THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No.: 13-ALJ-17-0523-CC

Greenville Hospital System .....Appellant,

v.

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

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. Did the Administrative Law Court err in holding that the General Assembly intended to exclude political subdivisions and charitable institutions in the nature of hospitals from the broad exemption from sales tax granted in South Carolina Code sections 12-36-2120(41) and 12-37-220 to any "organization" which is a "religious, charitable, eleemosynary, educational, or literary society, corporation, trust, or other association" and "all charitable trusts and foundations"?

2. Did the Administrative Law Court err in holding that, "as a general principle," a political subdivision can never qualify as a charitable organization for purposes of the sales tax exemption granted in South Carolina Code sections 12-36-2120(41) and 12-37-220(B)(16) to any "organization" which is a "religious, charitable, eleemosynary, educational, or literary society, corporation, trust, or other association"?

3. Did the Administrative Law Court err in holding that the rule adopted by the South Carolina Supreme Court, requiring that statutory tax exemption provisions be liberally construed in favor of granting exemptions to government entities and other public bodies, does not apply to the sales tax exemption sought in the present case by Greenville Hospital System, a political subdivision of the State of South Carolina?

STATEMENT OF THE CASE

This appeal arises from the South Carolina Department of Revenue's denial of Greenville Hospital System's (GHS's)[1] Application for Sales Tax Exemption pursuant to S.C. Code Ann. § 12-36-2120(41). (Department Determination, pp. 1-29.) GHS applied for the sales tax exemption on May 25, 2011. (Application for Sales Tax Exemption, pp. 1-3.) Two and a half years later, on October 4, 2013, the Department issued its final Department Determination denying GHS's Application. (Department Determination, pp. 1-29.) GHS timely filed its Notice of Request for Contested Case Hearing with the Administrative Law Court on November 1, 2013. (Notice of Request for Contested Case Hearing, pp. 1-2.)

After conducting extensive fact and expert discovery, the parties conferred regarding how to move the case to final hearing and resolution in the most organized, prompt, and efficient manner possible. To that end, GHS and the Department jointly developed a plan whereby the parties would provide briefing and oral argument to the ALC on several disputed questions of law the parties identified as having a material impact on the scope of issues and related live testimony, documents, and other evidence that would be presented at the final evidentiary hearing before the ALC. The parties memorialized their agreement and proposed plan in a Consent Order Governing Further Proceedings which listed seven "Disputed Legal Issues" on which the parties would seek a ruling from the ALC prior to the final evidentiary hearing. The ALC approved and entered the Consent Order on January 18, 2017. (Consent Order, pp. 1-4.)

In accordance with the Consent Order, GHS filed its "Motion for Partial Summary Judgment And/or Ruling on Disputed Legal Issues" on February 3, 2017 (GHS Mot. for Partial Summ. J., pp. 1-2), and the parties submitted their respective supporting and opposition briefs to

[1] During the pendency of the underlying contested case matter, GHS's name was changed from "Greenville Hospital System" to "Greenville Health System."

the ALC according to the schedule set out in the Consent Order. (GHS Supp. Mem., pp. 1-42; Department's Opp. Mem., pp. 1-51; GHS Reply Mem., pp. 1-28.)

On May 8, 2017, the ALC issued an "Order Denying Petitioner's Motion for Partial Summary Judgment and Granting Respondent's Cross Motion for Partial Summary Judgment."[2] (May 8, 2017 Order, pp. 1-9.) In its initial Order, the ALC held, as a factual matter, that GHS was not a charitable organization within the meaning of the sales tax exemption statute, Section 12-36-2120(41). (*Id.* at 5-6.) The ALC further held that the sales tax exemption granted under Section 12-36-2120(41) did not, as a matter of law, apply to political subdivisions or charitable institutions in the nature of hospitals. (*Id.* at 7.) The ALC found that its rulings on these issues were dispositive of GHS's request for the sales tax exemption and that the remaining Disputed Legal Issues presented by the parties were moot. (*Id.* at 8.)

GHS filed a Motion to Reconsider, Alter, or Amend on May 17, 2017, asserting that the ALC's Order included improper factual findings and conclusions in violation of the procedure set forth in the Consent Order and which were made without an evidentiary hearing having been conducted.[3] (GHS Mot. to Reconsider, pp. 13-16.) GHS further argued the ALC overlooked or misapplied key principles of law in reaching its legal conclusions. (*Id.* at 4-16.) A hearing on GHS's Motion to Reconsider was held on June 15, 2017. (June 15, 2017 Hearing Tr., pp. 1-28.)

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[2] Contrary to the ALC's May 8, 2017 Order, the Department did not file a cross-motion for partial summary judgment or other type of dispositive motion.

[3] As explained in the Consent Order, the parties' purpose in obtaining rulings on the seven "Disputed Legal Issues" was to narrow and focus the scope of factual matter that would need to be presented at the final evidentiary hearing before the ALC. The procedure set forth in the Consent Order was expressly not intended as a replacement for or in lieu of a final evidentiary hearing on disputed factual issues. Should this Court reverse the legal rulings in the ALC's Final Order, this case would be remanded to the ALC and a regular evidentiary contested case hearing, conducted in accordance with S.C. Code Ann. § 1-23-330, would ultimately be required on the factual issues relevant to GHS's application for the sales tax exemption after the ALC addresses the remaining Disputed Legal Issues.

