

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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Appeal from the Administrative Law Court

DEC 20 2017

The Honorable S. Phillip Lenski

SC Court of Appeals

Case Nos. 2014-ALJ-17-0602-CC; 2014-ALJ-0601-CC

Fairfield Waverly, LLC,

Respondent,

v.

Dorchester County Assessor,

Appellant.

GS Windsor Club, LLC,

Respondent,

v.

Dorchester County Assessor,

Appellant.

BRIEF OF RESPONDENTS
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STATEMENT OF ISSUE ON APPEAL

1. Did the Administrative Law Court err in concluding property owners are entitled, on a prospective basis, to the property tax exemption under S.C. Code Ann. § 12-37-3135 if the property owner files for the exemption before January 31 of any tax year subsequent to the tax year for which the property first qualifies for the exemption?

STATEMENT OF THE CASE

This consolidated matter came before the South Carolina Administrative Law Court (“ALC” or “court”) pursuant to S.C. Code Ann. § 12-60-2540(A) (2011) for a contested case hearing requested by the two Respondents.

This action began when the Respondents filed a request for a contested case hearing with the Administrative Law Court on March 16, 2015. After notice to the parties, a hearing was held on May 20, 2015 at the ALC in Columbia, South Carolina. The issue that was decided by the court is whether, for property tax purposes, Respondents were entitled to benefit from the alternate property valuation available under S.C. Code Ann. § 12-37-3135 on a prospective basis for the sales of two real property parcels which occurred in 2012. Both Respondents and Appellant agreed that Respondents properly filed for and claimed the exemption for the 2014 tax year and following. Respondents failed to file for the exemption by January 31 of the year immediately following the 2012 sales, which in both cases was in 2013.

The two separate cases were consolidated before the ALC. The parties entered into Stipulations of Facts and both sides moved for summary judgment (R. pp. 17-22). The ALC ruled in favor of the Respondents on February 1, 2017 (the “ALC Order”) and the Appellant timely appealed. The Respondents agree with the Appellant regarding the sole issue before this Court, to wit, whether the Respondents are entitled to the Assessable Transfer of Interest Exemption under

§ 12-37-3135 on a prospective basis if the exemption is filed with the County in a year subsequent to the assessable transfer of interest.

FINDING OF FACTS

The parties have stipulated to the facts. The following is a recitation of those stipulations for each party (R. pp. 17-22).

A. Fairfield Waverly, LLC

1. This case involves the sole issue of whether the Fairfield Waverly, LLC (the “taxpayer”) is entitled on a prospective basis to the ATI fair market value property tax exemption available under S.C. Code Ann. § 12-37-3135 (the “ATI Exemption”) if it files for the exemption with the county in the year after the property first qualifies for the exemption.
2. The ATI Exemption allows property owner to apply for and receive a partial exemption reducing the property tax value for any parcel of real property and any improvements thereon which are subject to the six percent assessment ratio and which undergo an assessable transfer of interest after 2010. The exemption is equal to 25% of the “ATI fair market value” of the parcel, as defined by statute.
3. The taxpayer purchased the property at issue (1900 Waverly Place, North Charleston, TMS# 181-00-00-040.000) on December 21, 2012 for a purchase price of \$13,850,000.
4. At the time of the purchase, the current fair market value and taxable value according to Dorchester County (the “County”) for the 2012 tax year was \$11,155,000.
5. The property was eligible for the ATI Exemption beginning with the 2013 Tax Year.
6. The taxpayer did not file for the ATI Exemption for the 2013 Tax Year and therefore did not qualify under S.C. Code Ann. § 12-37-3135(C) for the 2013 Tax Year.
7. As a result, the County appraised the property for the 2013 Tax Year based on the assessable transfer of interest which occurred in December 2012. Based on the assessable

transfer of interest, the County appraised the property as of December 31, 2012 for the 2013 Tax Year with a taxable value of \$13,849,900.

