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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Circuit Court Judge

Case No. 2016-CP-40-3102
Appellate Case No. 2016-001839

Richland County, South Carolina, Appellant/Respondent,

v.

The South Carolina Department of Revenue, and
Rick Reames, III in his Official capacity as its Director Respondents/Appellants,

v.

Richland PDT, a joint venture consisting of M.B. Kahn
Construction Co., Inc., ICA Engineering, Inc., and Brownstone
Construction Group, LLC, as a unit and individually, Third-Party Defendants.

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did the Circuit Court Err in Granting the County's Petition for a Writ of Mandamus Requiring SCDOR and the Director to Allocate and Remit All Penny Tax Revenues Collected Within the County for 2016 and All Future Allocations and Remittances?
- II. Did the Circuit Court Err in Denying SCDOR's Motion for an Injunction Based Upon the Court's Holding that SCDOR Failed to Establish that SCDOR and its Director Would Suffer Irreparable Harm?
- III. Did the Circuit Court Err in Denying SCDOR's Motion for the Appointment of a Receiver Based upon a Finding That SCDOR and its Director Have No Authority to Seek Appointment of a Receiver and, Alternatively, That the Request for the Appointment of a Receiver Was Untimely?

STATEMENT OF THE CASE

On May 20, 2016, Richland County brought an action against the SCDOR and its director, Rick Reames, III (the "Director"), related to the Richland County Penny Tax Revenues. Specifically, the County sought a declaratory judgment that SCDOR and the Director did not have authority to withhold revenues under the Penny Tax Program. The County also sought a writ of mandamus directing the SCDOR to remit the Penny Tax Revenues to the State Treasurer for transfer to the County, injunctive relief preventing the SCDOR from ordering or directing the County how to spend the revenues under the Penny Tax Program, and an award of fees and costs. (Complaint)

On June 20, 2016, the SCDOR and the Director filed an answer and counterclaim, and included a third-party complaint against Richland PDT. SCDOR sought court assistance to take action to address alleged problems discovered during an audit of the County's Penny Tax Program. SCDOR also challenged the County's ordinance to the extent it permitted expenditures not authorized under Title 12 of the South Carolina Code. SCDOR sought an accounting and disgorgement from the County and PDT, and requested that the circuit court enter an injunction prohibiting further expenditures as well as the appointment of a receiver to ensure lawful operation of the Penny Tax Program while the matter was pending. On June 21, 2016, SCDOR filed a separate motion for injunctive relief or, alternatively, the appointment of a receiver.

On June 23, 2016, the County filed a memorandum in support of its petition for writ of mandamus and for its motion for temporary injunction. The County contended that SCDOR and the Director did not have the authority to refuse to remit quarterly tax

revenues to the County Treasurer or to withhold the remittance of the Penny Tax Revenues based upon how the County used the funds. The County also sought an order enjoining or otherwise prohibiting SCDOR “from issuing directives, demands, or orders on any matter related to Richland County’s and Council’s spending of the Penny Tax Revenues.”

On June 23, 2016, SCDOR and the Director filed a memorandum in opposition to the County’s request for declaratory judgment, writ of mandamus and injunctive relief. On June 24, 2016, SCDOR filed a memorandum in support of its claims for injunctive relief or the appointment of a receiver, and the County filed a memorandum in opposition to SCDOR’s motions. The County also moved to strike portions of affidavits of Tim Donovan and Jerilynn VanStory SCDOR filed with its motion for injunctive relief. Chief Administrative Judge Alison Lee entered an order on June 24, 2016, designating the matter as complex and assigning the case to Judge G. Thomas Cooper.

On June 28, 2016, the circuit court held a hearing on all pending motions. The court issued an order on June 30, 2016 in which it:

- A. Granted the County’s petition for writ of mandamus directing SCDOR and the Director to remit the Penny Tax Revenues for the quarter ending June 2016 to the State Treasurer;
- B. Ruled that SCDOR and the Director had standing to assert their motions, counterclaims and third-party claims based upon “a level of statutory authority to oversee the County’s use of the Penny Tax Revenues”;
- C. Ruled that SCDOR and the Director had standing based also on the

“public importance” exception;

- D. Denied the County’s motion for temporary injunction;
- E. Denied SCDOR’s motion for injunctive relief;
- F. Denied SCDOR’s motion for appointment of a receiver on the ground that SCDOR has no authority to petition for appointment of a receiver and the request was untimely.

