THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
In a Contested Case Hearing

Deborah Brooks Durden, Administrative Law Judge

Docket No. 15-ALJ-17-0105-CC
Appellant Case No.: 2015-002087

Hock RH, LLC and York Preparatory Academy,.....Appellants,

v.

South Carolina Department of Revenue,.....Respondent.

FINAL BRIEF OF RESPONDENT

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ISSUE ON APPEAL

DID THE ADMINISTRATIVE LAW COURT ERR IN HOLDING THAT THE APPELLANTS ARE NOT ENTITLED TO A REFUND OF PROPERTY TAXES PAID FOR THE 2013 TAX YEAR?

STATEMENT OF THE CASE

York Preparatory Academy ("YPA"), a South Carolina nonprofit corporation, leased a parcel from Hock RH, LLC ("Hock") (collectively, "Appellants") on or about November 12, 2012. (R., p. 1; ALJ Order, p. 1). Thereafter YPA utilized the parcel to operate a charter school. The parcel, located in Rock Hill, South Carolina, consists of 45.01 acres, and a building. (the "Premises"). Hock owned the Premises for the entirety of Tax Year 2013. In February 2014, Hock conveyed the property to YPA, and YPA became the fee simple owner of the property. Id.

On November 4, 2013, the South Carolina Department of Revenue (the "Respondent") received an Application for Exemption, requesting the Premises be exempt from property tax for Tax Year 2013. The Application sought an exemption pursuant to S.C. Code Ann. § 12-37-220(A)(2) (Supp. 2013). On January 31, 2014, the Respondent denied YPA's Application for Exemption under § 12-37-220(A)(2), because the statute makes no allowances for properties leased to charter schools to be exempted from property tax. On February 20, 2014, Hock paid the 2013 tax for the Premises in the amount of $271,801.51 using funds YPA tendered pursuant the their lease agreement. Id.

In May 2014, the South Carolina General Assembly passed Act No. 208, S.C. Acts 2014 codified as S.C. Code Ann. § 59-40-140(K) (2014) which amended § 59-40-140(K) and creates tax exemptions, including property tax, for charter schools. In October, 2014, the Respondent received a protest from the Appellants, who were seeking

a refund of previously tendered 2013 property tax. On February 3, 2015, the Respondent issued its Department Determination, finding the Appellants were not entitled to a refund. On March 3, 2015, Appellants appealed the Department Determination to the Administrative Law Court and requested a Contested Case Hearing.

During a status conference with Judge Deborah Durden, the Administrative Law Judge assigned to the hearing, the parties agreed there were no genuine issues of material fact and that the matter could be resolved by summary judgement. The Respondent and Appellants filed their motions for summary judgement on July 8 and July 10, 2015, respectively.

The Administrative Law Court issued its Order on September 2, 2015, granting the Respondent's motion for summary judgement, finding that the Appellants were not entitled to a refund of their 2013 property taxes. (R., p. 6; ALJ Order, p. 6). Subsequently, the Appellants appealed the Administrative Law Court's Order, filing and serving their Notice of Appeal on October 2, 2015.

ARGUMENT

The Appellants seek a refund of the $271,801.51 paid to satisfy Appellant Hock RH, LLC's 2013 property tax liability. In an effort to obtain such refund, the Appellants argue that the General Assembly intended its 2014 amendment of § 59-40-140 to be curative only, thereby allowing such to be applied retroactively to the 2013 tax year. However, the Appellants are unable to overcome the presumption and precedent that amended statutes apply prospectively. Further, § 59-40-1409(K) now excludes an entire class of property from ad valorem taxation, which is a substantive change in the law and not simply curative.

The review of an Administrative Law Court order is defined in S.C. Code Ann. § 1-23-610(B) (Supp. 2014), which states:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because of a finding, conclusion, or decision is:
>
> (a) In violation of constitutional or statutory provisions;
> (b) In excess of the statutory authority of the agency;
> (c) Made upon unlawful procedure;
> (d) Affected by other error of law;
> (e) Clearly erroneous in the view of the reliable, probative, and substantial evidence on the whole record; or
> (f) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Administrative Law Court properly applied South Carolina case law and precedent in its finding that the Appellants are not entitled to a refund of property taxes paid for the 2013 tax year. In addition, the court's finding that the statute in question contains no ambiguous language, and therefore must be applied prospectively, is squarely in keeping with South Carolina law. Put simply, the Administrative Law Court did not err in its order denying the Appellants a refund and did not misapply South Carolina law. Therefore, the Respondent respectfully requests that the Court uphold the order of the Administrative Law Court.

THE ADMINISTRATIVE LAW COURT DID NOT ERR IN HOLDING THAT THE APPELLANTS ARE NOT ENTITLED TO A REFUND OF PROPERTY TAXES PAID FOR THE 2013 TAX YEAR.