8. The taxpayer applied for ATI Exemption for the 2014 Tax Year by filing an application on January 16, 2014.
9. By letter dated August 19, 2014, the County denied the ATI Exemption for the taxpayer for the 2014 Tax Year.
10. On September 30, 2014, the taxpayer properly protested the County's decision to deny the ATI Exemption for the 2014 Tax Year.
11. After a hearing held on November 10, 2014, the Dorchester County Board of Assessment Appeals upheld the County's determination by decision dated November 26, 2014.
12. The taxpayer timely appealed the decision of the Board of Assessment Appeals by requesting a contested case hearing before this Court.

B. GS Windsor Club, LLC

1. This case involves the sole issue of whether the GS Windsor Club, LLC (the "taxpayer") is entitled on a prospective basis to the ATI fair market value property tax exemption available under S.C. Code Ann. § 12-37-3135 (the "ATI Exemption") if it files for the exemption with the county in the year after the property first qualifies for the exemption.
2. The ATI Exemption allows property owner to apply for and receive a partial exemption reducing the property tax value for any parcel of real property and any improvements thereon which are subject to the six percent assessment ratio and which undergo an assessable transfer of interest after 2010. The exemption is equal to 25% of the "ATI fair market value" of the parcel, as defined by statute.
3. The taxpayer purchased the property at issue (9580 Old Glory Lane, Summerville, TMS# 171-00-00-216.000) on November 19, 2012 for a purchase price of \$26,372,923.

4. At the time of the purchase, the current fair market value and taxable value according to Dorchester County (the "County") for the 2012 tax year was \$17,230,100.
5. The property was eligible for the ATI Exemption beginning with the 2013 Tax Year.
6. The taxpayer did not file for the ATI Exemption for the 2013 Tax Year and therefore did not qualify under S.C. Code Ann. § 12-37-3135(C) for the 2013 Tax Year.
7. As a result, the County appraised the property for the 2013 Tax Year based on the assessable transfer of interest which occurred in November 2012. Based on the assessable transfer of interest, the County appraised the property as of December 31, 2012 for the 2013 Tax Year with a taxable value of \$24,650,000.
8. The taxpayer applied for ATI Exemption for the 2014 Tax Year by filing an application on January 24, 2014.
9. By letter dated August 19, 2014, the County denied the ATI Exemption for the taxpayer for the 2014 Tax Year.
10. On September 30, 2014, the taxpayer properly protested the County's decision to deny the ATI Exemption for the 2014 Tax Year.
11. After a hearing held on November 10, 2014, the Dorchester County Board of Assessment Appeals upheld the County's determination by decision dated November 26, 2014.
12. The taxpayer timely appealed the decision of the Board of Assessment Appeals by requesting a contested case hearing before this Court.

END OF STIPULATION

STANDARD OF REVIEW

The Administrative Procedures Act governs appellate review of decisions from the ALC. *DirectTV, Inc. v. S.C. Dep't of Rev.*, 421 S.C. 59, 804 S.E.2d 633 (Ct. App. 2017); *Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 203, 712 S.E.2d 428, 431 (2011). The review of the ALC Order must be confined to the record. This Court may not substitute its judgment for the judgment of the ALC 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 the 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 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.

S.C. Code Ann. § 1-23-610(B) (Supp. 2016).

An appellate court should only reverse the ALC Order if it is unsupported by substantial evidence in the record or contains an error of law. *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008); see also *Media Gen. Comm'ns, Inc. v. S.C. Dep't of Rev.*, 388 S.C. 138, 144, 694 S.E.2d 525, 528 (2010) (“A reviewing court may reverse the decision of the ALC [when] it is in violation of a statutory provision or it is affected by an error of law.”).

