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 BRIEF OF APPELLANTS

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I. STATEMENT OF THE ISSUE ON APPEAL

1. Did the lower court err by refusing to order the South Carolina Department of Revenue to refund to Appellants their 2013 property taxes on property leased by Appellant York Preparatory Academy for a charter school, even though the South Carolina General Assembly enacted a "clarifying statute" in 2014 that exempted land leased by charter schools from *ad valorem* property tax?

II. STATEMENT OF THE CASE

This case arises from an application for a refund of property taxes paid in 2013 by Appellants, York Preparatory Academy ("YPA") and Hock RH, LLC ("Hock"). YPA is a public charter school organized and existing under S.C. Code Ann. §§ 59-40-10, *et seq.* R 1. The school operates under a charter issued by the South Carolina Public Charter School District, and it serves grades K-12. YPA is a South Carolina nonprofit corporation that has been granted a 501(c)(3) designation by the Internal Revenue Service. R 2.

Throughout 2013, YPA leased its 45-acre campus on Golden Gate Court in Rock Hill, South Carolina from Hock. *Id.* The lease required YPA to be responsible for all maintenance and upkeep of the leased premises, including, but not limited to, payment of property taxes. YPA has used the property continuously since that time for the operation of a charter school. *Id.* YPA purchased the campus from Hock in February 2014. *Id.*

On November 4, 2013, YPA sought a property tax exemption for its Golden Gate Court campus from the South Carolina Department of Revenue. *Id.* The Department denied the application by determination letter dated January 31, 2014, concluding that South Carolina law did not permit a property tax exemption for property leased by school. *Id.* On February 20, 2014, Hock paid the 2013 property tax for YPA's Golden

Gate campus in the amount of $271,801.51, *id,* using funds that YPA had tendered to Hock pursuant to its obligations under its lease with Hock.

Three months later, on May 29, 2014, the South Carolina General Assembly passed Act 208, which was entitled "an act . . . to *clarify* that property of charter schools exempt from . . . taxation includes owned or leased property." (emphasis added) Prior to this amendment, the first sentence of S.C. Code Ann. § 59-40-140(K) had provided that "Charter schools are exempt from all state and local taxation, except the sales tax, on their earnings and property." After the amendment, the first sentence provides that "Charter schools are exempt from state and local taxation, except the sales tax, on their earnings and property, *whether owned or leased.*" (emphasis added).

Based on the foregoing statutory clarification, on October 6, 2014, Hock and YPA submitted a protest to the Department pursuant to S.C. Code Ann. § 12-60-470. R 13-15. Thereby, Hock and YPA sought a refund of the $271,801.51 in 2013 property taxes that they had paid. *Id.* The Department issued its Department Determination on February 3, 2015, finding that Appellants were not entitled to a property tax exemption. R 8-12.

Appellants timely appealed the Department's Determination to the Administrative Law Court by serving a Request for Contested Case Hearing on March 3, 2015. R 26. Subsequently, in a status conference with the Administrative Law Judge assigned to the matter, the parties agreed that there existed no genuine issues of material fact and that the matter could be resolved by summary judgment. The Department filed its motion for summary judgment on July 8, 2015, and Appellants served their own motion for

summary judgment on July 10, 2015—all pursuant to the schedule established by the Administrative Law Court. R. 27-37, 42-57.

Following responsive briefing, the Administrative Law Court issued its Order on September 2, 2015, granting the Department's motion for summary judgment and finding that Appellants were not entitled to a refund of their 2013 property taxes. R 6. Appellants timely appealed this Order by filing and serving their Notice of Appeal on October 2, 2015.

III. STANDARD OF REVIEW

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c). Summary judgment is appropriate when the pleadings, depositions, affidavits and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Turner v. Milliman,* 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011).

Here, all parties agree that no disputed issues of fact exist that are relevant to this matter. Because the only issue for consideration is a question of law, this Court reviews *de novo* the conclusion of the Administrative Law Court. *Catawba Indian Tribe of S.C. v. State,* 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) ("We are free to decide a question of law with no particular deference to the circuit court.").

IV. ARGUMENT

A. APPELLANTS ARE ENTITLED TO A REFUND OF THE 2013 PROPERTY TAXES THAT THEY PAID BECAUSE THE GENERAL ASSEMBLY HAS SINCE CLARIFIED THE LAW TO INDICATE THAT CHARTER SCHOOLS ARE NOT SUBJECT TO PROPERTY TAX ON PROPERTY THAT THEY LEASE.