On July 11, 2016, the parties filed cross-motions for the court to alter or amend its order. On July 15, 2016, the court granted the County’s motion to strike portions of the affidavits of Mr. Donovan and Ms. VanStory on the grounds they contained legal conclusions or were not based on personal knowledge. That same date the court entered an order permitting Central Midlands Regional Transit Authority (CMRTA) to intervene with the consent of all parties.

On July 20, 2016, the County moved to dismiss the counterclaims and third-party claims brought by SCDOR and the Director.

On August 2, 2016, the circuit court entered an order granting in part the motions for reconsideration filed by each party and amended its final order accordingly. On August 16, 2016, the court entered an order granting the third-party defendants’ motion to dismiss SCDOR’s third-party complaint. On August 17, 2016, the court entered an order denying the County’s motion to dismiss SCDOR’s counterclaims.

On September 2, 2016, the County filed and served a Notice of Appeal and on September 13, 2016, filed and served an amended Notice of Appeal. On September 14, 2016, SCDOR and the Director filed and served a notice of cross-appeal. On September

19, 2016, Intervenor CMRTA moved the Court of Appeals to be included as a party in the appeal.

FACTS

STANDARD OF REVIEW

“Actions for injunctive relief are equitable in nature.” *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010). The appellate court reviews equitable issues *de novo*. *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 414 S.C. 33, 777 S.E.2d 176 (2015); *Lambries v. Saluda County Council*, 409 S.C. 1, 760 S.E.2d (2014) (upon review of an action in equity, the appellate court may make factual findings based on its own view of the preponderance of the evidence).

Furthermore, determining the proper interpretation of a statute is a question of law, and the appellate court also reviews questions of law *de novo*. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). “In a case raising a novel issue of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court.” *Sloan v. S.C. Bd. of Physical Therapy Exam’rs*, 370 S.C. 452, 466, 636 S.E.2d 598, 605 (2006). “The appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the Court’s sense of law, justice, and right.” *Lambries; Sloan*.

Therefore, this Court’s standard of appellate review in this matter is the broadest available.

THE SCDOR

The General Assembly created the South Carolina Department of Revenue (SCDOR) “to administer and enforce the revenue laws of this State; administer and enforce licensing laws and regulations relating to alcoholic liquors, beer and wine and assess penalties for violations thereof; and other laws specifically assigned to it.” S.C. Code Ann. § 12-4-10 (2014). The SCDOR has broad authority to facilitate tax administration, regulation, and enforcement. S.C. Code Ann. § 12-4-310 (2014), *et seq.* The SCDOR also has authority for tax administration, regulation, and enforcement as it relates to sales and use taxes. S.C. Code Ann. § 12-36-2660 (2014) (“[t]he Department of Revenue shall administer and enforce the provisions of this chapter [Chapter 36].”).

THE TRANSPORTATION OR “PENNY TAX” ACT

In 1995, the General Assembly passed Act No. 52 creating Chapter 37 of Title 4 of the Code. S.C. Code Ann. § 4-37-10 (Supp. 2016), *et seq.* The new chapter provided for “Optional Methods for Financing Transportation Facilities.” Pursuant to the Act, South Carolina counties may choose “to finance all of the cost of highways, roads, streets, bridges, and other transportation-related projects and elect[] to create an authority for that purpose....” S.C. Code Ann. § 4-37-10 (A), (C). Counties are “empowered to impose by ordinance a sales and use tax in an amount not to exceed one percent within its jurisdiction for a single project or for multiple projects and for a specific period of time to collect a limited amount of money.” S.C. Code Ann. § 4-37-30(A). The Act is referred to as the “Transportation Act” or the “Penny Tax Act.”