ARGUMENT

- I. **The ALC did not err in concluding property owners are entitled, on a prospective basis, to the property tax exemption under S.C. Code of Laws Ann. § 12-37-3135 if the property owner files for the exemption before January 31 of any tax year subsequent to the tax year for which the property first qualifies for the exemption.**

- A. **General**

Under the catch-all rule of S.C. Code Ann. § 12-43-220(e), except as otherwise provided, all commercial real property is taxed on an assessment equal to 6% of the fair market value of the property. The properties involved in this case are commercial property.

Near the end of the 2006 legislative session, the South Carolina General Assembly passed Act 388 and the South Carolina Real Property Valuation Reform Act of 2006 (collectively the “Acts”). Prior to the passage of these Acts, many property owners were faced with significant increases in their properties’ assessed values, and in turn, their tax liabilities. The Acts sought to cap reassessments while making up the loss of revenue through a variety of ways, including a 1% increase in the general sales and use tax.

As part of the Acts, § 12-37-3140(B) put a 15% cap on any increase in fair market value of real property attributable solely to the mandated five-year reassessment. While this cap provided welcomed relief for property owners across South Carolina, the Acts also created another reassessment trigger: the “Assessable Transfer of Interest” (“ATI”). The Acts added § 12-37-3150, which required counties to reassess properties’ values for purposes of the property taxes in non-reassessment years upon a variety of transfers of interest, including sales. Accordingly, the 15% cap remains in effect so long as the taxpayer retains ownership of the property. If the taxpayer sells the property (i.e. assessable transfer of interest), then not only is the 15% cap removed, but the property also is immediately reassessed at the full purchase price (even though in most cases

the transfer occurred in a non-reassessment year). As stated below, this created significant competitive disadvantages for owners of commercial property.

Suppose you have two very similar multi-family housing complexes across the street from each other, both with a value in 2006 of \$10,000,000. Suppose Complex A remained in the same ownership through 2011. Its value for tax purposes would never exceed \$11,500,000 ($\$10,000,000 \times 15\%$) for all five years. Suppose Complex B was sold for \$14,000,000 in 2007. It would be taxed at \$14,000,000 through 2011, and if there was a reassessment in the intervening years, its value could possibly rise another 15%, to \$16,100,000.

So in our example, you have identical, competing multi-family complexes, one taxed at a maximum of \$11,500,000 and the other at a maximum of \$16,100,000. (The example assumes rising property values.) Assuming the properties are commercial in nature (6% assessment ratio) and in a tax district with a millage rate of 350 mills, the difference in taxes is almost \$100,000 per year.¹

Obviously this creates a horrible competitive disadvantage. In addition, as discussed more fully below, South Carolina has amongst the highest property tax rates in the country for all classes of property except primary residences. And Act 388, by shifting the property tax burden even further from primary residences to all other classes of property made the situation worse. The General Assembly responded to the numerous complaints made by commercial property owners, including buyers and sellers, by providing partial relief in enacting § 12-37-3135.

Undoubtedly as a result of our very high property tax rates, the General Assembly has provided partial property tax relief in other ways by means of a multitude of statutes. For manufacturers, this includes the manufacturer's abatement at § 12-37-220(A)(7) (which eliminates

¹ Estimated tax of the property valued at \$11,500,000 is \$241,500 ($\$11.5 \text{ Million} \times 6\% \text{ assessment ratio} \times .350 \text{ millage rate}$); estimated tax of the property valued at \$16,100,000 is \$338,100 ($\$16.1 \text{ Million} \times 6\% \times .350$).

the county portion of the millage for five years), fee-in-lieu at §§ 4-29-67 and 4-12-10 et seq. (which reduces the assessment ratio from 10.5% to 6% and freezes the millage) and a complete exemption for pollution control equipment at § 12-37-220(A)(8). For retailers, the General Assembly abolished property taxes on inventory at § 12-27-220(A)(6). For banks, the General Assembly eliminated the property taxes on personal property at § 12-37-220(b)(23). For commercial property, the General Assembly adopted multi-lot discounts at § 12-43-225. Section VII of the Department of Revenue's South Carolina Property Tax Manual (2015) lists the numerous exemptions. Many of the exemptions must be claimed, either by filing a notice or by claiming them on the taxpayer's property tax return (*e.g.*, pollution control equipment).