On June 20, 2017, the ALC entered an order granting GHS's Motion to Reconsider in part, vacating its prior May 8, 2017 Order, and substituting its June 20, 2017 Order as the ALC's "Final Order." (Final Order, pp. 1-8.) The ALC's Final Order removed some of the improper factual findings from its previous May 8, 2017 Order, but maintained its conclusion that GHS could not, as a matter of law, qualify for the sales tax exemption granted under Section 12-36-2120(41) and that the remaining Disputed Legal Issues were, therefore, moot. (*Id.*) GHS timely filed and served its Notice of Appeal on July 14, 2017.[4]

FACTS

Given the ALC's ruling on the disputed legal issues presented by the parties, the present appeal concerns questions of law regarding issues of statutory interpretation. However, the following facts provide context that may aid the Court's understanding of the legal issues discussed in the Argument section below.

GHS is a nonprofit academic health care system created by an act of the South Carolina General Assembly in 1947. *See* Act No. 432, 1947 S.C. Acts 1145 (as amended by Act No. 105 (2013)). In enacting the legislation creating GHS, the General Assembly expressly stated that its aim was to address a pressing charitable need in Greenville County: "The General Assembly, after due investigation, has found that there exists in Greenville County a lack of hospital facilities, and that as a result of this condition many persons, and in particular, those of small income, are being deprived of adequate medical and hospital care." *See id.* at § 1. GHS fulfills its public service mission through the operation of acute care hospitals and specialty health care

[4] Although the present appeal is necessarily limited to the rulings of the ALC on the legal issues it addressed, GHS does not waive or abandon the remaining legal issues which the ALC found were rendered moot in its Final Order. (*See* Final Order, p. 8.) Should this Court reverse the rulings in the ALC's Final Order and remand this matter to the ALC, the other Disputed Legal Issues would remain to be decided by the ALC at the appropriate time in the contested case proceedings below.

facilities serving the 10-county Upstate region of South Carolina. GHS is governed by an independent Board of Trustees comprised of local residents who represent the communities served by GHS and who are appointed by the Greenville County Legislative Delegation. *See id.* at § 4. GHS has been continuously recognized by the Internal Revenue Service as a tax-exempt charitable organization pursuant to 26 U.S.C. § 501(c)(3). (Final Order, p. 3.)

Based on its long-recognized status as a charitable organization, GHS submitted an application in May 2011 to the Department of Revenue requesting an exemption from sales tax pursuant to South Carolina Code Section 12-36-2120(41). This specific subsection of the statute exempts from sales tax "the gross proceeds of sales, or sales price of":

> items sold by organizations exempt under Section 12-37-220(A)(3) and (4) and B(5), (6), (7), (8), (12), (16), (19), (22), and (24), if the net proceeds are used exclusively for exempt purposes and no benefit inures to any individual.

S.C. Code Ann. § 12-36-2120(41). GHS submitted that it qualified for the exemptions under Section 12-37-220(B)(16)(a) (charitable organizations) and Section 12-37-220(A)(4) (charitable trusts and foundations). As further explained in its Application, the primary items that GHS sells to the public which might be subject to sales tax are the food products sold in its on-site hospital dining facilities provided for the convenience of patients, visitors, and staff. (Application for Exemption, p. 4.)

After delaying more than two and a half years, the Department issued its written Department Determination on October 4, 2013, denying GHS's request for the sales tax exemption. (Department Determination, pp. 1-29.) The Determination, however, contained many factually incorrect statements about GHS and other, separate legal entities affiliated with GHS, which have never applied for or otherwise sought the sales tax exemption. In the Determination, the Department stated that GHS has failed to demonstrate—as a factual matter—

that GHS is a "charitable organization." (*See id.*, pp. 19-29.) In reaching its factual conclusions, the Department expressly referenced the well-recognized definition and standard for determining whether an organization is "charitable" as prescribed under 26 U.S.C. § 501(c)(3) and related regulations and case law. (*See id.*, p. 20.)

After the parties conducted extensive fact and expert discovery on the issues raised in the Department Determination, the Department shifted from the reasoning and analysis in its Department Determination and instead argued that the ALC should ignore the federal tax law standards for "charitable organizations" cited in its Department Determination and find that, under the South Carolina statutes, GHS could not qualify for the sales tax exemption on the grounds that it is a political subdivision of the State of South Carolina. As argued to the ALC and as discussed further below, the Department's position is contrary to the plain language of Section 12-36-2120(41) and the Department's own published regulation and advisory opinion interpreting the statute.

ARGUMENT

I. The ALC erred in holding that the General Assembly intended to exclude political subdivisions and charitable institutions in the nature of hospitals from the sales tax exemption granted to all charitable "organizations."

A. The Tax Exemption Statutes at Issue and the Ruling Below

South Carolina law imposes a six percent tax on the sale of goods and certain services. S.C. Code Ann. §§ 12-36-910(A), 12-36-1110. However, the General Assembly has granted numerous exemptions from the sales tax which are set forth in South Carolina Code Section 12-36-2120. At issue in this case is the sales tax exemption granted to those organizations listed in subsection (41) of the statute. Subsection (41) grants the sales tax exemption to organizations

which are exempt from payment of property tax under certain provisions of Section 12-37-220. Specifically, Section 12-36-2120(41) exempts from sales tax:

> items sold by organizations exempt under Section 12-37-220(A)(3) and (4) and B(5), (6), (7), (8), (12), (16), (19), (22), and (24), if the net proceeds are used exclusively for exempt purposes and no benefit inures to any individual.