The Act provides that the “tax levied pursuant to this section must be administered and collected by the SCDOR in the same manner that other sales and use taxes are collected.” S.C. Code Ann. § 4-37-30 (A)(8). The Act also provides the SCDOR with authority to terminate the sales and use tax (the Penny Tax) if, prior to the end of the maximum time allotted for the tax, the SCDOR “determines that the tax has raised revenues sufficient to provide the greater of either the cost of the project or projects as approved in the referendum or the cost to amortize all debts related to the approved projects.” S.C. Code Ann. § 4-37-30 (A)(5)(b).

THE COUNTY ORDINANCE

On July 18, 2012, Richland County enacted Ordinance No. 039-12HR (County Ordinance) which provided for the imposition of a one-percent sales and use tax pursuant to the Penny Tax Act upon approval by referendum. The Ordinance scheduled the referendum for November 6, 2012. The proceeds of the one-percent sales and use tax were to be used in accordance with the statutory restrictions imposed by the General Assembly as outlined in the Act.

After voter approval of the referendum in November 2012, the sales and use tax became effective in Richland County on May 1, 2013. The County’s Penny Tax is authorized to run for twenty-two (22) years and is expected to raise over one billion (\$1,000,000,000) dollars for use as specified under the Act.

ADDITIONAL FACTS

SCDOR began collecting the Penny Tax revenues on May 1, 2013 and remitted the County's Penny Tax allocation to the State Treasurer pursuant to Section 4-37-30 (A)(15). Under the Code, the State Treasurer then distributes the revenues with interest earned after accounting for refunds made and SCDOR's costs for administering the tax.

Id.

In April 2015, the Director informed the County's Administrator that SCDOR intended to initiate a "review" of the County's Penny Tax Program. The Director sent a letter to the County on December 3, 2015 requesting the County "correct" its actions "prospectively and by reimbursement for previously paid amounts" from the Penny Tax. (Memorandum, Exh. B). The Director stated that administrative expenses associated with the Penny Tax Program could not be paid from the Penny Tax Revenues. The Director's letter set out the results of SCDOR's review and outlined "three general areas of concern": (1) questions of "potential public corruption and fraud" with regard to County's procurement of the PDT which the SCDOR referred to law enforcement; (2) evidence of criminal behavior associated with the Penny Tax Program which was referred to the SCDOR's Criminal Investigative Division; and (3) concerns with the expenditure of Penny Tax funds for purposes outside of the enabling statute, such as the set-up and operation of the Small and Local Business Enterprise Program (SLBE) and ill-defined public relations contracts. The Director's letter itemized those expenditures that were outside the Transportation Act and the County Ordinance. Only the third area of concern was before the circuit court. (Amended Order, p. 4, n. 2).

In January 2016 SCDOR personnel met with Rob Perry, the County's Transportation Director, and Larry Smith, the County's attorney. (VanStory Affidavit, ¶ 5). During this meeting, the SCDOR explained the potential use of IRC 263/263A as a guide to help the County determine which costs could appropriately be paid for using Penny Tax revenues. (VanStory Affidavit, ¶ 8).

On February 24, 2016, SCDOR sent a letter to the County, reiterating SCDOR's position that administrative expenses could not be paid with the Penny Tax revenues and that the Penny Tax revenues could only be used for capital projects. SCDOR attached its "Report on Sales and Use Tax for Transportation Facilities in Richland County." The Report contained instructions from SCDOR and the Director to the County as to how the Penny Tax revenues must be spent and allocated. On April 1, 2016, SCDOR provided the County with a list of twelve action items, including a recommendation that the County use IRS § 263 and § 263(A) under the Penny Tax Program.

On April 27, 2016, SCDOR informed the County that unless it complied with the recommendations from SCDOR and the Director regarding spending of Penny Tax revenues, SCDOR's monthly allocation of the County's Penny Tax revenues and the July 2016 tax distribution would be zero. That is, SCDOR would withhold the Penny Tax revenues collected from Richland County sales. SCDOR took the position that Penny Tax revenues could only be spent for capital projects. Subsequent correspondence from the County indicated a desire to explore the SCDOR's concerns regarding expenditures. (Complaint, Exh. C, D).

The County filed suit on May 20, 2016 challenging the SCDOR's authority to

regulate its practices with regard to the expenditure of Penny Tax revenues and seeking to force SCDOR to resume allocations of tax revenues and remittance to the State Treasurer. The County sought a writ of mandamus as well as injunctive relief. SCDOR counterclaimed for injunctive relief and the appointment of a receiver. The County challenged SCDOR's standing to seek the relief.