Because taxpayers sometimes miss timely filing for exemptions, the General Assembly provided a refund provision in the Revenue Procedures Act, *see* section 536 in DOR South Carolina Property Tax Manual (2015). This section states the general rule that “[a]ll claims for refund must be filed within the later of 3 years from the date a return was filed, or 2 years from the date of payment of the tax.” Section 536 further notes that “*A refund will not be granted if the claim is based on an exemption requiring an application unless the application was timely filed.*” (Emp. added.) Note that this provision is strictly limited to refund claims. For this reason, the Respondents in this action are not requesting a refund; they are only requesting prospective treatment.

B. The ATI Exemption² Statute

As stated above, to soften the impact of the ATI, the General Assembly passed S.C. Code Ann. § 12-37-3135, which provided for alternate valuation for eligible commercial property. (The

² As discussed more fully below, although the parties have characterized the lower taxable amount as an “exemption,” it can more aptly be described as an alternate valuation period—in other words, for a short period of time, the statute requires county assessors to recognize a lower property value for purposes of its tax assessment.

section only applies to commercial property, and not to residential, manufacturing, or utility properties.) The exemption also does not apply to new construction—this means the property and any improvements thereon must have been subject to taxation prior to the ATI which forces the reassessment.

Under this statute, when commercial property undergoes an ATI after 2010, the taxpayer may be able to take advantage of an alternate valuation of its property. The following summarizes the subsections of the statute at issue in this case.

1. Definitions of Terms

The ATI Exemption is riddled with defined terms. For example:

- (1) “ATI fair market value” means the fair market value of a parcel of real property and any improvements thereon as determined by appraisal at the time the parcel last underwent an assessable transfer of interest.
- (2) “Current fair market value” means the fair market value of a parcel of real property as reflected on the books of the property tax assessor for the current property tax year.
- (3) “Exemption value” means the ATI fair market value when reduced by the exemption allowed by this section.
- (4) “Fair market value” means the fair market value of a parcel of real property and any improvements thereon as determined by the property tax assessor by an initial appraisal, by an appraisal at the time the parcel undergoes an assessable transfer of interest, and as periodically reappraised pursuant to Section 12-37-3140(B).

§ 12-37-3135(A).

2. How to Value the ATI Exemption

Subsection (B)(1) of this section provides the ATI exemption as follows:

When a parcel of real property and any improvements thereon subject to the six percent assessment ratio provided pursuant to Section 12-43-220(e) and which is currently subject to property tax undergoes an assessable transfer of interest after 2010, there is allowed an exemption from property tax of an amount of the ATI fair market value of the parcel as determined in the manner provided in item (2) of this subsection. Calculation of property tax value for such parcels is based on exemption value. The exemption

allowed by this section applies at the time the ATI fair market value first applies.

S.C. Code Ann. § 12-37-3135(B)(1). Subsection (B)(2) outlines the calculation of the exemption:

(a) The exemption allowed by this section is an amount equal to twenty-five percent of ATI fair market value of the parcel. However, no exemption value calculated pursuant to this section may be less than the current fair market value of the parcel.

(b) If the ATI fair market value of the parcel is less than the current fair market value, the exemption otherwise allowed pursuant to this section does not apply and the ATI fair market value applies as provided pursuant to Section 12-37-3140(A)(1)(b).

S.C. Code Ann. § 12-37-3135(B)(2). In other words, the ATI fair market value exemption is calculated as 25% of the (1) ATI fair market value of the parcel or (2) the current fair market value, whichever is higher. The ATI Exemption is not available in one case not relevant here.