GHS is exempt from property taxation under several provisions of Section 12-37-220, including two of the provisions listed in Section 12-36-2120(41):

- **Section 12-37-220(B)(16)(a)** – exempting the "property of any religious, charitable, eleemosynary, educational, or literary society, corporation, trust, or other association"; and
- **Section 12-37-220(A)(4)** – exempting the "property of all charitable trusts and foundations."

Because GHS is a political subdivision of the State of South Carolina, it is also exempt from property taxation pursuant to Section 12-37-220(A)(1), which exempts "all property of the State, counties, municipalities, school districts, Water and Sewer Authorities and other political subdivisions."

In its Final Order, the ALC held that, because GHS is eligible for exemption from property tax as a "political subdivision" pursuant to Section 12-37-220(A)(1) or as a "charitable institution in the nature of a hospital" pursuant to Section 12-37-220(A)(2)—which are not listed in Section 12-36-2120(41)—GHS cannot, as a matter of law, also be eligible for the property tax exemptions under Sections 12-37-220(A)(4) and (B)(16). (Final Order, pp. 5-6.) As discussed below, the ALC's holding is erroneous for two reasons: (1) it is contrary to the plain language of Section 12-36-2120(41) and Section 12-37-220; and (2) it is contrary to the Department of Revenue's own published public advisory opinion construing and applying Section 12-36-

2120(41), wherein the Department states that organizations such as political subdivisions or nonprofit hospitals may qualify for the sales tax exemption.

Because "[q]uestions of statutory interpretation are questions of law," this Court is free to decide these questions "without any deference to the tribunal below." *Charleston Cty. Assessor v. Univ. Ventures, LLC*, 805 S.E.2d 216, 221 (S.C. Ct. App. 2017), *reh'g denied* (Oct. 19, 2017). "The language of a tax statute must be given its plain and ordinary meaning in the absence of an ambiguity therein." *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Buchanan v. The S.C. Prop. & Cas. Ins. Guar. Ass'n*, 417 S.C. 562, 567, 790 S.E.2d 783, 785-86 (Ct. App. 2016).

B. The ALC's holding is contrary to the plain language of Sections 12-36-2120(41) and 12-37-220.

In order to affirm the ALC's holding, this Court must insert a new requirement into the language of Section 12-36-2120(41) that was neither enacted nor otherwise intended by the General Assembly. Specifically, the ALC added a requirement to Section 12-36-2120(41) that an organization cannot qualify for the sales tax exemption if, like GHS, it is eligible for exemption from property tax under one or more of the Section 12-37-220 exemptions *not listed* in Section 12-36-2120(41)—even if the organization can prove that it is also exempt under one of the eleven property tax exemptions that *is listed* in Section 12-36-2120(41). In other words, the ALC has rewritten Section 12-36-2120(41) to limit its application to only those organizations exempt ***solely and exclusively*** under the property tax exemptions listed in subsection (41).

No language in Section 12-36-2120(41) limits its application in this manner, and the courts cannot insert new requirements absent clear legislative intent. *See, e.g., Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., LLC*, 409 S.C. 331, 343, 762 S.E.2d 561, 567 (2014)

(holding that "[w]e are not at liberty, under the guise of construction, to alter the plain language of a statute by adding words which the Legislature saw fit not to include"); *Lambries v. Saluda Cty. Council*, 409 S.C. 1, 16, 760 S.E.2d 785, 792-93 (2014) (holding that, in interpreting and applying a statute, "a court is not allowed to change its meaning, and a court cannot speculate on legislative intention because to do so would be an assumption of legislative power"); *Key Corp. Capital, Inc. v. Cty. of Beaufort*, 373 S.C. 55, 59, 644 S.E.2d 675, 677 (2007) (holding that "it is beyond this Court's power to effect a change in the statutes enacted by the Legislature"); *Shelley Const. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 28-29, 336 S.E.2d 488, 491 (Ct. App. 1985) ("We are not at liberty, under the guise of construction, to alter the plain language of the statute by adding words which the Legislature saw fit not to include. Our duty is to apply the statute according to its own terms." (citation omitted)).