Following a hearing, the circuit court entered an order: (1) granting the County's writ of mandamus; (2) finding SCDOR and the Director had standing to assert their defenses and counterclaims; (3) denying the County's motion for temporary injunction; (4) denying SCDOR's motion for an injunction; and (5) denying SCDOR's request for the appointment of a receiver. Following cross-motions for reconsideration the circuit court entered an amended order adhering to, but clarifying, the prior mandates.

The County appealed that portion of the order finding SCDOR and the Director had standing and denying the County's motion for injunctive relief. SCDOR then filed this cross-appeal.

ARGUMENTS

The circuit court should not have granted the County's petition for writ of mandamus. Furthermore, the court should have granted SCDOR's motion for injunctive relief and for the appointment of a receiver. This Court should reverse the circuit court's rulings on these issues.

I. THE CIRCUIT COURT ERRED IN GRANTING THE COUNTY A WRIT OF MANDAMUS

The circuit court granted the County's request for a writ of mandamus requiring the Director to direct SCDOR to allocate and remit all Penny Tax revenues collected within the County, including the July 2016 allocation and remittance due for the second quarter of 2016 and all future allocations and remittances. This was error.

As the Supreme Court recently stated:

The writ of mandamus is the "highest judicial writ known to the law." *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 493, 685 S.E.2d 600, 605 (2009) (internal citations omitted). Mandamus is utilized only to compel ministerial duties and then only if the "asserted right is clear and certain." *Godwin v. Carrigan*, 227 S.C. 216, 222, 87 S.E.2d 471, 473 (1955). "The primary purpose of a writ of mandamus is to enforce an established right and to enforce a corresponding imperative duty created and or imposed by law." *Porter v. Jedziniak*, 334 S.C. 16, 18, 512 S.E.2d 497, 497 (1999); *see also Sanford*, 385 S.C. at 493, 685 S.E.2d at 605-06 (holding the principal function of mandamus is "to command and execute, and not to inquire and adjudicate").

Knight v. Austin, 396 S.C. 518, 522, 722 S.E.2d 802, 804 (2012).

To obtain a writ of mandamus requiring the performance of an act, the petitioner must show: (1) a duty to perform the act; (2) the ministerial nature of the act; (3) the petitioner's specific legal right for which discharge of the duty is necessary; and (4) a lack

of any other legal remedy. *Sanford*, 385 S.C. at 494, 685 S.E.2d at 606. Mandamus is based on the theory that an officer charged with a purely ministerial duty can be compelled to perform that duty in case of refusal. *Id.*; *Wilson v. Preston*, 378 S.C. 348, 662 S.E.2d 580 (2008).

(A) A DUTY TO PERFORM THE ACT

The circuit court held that Section 4-37-30(A)(8) of the Transportation Act imposed upon SCDOR and the Director the duty to levy the Penny Tax, collect the Penny Tax revenues, and assure that the revenues collected in Richland County are properly accounted for as funds belonging to the County. (Order, pp. 9-10). That section provides:

The tax levied pursuant to this section must be administered and collected by the Department of Revenue *in the same manner that other sales and use taxes are collected*. The department may prescribe the amounts which may be added to the sales price because of the tax.

S.C. Code Ann. § 4-37-30(A)(8) (Supp. 2016) (emphasis added). As the circuit court noted, SCDOR and the Director did not dispute they were collecting the Penny Tax revenues for the County's use for public transportation related projects. (Order, p. 10).

Importantly, however, the circuit court also noted "when a public officer receives money for the public use, he is [a] *trustee* to receive such monies and to pay them to the public official or function for whom or which they were intended." (Order, p. 10, citing *Sumter County v. Hurst*, 189 S.C. 316, 319, 1 S.E.2d 242, 244 (1939)) (emphasis added). In a strict sense, a "trustee" is one who holds the legal title to property for the benefit of another. *Cf. State ex rel. Lee v. Sartorius*, 130 S.W.2d 547, 549 (Mo. 1939); *Taylor v. Davis*, 110 U.S. 330, 335 (1884) ("A trustee may be defined generally as a person in

whom some estate interest or power in or affecting property is vested for the benefit of another.”). In a broad sense, the term is sometimes applied to any one standing in a fiduciary or confidential relation to another, such as agent, attorney, bailee etc. *Lee v. Sartorius*. Thus, while SCDOR agrees that it owes the duties set forth in Section 4-37-30(A)(8), the circuit court correctly noted those duties render SCDOR a “trustee” of the funds collected from the taxpayers, and along with that status comes an obligation to act responsibly with regard to those funds.