3. Applying for the Exemption

Subsection (C) reads:

The exemption allowed in this section does not apply unless the owner of the property, or the owner's agent, notifies the county assessor that the property will be subject to the six percent assessment ratio provided pursuant to Section 12-43-220(e) before January thirty-first *for the tax year for which the owner first claims eligibility for the exemption*. No further notifications are necessary from the current owner while the property remains subject to the six percent assessment ratio. (Emp added).

S.C. Code Ann. § 12-37-3135(C) (emphasis added). In other words, the owner must notify the county assessor before January 31st for the tax year for which the owner first claims eligibility for the exemption. If the county assessor is properly notified, the property should qualify for the ATI fair market value property tax exemption/alternate valuation for the tax year in which the owner first claims eligibility. Obviously, to obtain the maximum value of the exemption, the buyer wants to apply for the ATI Exemption by January 31 of the year following the purchase. The statute does not require this, however, and such was not done in this case.

4. Example

As an example, consider commercial property (taxed at 6%) was purchased in 2009 after the county's last reassessment for \$400,000. Since the purchase, the property had increased in value, such that the county assessor believes it is worth \$550,000 (current fair market value) on December 31, 2012. But because of the 15% cap, the property was taxed in 2013 based on a taxable value of \$460,000.

If the property is sold on January 1, 2014 for \$750,000 (ATI fair market value), and if the taxpayer otherwise met the requirements of § 12-37-3135, then the ATI Exemption would be determined as follows:

ATI fair market value x 0.25 = amount of exemption

\$750,000 x 0.25 = \$187,500 (amount of exemption)

Exemption value = ATI fair market value – amount of exemption

\$750,000 - \$187,500 = \$562,500 (exemption value)

Because the exemption value is greater than the current fair market value of \$550,000, the exemption value becomes the taxable value (instead of \$750,000).

If, on the other hand, the property sold on January 1, 2014 for \$625,000, then the ATI Exemption would be determined as follows:

ATI fair market value x 0.25 = amount of exemption

\$625,000 x 0.25 = \$156,250 (amount of exemption)

Exemption value = ATI fair market value – amount of exemption

\$625,000 - \$156,250 = \$468,750 (exemption value)

In this example, because the exemption value is less than the current fair market value of \$550,000, the current fair market value becomes the taxable value.

C. Respondents are Entitled to the ATI Exemption Even Though it Was Not Claimed in First Year of Eligibility.

Because Respondents are entitled to and eligible for the ATI Exemption under the plain meaning of the statute, they also are entitled to benefit from the alternate valuation provided by the ATI Exemption. The benefit is the calculation of the exemption value of Respondents' property "for the tax year for which the owner first claims eligibility for the exemption" using the fair market value during the year the properties were acquired by the Respondents. The purpose and intent of the statute compels such a finding. Moreover, given the economic incentive nature of the statute, any ambiguity in the ATI Exemption should be resolved in favor of the taxpayer. (Incidentally, Respondents are not aware of any Appellate Court decisions, or other ALC decisions on point, which is perhaps some indication that other counties are not taking Appellant's position.)

1. Principles of Statutory Construction Compel a Finding that Respondents are Entitled to the ATI Exemption

While the plain meaning and literal language rule normally is applicable, the real purpose and intent of the lawmakers will prevail over the literal import of the words. *Caughman v. Cola. Y.M.C.A.*, 212 S.C. 337, 47 S.E.2d 788 (1948); *Walton v. Walton*, 282 S.C. 165, 318 S.E.2d 14 (1984). The context of the statute must also be examined as part of the process of determining the intent of the General Assembly. *Hancock v. Southern Cotton Oil Co.*, 211 S.C. 432, 45 S.E.2d 850 (1948).