Had the Legislature intended to limit eligibility for the sales tax exemption to only those organizations exempt "exclusively," "solely," or "only" under the property tax exemption provisions listed in Section 12-36-2120(41), it could have plainly said so. *See Buist v. Huggins,* 367 S.C. 268, 277, 625 S.E.2d 636, 640 (2006) (holding that, if the Legislature had intended a certain result in the statute, "it could have plainly said so"). Indeed, the Legislature used the modifier "exclusively" in the very next clause of Section 12-36-2120(41), where it limited the scope of the sales tax exemption to sales where the "net proceeds are used ***exclusively*** for exempt purposes." (emphasis added). The General Assembly apparently chose not to apply the term "exclusively" (or an equivalent word) to the list of property tax exemptions contained in the same subsection. Absent such express language from the Legislature, there was no basis for the ALC to insert an additional requirement into Section 12-36-2120(41). As this Court has held, "[t]he court has no right to add the words the legislature omitted, nor to interpolate them on

conceits of symmetry and policy." *Consumer Advocate for State v. S.C. Dep't of Ins.*, 397 S.C. 599, 602, 725 S.E.2d 708, 710 (Ct. App. 2012) (quoting *Kinard v. Moore*, 220 S.C. 376, 388, 68 S.E.2d 321, 325 (1951)); *see also, e.g., William v. Gonzales*, 499 F.3d 329, 333 (4th Cir. 2007) (refusing to imply a "physical presence" requirement in the statute in question where Congress had put "physical presence" requirements in other statutes; "Congress knew how to include a requirement of physical presence when it wished to do so . . ." but did not do so in the statute in question).

Moreover, the property tax exemptions set forth in Section 12-37-220 are not mutually exclusive—*i.e.*, exemption under one of the provisions of Section 12-37-220 does not necessarily disqualify the organization from simultaneously being exempt under another provision of 12-37-220. Indeed, the ALC acknowledges that GHS may be exempt from property tax under multiple provisions of Section 12-37-220. (Final Order, p. 6.) Therefore, it is improper to construe the list of the Section 12-37-220 property tax exemptions contained in Section 12-36-2120(41) as excluding organizations, such as GHS, which may also qualify for property tax exemptions not listed in Section 12-36-2120(41). *See, e.g., Doe v. S.C. Dep't of Soc. Servs.*, 407 S.C. 623, 634, 757 S.E.2d 712, 717 (2014) (holding that "the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect"); *Eagle Container Co., LLC v. Cty. of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 896 (2008) ("The language [of a statute] must also be read in a sense which harmonizes with its subject matter and accords with its general purpose.").

C. The ALC's holding is contrary to the Department's own published Revenue Procedure # 03-6 providing guidance to the public on the interpretation and application of Section 12-36-2120(41).

The ALC's erroneous interpretation of Section 12-36-2120(41) is thrown into sharp relief by the Department of Revenue's own published advisory opinion stating that an organization exempt from property tax, such as as a political subdivision or nonprofit hospital, "may also qualify for a property tax exemption listed in Code Section 12-36-2120(41)." The Department issued S.C. Revenue Procedure # 03-6 "to provide guidelines for determining whether an organization qualifies for an exemption certificate issued pursuant to Code Section 12-36-2120(41)." The Revenue Procedure states that "[a]n organization is not qualified for an exemption certificate if it is . . . [e]xempt from property tax, but under a code section not listed in Code Section 12-36-2120(41)." However, in the next paragraph of the Revenue Procedure, the Department explains that organizations exempt from property tax under a code section *not listed* in Section 12-36-2120(41) "may also qualify" for one of the exemptions that is listed in the statute:

> Note: Code Section 12-37-220 provides specific property tax exemptions for the State of South Carolina, its counties, municipalities, school districts, and other political authorities or subdivisions; private schools, colleges and other institutions of learning; nonprofit hospitals and nonprofit institutions which care for the infirmed, the handicapped, the aged, children or indigent persons; and nonprofit museums. The property tax exemptions for these organizations are not specifically listed in Code Section 12-36-2120(41).
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> ***However, some of these organizations may also qualify for a property tax exemption listed in Code Section 12-36-2120(41).*** For example, a private school may qualify for the property tax exemption under Code Section 12-37-220(B)(16)(a) established for certain religious, charitable, eleemosynary or educational organizations.

S.C. Rev. Proc. # 03-6 (p. 4) (emphasis added). Therefore, under the specific example cited by the Department in its own public guidance, an organization may be exempt from property taxation under provisions of Section 12-37-220 not listed in Section 12-36-2120(41), yet still qualify for the sales tax exemption if it is also exempt under Section 12-37-220(B)(16)(a). Accordingly, the fact that GHS may qualify for the property tax exemption as a political subdivision under Section 12-37-220(A)(1) or as a charitable institution in the nature of a hospital under Section 12-37-220(A)(2) does not automatically render it ineligible for the sales tax exemption under Section 12-36-2120(41). All that the sales tax exemption statute requires is that GHS be eligible for at least one of the property tax exemptions specifically listed in Section 12-36-2120(41).

By its express terms, Revenue Procedure # 03-6 is a public advisory opinion "issued to assist in the administration of laws and regulations by providing guidance that may be followed in order to comply with the law" and is "binding on agency personnel." S.C. Rev. Proc. # 03-6 (p. 1). Because the Department is the author of all revenue procedures and is charged with the administration of the tax laws, its interpretation of Section 12-36-2120(41) set forth in its published Revenue Procedure is entitled to deference. *See S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260-61, 725 S.E.2d 480, 483 (2012). Although the ALC in its Final Order expressly acknowledged in a footnote that Revenue Procedure # 03-6 contradicted the Court's own reading of the statute, the ALC nevertheless refused to "address[] the agency's policy document" (Final Order, p. 7 fn. 5) despite GHS having raised this argument repeatedly in its briefing on the Motion for Partial Summary Judgment, in its Motion for Reconsideration, and at the hearing before the ALC on June 17, 2017. (*See* GHS Mem. Supp. Mot. for Partial Summ. J., pp. 13-15; GHS Reply Mem. Supp. Mot. for Partial Summ. J., pp. 7-8; Hearing Tr. pp. 22-23).