Furthermore, SCDOR has the authority to prevent the misuse, misallocation, and improper expenditures of the County’s use of Penny Tax revenues. This authority derives from a number of statutory sources which set forth and describe the Department’s tax administration, regulatory and enforcement powers. That authority extends to the matters at issue here – whether Penny Tax revenues are being used in accordance with the permissive uses and restrictions set forth in the Act.

As noted above, the legislature created SCDOR “to administer and enforce the revenue laws of this State; administer and enforce licensing laws and regulations relating to alcoholic liquors, beer and wine and assess penalties for violations thereof; and other laws specifically assigned to it.” S.C. Code Ann. § 12-4-10 (2014). SCDOR has broad authority to facilitate tax administration, regulation, and enforcement. S.C. Code Ann. § 12-4-310 (2014), *et seq.* SCDOR’s authority for tax administration, regulation, and enforcement as it relates to sales and use taxes is set forth in Section 12-36-2660, which provides “[t]he Department of Revenue shall administer and enforce the provisions of this chapter [Chapter 36].” S.C. Code Ann. § 12-36-2660 (2014).

SCDOR also has broad authority to facilitate tax administration, regulation and enforcement. S.C. Code Ann. § 12-4-310 (2014), *et seq.* To that end, the Tax Code provides SCDOR “shall use available personnel to conduct audits involving *all taxes to promote voluntary compliance* and to collect revenues for the general fund of the State and designated accounts.” S.C. Code Ann. § 12-4-387 (2014) (emphasis added).

The circuit court ignored this authority when it ruled that SCDOR’s duty was limited to the collection and remittance of the Penny Tax revenues without regard to how those revenues are being used. The legislature specifically vested SCDOR with supervisory tax authority. SCDOR is empowered, as that authority, to take action when it becomes aware tax funds are being of used outside the express directives of the enabling legislation. That is precisely what occurred here.

(B) THE MINISTERIAL NATURE OF THE ACT

The circuit court held Section 4-37-30(A)(15) imposes on SCDOR and the Director the ministerial duty to remit to the State Treasurer the 2016 Second Quarter Penny Tax Revenues that SCDOR collected on behalf of the County. The court focused only on the following language from Section 4-37-30(A)(15): “The revenues of the tax collected in each county pursuant to this section must be remitted to the State Treasurer and credited to a fund separate and distinct from the general fund of the State.” S.C. Code Ann. § 4-37-30(A)(15) (Supp. 2016). (Order, pp. 10-11). The court ignored other relevant law empowering SCDOR to exercise oversight on the use of the Penny Tax revenues.

A ministerial duty is one which a person performs in obedience to a mandate of

legal authority without regard to the exercise of his own judgment upon the propriety of the act to be done. *In Interest of Tyson*, 282 S.C. 212, 318 S.E.2d 279 (1984). SCDOR's responsibility towards the Penny Tax revenues it collects is not ministerial. The General Assembly provided SCDOR with tax administration authority with regard to the Penny Tax Act, including the right to promulgate such regulations as may be necessary to administer the Penny Tax Act. Implicit within the grant of authority to SCDOR to administer the Penny Tax Act is the discretion to withhold Penny Tax Revenues when SCDOR has a good-faith belief, as it did in this case, that the Penny Tax Revenues are being used improperly and in violation of the statute. SCDOR's ability to terminate the tax under Section 4-37-30(5)(b) significantly undercuts the view that its allocation duty is sufficiently ministerial to support a writ of mandamus.