Most importantly, the Court must consider the clear purpose and intent of the statute in finding Respondents are entitled to benefit from the ATI Exemption. Although the General Assembly provides no written record of the legislative intent, the General Assembly's intent in its adoption of § 12-37-3135 was to limit the effect an ATI has on the property tax liabilities in the tax years immediately following the ATI. South Carolina law caps the increase of the current fair market value/taxable value in the reassessment year at 15% unless there is an ATI. Prior to the

enactment of § 12-37-3135, an ATI would trigger the uncapping of the current fair market value/taxable value of the property in the tax year following the ATI; this would allow for the current fair market value/taxable value to approach the sale price of the property. In many cases, the sale price was *significantly* higher than the current fair market value, resulting in property tax increases that hurt investors and limited their ability to invest in South Carolina in the future, and created significant competitive disadvantages. The legislature responded by implementing § 12-37-3135 to encourage investment and level the competitive playing field by limiting property tax increases for commercial property in the tax years following an ATI. In both of the cases at issue, if the alternate valuation is not applied for in the 2013 Tax Year, then the taxable values will exceed the sale prices when the properties are reassessed; this is contrary to the legislative intent behind § 12-37-3135.

Moreover, this form of property tax reduction was necessary for South Carolina to continue to attract new business in light of its high property tax rates for commercial development. For example, according to the Tax Foundation's 2012 publication *Location Matters: A Comparative Analysis of State Tax Costs on Business*, South Carolina ranks 49th place (out of 50 states) for taxes on new retail operations.³ (Retail operations are taxed as commercial, and are thus eligible for the ATI exemption.) With respect to other commercial property, to wit new distribution center operations which are taxed as commercial, South Carolina does marginally better—48th out of 50 states.⁴

More recently, in the leading national study prepared in 2017 by the Minnesota Center for Fiscal Excellence in conjunction with the Lincoln Institute of Land Policy analyzing 2016 property

³ See p. 41 (*available at* <http://taxfoundation.org/sites/taxfoundation.org/files/docs/location%20matters.pdf>).

⁴ *Id.* at 53.

taxes,⁵ South Carolina fared much the same, i.e. very poorly. Lincoln Institute ranks 53 taxing jurisdictions (50 states, plus Washington, DC, NYC and Chicago) for a variety of property tax classifications, including residential, industrial, and commercial. The Study looked at the property taxes in the state's largest city (Columbia) as well as one rural city (Mullins). A rank of 1 was the highest tax in the nation, and a rank of 53 was the lowest tax. The Study also looked at small, (\$100,000), medium (\$1 million), and large (\$25 million) projects for each tax type. Columbia ranked the 7th highest commercial property taxes in the country for small and medium projects, and 8th highest for large projects.⁶ Mullins ranked 5th highest for small projects, 6th for medium projects and 7th for largest projects.⁷ Using another measurement methodology, one study also determined that South Carolina had the seventh highest commercial property tax rate in the nation.⁸

In addition to the studies referenced above, news coverage following adoption of the ATI Exemption clearly demonstrates the purpose and goals of the legislation. On March 25, 2012, David Slade of the Post and Courier news website interviewed local real estate professionals following the enactment of § 12-37-3135.⁹ John Darby of the Beach Company, for example, stated that “the projects that we have on the drawing board wouldn’t be on the drawing board” if the law had not changed. *Id.* Similarly, a local broker commented on the effect the previous law had on his deals, saying “we actually lost a sale last year for some multifamily (property) because of it, when they figured out how the taxes would go up.” *Id.* The intent of the legislature is clear: to

⁵ Lincoln Institute of Land Policy and Minnesota Center for Fiscal Excellence, *50-State Property Tax Comparison Study 2016*, available at <http://www.lincolnst.edu/sites/default/files/pubfiles/50-state-property-tax-comparison-for-2016-full.pdf>.

⁶ *Id.* at 74-75 (Appendix Table 3a: Commercial Property Taxes for Largest City in each State).

⁷ *Id.* at p. 78-79 (Appendix Table 3c: Commercial Property Taxes for Selected Rural Municipalities).