However, the ALC was bound to and should have addressed and followed the Department's own public guidance interpreting the specific statutory exemption provisions at issue in this case. *See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014) ("As repeatedly stated in our decisions, our deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations 'unless there is a compelling reason to differ.'").

The guidance provided by the Department in Revenue Procedure # 03-6 has been published and relied upon by the public for more than 14 years without change or challenge by the Department, the courts, or the Legislature. The Department's explanation of Section 12-36-2120(41) in relation to Section 12-37-220 contained in this Revenue Procedure is entirely consistent with the plain language of both statutes, and the ALC lacked a compelling reason to ignore or reject the Department's interpretation.

II. The ALC erred in holding that, "as a general principle," a government entity cannot "qualify as a charitable organization for purposes of the sales tax exemption."

On Page 5 of its Final Order, the ALC stated that "I find it unnecessary to decide the broader issue of whether any political subdivision may also be considered a charitable organization." (Final Order, p. 5.) However, on Page 6 the ALC opined that, "if it were necessary to reach the issue of whether, as a general principle, a government entity may also qualify as a charitable organization for purposes of the sales tax exemption, I conclude that it does not." (*Id.*, p. 6.) In reaching this conclusion, the ALC first rejects the 26 U.S.C. § 501(c)(3) standard for "charitable organizations" that is incorporated into Title 12 (Taxation) of the South Carolina Code and the Department's own public guidance and instead cites and quotes a definition of "charity" from a 150-year-old Massachusetts case that has never been relied on by any South Carolina court except once in a 1922 case pertaining to an unrelated, non-tax issue.

The ALC then invokes an inapposite distinction between "private corporations" and "public corporations" and holds that Section 12-36-2120(41) applies only to "private corporations" despite the absence of any language in the statute suggesting such a distinction or limitation was intended. As discussed below, both of these points constitute manifest errors of law this Court should reject and reverse.

A. The ALC's definition of "charitable organization" would upend decades of settled tax law, the General Assembly's legislative mandate, and the Department's own public guidance.

The ALC first summarily casts aside the long-settled and universally-applied standard under 26 U.S.C. § 501(c)(3) for determining whether an organization is charitable for tax exemption purposes, brushing off the fact that GHS has been continuously recognized as a charitable organization and government entity pursuant to 26 U.S.C. § 501(c)(3) for more than 70 years as "neither controlling nor persuasive to the Court as it pertains to this case." (Final Order, p. 6.) The ALC instead quotes a definition of "charity" contained in an 1867 Massachusetts case, *Jackson v. Phillips*, 96 Mass. 539, 556 (1867). (*Id.* at 7.) The ALC's holding on this point is contrary to settled tax law in South Carolina and virtually every other jurisdiction and, if affirmed, would throw into doubt the status of thousands of nonprofit charitable organizations in South Carolina.

First, as this Court is aware, a detailed body of federal law under Section 501(c)(3) of the federal Internal Revenue Code and the related Treasury Regulations define the organization and operation of tax-exempt, charitable organizations. *See* 26 U.S.C. § 501(c)(3); Treas. Reg. § 1.501(c)(3)-1. This definition has been adopted and applied by federal and state tax authorities in virtually every jurisdiction around the country—including South Carolina. The South Carolina General Assembly has expressly legislated that the terms and provisions of the Internal

Revenue Code apply to state tax law. *See* S.C. Code Ann. §§ 12-6-40, -50. Additionally, this Court cited and relied upon federal case law applying 26 U.S.C. § 501(c)(3) in construing a closely similar provision of South Carolina Code Section 12-37-220. *See Hibernian Society v. Thomas*, 282 S.C. 465, 471-72, 319 S.E.2d 339, 343 (Ct. App. 1984) (citing *Harding Hospital v. U.S.*, 505 F.2d 1068 (6th Cir. 1974), in construing the legislative intent underlying the property tax exemption granted by S.C. Code Ann. § 12-37-220(B)(12) to "any fraternal society, corporation or association"). Under this federal tax law, some government entities can be simultaneously recognized as exempt under 26 U.S.C. § 115 (the exemption for "a State or any political subdivision thereof") and 26 U.S.C. § 501(c)(3) (the exemption for charitable organizations). Indeed, GHS has enjoyed this dual status exemption since its inception.[5] Therefore, the ALC fundamentally erred in finding the standard for charitable organizations under Section 501(c)(3) is "neither controlling nor persuasive."