A. The Premises is not exempt from property taxes for the 2013 Tax Year.

At issue is whether the Premises is exempt from property taxes for Tax Year 2013. It is well established in South Carolina that an exemption of private property is strictly construed because in such case taxation is the rule and exemption is the exception. State v. City of Columbia, 115 S.C. 108, 114 S.E. 337 (1920). S.C. Code Ann. § 12-37-210 (Supp. 2012) provides "[a]ll real and personal property in this State . . . shall be subject to taxation" unless explicitly exempted. General exemptions to property tax are delineated in § 12-37-220(A)(2). It is well settled that exemptions from taxing statutes exist through legislative grace, and a taxpayer asserting an exemption must bring itself squarely within the statute authorizing the exemption. Southern Weaving Co. v. Query, 206 S.C. 307, 313, 34 S.E.2d 51, 54 (1945). This construction means that the statutory language creating such exemptions will not be strained or liberally construed in the taxpayer's favor. Charleston County Aviation Authority v. Wasson, 277 S.C. 480, 289 S.E.2d 416 (1982).

The Appellants executed a lease for the Premises on November 12, 2012. On November 4, 2013, Appellant York Preparatory Academy applied for a property tax exemption for the Premises for Tax Year 2013. In the application, the Appellants cited § 12-37-220(A)(2) (Supp. 2012).

Among other things, § 12-37-220(A)(2) (Supp. 2012), entitled "General exemption from taxes", enumerates institutions that are exempt from ad valorem taxation. Section 12-37-220(A)(2) states:

> (A) Pursuant to the provisions of Section 3,Article X of the State Constitution and subject to the provisions of Section 12-4-720, there is exempt from ad valorem taxation:
>
> ***

> (2) all property of all schools, colleges, and other institutions of learning . . .

From its application, it appears the Appellants sought an exemption for the Premises as being the property of the school. Contrary to this assertion, the Premises was not the property of the school during 2013. While the Appellant York Preparatory Academy may have used the property in 2013, it is undisputed that it did not own the property in 2013. To the contrary, the Appellant YPA merely leased the property. The Appellant Hock owned the property throughout 2013 and Appellant Hock is not a school or institution of learning. On January 31, 2014, the Department denied the Appellant Hock's application because § 12-37-220(A)(2) makes no provision for leased property. Because Appellant YPA did not own the Premises, it does not qualify for an exemption through § 12-37-220(A)(2). Moreover, because Appellant Hock is not a school it does not qualify for an exemption pursuant to § 12-37-220(A)(2).

The Respondent denied the application for an exemption because requirements of § 12-37-220(A) were not met. Appellant YPA cannot receive an exemption under § 12-37-220(A) from property tax on property it did not own. Moreover, the lease of the property to a charter school does not make that property tax exempt under § 12-37-220(A). The exemption within § 12-37-220(A) only applies to the owner of the property and the owner's qualifications for exemption. Leasing property to an entity that would be exempt if it owned the property does not create an exemption. Appellant Hock RH is not an exempt entity so it does not qualify and Appellant YPA did not own the property so it did not qualify. Therefore, the Respondent denied the application for a property tax

exemption for the 2013 Tax Year because neither Appellant qualifies for an exemption from property tax paid for that period.

B. The General Assembly intended for § 59-40-140(K) (Supp. 2014) to operate prospectively.

Because the Appellants do not satisfy the requirements of § 12-37-220(A) as applicable in 2013, they seek a refund under the theory that a 2014 amendment to § 59-40-140 should be applied retroactively thereby making the premises tax exempt for 2013. At the time the Appellants initially applied for a property tax exemption the South Carolina Code did not exempt property leased to a charter school. However, in June 2014, the General Assembly amended § 59-40-140(K) to create an exemption for property leased by charter schools. The Appellants then applied for a refund of the 2013 taxes, claiming the amended § 59-40-140(K) is curative in nature and applies retroactively, thereby enabling the Appellants to receive a refund. The Administrative Law Court properly ruled that § 59-40-140(K) does not apply retroactively and the Appellants are not entitled to a refund of the property taxes paid by Appellants in tax year 2013.

In 2014, the South Carolina General Assembly passed Act 208, S.C. Acts 2014, which amended § 59-40-140(K) to specifically address tax exemptions for charter schools. Section 59-40-140(K) now states:

> (K) Charter schools are exempt from state and local taxation, except the sales tax, on their earnings and property **whether owned or leased**. Instruments of conveyance to or from a charter school are exempt from all types of local or state taxes and transfer fees.

(Emphasis added). Pursuant to this amended statute property leased by a charter school, and not just property owned by the school, is exempt from property tax. The

Appellants argue that § 59-40-140(K) is meant to be retroactive and as such, they should be exempt from the 2013 property tax liability. However, there is no evidence to support the Appellants' assertion of retroactivity for § 59-40-140(K). In the present matter the language of § 59-40-140(K) contains no specific provision allowing for retroactive application. Moreover, there is no evidence of any legislative intent that the statute be applied retroactively.

The crux of the Appellants' argument is that the 2014 Amendment, although passed after the 2013 property tax year, should be applied to the 2013 tax year so they can receive a refund. The enactment or amendment to a statute carries the presumption that such is prospective in nature. "In the construction of statute, there is a presumption that statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision in the enactment or clear legislative intent to the contrary." Hyder v. Jones, 271 S.C. 85, 245 S.E.2d 123 (1978). Where additional tools of statutory construction are needed to determine the meaning of a statute, the plain text of the statute is to be analyzed to determine the General Assembly's intent. "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Kirven v. Central States Health and Life Co., of Omaha, 409 S.C. 30, 760 S.E.2d 794 (2014) (quoting Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 725 S.E.2d 693, 695 (2012) quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). Despite the possible application of additional tools of statutory construction, there is a presumption against retroactivity. "Both federal and South Carolina courts employ a robust presumption against statutory retroactivity." Jenkins v. Meares, 302 S.C. 142, 146,

394 S.E.2d 317, 319 (1990). Further, South Carolina courts " . . . assume that statutes operate prospectively only, to govern future conduct and claims, and do not operate retrospectively, to reach conduct and claims arising before the statute's enactment." Id. This presumption of prospective only application applies to the 2014 Amendment to § 59-40-140(K) and therefore the Appellants do not qualify for a refund for 2013.

