THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC 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..... Appellant,

vs.

City of Goose Creek ..... Respondent,

APPELLANT'S REPLY BRIEF TO AMICUS BRIEF OF MUNICIPAL ASSOCIATION

May 31, 2016

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REPLY TO MUNICIPAL ASSOCIATION'S STATEMENT OF INTERESTS

In an effort to influence the Court's decision in this case, the Municipal Association mischaracterizes this case. This case is about a single taxpayer and a single local government's misapplication of its unambiguous ordinance due to animus for the taxpayer stemming from an unrelated disagreement in which the taxpayer prevailed. (See Appellant's testimony at R.O.A. page 174:

> Prior to [this] business license tax controversy that gave rise to this lawsuit, I had a previous disagreement with the City over the City's interpretation of an internal memorandum published by the City. The City put a stop work Order on me when I was making repairs to a home I owned. The City also turned off my water service. After numerous discussions, the City finally agreed with me and allowed me to continue work. The experience had the unfortunate consequence of making me known to the City, in particular Ron Faretra and Jennifer although who have since harassed me. After I satisfactorily resolved the repair dispute, I received shortly thereafter—around May of 2011—a notice from the City that it had audited my business license returns and informed me that I not properly reported my gross income.

The Municipal Association not only ignores these undisputed facts, but also makes several misstatements of law and misstatements of fact in an effort to influence the Court's review of straightforward legal issues.

First of all, the taxpayer/appellant in this case called the gross income issue to the Municipal Association's attention in October and November of 2012, and two highly placed officials of the Municipal Association responded to the appellant in writing, confirming that the business license tax is calculated on gross income in conformity with the statute, § 5-7-30, S. C. Code. On November 7, 2012, appellant consulted with the Municipal Association's, Mellissa M. Carter, its "Research & Legislative Liaison." In response to the appellant's inquiry, she wrote appellant: "Thank you for following up on our conversation.

You have stated my understanding correctly. If you have any further questions please give either Warren [Harley, Governmental Affairs Liaison] or me a call." The subject of this November 7, 2012, correspondence is "Business License Calculation," in which the appellant laid out the following example for Ms. Carter: "The example you [Mellissa Carter] shared was if you pay $200,000. And sell for $300,000 the license fee should be calculated on $100,000 gain, not the sale price $300,000." (November 1, 2012, e-mail Olds to Mellissa McCullough Carter,) Prior to that email, on October 31, 2012, the Municipal Association's Governmental Affairs Liaison, Warren Harley wrote to appellant: "For the purpose of determining gross income our business license guide references Section 61(a) of the IRS code. Your business license is calculated on the amount you show as your gross income on your tax return." Mr. Harley's answer is, of course, not only exactly what Goose Creek's ordinance says, but also exactly what the City of Goose Creek says in its administrative appeal memorandum of Law, quoted below on page 6. (R.O.A. page 224)

Of course, the Municipal Association's October and November 2012, written answers are correct and in exact conformity with the state's enabling statute, § 5-7-30, and conform to the exact wording of Goose Creek's ordinance § 100.001. Therefore, applying the standard rules of statutory construction to this issue demonstrates the circuit court's error. On page 10 of its reply brief, the City of Goose Creek identifies the central issue from the City's point of view by asking this Court to ignore the plain words of the statute and the City's ordinance in order to torture the meaning so that "gross income" is twisted into becoming "gross receipts" because that interpretation "generates substantial revenues for municipal and county government across the state." (City's Brief at page 10.) The

South Carolina Supreme Court rejected this end-justifies-the-means reasoning in *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015).

Neither the City nor the Municipal Association identifies any authority that justifies such a metamorphosis to transform "receipt" into "income." (Lawyers deal with this on a daily basis. When a lawyer settles a case for $10,000.00, she does not have $10,000.00 of income. Rather, she takes her fee out of the settlement amount and reports her fee as "income." In a typical tort case, a lawyer would have $10,000.00 in "receipts" and $3,333.00 in "income." Anyone with the slightest familiarity with a closing statement in a real estate transaction knows the difference between the sales price and the gain. The gain is income.)