Second, no South Carolina statute, regulation, case, rule, or other authority has employed the definition of "charity" or "charitable organization" set forth in the Massachusetts Supreme Court's 1867 decision in *Jackson v. Phillips* cited and quoted by the ALC in determining whether a corporation, trust, association, or other organization qualifies as a charity or charitable organization under any provision of Title 12 of the South Carolina Code. In fact, the *Jackson* case appears to have been cited by a South Carolina court only once—in 1922—in a case concerning the status of a charitable trust. *See Harter v. Johnson*, 122 S.C. 96, 115 S.E. 217, 220 (1922). Indeed, prior to the ALC's ruling in this matter, neither GHS *nor the Department* had

[5] Not all government entities can qualify as exempt under both 26 U.S.C. § 115 and § 501(c)(3). To so qualify, a government organization must be dedicated to charitable purposes and otherwise satisfy the requirements of Section 501(c)(3). Government hospitals are among the limited type of government entities that can meet these requirements due to the fact that the promotion of health by nonprofit hospitals has long been recognized as a charitable purpose. *See, e.g.,* IRS Revenue Ruling 69-545, 1969-2 C.B. 117.

suggested that such a definition or standard can or should govern the determination of whether a taxpayer is a "charity" or "charitable organization" under South Carolina tax law.

Third, the ALC's definition of charitable organization is contrary to the definition adopted and applied by the Department to the public generally and to GHS in this specific case. In the Department's Revenue Procedure # 03-6 setting forth the guidelines for determining whether an organization qualifies for the sales tax exemption under S.C. Code Ann. § 12-36-2120(41), the Department expressly adopts 26 U.S.C. § 501(c)(3) as the standard for determining whether an organization qualifies for the sales tax exemption. As discussed above, this public advisory opinion is binding on the Department. *See* S.C. Rev. Proc. # 03-6 (p. 1). Furthermore, the Department applied the definition of charitable organization under 26 U.S.C. § 501(c)(3) and Treasury Regulation § 1.501(c)(3)-1 in its own written final Department Determination issued to GHS in this case. The Department's Determination states:

> No definition exists for the term "charitable organization" in Title 12, except to the extent addressed in the Internal Revenue Code as adopted by the General Assembly, S.C. Code Ann. § 12-6-40 (Supp. 2012). The term is defined for purposes of corporate solicitation of donations in S.C. Code Ann. § 33-56-170(1) (2006) which provides: "[c]haritable organization" means any organization, institution, association, society, or corporation which is exempt from taxation pursuant to § 501(c)(3) or 501(d) of Title 26 of the United States Code, as amended. That said, the "charitable" component of the exemption is two-fold under the IRC. Treas. Reg. § 1.501(c)(3)-1(a)(1) provides:
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> > In order to be exempt as an organization described in § 501(c)(3), an organization **must be both organized and operated exclusively** for one or more of the purposes specified in such section. If an organization fails to meet either the organizational test or the operational test, **it is not exempt.**
>
> (emphasis added). To that end, a tax-exempt "organization" must meet "five criteria as provided in IRC § 501(c)(3)":

1. It must be organized exclusively for an exempt purpose;
2. It must be operated exclusively for an exempt purpose;
3. It must avoid any private inurement;
4. It must avoid substantial lobbying;
5. It must avoid any political activity.

> The organizational **and** operational requirements also require exclusivity, tax exempt purpose, and keeping of various procedural requirements. Courts have added three more criteria: 1. the entity must provide a public benefit; 2. the entity must not violate established public policy; 3. the activities must not be illegal. Darryll K. Jones, et al., The Tax Law of Charities and Other Exempt Organizations.

(Department Determination, p. 20 (emphasis in original)).

Accordingly, the ALC erred in refusing to apply the settled definition of "charity" and "charitable organization" mandated by the General Assembly and applied by the Department. Under that governing standard, GHS and other political subdivisions can qualify as charitable organizations if they meet the requirements of Section 501(c)(3) and the related regulations and case law.

B. The ALC's holding that Section 12-36-2120(41) applies only to "private corporations" is contrary to the plain language of the statute.

In addition to adopting a definition of "charity" or "charitable organization" at odds with the Section 501(c)(3) standard mandated by South Carolina law and applied by the Department, the ALC also excludes GHS and other political subdivisions from qualifying for the sales tax exemption as charitable organizations based on its conclusion that Section 12-36-2120(41) applies only to "private corporations." The ALC relied on what it described as "a long history of jurisprudence in this state distinguishing government entities ('public corporations') from private entities that engage in charitable work." (Final Order, p. 7.) The ALC cites three cases dating from 1967, 1922, and 1832—none of which address whether a corporation or other type

of organization is entitled to the sales tax exemption or property tax exemption. Nevertheless, even assuming the ALC's distinction between "public corporations" and "private corporations" was a relevant concept under present-day tax law, the plain language of both Section 12-36-2120(41) and Section 12-37-220 does not limit their application to "private corporations." Section 12-36-2120(41) says that it applies to all "**organizations**"; Section 12-37-220(B)(16)(a) applies to "any religious, charitable, eleemosynary, educational, or literary **society, corporation, trust, or other association**"; and Section 12-37-220(A)(4) applies to "all charitable trusts and foundations." These terms used by the Legislature are broader than "private corporation" and include the full range of the different types of entities. Had the Legislature intended to limit the terms "organization," and "society, corporation, trust, or other association" to just "private corporations" "it could have plainly said so." *See Buist,* 367 S.C. at 277, 625 S.E.2d at 640. Indeed, assuming the ALC was correct in its characterization of the "long history of jurisprudence" distinguishing "private corporations" and "public corporations," this Court must presume the General Assembly was aware of the distinction and chose not to employ that distinction when drafting these statutes. *See, e.g., Wooten v. Wooten*, 364 S.C. 532, 552, 615 S.E.2d 98, 108 (2005) (holding that "Legislature is presumed to be aware of common law when enacting statutes and using terms that have a well-recognized meaning in the law").