1. *South Carolina Law has long exempted property "of schools" from* ad valorem *property taxation.*

The Constitution of South Carolina exempts "all property of all schools, colleges and other institutions of learning" from *ad valorem* property taxation. S.C. Const. art. X, 3(b). The portion of the State's tax code that catalogs property tax exemptions includes this constitutional prescription verbatim. S.C. Code Ann. § 12-37-220(A)(2) (2014). Likewise, as the Constitution demands, the General Assembly included this exemption in the South Carolina Charter School Act of 1996, providing that "[c]harter schools are exempt from all state and local taxation, except the sales tax, on their earnings and property." Act No. 447, 1996 S.C. Acts 2708.

None of the foregoing authorities expressly addresses whether property *leased* and occupied by a school, rather than *owned* outright, should be considered property "of" that school that is exempt from *ad valorem* taxation. For most public schools in South Carolina, this distinction is irrelevant, for such schools generally own their campuses. Public charter schools like YPA, however, are different. Because charter schools receive no direct facilities funding, many of them lease rather than own the facilities that they use for educational purposes. *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. For

charter schools, then, whether leased property is subject to property taxation is a matter of intense practical and financial interest.

Fortunately, in May 2014, the General Assembly acted to remove any uncertainty concerning the taxation of campuses leased by charter schools. In Act 208, it added language to S.C. Code § 59-40-140(K) to emphasize that charter schools are exempt from tax "on their earnings and property *whether owned or leased.*" (emphasis added). The General Assembly expressly indicated in the title to Act 208, however, that the legislation did *not* signify a shift in legislative policy or a change in the law. Rather, the Act was intended only "to clarify that property of charter schools exempt from [state or local] taxation includes owned or leased property." *Id.*[1] Indeed, Act 208 simply furthers South Carolina's longstanding policy of ensuring that a school's campus—regardless of the legal form of ownership in which it is vested—is not burdened by taxation.

2. *Because Act 208 of 2014 was intended only to "clarify" existing law, not to change the law, it entitles Appellants to a refund of their 2013 property taxes.*

The sole question presented by this appeal is whether the General Assembly's 2014 "clarification" of the scope of the educational property tax exemption entitles Appellants to a refund of the $271,801.51 in property taxes that they paid in 2013. Admittedly, the General Assembly did not expressly indicate in the legislation whether it was intended to apply to prior tax years. And to be sure, as the lower court noted, the law recognizes a general presumption that "statutory enactments are to be considered prospective rather than retroactive in their operation[.]" *Neel v. Shealy,* 261 S.C. 266,

[1] It is perhaps no coincidence that the General Assembly acted to "clarify" the law just a few months after the Public Charter School Alliance of South Carolina published its study describing the facilities challenges facing South Carolina's charter schools.

273, 199 S.E.2d 542, 545 (1973). In this case, however, that rule of construction must yield to an opposing presumption: statutes that are considered to be curative, remedial or clarifying will necessarily be applied retroactively.

This presumption of retroactivity—which applies to statutes that may be considered "corrective" in nature—is well-established both in South Carolina and throughout the country. In *Green v. City of Rock Hill,* 149 S.C. 234, 147 S.E. 346 (1929), for example, the South Carolina Supreme Court recognized that a "curative or validating statute . . . is necessarily retrospective in character and retroactive in effect[.]" Likewise, in *Merchants Mut. Ins. Co. v. S.C. Second Injury Fund,* 277 S.C. 604, 291 S.E.2d 669 (1982), the Court observed that a "remedial or procedural statute is generally held to be retroactive." 277 S.C. at 608, 291 S.E.2d at 669. The *Merchants* Court expressly observed that the presumption of retroactivity for curative or remedial statutes displaces the general, contrary presumption of prospective application for other types of statutes. *Id.*; *see also Segars v. Gomez,* 360 F.Supp. 50, 52-53 (D.S.C. 1972) (citing *Merchants* and noting that "[a] principal exception to th[e] rule [of prospective application of statutes] is that remedial or procedural statutes are generally held to operate retrospectively.").