Lest there be any ambiguity about what is indisputably clear, the Court can refer to page 224 of the Record on Appeal and read the City of Goose Creek's August 30, 2011, memorandum of law to the City Council:

> Furthermore, the city's definition of gross income is in accord with the Internal Revenue Code ("IRC"). IRC Section 61 defines gross income. IRC Section 61(a) states that "[e]xcept as otherwise provided in this subtitle, gross income means **all income from whatever source derived**" (Emphasis added), which is consistent with the broad definition of "total revenue" used by the City's ordinance."
>
> *City of Goose Creek Memorandum of Law*, August 30, 2011, R.O.A. page 224-25

Oddly, the Municipal Association now takes an opposing view to the City of Goose Creek's 2011 memorandum and its 2012 written statements. On page 3 of its brief, the Association contradicts the City's Memorandum and its previous written statements regarding how the City's definition is in accord with the income tax definition: "The subject ordinance employs a definition of gross income for purposes of a tax completely different in nature than the income tax definition relied on by appellant." (Amicus Brief at page 3)

Appellant and the City of Goose Creek find common ground and agree about the definition of its ordinance. The Municipal Association is uninformed about the City's ordinance because it inaccurately states its provisions. Both Appellant and the City of Goose Creek agree that the gross income reported to the Town must match the gross income reported to the I.R.S. and to the State Department of Revenue, and "receipts" are never reported as "income." The Municipal Association ignores the requirements of Goose Creek's ordinance. In fact, the 2011 Goose Creek Memorandum Of Law supports appellant's position that the City's definition is in accord with the income tax definition, which is what the enabling statute requires.

The Municipal Association ignores § 5-7-30 and errs when it states on page 1 of its brief that the City enacted an ordinance defining "gross income" as "total revenue of a business" or "gross receipts." In fact, as shown below the City's ordinance does not equate "gross income" **as** "gross receipts," but rather distinguishes between the two:

> ***GROSS INCOME***. The total revenue of business, receive or accrued, for one calendar year, collected or to be collected by a business within the city, excepting, therefore, 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 count.
>
> The term ***GROSS RECEIPTS*** means the value proceeding or accruing for 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 of or 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.
>
> § 110.001 DEFINITIONS (R.O.A. page 129; See also page 187 R.O.A. for Professor Gutting's discussion of this issue, which demonstrates just how wrong the Municipal Association in reversing course.)

The Municipal Association states "no state or federal authority exists imposing the

income tax definition on municipalities . . . and, . . . municipalities are within their authority to establish such definitions." (page 4 of amicus brief) First, the Municipal Association is just wrong. Second, and more importantly, the City of Goose Creek did just that: it established separate and distinct definitions for "gross income" and "gross receipts" and imposes a tax on "gross income." See Professor Gutting's affidavit at pages 182 – 188 of the Record on Appeal because she explains this in detail, which the lower court simply ignored.

Rather than address the City's definition adopted by ordinance, the Municipal Association turns its back on state law and on the Goose Creek's ordinance and relies, instead, on *Black's Law Dictionary* for abstract definitions without context. However, resort to a law dictionary is not dispositive when the State and the City provide clear definitions. "Law dictionaries are not particularly helpful to [a court] in determining the precise meaning of a term in context." *Heilker v. Beaufort County Board of Zoning Appeals*, 346 S.C. 401, 552 S.E.2d 42 (2001)

On page 7, the Municipal Association states that the South Carolina Attorney General has regarded "gross income" and "gross receipts" "synonymously" and "within a municipality's authority to define; therefore, to use the terms interchangeably within an ordinance does not, **without more**, render the ordinance invalid." (emphasis added) It is the "more" the Association ignores. First, state law limits what a municipality can tax, and it is "gross income." § 5-7-30, S. C. Code. Second, the City's ordinance does provide more authority. The City defines the terms in two ways. First in its definitions, and second, in the context of its ordinance provisions:

The ***GROSS INCOME*** for business license purposes shall conform to the gross income reported to the State Tax Commission or the State Insurance Commission.