Further, when a statute is clear and unambiguous, there is no need for a court to engage in painstaking construction to determine the General Assembly's intent. "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005). The South Carolina Supreme Court's reasoning is firmly rooted in this doctrine and the Court further stated in Key Corporate Capital v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007):

> If a statute's language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006). (internal quotes and citation omitted). Instead, the words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Id. Moreover, "it is beyond this Court's power to effect a change in the statutes enacted by the Legislature." State v. Corey D., 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000)." (Emphasis added.)

Thus, when looking at the plain language of statutes, South Carolina courts can divine the statute's intention and apply it per the very words chosen by the General Assembly.

Section 59-40-140(K) states, "Charter schools are exempt from state and local taxation, except for sales tax, on their earnings and property whether owned or leased." The addition of the phrase "whether owned or leased" reflects an amendment added to the statute in June of 2014. Prior to June of 2014, § 59-40-140(J) stated "Charter schools are exempt from all state and local taxation, except the sales tax, on their earnings and property." The June of 2014 Amendment indicates the General Assembly's intention to exempt charter schools from property tax, whether owned or leased. Prior to the Amendment, leased property was not included in the statute and therefore not exempt. Per the aforementioned case law, the General Assembly's intent must be derived from the plain language of the statute. Here, The General Assembly amended the statute, because the General Assembly wished to make a change in the statute. Indeed, "it must not be presumed the Legislature did not intend a futile act, but rather intended its statutes to accomplish something." Stuckey v. State Budget and Control Board, 339 S.C. 397, 529 S.E.2d 706 (2000). What the General Assembly intended to accomplish was to exempt leased property by changing the statute to include such.

The prospective intent of § 59-40-140(K) is supported by the presumption against retroactivity and the plain language of the statute itself. The plain language of the statute makes no indication that such statute is to be applied retroactively. Furthermore, there is ample evidence that the General Assembly could have written § 59-40-140(K) to apply retrospectively if that was truly what the General Assembly intended.[1] If the General

[1]For example, in § 59-40-140(L), the General Assembly requires the computation of funding to occur along a certain timeline, namely after the effective date of the statute. Section 59-40-140(L) states, in part: "Notwithstanding the above provisions of this

Assembly wished to overcome the presumption against retroactivity, the General Assembly could have merely stated that § 59-40-140(K) applies to charter schools even before the effective date of the statute. It has not done so. The fact that § 59-40-140(K) does not include an indication that it applies retroactively supports the Administrative Law Court's decision in this case.

Because the text of § 59-40-140(K) does not include any indication of retroactive application, the Appellants assert that the title of Act 208, S.C. Acts 2014 must be analyzed to determine the General Assembly's intent. Contrary to the Appellants assertions that § 59-40-140(K) is not ambiguous and the Administrative Law Court was not obligated to look to the title of Act 208, S.C. Acts 2014 to determine the intent behind the Act. The Administrative Law Court agreed with this analysis. As Judge Durden noted in her Order:

> Our Supreme Court has held that where 'the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning'. Hodges, 341 S.C. 79.'What a legislature says in the text of the statute is considered the best evidence of the legislative intent or will.' Kirven, 409 S.C. 30. Here, there is no ambiguity in the text of the statute and no need to resort to searching the title of the act for clues as to how to interpret the plain and unambiguous language. The plain language of Act 208 states, 'Time effective. SECTION 2. This act takes effect upon approval by the Governor." I find the language of the Act to be plain and unambiguous. The Act was approved by the Governor on June 2, 2014. Therefore, the exemption from ad valorem taxation for real property leased by a charter school does not apply to the 2013 tax year.

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section, this subsection applies to converted charter schools that converted into a charter school **after the effective date of this act**." (Emphasis added.)

(R., p. 6; ALJ Order, p. 6.) The Appellants point to the title of Act 208, S.C. Acts 2014 as a clear indication of the General Assembly's intent for § 59-40-140(K) to be curative in nature. The title includes the phrase, ". . . so as to clarify that property of charter schools exempt from such taxation includes owned or leased property." The Appellants have not provided any precedent holding that the title of the Act outweighs the words of the statute itself. Much to the contrary, and as previously mentioned, the South Carolina Supreme Court has instead held:

> If a statute's language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006). (internal quotes and citation omitted). Instead, the words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Id. Moreover, "it is beyond this Court's power to effect a change in the statutes enacted by the Legislature." State v. Corey D., 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000)." (Emphasis added.)

A contention that the title of the Act holds more weight than the plain, unambiguous language of the statute is, at best, forced construction to expand the statute's operation. Section 12-37-210 (Supp. 2012) provides "[a]ll real and personal property in this State . . . shall be subject to taxation" unless explicitly exempted. It is well settled that exemptions from taxing statutes exist through legislative grace, and a taxpayer asserting an exemption must bring itself squarely within the statute authorizing the exemption. Southern Weaving at 313, 34 S.E.2d 51, 54 (1945). This construction means that the statutory language creating such exemptions will not be strained or liberally construed in the taxpayer's favor. Charleston County.