The presumption of retroactivity that South Carolina courts observe for curative or remedial statutes is consistent with the approach taken by numerous other courts throughout the country. *See, e.g., Matter of D.C.,* 146 N.J. 31, 51 (1996) (describing New Jersey statutory amendments as clarifying and curative in nature and requiring retroactive application); *Washington Waste Systems, Inc. v. Clark County,* 794 P.2d 508, 511 (Wash. 1990) (noting that "curative statutes, i.e., statutes which clarify ambiguities in

older legislation without changing prior case law, presumably act retroactively" and finding Washington legislation to be a curative statute entitled to retroactive effect); *Swink v. Fingado,* 115 N.M. 275, 284 (1993) ("[A] statute which clarifies existing law may properly be regarded as having retroactive effect."); *City of Shelton v. Comm'r of Dept. of Env. Protection,* 193 Conn. 506, 514, 479 A.2d 208, 212-13 (1984) (applying retroactively a statute "intended to clarify and not to alter the preexisting law" and observing that "[a]n amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act.") Indeed, a number of courts have reasoned that a statute that merely clarifies existing law does not present a question of retroactivity at all, even if it is applied to transactions predating its enactment. *See, e.g., McClung v. Employment Development Dept.,* 99 P.3d 1015, 1019 (Cal. 2004) ("If [an] amendment merely clarifie[s] existing law, no question of retroactivity is presented."); 16B Am. Jur. 2d *Constitutional Law* § 735 (2009) ("[A] statute that merely clarifies rather than changes existing law does not apply retrospectively even if it is applied to transactions predating its enactment.").

All of these authorities, both within South Carolina and beyond, reflect the same sensible policy: a statute that is merely intended to confirm an original legislative act—by, for example, clarifying an ambiguity or removing an uncertainty—should be applied to transactions predating as well as following the statute's enactment. Both fairness and reason demand this result, for such a statute is not intended to change existing law, but to further it. As one leading treatise has summarized it:

> A retrospective statute is considered "interpretive," for purposes of determining whether it may be retroactively applied, when it does not create new rules but merely establishes a meaning that the interpretive statute had from the time of its enactment; it is the original statute, not the interpretive one, that establishes rights and duties. A "substantive law," which ordinarily can be applied prospectively only, is one that creates an obligation such that it creates, confers, defines, or destroys rights, liabilities, causes of action or legal duties. The rule of prospective application applies to laws that are substantive in nature, while laws that are procedural or interpretive may be applied retroactively.

16B Am. Jur. 2d *Constitutional Law* § 735 (2009). The question for this Court, then, is whether Act 208 is (i) a curative, clarifying or remedial statute, or (ii) an enactment reflecting a substantive change in legislative intention and existing law. If the former, the presumption favoring retroactive application governs, and Appellants are entitled to a refund of their 2013 property taxes. If the latter, the presumption of prospective application governs, and no tax refund is due.

To answer this question, one need look no further than the title of Act 208 itself. That title expressly states that the Act is intended to "clarify" the law to indicate that property both leased and owned by charter schools is exempt from *ad valorem* taxation. As noted above, unlike some other property tax exemptions that South Carolina has adopted over the years, the exemption for property used by educational institutions does not clearly indicate whether leased property is exempt. The General Assembly may well have considered that, with the rise of charter schools in South Carolina and the increasing use of leased campuses by those schools, the time had come to "clarify" the educational property tax exemption, at least for charter schools. But regardless of the reason, because Act 208 is undoubtedly a clarifying statute, it should be applied to give Appellants a refund of the 2013 taxes paid on YPA's leased campus.

3. The lower court erred by giving Act 208 only a prospective application and denying Appellants a refund of their 2013 property taxes.

The Administrative Law Court recognized that its principal task was to determine the scope of application of Act 208. The court rejected, however, Appellants' argument that the title of the Act indicates that it is a "clarifying statute" that should be applied to refund to Appellants their 2013 property taxes. R 5. The court reasoned that such an application would upset "the Department's longstanding contrary interpretation and application of the [exemption] statute." R 4. The court went on to assert that that "contrary interpretation" had been "affirmed by the Court of Appeals and acquiesced in by the legislature through numerous amendments to the section of the statute." *Id.*

Here, the lower court erred, for there is no evidence whatsoever of a "longstanding" interpretation of the property tax exemption statute by the Department of Revenue that is "contrary" to the interpretation urged by Appellants. Indeed, the only evidence before the lower court of the imposition of property taxes on property leased, but not owned, by a charter school for educational purposes are the 2013 taxes at issue in *this* case. The sole example of a contrary Department interpretation cited by the lower court—described in *Citadel Dev. Found. v. Greenville Cnty.*, 279 S.C. 443, 308 S.E.2d 797 (Ct. App. 1983)—is simply inapposite.

The taxpayer in *Citadel Dev. Found.*—The Citadel Development Foundation—was not an educational institution in its own right, but an eleemosynary corporation whose principal purpose was to raise funds to support The Citadel. 279 S.C. at 444, 308 S.E.2d at 798. Nevertheless, the Foundation sought to bring itself within the property tax exemption for "institutions of learning" found in S.C. Code § 12-37-220(A)(2), on the grounds that its relationship with the Citadel rendered it such an institution in its own

right. This Court rejected that argument, concluding that the Foundation "has none of the usual characteristics of such an institution." 279 S.C. at 447, 308 S.E.2d at 800. Here, however, YPA is, indisputably, a school and an "institution of learning" in its own right.