The ***GROSS INCOME*** for business licenses 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 governmental agencies.

§ 110.001 DEFINITIONS, R.O.A. page 129

See also § 110.003 INSPECTION AND AUDITS, R.O.A. page 130:

(C) The Business License Inspector, upon approval of the Finance Director, may disclose gross income of licenses to the Internal Revenue Service, South Carolina Department of Revenue and other municipal or county offices for the purpose of assisting tax assessments, tax collections and enforcement.

See also § 110.008 REGISTRATION REQUIRED; LICENSE APPLICATION, R.O.A. page 132:

(B) . . . Applicants may be required to submit copies of portions of state and federal income tax returns reflecting gross income figures.

Therefore, it is impossible to apply read the Goose Creek Ordinances in their proper context, all of which are clear and unambiguous, without concluding that the ordinances support appellant, not the Municipal Association. It is the Municipal Association, not appellant, which is reading the ordinances in a disjointed fashion and without any context and in violation of the well-developed rule of statutory construction that requires courts to enforce ordinances in their plain and ordinary meaning. The ordinances are written in clear, precise language, consistent with the enabling statute and thus there is no support in this record or in case law to assert that "income" = "receipts." The Municipal Association ignores the City's obvious misapplication of its ordinance to the appellant in this case, and the lower court erred in failing to find the appellant raised a genuine issue of material fact.

REPLY TO MUNCIPAL ASSOCIATION'S ARGUMENTS

The rest of the Municipal Association's argument is a repetition of the same arguments made by Goose Creek and fully briefed except that the Municipal Association cites 13 cases not previously briefed by the parties. The Municipal Association relies on out-of-state and federal cases that have no bearing on the well-developed body of South Carolina law on the rules of statutory construction, especially where our jurisprudence instructs courts not to look out of state when South Carolina law provides the definition. When a municipal ordinance provides a clear definition, the Municipal Association needs look no further than the local law. Only when South Carolina law is silent on a legal issue do out-of-state authorities become pertinent: "No reported case in South Carolina jurisprudence provides s definition [use] thus this Court must look to the law of other jurisdictions for assistance." *Heilker v. Zoning Board of Appeals for the City of Beaufort*, S.C. S.E.2d (2001). Here the definitions are provided in the ordinances being applied, and South Carolina law is clear on how such ordinances are to be read. Here the definitions are clear. Here the definitions all fit in the context, and therefore, there is no need to look out-of-state to provide what the City of Goose Creek and the South Carolina General Assembly already provide.

However, since the Municipal Association relies on out-of-state cases to support its position, appellant summarizes each one below. Those cases are as follows:

STATE CASES

Case from Illinois (1)

Case from Missouri (1)

Case from New York (1)

Cases from South Carolina (5)

Case from Washington State (1)

Case from Virginia (1)

FEDERAL CASES

Cases from the District of Columbia (2)

Case from the United States Supreme Court (1)

Not one of these cases supports the Municipal Association's assertion that a municipality can expand the definition of gross income to support increasing the taxes on a business.

Case from Illinois

German Alliance Ins. Co. et. al. v. Van Cleave, 191 Ill. 410, 61 N.E. 94 (1901) is about as far removed as authority as one can imagine. "The matter in controversy is the proper construction of the act approved April 19, 1899, entitled 'An act providing for a tax on gross premium receipts of insurance companies and associations other than life.' . . . That act provides that every insurance company of the class to which complainants belong 'shall at the time of making the annual statements as required by law, pay to the insurance superintendent as taxes, two per cent. Of the gross amount of premiums received by it for business done in this state. . ." The conclusion of the Supreme Court of Illinois was: "In the construction of the act, effect is to be given to the intention of the legislature, and that intention appears to be to levy a tax on the gross income of foreign fire insurance companies." The Illinois Supreme Court went on to say that the tax collector could **not**

include return of unearned premiums as part of the company's gross income. "An insurance company would not be authorized to omit form its statement any part of premiums received merely on the ground that polices might be cancelled in the future; but, where they have been in fact canceled and the money returned, the entire or gross premium receipts cannot, by any fair interpretation, include the moneys so returned." The Municipal Association cited this case without reading it.