The circuit court pointed to the preamble of Act No. 52 as evidence of the legislature's intent behind adopting the Transportation Act. (Order, pp. 11-12). The Act's preamble states that counties are "authorized to establish transportation authorities and to finance ... the cost of acquiring, designing, constructing, equipping and operating highways, roads, streets, and bridges, and other transportation-related project...." The County pointed to the term "operating" in the preamble as the source of its use of the funds for public relations, mentor programs, and other various expenditures that are not remotely related to the acquisition of capital structures or payment for "projects." The circuit court stated the terms "'acquiring, designing,...and operating' cannot be ignored." (Order, p. 11). These statements should not be persuasive.

The preamble is not part of the effective portion of a statute, even though it may

supply the guide to the Act's meaning. *Mitchell v. City of Greenville*, 411 S.C. 632, 770 S.E.2d 391 (2015). Furthermore, the word "operating" appears nowhere in the statute, indicating that while the term may have shown up in the preamble, the legislature excluded it when creating the final statutory scheme. It has long been the rule that the preamble of a statute cannot restrain the enacting part of the statute where the enacting part is clearly larger than the preamble. *State v. Findlay*, 3 S.C.L. (1 Brev.) 107 (1802). The Court should reject the circuit court's finding that the preamble evidences the legislature's intent in the Transportation Act to give the County the authority to use the revenues for purposes other than capital improvements.

Furthermore, while the court pointed to the word "shall" as indicating a mandate, this is not always so. The word "shall" may be construed as permissive in order to effect legislative intent. *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981). This is particularly true where a statute directs an entity to determine certain matters. *Id.*

Even if the duty were merely ministerial, and SCDOR's termination power proves it is not, SCDOR has a further relationship related to those funds arising out of its fiduciary duty with regard to the Penny Tax revenues. As the circuit court noted, under *Sumter County v. Hurst*, the Director and SCDOR take possession of those funds as a "trustee," which means exercising that duty as a fiduciary. The SCDOR has the duty to resist disbursements and invasions which violate the law.

(C) THE PETITIONER'S SPECIFIC LEGAL RIGHT FOR WHICH DISCHARGE OF THE DUTY IS NECESSARY

The circuit court held that pursuant to Sections 4-37-30(A)(8) and (15), the County had the specific legal right to receive the Penny Tax revenues collected in Richland County. (Order, p. 12). But the court ignored those provisions of the South Carolina Tax Code that grant SCDOR broad administrative authority over tax matters. *See, e.g.*, S.C. Code Ann. §§ 12-4-10, 12-4-310 and 12-36-2660. Thus, the County does not have a “specific legal right for which discharge of the duty is necessary” but, instead, that right is bounded by SCDOR’s duties under other sections of the Code. *See Amisub of S.C., Inc. v. S.C. Dep’t of Health & Env’tl. Control*, 407 S.C. 583, 598, 757 S.E.2d 408, 416 (2014) (“[S]tatutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result.... Because we must presume that the General Assembly is familiar with existing legislation, statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative.”).

(D) A LACK OF ANY OTHER LEGAL REMEDY

The circuit court held that SCDOR’s “demands” that the County comply with SCDOR’s “recommendations” do not fall within the definition of a “contested case” for purposes of the South Carolina Administrative Procedures Act (APA), and no other remedy exists under the Transportation Act for the County to challenge SCDOR’s withholding of the Transportation Act Revenues. (Order, p. 13). The Court should reverse that ruling.

Under the APA, a “contested case” is “a proceeding *including, but not restricted to*, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing....” S.C. Code Ann. § 1-23-310(3) (Supp. 2016). See also S.C. Code Ann. § 1-23-505(3) (Supp. 2016) (“‘Contested case’ means a proceeding *including, but not restricted to*, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for hearing.”). These definitions of a “contested case” apply in cases involving tax disputes. *Cf. Boggero v. South Carolina Dept. of Revenue*, 414 S.C. 277, 777 S.E.2d 842 (Ct. App. 2015) (applying the APA to a tax appeal).

In light of the unusual nature of the writ of mandamus, and its status as the “highest judicial writ known to law,” *Knight v. Austin*, the Court should find that the County did, in fact, have another legal remedy – a contested case under the APA – before turning to the most extreme remedy the circuit court could provide.

This Court should reverse the circuit court’s order granting the County’s writ of mandamus.