The present matter involves exempting privately held property from ad valorem property taxes. It is well established in South Carolina that exemptions of private property are strictly construed, because in such cases taxation is the rule and exemption is the exception. State v. City of Columbia, 115 S.C. 108, 104 S.E. 337 (1920). Pursuant to the foregoing, the property at issue in this case is presumed to be taxable and not exempt. Moreover any statute addressing an exemption to the property at issue must be strictly construed. Section 59-40-140(K) is not to be strained or liberally construed in the Appellants' favor. Appellants' interpretation of § 59-40-140(K) requires a strained liberal construction that is not permissible in private property exemption cases. To hold that the title of an act including the phrase clarification means the amended statute applies retroactively when there is no indication of retroactive intent, no indication that the statute is remedial in nature, and no recognition of the dangers that retroactive application creates, is an impermissibly liberal application of the statute.

The General Assembly could have stated whether § 59-40-140(K) had any additional constraints. The General Assembly's ability to add such additional constraints is evidenced in § 59-40-140(L). Because the statute's language is unambiguous, the General Assembly clearly meant for § 59-40-140(K) to be prospective in nature. This follows our Supreme Court's guidance that, "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Kirven v. Central States Health and Life Co., of Omaha, 409 S.C. 30 (2014) quoting Hodges at 85, 533 S.E.2d 578, 581 (2000). The text of the statute contains no indication that the statute applies retroactively or that the prior version of the act exempted leased property. The

use of the word "clarify" in the Act's title does not make the exemption retroactive when the statute itself does not state such retroactivity. Here, again, the Administrative Law Court did not err by simply applying the 2014 Amendment prospectively. To the contrary, the Administrative Law Court properly ruled in accordance with applicable precedent.

C. South Carolina case law applicable to determining whether a statute should be applied retroactively supports the Administrative Law Court's decision.

The South Carolina Supreme Court provided a test to determine whether statutory amendments can be applied retroactively in the absence of plain and unambiguous language. That test is found in Merchants Mutual Insurance Co. v. S.C. Second Injury Fund, 277 S.C. 604, 291 S.E.2d 669 (1982).

In Merchants, the Court applied a two-part test to determine if a statute should be applied retroactively:

> The presumption is that statutory enactments are prospective absent clear legislative intent or specific provision to the contrary, however, a remedial or procedural statute is generally held to be retroactive. Thus, two questions are raised. First, we must determine whether the amendment is remedial or procedural...The next question is whether there is clear legislative intent or specific provision indicating the statute shall be retroactive.

The Merchants court reiterates the fundamental presumption that all statutory enactments are prospective unless there is clear intent to the contrary. That presumption may only be overcome by satisfying the two-part test established therein. Pursuant to Merchants, a two-part test must be applied to determine whether § 59-40-140(K) applies retroactively. The first step requires determination of whether that statute is remedial or

procedural. The second step looks to whether there is clear legislative intent or a specific provision indicating a retroactive application of the statute. As explained more fully herein, § 59-40-140(K) does not satisfy either of the two parts of the Merchants test.

As to the first step, a procedural statute "sets out a mode of procedure for a court to follow or prescribes a method of enforcing rights." Edwards v. State Law Enforcement Division, 395 S.C. 571, 720 S.E.2d 462 (2011). Section 59-40-140(K) does not prescribe a method of enforcing a right or set out a court procedure. Therefore, § 59-40-140(K) is not procedural in nature.

Because § 59-40-140(K) is not procedural, the question becomes whether it is remedial. Per Merchants, an extension of a right or a legislative grace, even with additional conditions that must be met before the right attaches, is not considered remedial. Simply stated, § 59-40-140(K) is an extension of a legislative grace and therefore not remedial. It is well established under both state and federal laws that exemptions, including property tax exemptions like the one at issue here, are a matter of legislative grace rather than entitlement. Adams v. Burts, 245 S.C. 339, 140 S.E.2d 586 (1965); Fennell v. S.C. Tax Comm'n, 233 S.C. 43, 103 S.E.2d 424 (1958). Section 59-40-140(K) extends an exemption, which is a form of legislative grace, to include property leased to a charter school. Therefore, because § 59-40-140(K) is an extension of a legislative grace, pursuant to Merchants, it is not remedial. Furthermore, there is no evidence that § 59-40-140(K) is meant to be remedial. Section 59-40-140, the South Carolina Charter Schools Act of 1996, was enacted in 1996. Despite the various amendments to § 59-40-140, there is no evidence or language that any of these amendments remediate prior versions of § 59-40-140. Prospectively exempting charter

schools from property tax is not tantamount to a procedural alteration to the nature of charter schools, or their operation, in the state. Therefore, § 59-40-140(K) is not procedural and is not to be applied retroactively.