Case from Missouri

The Municipal Association provides an incorrect citation for *Food Center of St. Louis, Inc. v. Village of Warson Woods*. The correct citation is: 177 S.W.2d 573 (Mo. 1945). This case has no bearing on the issue before the Court because the issue there involved a unusual situation involving a business that straddled a boundary. *Food Center of St. Louis, Inc.* involved a supermarket located on the line dividing the City of Rock Hill from the Village of Warson Woods. The check-out stands, cash registers, *etc.* were all in Rock Hill. Part of the shelves of merchandise were in Rock Hill and part in Warson Woods. A large parking lot and other auxiliary facilities were located in Warson Woods. In this situation the court decided that *each* community might levy an occupation tax measured on the *full amount* of the sales at the supermarket. This was, in part, based upon the language of Warson Woods' occupation license ordinance which, as a basis for the tax, included not only the sale of goods but rendering of services in connection with sales. A November, 1956, law review article discussing the case did not think the same result would have obtained had the Warson Woods' ordinance been drafted differently. In other words, the issue in the case is apportionment, not a discussion of receipts vs. income.

Case from New York

The Municipal Association provides an incorrect citation for this case. It is not *New Yorker Magazine, Inc. v. Gorosa.* It is *New Yorker Magazine, Inc. v. Gerosa*, 3 N.Y.2d 362, 165 N.Y.S.2d 367, 144 N.E.2d 367 (N.Y., 1957). Once again, the case has no bearing on the issue before this Court. In *Gerosa*, *New Yorker Magazine* complained that it was being treated differently from other media outlets, and thus the issue in *Gerosa* was whether or not it was fair to apportion taxes on electronic media but not the *New Yorker.* "The tax here involved was imposed on appellant's total receipts from advertising less advertising receipts received from its Chicago branch office."

Case from Virginia

Stork Diaper Service, Inc. v. City of Richmond, 210 Va. 705, 173 S.E.2d 859 (1970) is another allocation case. Stork Diaper Service objected to its tax being calculated on business done outside of the City of Richmond. The Court of Appeals held that because of an omission in the ordinance, the City was allowed to consider the taxpayer's income from other counties. "Either by legislative advertence or inadvertence, Code § 58-266.5 contains no provision that permits a licensee like Stork, which has a place of business or office only in the City of Richmond, to exclude any of its gross receipts from the City's license tax base. We cannot supply a provision that was not enacted by the General Assembly." The Court uses "receipts" in a casual way and in no way analyzes the issue now before the Court.

Case from Washington State

Dravco Crop. V. Tacoma, 80 Wn.2d 590, 496 P.2d 286 (1972) addresses the right

of taxing authority to tax an out-of-state entity doing business within the State of Washington (dam construction). It does not attempt to construe a formula for collection of a business license tax and provides no authority for the Municipal Association's assertion.

Case from United States Supreme Court

In *Stratton's Independence v. Howbert*, 231 U.S. 399, 34 S.Ct. 136, 58 L.Ed. 285 (1913), the U.S. Supreme Court upheld the right of Colorado, under federal mining law, to assess an income tax on a British mining company. The Supreme Court held: "The act prescribed that the tax should be 'equivalent to one per centum upon the entire net income over and above $5,000 received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations,' *etc.*, or, with respect to foreign corporations, 'upon the amount of net income over and above $5,000, received by it from business transacted and capital invested with the United States,' *etc.* And the net income was to be ascertained by taking, first, the 'gross amount of the income of such corporation. . . . received within the year from all sources,' or, in the case of foreign corporations, 'from business transacted and capital invested within,' *etc.*, and deducting therefrom losses sustained, interest paid, *etc.*" This case does not support the Municipal Association's assertions.