Straining to justify its departure from the plain language of the statute, the ALC further relies on an unpublished Attorney General Opinion issued in 1970 construing unrelated provisions of an obsolete version of the South Carolina Code.[6] *See* Op. S.C. Atty. Gen. No. 2921

[6] It is well settled that an Attorney General opinion is not binding or precedential authority upon which a court can base its decision. *See, e.g., CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 78, 716 S.E.2d 877, 883 (2011) (explaining that "we assign no weight to the two Attorney General's Opinions relied upon by the ALC"); *Eargle v. Horry Cty.*, 344 S.C. 449, 455,

(June 20, 1970), 1970 WL 12203. This Opinion does not address the sales tax exemption for charitable organizations in Section 12-36-2120(41) or the property tax exemptions in Sections 12-37-220(A)(4) and 12-37-220(B)(16)(a). Indeed, the sales tax exemption for charitable organizations in Section 12-36-2120(41) was not even enacted *until 1989*. Instead, the Opinion cited by the ALC pertains to whether the University of South Carolina might be exempt from the tax levied "upon all paid admissions to all places of amusement" under Section 65-802(4) of the former Code of Laws of South Carolina, 1962. The Attorney General specifically considered whether USC was properly categorized as an "eleemosynary and nonprofit corporation" such that it qualified for the exemption from admissions tax under Section 65-802 (Supp. 1975). The Attorney General concluded that this specific statutory language limited the exemption to "private corporations" and found that USC did not qualify for the exemption.[7]

However, even assuming the then-Attorney General's interpretation of former Code Section 65-802(4) was correct, it is clear the Legislature intended the exemption statutes at issue in the present case to include any "organization" (§ 12-36-2120(41)) which is a "religious, charitable, eleemosynary, educational, literary society, corporation, trust, or other association" (§ 12-37-220(B)(16)), not just "private corporations" as defined by the former Attorney General in 1970. Indeed, the fact that the General Assembly did not adopt the language of the 1962 Code

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545 S.E.2d 276, 280 (2001) (noting that "this Court is not bound by opinions of the Attorney General").

[7] Although the then-Attorney General limited "eleemosynary" to "private corporations," the South Carolina Supreme Court has suggested a broader definition applies: "'Eleemosynary' has come in the law to be interchangeable with the word 'charitable.'" *Peden v. Furman Univ.*, 155 S.C. 1, 151 S.E. 907, 914 (1930); *see also Eiserhardt v. State Agr. & Mech. Soc. of S.C.*, 235 S.C. 305, 309, 111 S.E.2d 568, 570 (1959) ("'Eleemosynary corporations are those created for charitable and benevolent purposes.' . . . the word 'eleemosynary' is not a technical one of art or one which has 'acquired a rigid meaning by judicial construction.'"); BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "eleemosynary" as: "Of, relating to, or assisted by charity; not-for-profit; an eleemosynary institution").

when enacting the new sales tax exemption statute decades later provides further evidence of the Legislature's intent to ***not*** exclude political subdivisions from the scope of "organizations" that may qualify for exemption under Section 12-36-2120(41). *See, e.g., Cunningham v. Scibana*, 259 F.3d 303, 308 (4th Cir. 2001) ("The use of different terms within related statutes generally implies that different meanings were intended.").

III. The ALC erred in holding that the rule adopted by the South Carolina Supreme Court requiring liberal construction of exemption statutes in favor of political subdivisions did not apply to exemptions from the payment of sales taxes.

The South Carolina Supreme Court has long held that tax exemption statutes must be liberally construed in favor of granting the exemption to government entities:

> The general rule is that exemptions of private property are strictly construed, because in such cases taxation is the rule and exemption the exception; but exemptions of the property of municipal corporations are liberally construed, for exemptions of such property is the rule and taxation the exception. With us municipal corporations are merely agencies of the state for governmental purposes; and ***it has never been the policy of this state to tax its own agencies or instrumentalities of government. From which we conclude that the provision should be construed liberally in favor of the exemption claimed.***

Town of Myrtle Beach v. Holliday, 203 S.C. 25, 30, 26 S.E.2d 12, 14 (1943) (emphasis added), *citing State v. City of Columbia*, 115 S.C. 108, 112, 104 S.E. 337, 338 (1920); *see also Hampton Friends of Arts v. S.C. Dep't of Revenue*, 401 S.C. 372, 376, 737 S.E.2d 628, 630 (2013) (noting the rule of liberal construction of exemptions claimed by public entities announced in *Holliday* and *State v. City of Columbia*); *Charleston County Aviation Auth. v. Wasson*, 277 S.C. 480, 485, 289 S.E.2d 416, 419 (1982) (citing *Holliday* and *State v. City of Columbia* for holding that "[a]n exception to that rule [of strict construction against claimed exemptions] exists, however, for municipal or publicly-owned property"); *see also, e.g.*, 84 C.J.S. *Taxation* § 268 (noting that "the rule of strict construction has no application in the case of property devoted to certain uses which

it has always been the settled custom and policy of the state to abstain from taxing"). Because GHS is a political subdivision of the State of South Carolina, the Court must construe Section 12-36-2120(41) ***liberally*** in favor of granting the sales tax exemption.