Moving to the second part of the Merchants test, there is no clear legislative intent or specific provision indicating the statute shall be retroactive. As previous stated, the majority of the Administrative Law Court's analysis occupied this area of deficiency in the Appellant's argument. There is no indication the General Assembly intended for the exemption extended to charter schools in § 59-40-140(K) to be retroactive. Had the General Assembly intended the statute to be retroactive, it could have easily included language to that effect. Throughout the South Carolina Code of Laws when the General Assembly intends for something to be retroactive, it plainly manifests that intention through the language of the statute. For example, in § 12-43-220(c), the General Assembly stated:

> (6) Notwithstanding any other provision of law, a purchaser who purchases a residential property intending that the property shall become the purchaser's primary residence, but subject to vacation rentals as provided for in Article 2, Chapter 50, Title 27 for no longer than ninety days, may apply for the four percent assessment ratio when the purchaser actually occupies the property. If the owner actually occupies the residence within ninety days of acquiring ownership, the four percent assessment ratio, if the owner is otherwise qualified, **applies retroactively to the date ownership was acquired**. (Emphasis Added.)

Likewise, S.C. Code Ann. § 12-6-1120(9) (2014) states:

> Notwithstanding Section 12 of Act 101 of 1985, Internal Revenue Code Section 7518 **applies retroactively to taxable years beginning after 1986 and applies to any taxpayer**. (Emphasis Added.)

There are many other statutes that express, with clarity, the General Assembly's intention for a statute to operate retroactively.[2] However, § 59-40-140(K) (2014) contains no such language. Therefore, the Appellants' argument also fails the second part of the Merchants test. Because § 59-40-140(K) fails both parts of the Merchants test, the statute cannot be applied retroactively. Because § 59-40-140(K) cannot be applied retroactively, it does not create a basis for the Appellants to receive an exemption from the 2013 property tax.

D. The Administrative Law Court did not err by finding the amendment to § 59-40-140 is not curative or corrective in nature.

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[2]The following are a few examples of statutes specifically mentioning retroactivity.

S.C. Code Ann. § 20-1-60: Marriage of parents legitimates illegitimate children.
If the parents of an illegitimate child subsequently marry, the child shall become legitimate as if born in lawful wedlock and, as to the child so legitimated, all limitations imposed by law upon the amount of property that may be given illegitimate children by deed, will, inheritance or otherwise shall be removed. The provisions of this section shall be **retroactive** to the extent that they shall apply in all cases in which prior to May 2, 1951, the parents of an illegitimate child shall have married and the father and such child shall have been living on said date.

S.C. Code Ann. § 35-1-408: South Carolina Uniform Securities Act
(e) If the Securities Commissioner determines that a registrant or applicant for registration is no longer in existence or has ceased to act as a broker-dealer, agent, investment adviser, or investment adviser representative, or is the subject of an adjudication of incapacity or is subject to the control of a committee, conservator, or guardian, or cannot reasonably be located, a rule adopted or order issued under this chapter may require the registration be canceled or terminated or the application denied. The Securities Commissioner may reinstate a canceled or terminated registration, with or without hearing, and may make the registration **retroactive**.

S.C. Code Ann. § 62-2-806: Modification to achieve testator's tax objectives.
To achieve the testator's tax objectives, the personal representative or any interested person may file a summons and petition requesting the court, after notice and a hearing, to issue an order modifying the terms of a testator's will in a manner not contrary to the testator's probable intent. The court may provide that the modification has **retroactive** effect.

S.C. Code Ann. § 56-9-110: Retroactive application of chapter.
This chapter shall not apply with respect to any accident or judgment arising therefrom or violation of the motor vehicle laws of this State, occurring prior to January 1, 1953.

The Appellants maintain the Administrative Law Court erred by not finding the Amendment to § 59-40-140 to be "curative" or "corrective in nature". The Appellants assert that curative statutes exist merely to clarify existing law meaning "issues of retroactivity simply are not implicated" yet simultaneously argue "'curative statutes' [are] by their very nature, retroactive". (Appellants' Brief, p. 6).

To support their argument, the Appellants rely predominately on case law which originated outside of South Carolina, while ignoring the Merchants test. Indeed, the Appellants identify two South Carolina cases to support their argument, Green and Merchants. However, Green is inapplicable as to its findings and the Appellants cite Merchants as their basis of a retrospective inquiry, yet as explained previously, the Appellants fail to satisfy the two-part test found therein.

The Appellants argue that it is the long standing policy of this State to exempt the property of schools from taxation regardless of whether it is owned or leased. The Appellants provided no authority to support this assertion. This claim, along with the assertion that § 59-40-140(K) is curative or corrective in nature shows the Appellant's failure to understand or recognize that our General Assembly and the Code of Laws it enacted treats leased and owned property differently. Adding leased property to the list of exempted property is a substantial change in the law. The distinction between owned and leased property can be seen throughout property tax exemptions found in § 12-37-220.

Appellants' curative argument is based upon the assertion that when the General Assembly says "property" in an exemption statute, as it did when it enacted § 59-40-140 in 1996, it really means property owned or leased despite the fact it did not state such in the statute. Under the Appellants' curative argument the 2014 Amendment simply cured

the statute so as to read what the General Assembly always intended. The Appellants' argument is simply incorrect and contradicted by the other parts of the Code of Laws.