Cases from District of Columbia

(1) *Cedar Hill Cemetery Crop. V. District of Columbia,* 124 F.2d 286 (1941). This case has no bearing on the issues presented here. In *Cedar Hill*, the petitioner challenged the applicability of a business licenses tax on it because it was an out-of-state corporation. The Court held that the District of Columbia could impose a business license tax on an out-

of-state corporation. This case has nothing to do with the manner in which the District of Columbia computed its tax.

(2) *Suburban Title & Investment Corp. V. District of Columbia*, 180 F.2d 387 (1950) This case decided the same issue as *Cedar Hill*, to wit, that the District of Columbia is authorized to impose a business license tax upon a corporation that is located in the State of Maryland. As in *Cedar Hill*, this case does not construe or even address the issue raised here.

South Carolina Cases

Neither the out-of-state nor the federal cases offer any guidance to the Court in deciding this issue. The five newly identified South Carolina cases cited by the Municipal Association are:

(1) *Eli Witt Company v. City of West Columbia*, 309 S.C. 555, 425 S.E.2d 16 (1992)

(2) *Home Builders Association of South Carolina v. Sch. Dist. No. 2 of Dorchester County*, 405 S.C. 458, 748 S.E.2d 230 (2013)

(3) *Hospitality Association of South Carolina Inc. v. County of Charleston*, 320 S.C. 219, 464 S.E.2d 113 (1995)

(4) *Scott v. South Carolina Tax Commission*, 262 144 (1974)

(5) *Town of Hilton Head Island, S.C. v. Kigre, Inc.*, 408 S.C. 647, 760 S.E.2d 103 (2015)

In *Eli Witt*, the taxpayer challenged the classification of its business and complained that he was being unfairly classified. The South Carolina Supreme Court held that the classification was proper: "If a classification is reasonably related to a proper legislative

purpose and the members of each class are treated equally, any challenge under the equal protection clause fails." That is not the issue here, and more importantly, the Supreme Court noted that "Under the ordinance, the business license tax is assessed upon a **business's gross income** for the year," (emphasis added) which supports the appellant's legal position.

In *Home Builders*, the South Carolina Supreme Court reversed the grant of a judgment on the pleadings and remanded the case back to the circuit court to evaluate the constitutionality of an ordinance that imposed an impact fee on property owners who constructed a new residence within the school district. This case has no bearing on the issue before the Court.

In *Hospitality Association of South Carolina Inc. v. County of Charleston*, the issue was the Charleston's and Hilton Head's enactment of a 2% "hospitality tax." The taxpayers argued that the hospitality tax was pre-empted by a state law. The South Carolina Supreme Court disagreed and held "Because the defendants had the power to enact the ordinances at issue, and the ordinances are not inconsistent with the Constitution or general law of the State, we hold that the ordinances are valid." Thus, this case has no bearing on the issue before the Court. Here, the parties agree that § 5-7-30, S. C. Code, authorizes a local government to impose a business license tax on "gross income."

In *Scott v. S. C. Tax Commission*, which correct citation is 262 S.C. 144, 202 S.E.2d 854 (1974), the South Carolina Supreme Court held that an irrevocable assignment of an annuity should be included in gross income for tax purposes. (This is not surprising to anyone who took a tax class.) The Supreme Court held, consistent with every court that

ever addressed this issue, "[t]he power to dispose of income is the equivalent of ownership of it." This is a similar argument that Bogan advanced to the Family Court and lost. *Bogan v. Bogan*, 298 S.C. 139, 378 S.E.2d 606 (Ct. App. 1989), discussed in appellant's reply brief at pages 9 -10.

