCDOR Br.*, at pp. 15-16. But the *Merchants* court noted that ***either*** "clear legislative intent ***or*** [a] specific provision" could displace the general presumption favoring prospective application of a statute. *Id.* The fact that "either" will suffice means that some other evidence of legislative intent favoring retroactivity—besides a specific provision to that effect—will be enough.

Whatever that evidence of legislative intent may look like in other contexts, such evidence is available here—in the same title of Act 208 that the Department seems determined to ignore. By declaring as the clear and unambiguous purpose of Act 208 its intention to make it clear that an *existing* property tax exemption (§ 54-40-140(K)) already "include[d]" leased property, the General Assembly provided clear evidence of its intent to apply its original exemption retroactively. That common-sense interpretation is the only construction that gives effect to the legislature's "clarifying" purpose in passing Act 208.

In short, there is nothing in *Merchants* that is inconsistent with the uniform rule that clarifying enactments are to be given retroactive application. Such enactments fall entirely outside *Merchants'* purview, because the law at issue in that case was not a

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[3] At some points, the Department suggests that *both* parts of the *Merchants* two-part test must be satisfied before a statute can be applied retroactively. This is not the case. The Supreme Court plainly held that a remedial or procedural statute, without more, should be retroactively applied. The second part of the *Merchants* test—clear legislative intent—is an *additional* way to justify retroactive application. Put another way, the *Merchants* two-part test is disjunctive, not conjunctive.

clarifying statute. But even if the *Merchants* "two-part test" for retroactivity were exclusive, there is ample evidence of legislative intent to justify retroactive application of Act 208 under the second part of that test.

C. THE "PARADE OF HORRIBLES" THAT THE DEPARTMENT DESCRIBES TO DISCOURAGE RETROACTIVE APPLICATION OF ACT 208 IS NEITHER RELEVANT NOR PERSUASIVE.

In the final section of its brief, the Department argues that Act 208 should not be given retroactive application because such an application will "have harmful effects." *SCDOR Br.*, at pp. 24-26. In support of this proposition, the Department cites *TNS Mills, Inc. v. S.C. Dept. of Rev.*, 331 S.C. 611, 503 S.E.2d 471 (1998) for the proposition that "an interpretation [of a tax statute] allowing retroactive exemptions would not fit with the procedural scheme set out by the General Assembly." 331 S.C. at 620, 503 S.E.2d at 476. As this quote makes clear, however the task of both the Department and this Court, when reviewing a tax exemption, is to give effect to the intent of the General Assembly, wherever that intent might lead. If the legislative purpose of Act 208—as noted above—was to "clarify" a previously existing exemption and give that clarification retroactive force, the Department may not frustrate that purpose by ignoring it. As in virtually every case of statutory interpretation, honoring legislative intent is paramount.

The Department goes on to contend that counties across South Carolina may suffer "devastating" financial consequences if they are forced to refund property taxes to charter schools that leased their campuses between 2006 (when § 54-40-140(K) was first enacted) and 2014 (when the statute was clarified). *SCDOR Br.*, at p. 25. The short response to this suggestion is that such a result is compelled by the General Assembly's clarification of the statute's taxing exemption. Again, it is for the General Assembly, not the Department, to make a legislative decision based on a consideration of purpose and

effects. The Department is not free to disregard that decision based on its own, independent cost-benefit analysis.

Another response to the Department's suggestion is that it is overblown. There is no evidence in the record that any other charter school besides YPA has applied for a property tax refund for taxes paid on leased property. Presumably, if the Department knew of any such other examples, it would have produced them to the Administrative Law Judge. And the clock is ticking, S.C. Code Ann. § 12-54-85(F)(1) provides that a claim for a property tax refund must be made within three years of the date the return is filed or two years after the tax is paid, whichever is later. As of right now, claims for refunds based on returns filed prior to February 2013 (15 months before Act 208 was passed or taxes paid prior to February 2014 (three months before Act 208 was passed) would be time-barred. The list of charter school taxpayers eligible for refund (if such taxpayers exist at all) is growing shorter by the day. But regardless of how long that list may be, it does not represent a reason the frustrate the clearly expressed intent of the General Assembly.

II. CONCLUSION

For the foregoing reasons, Appellants respectfully request that the judgment of the lower court be reversed and that they be granted a refund of their 2013 property taxes.

This 29th day of March, 2016.

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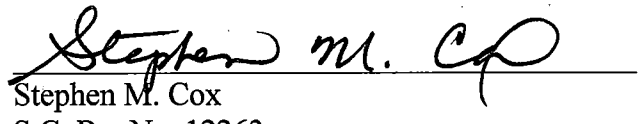
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief and Final Reply Brief of Appellants, Hock RH, LLC and York Preparatory Academy, in this matter comply with Rule 211(b) of the South Carolina Appellate Court Rules.

This 29th day of March, 2016.



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PROOF OF SERVICE

I hereby certify that I have served the foregoing **Final Reply Brief of Appellants** on Respondent South Carolina Department of Revenue by depositing a copy of said Notice in the United States Mail, postage prepaid, on March 29, 2016, addressed to the attorneys of record for the South Carolina Department of Revenue: G. David Crocker, Sean G. Ryan, and Milton Kimpson, South Carolina Department of Revenue, 300-A Outlet Pointe Boulevard, Post Office Box 12265, Columbia, South Carolina 29211-9979.

This 29th day of March, 2016.

Stephen M. Cox