Property tax exemptions are generally found at § 12-37-220. Throughout § 12-37-220 there are numerous examples of when the General Assembly recognizes the difference between property owned by a taxpayer and property leased by a taxpayer. Sections 12-37-220(B)16, 18, 19, 21, 25, 26, 27, 28, 29, 37, 45, 46, and 49 all explicitly address property that is leased rather than owned. These statutes unequivocally demonstrate that when the General Assembly intends for a statute to include leased property it explicitly states such. Moreover, when a statute does not explicitly include leased property it would be improper to include leased property as such interpretation would render other sections of the Code of Laws superfluous. For example, § 12-37-220(18) exempts "real property leased on a nonprofit basis, to a state agency, county, municipality or other political subdivision so long as it is used for a general public purpose; provided, however, this exemption shall not apply to property used for office space or warehousing." All property of the state, counties, municipalities and other political subdivisions is already exempt pursuant to § 12-37-220(A)(1). Therefore, if the Appellants' assertions that when the General Assembly says "property" it really means property that is both owned or leased is correct, any property leased to the state, counties, municipalities and other political subdivisions is already exempt. There would have been no need for the General Assembly to enact § 12-37-220(18). In fact, the Appellants' theory would render § 12-37-220(18) superfluous and unnecessary.

Similarly § 12-37-220(19) exempts:

> all property owned by volunteer fire departments and

> rescue squads used exclusively for the purposes of these departments and squads. Property leased to a department or squad by an entity itself exempt from property tax is exempt in the same manner that property owned by these departments and squads is exempt;

Here again if the Appellants' assertions were correct, the General Assembly would not have needed any of the second sentence of this subsection. Property of the fire department, regardless of owned or leased would have been exempt. Under Appellants' theory the second sentence is superfluous and unnecessary. In interpreting statutes, this Court must presume the Legislature did not intend a futile act, but rather intended its statutes to accomplish something. TNS Mills, Inc. v. South Carolina Dept. of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998); State ex rel. McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964). Because the Appellants' theory would render numerous sections of § 12-37-220 superfluous and unnecessary, Appellants' theory is clearly incorrect. On the other hand, when leased property is recognized as being different from owned property, the impermissible results incurred under Appellants' theory are avoided.

Contrary to the Appellants' assertions, as explained above, leased property is not the same as owned property in terms of property taxes. When the General Assembly seeks to exempt leased property it clearly states such as it did in the numerous subsections of § 12-37-220 cited above. Because "property" when used in exemption statutes does not inherently include leased property, the General Assembly's 2014 Amendment to § 59-40-140 to include property leased by charter schools is not simply a curative change, rather such constituted a substantive change to the law.

As to the Green case, the District Court of South Carolina gave an excellent summation of the Green case within the holding of Segars v. Gomez, 360 F. Supp. 50, 53-54 (D.S.C. 1972). The District Court stated:

> [t]his was a class action brought against the city contesting the validity of a proposed contract to construct a water supply system. The petitioners based their argument on what is referred to in the decision as the "act of 1914," which established the commission form of government for Rock Hill. One section of the "act of 1914" provided that, upon the adoption of the commission form of government, the duties of the board of commissioners of public works would devolve upon the city council, and the board of commissioners of public works would thereby be abolished. However, this particular section of the "act of 1914" was omitted from the 1922 codification of the state statutes, and it was conceded that the effect of the failure of the codifiers to incorporate that part of the "act of 1914" in the Code of 1922 was to render that act inoperative after the effective date of the adoption of the Code. Upon this happenstance the petitioners based their claim that the Rock Hill city council was without authority to enter into a contract dealing with a water supply system. But during the pendency of that litigation, the General Assembly ratified several acts which "were intended to cure the inoperative status of the act of 1914, as amended, and were especially and expressly directed to the purpose of re-enacting such inoperative statutes, with retroactive effect, and of validating the acts of the city of Rock Hill taken during the period of time the statutes were so rendered inoperative." 147 S.E. at 352.

The South Carolina Supreme Court, hearing the case in its original jurisdiction, found that the validating acts passed in 1929 were "plainly curative and remedial in character, and are clearly applicable to the pending controversy .... It is a well-settled general rule that the Legislature, by a curative or validating statute which is necessarily retrospective in character and retroactive in effect, can 'validate any act which it might originally have authorized.' [Citations omitted]. Obviously, the General Assembly

possessed the same powers to re-enact, with retroactive effect, the Act of 1914, and the Act of 1921 amendatory thereof, that it had to enact the said statutes originally." 147 S.E. at 352. Thus the court held that, by virtue of the curative acts, the city council was vested with the authority conferred upon the board of commissioners of public works to contract for building waterworks.

Specifically, the Court in Green sought a remedy for discrepancies between acts of the General Assembly in 1914, 1921 and 1922, during which time the City of Rock Hill had entered into public works contracts. Viewing the actions of the City of Rock Hill through the lens of the February 8, 1929 Act, the Court stated:

> An examination of these acts discloses that they were intended to cure the inoperative status of the act of 1914, as amended, and were especially and expressly directed to the purpose of re-enacting such inoperative statutes, with retroactive effect, and of validating the acts of the City of Rock Hill taken during the period of time the statutes were so rendered inoperative. The Acts of February 8, 1929, of which this court takes judicial notice, are plainly curative and remedial in character, and are clearly applicable to the pending controversy, in which no final judgment has been rendered. (Internal citation omitted.) It is a well-settled general rule that the Legislature, by a curative or validating statute which is necessarily retrospective in nature and remedial in effect, can "validate any act which it might originally have authorized." (Citations omitted.)