II. THE CIRCUIT COURT ERRED IN DENYING SCDOR'S MOTION FOR AN INJUNCTION

The SCDOR sought an injunction requiring the County to refrain from making further expenditures of Penny Tax Revenues until the County adopts and implements a uniform standard or other appropriate safeguard to ensure compliance with the statutory mandates and the Penny Tax Referendum. The circuit court denied the motion, finding SCDOR and the Director will not suffer irreparable harm if the injunction is not issued against [the County]." (Order, p. 17). The court stated that none of the affidavits SCDOR provided in support of its injunction request "discuss any injury that either [SCDOR] or the Director will suffer if the County continues its Penny Tax Program." (Order, p. 17). This ruling was error.

The court relied upon the following general rules:

Generally, the courts will not grant an injunction against a public official or public body when to do so would involve the review of a judgment that was not arbitrary, made in bad faith, or in the exercise of fraud. Courts will restrain agency actions when they are clearly outside its statutory powers, inconsistent with legislative intent, or if it can be shown that the pending action of the agency is *ultra vires* or without authority, or the agency intends to act in bad faith, arbitrarily, capriciously, and in a wantonly injurious manner.

42 Am. Jur. 2d *Injunctions* § 158.

Injunctions against government agencies will be granted when the request seeks a traditional subject of equity jurisdiction within the jurisdiction of the court or seeks to enjoin an agency from executing a law in an unlawful manner or from executing an illegal measure. Injunctive relief will not be granted against public officials with respect to their official acts unless the acts complained of are outside their authority or unlawful.

42 Am. Jur.2d *Injunctions* § 159. (Order, pp. 15-16). The Court also noted that "[t]o

obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law.” *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010). (Order, p. 16). The court focused on the rules set forth in *Denman* to deny SCDOR’s request.

The circuit court ignored SCDOR’s argument that the taxpayers of the County would suffer irreparable harm if the County was not required to follow the law with regard to the use of the Penny Tax revenues, that is, for capital expenditures and not for administrative costs. Once allocated and remitted, the revenues are wasted and cannot be recovered for their intended purposes. SCDOR’s role as “trustee” of the funds permits it to act to prevent that harm.

The circuit court’s denial of SCDOR’s request for injunctive relief solely upon the ground that “irreparable harm” was not shown, is erroneous and this Court should reverse.

III. THE CIRCUIT COURT ERRED IN DENYING SCDOR'S MOTION FOR THE APPOINTMENT OF A RECEIVER

The circuit court denied SCDOR's request for the appointment of a receiver, finding neither SCDOR nor its Director had authority to seek a receiver and, alternatively, that the request was not timely. This Court should reverse.

A. SCDOR AND ITS DIRECTOR HAVE AUTHORITY TO SEEK APPOINTMENT OF A RECEIVER

The circuit court denied SCDOR's request to appoint a receiver on the ground that there is no evidence the General Assembly intended for SCDOR or the Director to have the authority to seek the relief. This was error.

It bears repeating that the legislature granted broad power to SCDOR in the administration, enforcement, and regulation of tax matters. S.C. Code Ann. § 12-4-10 (2014); S.C. Code Ann. § 12-4-310 (2014), *et seq.*; S.C. Code Ann. § 12-36-2660 (2014). This includes the authority to "use available personnel to conduct audits involving *all taxes to promote voluntary compliance* and to collect revenues for the general fund of the State and designated accounts." S.C. Code Ann. § 12-4-387 (2014) (emphasis added).

Although the statutes do not expressly provide for the appointment of a receiver, that silence does not indicate the legislature's intent to preclude that remedy. The purpose for appointing a receiver is to preserve property pending an ultimate decision in this case, to stop the unlawful use of the Penny Tax revenues. *Cf.* 65 Am.Jur.2d *Receivers* § 6 (2011) ("[A] receiver's primary purpose is to preserve the property's value for those to whom it is ultimately determined that the property belongs so to accommodate all claims possible."); 65 Am. Jur. 2d *Receivers* § 182 (2011) ("The fundamental purpose of every

receivership is to place the property involved in litigation under control of the court so that it may be preserved and held ready for disposal in accordance with the final adjudication of the rights of the interested parties. The receiver's primary purpose is to preserve the property's value for those to whom it is ultimately determined that the property belongs.").