⁸ See Katie King Schanz, *2013 Competitiveness Agenda*, South Carolina Business, at 10 (Jan./Feb. 2013), (available at <http://southcarolinascoc.weblinkconnect.com/CWT/EXTERNAL/WCPAGES/DOCS/SCB-JAN-FEB-2013.PDF>).

⁹ David Slade, *Change to Property Tax Law Stimulates Some Real Estate Deals*, Post & Courier (Charleston), March 25, 2012 (available at <http://www.postandcourier.com/article/20120325/PC05/303259895>).

limit the effect an assessable transfer of interest has on subsequent property taxes. Appellant's restrictive interpretation hamstrings both current and future property owners by limiting the availability of an exemption meant to spur the economy.

2. Appellant's Interpretation of the ATI Exemption Produces Absurd Results.

Appellant's *interpretation* of the ATI Exemption statute produces absurd results. In construing a statute, absurd results are to be avoided and a construction of the statute must be rejected when to accept it would lead to a result so plainly absurd that it possibly could not have been intended. *State ex re. McLeod v. Montgomery*, 244 S.C. 308, 136 S.E.2d 778 (1964).

The ALC Order notes at page 2, "The [Appellant], on the other hand, contends that even though the [Respondents] qualify for and are eligible to receive the exemption under § 12-37-3135, the value of that exemption should be nothing. In other words, the Respondent argues that the exemption has no effect for any property owner that fails to file the exemption on or before January 31 in the year immediately following the purchase." In effect, Appellant's interpretation creates a *de facto* permanent deadline which limits the availability of the taxpayer benefit to no later than January 31st following the date after which the taxpayer purchases the property.

The ALC Order at page 10 accordingly describes Appellant's argument as follows:

Using the [Appellant]'s argument, an otherwise eligible taxpayer who purchased a property on February 1, 2015, and applied for an ATI Exemption on January 30, 2016, would not receive the ATI Exemption under the statute because the assessor would be required to use the "current property tax year" 2016 property tax value (i.e. the ATI or purchase price) and not the 2015 value. In essence, such a reading of the statute would disqualify anyone from receiving an ATI Exemption who applied in January of the year following an acquisition of property.

If the General Assembly had sought such a debilitating limitation, then it would have much more clearly articulated it. For example, prior to a change in law, the multiple lot discount

provided an alternate valuation structure for undeveloped acreage that required annual filing. The statute provided that “[p]latted lots shall not come within the provisions of this section unless the owners of such real property or their agents make written application therefore on or before May 1st of the tax year in which the multiple lot ownership discounted value is claimed.” § 12-43-224 (2010). The Department clarified the limitation with regulations which provided that “owners of such real property or their agents must make written application before May 1st of the tax year in which the multiple lot ownership discount value is claimed. The application shall be made to the County Assessor upon forms provided by the county and approved by the Department. *The failure to apply is treated as a waiver of the discount for that year.*” S.C. Regs. 117-1840.3 (emphasis added). (As stated above, the taxpayers concede they have waived the discount for their initial year of acquisition. They are only pursuing the incentive for the second and subsequent years.)

The ALC Order notes at page 10 that, “In this case, the statute *allows* the taxpayer to apply for the ATI Exemption anytime ‘before January thirty-first for the tax year *for which the owner first claims eligibility for the exemption.*’ § 12-37-3135(C).” The statute does not say ‘before January thirty-first for the tax year after the assessable transfer of interest occurs.’” To repeat, the limitation is upon the tax year “for which the owner first claims eligibility” – not the year of the sale (the ATI). There is no such similar limitation provided in either statute or regulation that prospectively conditions eligibility for the exemption based on the time the application is filed. In other words, both the General Assembly and the Department have identified and utilized methodology for limiting certain alternate valuation incentives based on the time the application is filed, but used no such methodology for the ATI Exemption.