In Green, the Court's curative analysis is based upon earlier cases which date back to the 1880's.[3] The Court sought to cure discrepancies in various acts after

[3]Green references the following cases in support of the curative rule statement: State v Whitesides, 30 S.C. 579, 9 S.E. 661, 3 L.R.A. 777; State v. Neely, 30 S.C. 587, 9 S.E. 664, 3 L.R.A., 672; Hodge v. School District, 80 S.C. 518, 61 S.E. 1009; Dove v. Kirkland, 92 S.C. 313, 75 S.E. 503; Lucas v. Barringer, 120 S.C. 68, 112 S.E. 746.

stipulation by the parties and judicial notice. The Court recognized that the General Assembly inadvertently failed to include parts of the 1914 Act. Therefore, it treated the later act as curing that inadvertent mistake and applied the statute as the General Assembly had always intended. This is wholly incompatible with, and inapplicable to, the case at hand. The Appellants seek to have Green serve as a guiding light in this case. The Appellants argue that the General Assembly intended § 59-40-140(K) to be curative in nature, thereby eliminating the need for any analysis of retroactivity. This reasoning fails for multiple reasons. First, the facts in Green are distinguishable from the present case. Also, the Appellants give greater value to the title of Act 208 than the words of the statute itself. Lastly, and as previously discussed in this brief, because the facts of Green are inapplicable, the South Carolina Supreme Court holding in Merchants supersedes Green and is the applicable standard.

E. The facts in Green are inapplicable to the present case.

As previously noted, the facts and holding of Green are distinguishable from this case and are superseded in relevance by the Merchants test. Furthermore, the "general rule" regarding curative statutes is also inapplicable in this case. The Court in Green stated that, "It is a well settled general rule that the Legislature, by a curative or validating statute which is necessarily retrospective in nature and remedial in effect, can 'validate any act which it might originally have authorized.'" Green v. City of Rock Hill, 149 S.C. 234 (1929). Importantly, the Court states a statute is curative in nature if it is "necessarily retrospective in nature and remedial in effect". (Emphasis added). Applying this "remedial in effect" requirement to the present matter demonstrates why Green is inapplicable here. There is no language contained in the 2014 Amendment to § 59-40-

140(K) that is necessarily retrospective in nature or remedial in effect. To the contrary, § 59-40-140(K) is absolutely silent as to any intention of retroactivity by the General Assembly.

Further, a distinction must be made between what is curative and what is clarifying. The General Assembly can, and does, act to cure or clarify statutes. The Court in Green provides insight into the difference. Per Green, the General Assembly acts to cure when there is a defect in a statute. Our Legislature amended § 59-40-140 numerous times since the original enactment in 1996 yet there is no evidence that a defect existed in § 59-40-140 or that any of those amendments sought to cure any aspect of § 59-40-140. Therefore, there is no basis to hold that the amended § 59-40-140(K) is curative.

Our General Assembly enacted § 59-40-140(K) in 2014. Subsequent to its enactment the General Assembly made several amendments to § 54-40-140 without making any amendment to subpart (K), the subpart at issue here. If the 2014 Amendment was truly curative as the Appellants assert, the General Assembly certainly would have made such curative correction in one of its earlier amendments. The fact the General Assembly clearly addressed and amended § 59-40-140 on several occasions without altering subsection (K) demonstrates that the 2014 Amendment was not actually curative. The significant impact that the 2014 amendment had to tax liabilities of charter schools demonstrates that such amendment is not clarification. Leased property that was previously subject to the tax is now tax exempt. This is a significant change in the law. Such a significant change cannot be described as simply a clarification. Furthermore, the fact the General Assembly made previous amendments to § 59-40-140 without altering

subsection (K) also demonstrates that the 2014 amendment was not simply a clarification but rather a substantive change to the law. See dissent in Goff v. Mills, 279 S.C. 382, 387, 308 S.E.2d 778, 781 (1983) recognizing that amendments to a statute after its enactment but prior to the amendment at issue means the amendment at issue was not merely a clarification but rather a change in the law. Goff v. Mills, 279 S.C. 382, 387, 308 S.E.2d 778, 781 (1983).

F. The outcome Appellants seek will cause harmful effects.

Applying the 2014 Amendment retroactively creates logistical and financial difficulties that could devastate the counties of South Carolina. Moreover as the Supreme Court recognized in TNS Mills the property tax scheme in South Carolina cannot properly function when retroactive exemptions are allowed. In TNS Mills the Supreme Court stated:

> Furthermore, an interpretation allowing retroactive exemptions would not fit with the procedural scheme set out by the General Assembly. The Code requires the Department to make annual determinations concerning exemptions and to notify the appropriate county officials of what property was exempted from taxation by June first. S.C.Code Ann. § 12–4–710 (Supp. 1992).