Finally, we reach *Town of Hilton Head Island v. Kigre, Inc.*, 408 S.C. 647, 760 S.E.2d 103 (2015), the one and only case the Municipal Association cites that sheds any light on the issue before the Court. However, the light of *Town of Hilton Head* unequivocally supports appellant, not the Municipal Association's position. In *Town of Hilton Head*, the South Carolina Supreme Court upheld the constitutionality of the business license tax—not an issue here—and states with its own emphasis: "The legislature has specifically granted municipalities the authority to enact ordinance and "levy a business license tax on *gross income*." The Supreme Court italicized "gross income," in order to emphasize the very legal principle that the Municipal Association is **now** refusing to recognize. (We emphasize "now" because in October and November, 2012, when appellant asked the Municipal Association to weigh in on this issue, the Municipal Association wrote back that appellant's legal position is correct.) The parties in *Kigre* did not ask the Supreme Court to define "gross income," and neither do we because Goose Creek has already done it in conformity with § 5-7-30, S. C. Code. All this appellant ever asked of Goose Creek is to apply its ordinance to him as it is written and not retaliate against him because he succeeded against the Town in an unrelated legal matter. The Hilton Head ordinance is clear just as the Goose Creek ordinance is clear, which should be a surprise to no one since the enabling act limits a municipality's right to collect a business

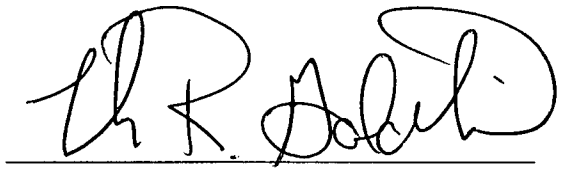
license tax to "gross income." The Municipal Association simply refuses to see the issue before the Court, which is Goose Creek's misapplication of its ordinance to the appellant.

In short, not a single case cited by the Municipal Association supports the Municipal Association's shifting position that municipalities can impose a business license tax on "gross receipts."

CONCLUSION

The Municipal Association makes an end-justifies-the-means argument, an argument rejected by the Supreme Court in *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015). Not once does the Municipal Association evaluate, let alone mention, Goose Creek's ordinances and the consistency with which its definition of "gross income" appears in all its sections and in all its contexts and how the figures reported to Goose Creek must match up with the figures reported to the I.R.S. and the State Department of Revenue. Every time Goose Creek uses the term "gross income," it is consistent and comports with the State's enabling statute. Professor Gutting addressed this in detail at pages 182-191 of the R.O.A. Not once does the Municipal Association address these facts or Goose Creek's misapplication of its unambiguous ordinance to the appellant, which is the issue before this Court. Moreover, because the Municipal Association waited until the last possible moment to file an amicus brief, it has escaped any examination for its rationale in asserting to this Court that "gross income" means "gross receipts."

Respectfully submitted,



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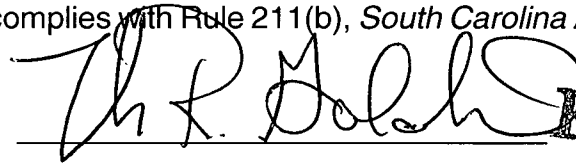
CERTIFICATE OF COUNSEL

I certify that this final brief complies with Rule 211(b), *South Carolina Appellate Court Rules*.



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PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellant and Designation of Contents of Record on Appeal on the Respondent, City of Goose Creek, by depositing a copy of it in the United States Mail, postage prepaid, on May 31, 2016, addressed to its attorney of record, Timothy A. Domin, 126 Seven Farms Drive, Suite 200, Daniel Island, S. C. 29492 and to the Municipal Association by depositing a copy of it in the United States Mail, postage prepaid addressed to its attorney of record, Mary D. Lafave, Crowe Lafave, P. O. Box 1149, Columbia, South Carolina, 29202.

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