In its Final Order, the ALC held that the rule requiring liberal construction in favor of granting tax exemptions to government entities does not apply specifically to the sales tax exemption statute. Although the ALC acknowledged the Supreme Court's expansive and unqualified finding, quoted above, that "it has never been the policy of this state to tax its own agencies or instrumentalities of government,"[8] the ALC asserted, without citation to any authority:

> This is simply not the case for sales and use taxes. Agencies, political subdivisions, and other instrumentalities of South Carolina government have long paid sales taxes on gross proceeds of sales derived from retail sales made by the government entity.

(Final Order, p. 4.) The ALC's conclusion is wrong as a matter of law and as a matter of fact.

First, the Supreme Court's holding in *Holliday* is not limited to property tax exemptions or otherwise restricted to any other specific category or type of tax exemption, nor has the Court in the seventy years since limited the holding to property tax exemptions. Contrary to the ALC's conclusory statement, the Supreme Court's holding in *Hampton Friends of Arts v. S.C. Department of Revenue*, 401 S.C. 372, 737 S.E.2d 628 (2013), does not proscribe or modify the holding in *Holliday*. On the contrary, the court in *Hampton Friends* reaffirmed the rule that exemption statutes should be liberally construed in favor of governmental entities. *Id.* at 375-76, 737 S.E.2d at 630. Moreover, there is nothing in *Holliday* to suggest that, had the sales tax

[8] In its Final Order, the ALC stated: "Notably, the *Holliday* court observed, 'it has never been the policy of this state to tax its own agencies or instrumentalities of government' in the property tax scheme." However, the Supreme Court in *Holliday* did not qualify or otherwise limit its holding with the additional language "in the property tax scheme" as suggested by the ALC in its description. (Final Order, p. 4.)

exemption statute been at issue in that case, the Supreme Court would have reached a different conclusion. Any such distinction between property tax and sales tax would be purely arbitrary and cannot have been the intent of the Legislature or our state's Supreme Court.

Additionally, the ALC's conclusion is belied by the Department of Revenue's own regulation expressly stating that political subdivisions can be exempt under the sales tax exemption statute. The Department promulgated S.C. Regulation 117-304 providing when sales by government entities will be subject to sales tax:

> Sales of tangible personal property by the State, counties, municipalities and other political subdivisions of the State (e.g. schools, sheriff offices, municipal housing authorities, welfare agencies) are subject to the sales tax, ***unless such sales*** fall within the provisions of Regulation 117-304.1 (transfers by State agencies to other agencies, counties or municipalities at cost) ***or are otherwise exempt. (See Code Sections 12-36-2120 and 12-36-2130 for the exemptions.)***

S.C. Code Ann. Regs. 117-304 (emphasis added). While the regulation does provide that political subdivisions are subject to sales tax, the qualifying language "**unless such sales . . . are otherwise exempt**" followed by citation to the general sales tax exemption statutes indicates that a political subdivision can qualify for the sales tax exemptions under Section 12-36-2120, including subsection (41). Indeed, the Department has granted the sales tax exemption to government agencies. *See, e.g.,* S.C. Private Revenue Opinion No. 2002-5 (Dec. 27, 2002), 2002 WL 32996166 (finding that DHEC, a state agency, was exempt from collection of sales tax on drugs sold through its central pharmacy pursuant to Section 12-36-2120(28) (exempting from sales tax prescription medicines sold for the treatment of certain diseases)). Therefore, the ALC's attempt to carve out sales tax exemptions from the Supreme Court's rule requiring liberal construction in favor of granting tax exemptions to government entities is in error and should be reversed.

CONCLUSION

For the reasons stated above, the Administrative Law Court erred in ruling—as a matter of law—that neither GHS nor any other political subdivision can ever qualify for the broad sales tax exemption granted to any "organization" which is a "religious, charitable, eleemosynary, educational, or literary society, corporation, trust, or other association" and "all charitable trusts and foundations." Accordingly, GHS asks that the Court reverse and remand this matter to the Administrative Law Court.

Respectfully submitted,

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November 8, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No.: 13-ALJ-17-0523-CC

Appellate Case No.: 2017-01548

Greenville Hospital System .....Appellant,

v.

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

PROOF OF SERVICE

I certify that I have served the ***Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal*** on Respondent by depositing copies of the documents in the United States Mail, postage prepaid, on November 8, 2017, addressed to counsel for Respondent as follows:

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November 8, 2017

The Honorable Jenny Abbott Kitchings
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RE: *Greenville Hospital System, Appellant, v. South Carolina Department of Revenue, Respondent,* Administrative Law Court Case No. 13-ALJ-17-0523-CC
Appellate Case No. 2017-01548

Dear Ms. Kitchings:

Please find enclosed for filing the original and one copy each of the Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal, together with our Proof of Service. After filing, please return a file-stamped copy to me in the enclosed self-addressed stamped envelope provided for your convenience.

By copy of this letter, I am serving a copy of same upon counsel for Respondent, South Carolina Department of Revenue.

Please feel free to contact me should you have any questions or concerns.

Sincerely,

HAYNSWORTH SINKLER BOYD, P.A.

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