Retroactive exemptions as advanced by TNS Mills would negate the purpose of notifying county officials by June first because the information given them would be worthless; the amount of exempted property, would change every time the Respondent granted a retroactive exemption. The plain language of these Code sections, when read together, show the Legislature intended to set clear deadlines for applying for exemptions as part of an overall plan to enable counties and school districts to plan budgets for each fiscal year. Any interpretation allowing the granting of exemptions after the deadline

would negate the benefit of this plan. TNS Mills, Inc. v. S. Carolina Dep't of Revenue, 331 S.C. 611, 620-21, 503 S.E.2d 471, 476 (1998)

Similarly in the present matter if this Court applies the 2014 Amendment to § 59-40-140(F) retroactively it has the same impact described in TNS Mills. The counties of South Carolina completed their past budgets including property tax from properties only leased and not owned by charter schools. The counties did this because property leased to charter schools was not exempt from property taxes at the time they determined which properties would be subject to taxation. Under Appellants' theory of this case, those counties now must refund past property taxes because of the 2014 Amendment. It is unclear how far back the Appellants assert the 2014 Amendment should be applied. Section 59-40-140(F) dates back to 2006 therefore the Appellants' argument potentially allows claims for refunds for property taxes for the past eight years. Forcing counties to retroactively issue refunds for the past eight years, when those funds have been budgeted and spent, could have a devastating impact on the counties. Our General Assembly could not have intended such potential devastation. In light of the devastating consequences and logistical difficulties that retroactive application of the 2014 Amendment creates, the General Assembly certainly would have been clear in stating that the Amendment applied retroactively if that was what they truly intended. On the other hand, if the 2014 Amendment is applied prospectively the property tax scheme of this State is not negated and the potentially devastating impact created by Appellants' position is avoided.

Utilizing a hypothetical which is consistent with Appellants' theory of the case, but reversing the impact demonstrates the inequity in the Appellants' argument. In this

hypothetical the Respondent and the counties had been interpreting property of the charter schools to include leased property and allowing those charter schools to receive property tax exemptions for such leased property since the § 59-40-140's inception. Then, in 2014 the General Assembly amended the statute to state that property of charter schools does not include leased property. Under Appellants' theory, the Respondent and the County would be entitled to retroactively pursue those charter schools for past years' property taxes. Those charter schools now facing massive property tax bills for past years would be devastated. The inequity of holding those taxpayers liable for taxes previously considered exempt demonstrates why the Appellants' theory cannot prevail. The Respondent ventures to say the Appellants would not be making the arguments they are now if this hypothetical were the reality before the Court.

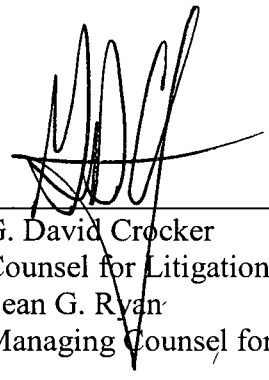
CONCLUSION

At issue in this case is the presumption against retroactivity, a presumption the Appellants have not overcome in order to gain the refund they seek. Retroactivity invariably causes damaging and unintended results, which is why courts have such high standards for overcoming presumptions against it. The South Carolina Supreme Court handed down a test for determining whether a statute is to be applied retroactively in the absence of clear legislative intent. That test is found in Merchants. The Merchants test is the applicable standard in this case. The Appellants seek any statutory construction that would entitle them to a refund. The Appellants claim § 59-40-140(K) is curative in nature. The Appellants cite Green as the basis of their claim that the presence of an amended statute is proof § 59-40-140 was defective before the June 2014 Amendment. Yet they offer nothing to substantiate a claim that the General Assembly sought to cure a

defect in the statute. Likewise, the Appellants claim § 59-40-140(K) is a clarification of law, entitling them to a refund without a determination of retroactivity. This analysis fails to establish whether the clarification triggers a substantive, material change in the law, which would require a determination of retroactivity. Instead, the Appellants offer the title of Act 208, S.C. Acts 2014, as proof of the General Assembly's intention for an exemption to be applied to the Appellants alone. The Appellants' ongoing misunderstanding of the difference in tax liabilities between owned and leased premises is the foundation of this action. Application of the Appellants' analysis of the General Assembly's intentions "would lead to an absurd result that could not have been intended by the Legislature." Kennedy v. South Carolina Retirement System. 345 S.C. 339, 549 S.E.2d 243 (2001).

The Administrative Law Court correctly applied applicable case law and precedent. Because there is no ambiguity in the language of the statute, the court did not err in its finding of prospective application. As explained more fully herein, Merchants is the applicable standard in determining retroactive application of statutes. Applying Merchants to the facts in this matter demonstrates that § 59-40-140(K) is not to be applied retroactively.

For the foregoing reasons, the Respondents respectfully request that the judgment of the lower court be upheld.



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March 25, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
In a Contested Case Hearing

Deborah Brooks Durden, Administrative Law Judge

Docket No. 15-ALJ-17-0105-CC
Appellant Case No.: 2015-002087

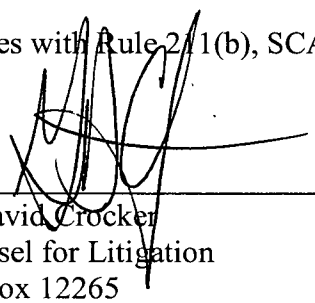
Hock RH, LLC and York Preparatory Academy,.....Appellants,

v.

South Carolina Department of Revenue,.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



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PROOF OF SERVICE

I, Jean M. O'Connor, do certify that I have caused to be mailed via United States Postal Service, postage prepaid, a copy of the Respondent's Final Brief in the above referenced matter to Stephen M. Cox, Esquire, PO Drawer 12070, Rock Hill, SC 29731 this 28th day of March 2016.

Jean M. O'Connor