Moreover, the Citadel Development Foundation had not occupied the subject property itself during the tax period at issue in that case, but had leased the property to the Daniel International Corporation, presumably for commercial use. 279 S.C. at 445, 308 S.E.2d at 799. Certainly there is no indication in this Court's opinion that the property was used for educational or other exempt purposes. This fact, too, distinguishes the case from this dispute.

In sum, *Citadel Dev. Found.* stands for the unremarkable proposition that a corporation that is not itself a school, but only supports a school, cannot claim an educational property tax exemption for property that it does not occupy but leases to another party for non-educational purposes. Nothing in the reasoning or result of the case speaks to the question here: whether property that a school leases for educational purposes is exempt from *ad valorem* property taxation. Indeed, undersigned counsel is aware of no published legal authority addressing this question. And absent any such authority, or any other evidence in the record, there is no support for the lower court's conclusion that the courts and legislature of this State have long acquiesced in a policy by the Department of imposing *ad valorem* taxes on property leased by schools.

The second basis upon which the lower court relied for refusing to apply Act 208 to grant a refund to Appellants was the language in the Act providing that it was to take effect "upon approval by the Governor." R 6. Because the Act was not signed by the

Governor until June 2, 2014, the lower court reasoned, it could not be applied to give Appellants a refund of their 2013 taxes. *Id.*

Here again, the lower court erred. The "effective date" of a statute is not determinative of the scope of the enactment's application. Put another way, a court will not hesitate to apply a statute to transactions preceding its effective date if there exists one of the presumptions favoring such an application. Thus, in *Hercules, Inc. v. S.C. Tax Comm'n,* 274 S.C. 137, 262 S.E.2d 45 (1980), the South Carolina Supreme Court gave retroactive effect to a statute that had been approved on June 16, 1971, and that provided that it would "take effect immediately upon its approval by the Governor." 274 S.C. at 143, 262 S.E.2d at 48; *see also* Act No. 410, 1971 S.C. Acts 741. The Supreme Court did not even consider the "effective date" of the statute as being relevant to its retroactivity analysis; rather, it asked whether the statute was remedial in nature. *Id.* Concluding that the statute was remedial, the Court readily applied the statute to past conduct, consistent with the presumption of retroactivity that applies in such cases. *Id.*

Likewise, in *Smith v. S.C. Retirement Sys.,* 336 S.C. 505, 520 S.E.2d 339 (Ct. App. 1999), this Court was asked to determine the scope of the application of S.C. Code § 9-18-100, which had a stated effective date of July 1, 1995. *See* Act No. 39, 1995 S.C. Acts 180. This Court concluded that the statute was remedial, and that "[a]n exception to the prospectivity presumption therefore applies [because s]tatutes that are remedial or procedural in nature are generally held to operate retrospectively." 336 S.C. at 515, 520 S.E.2d at 344. Notably, as in *Hercules,* this Court did not consider at all the statute's stated effective date when deciding whether to apply it retrospectively.

These authorities squarely demonstrate that a statute's "effective date" is not determinative of—or even relevant to—the question whether the statute is to be applied to matters and transactions preceding its enactment. Rather, in the absence of any express statement by the General Assembly of the statute's retroactive or prospective application, courts are to discern the legislature's intention by employing one of two presumptions. Statutes that are remedial, curative, procedural or clarifying in nature are presumed to apply retroactively. Statutes that fall within none of these categories, but that represent a substantive change in law, are presumed to apply prospectively.

V. CONCLUSION

Expressly characterized by the General Assembly as a "clarifying" statute, Act 208 is an enactment whose purpose is demonstrably curative in nature: to remove any ambiguity as to whether property leased by charter schools is subject to *ad valorem* taxation. In clarifying that such property is exempt, the General Assembly neither upset a longstanding contrary interpretation of the Department of Revenue nor changed South Carolina's general taxing policy. Instead, Act 208 simply heeds this State's longstanding practice of protecting the campuses of educational institutions from onerous tax burdens.

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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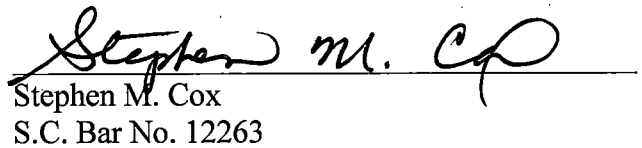
CERTIFICATE OF COUNSEL

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 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