The Court should reverse the circuit court's ruling that because no statute governing SCDOR or the Director mentions appointment of a receiver that remedy is not available under the circumstances of this case.

B. THE REQUEST FOR THE APPOINTMENT OF A RECEIVER WAS NOT UNTIMELY

The circuit court held, without citation to authority, that SCDOR and the Director "clearly acquiesced in the County's adoption of the Ordinance passage of the Referendum in 2012" and collected the Penny Tax revenues for three years. (Order, pp. 18-19). This ruling ignores that it was not until SCDOR audited the County's program and discovered potential malfeasance that SCDOR had any reason to confront the County. Further, the ruling ignores that SCDOR and the Director attempted to work with County personnel to rectify the problems but eventually had to act to stop the unauthorized use of the Penny Tax revenues. The court's ruling requires SCDOR to anticipate the possibility of misuse of the funds prior to notice of such and an attempt to remedy the same. This is an unrealistic expectation and is not required by the law.

This ruling is tantamount to a holding of waiver, but that theory requires that the party waive its rights knowingly. *See, e.g., Eason v. Eason*, 384 S.C. 473, 682 S.E.2d 804

(2009) (waiver requires a party to have known of a right and known he was abandoning that right); *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 433, 673 S.E.2d 448, 456 (2009) (waiver is the voluntary and intentional abandonment or relinquishment of a known right by a party that knew of its rights, or of all the material facts upon which they depend).

The ruling is also akin to estoppel, but that theory also requires a level of scienter on the part of the party being estopped. *E.g., Johns v. Johns*, 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct. App.1992) (“The elements of estoppel as to the party estopped are (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts.”).

In this case SCDOR acted seasonably once SCDOR confirmed through the audit that the County was misusing the Penny Tax revenues. The circuit court’s holding that SCDOR sat on its rights for over three years has no basis in the record, and this Court should reverse.

CONCLUSION

For the reasons stated the Court should reverse the circuit court's order denying the SCDOR's request for injunctive relief and a receiver. The Court should also reverse the circuit court's decision granting the County's request for a writ of mandamus.



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February 22, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

FEB 22 2017

SC Court of Appeals

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2016-CP-40-3102

Richland County, South Carolina Appellant/Respondent,

Central Midlands Regional Transit Authority, Intervenor/Respondent,

v.

The South Carolina Department of Revenue,
Rick Reames, III, in his official capacity as its Director, Respondents/Appellants,

v.

Richland PDT, a joint venture consisting of
M.B. Kahn Construction Co. Inc., ICA Engineering,
Inc., and Brownstone Construction Group, LLC, as a
unit and Individually Third-Party Defendants.

PROOF OF SERVICE

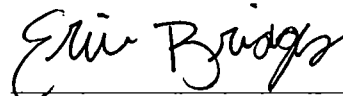
The undersigned hereby certifies that on the date indicated below she served
counsel with a copy of the *Motion for the Court to Accept the Initial Brief of Appellant of
Respondents-Appellants Out of Time* and the conditionally filed *Initial Brief of Appellant
of Respondents-Appellants and Designation of Matter to be Included in the Record on
Appeal* by mailing copies of the same by United States Mail with first class postage
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Erin Bridges

February 22, 2017



BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

February 22, 2017

RECEIVED

FEB 22 2017

SC Court of Appeals

VIA HAND DELIVERY

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Richland County v. SC Dept. of Revenue
Case Tracking No. 2016-001839

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of a Motion for the Court to Accept the Initial Brief of Appellant of Respondents/Appellants and Designation of Matter to be Included in the Record on Appeal Out of Time. Also, please find enclosed the conditionally filed original and one (1) copy of the Initial Brief of Appellant of Respondents/Appellants and Designation of Matter to be Included in the Record on Appeal in regards to this matter. I have also enclosed a Proof of Service upon counsel for the Appellant/Respondent. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges
Paralegal to John S. Nichols
BLUESTEIN, NICHOLS,
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/emb

Enclosures

cc: James E. Smith, Jr.

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