In the county’s view, the exemption is effectively permanently erased unless the taxpayer files by January 31st in the year after the sale (the ATI). Surely the General Assembly would have

used words other than “the tax year for which the owner first claims eligibility” if it intended this harsh result.

The county’s argument, using Fairfield Waverly, LLC as an example is as follows: In 2012 the property was valued by the county at \$11,155,500. Respondents purchased it on December 21, 2012 for a purchase price of \$13,850,000. Because no ATI exemption was applied for, the property went on the tax rolls in 2013 at approximately \$13,850,000. The county accepted the ATI exemption in 2014 but argues that “current FMV” means literally the “fair market value of the parcel of real property as reflected on the books of the property tax assessor for the *current property tax year*. (Emp. added.) Using \$13,850,000 – instead of \$11,155,000 – the current FMV eliminates any exemption. (The statute requires the higher of the current FMV and the exemption value as the taxable value. If the “current FMV” is \$13,850,000 then there is no exemption amount whenever a taxpayer applies in a subsequent year.)

The County argues for a literal reading of “current property tax year.” Read literally, however, this reading produces absurd results because the General Assembly grants taxpayers until January 31st *of the year following the purchase to apply*. (Presumably, this is in recognition of the numerous year end closings of real estate.)

Read literally, if a taxpayer purchased a property on February 1, 2014, and applied on January 30, 2015, would the assessor be required to use the “current property tax year” 2015 property tax value (*i.e.*, the ATI or purchase price) or the 2014 value? Surely he would use the 2014 value. So the Act cannot be read literally or it would disqualify anyone who applied in January of the year following the acquisition.

3. Ambiguity in the Statute Should Be Resolved in Favor of the Respondents.

Alternatively and notwithstanding that the plain language of the ATI Exemption compels the conclusion that Respondents are entitled to the exemption, any ambiguity of the statutory regime should be resolved in favor of the taxpayer.

In the context of a tax statute, it is a settled rule that ambiguities are resolved “against the government and in favor of the taxpayer.” As the South Carolina Supreme Court stated in *Alltel Communications, Inc. v. S.C. Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012):

Generally, a court must apply the rules of statutory interpretation to resolve the ambiguity and discover the intent of the legislature. *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001). However, “[i]n the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt.” *S.C. Nat’l Bank v. S.C. Tax Comm’n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989) (citing *Cooper River Bridge, Inc. v. S.C. Tax Comm’n*, 182 S.C. 72, 188 S.E. 508 (1936)). “[W]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor.” *Cooper River Bridge, Inc.*, 182 S.C. at 76, 188 S.E. at 509-510; see also *SCANA Corp. v. S.C. Dep’t of Revenue*, 384 S.C. 388, 394 n. 3, 683 S.E.2d 468, 471 (2009) (Beatty, J., dissenting) (noting general rule that where substantial doubt exists as to the construction of tax statutes, the doubt must be resolved against the government). The existence of an ambiguity in section 12-20-100 raises substantial doubt regarding the section’s application to Appellants. This doubt must be resolved in favor of Appellants. 731 S.E.2d at 873.

See *Hadden v. S.C. Tax Comm’n*, 183 S.C. 38, 46-47, 190 S.E. 249, 251 (1937) (noting that “where a tax statute is ambiguous or is reasonably susceptible of an interpretation that would exclude the person or subject sought to be taxed, any substantial doubt must be resolved against the government in favor of the taxpayer”); see also *Clark v. S.C. Tax Comm’n*, 259 S.C. 161, 169, 191 S.E.2d 23, 26 (1972) (“Revenue laws are generally construed in favor of the taxpayer and against the taxing authority.”); and *Sutherland Statutory Construction* § 66:1 (6th ed.).

Admittedly, the general rule is that tax credits and exemptions are a matter of legislative grace and are strictly construed against the taxpayer. *M. Lowenstein & Sons, Inc. v. S.C. Tax Comm'n*, 277 S.C. 561, 290 S.E.2d 812 (1982). However, as the Supreme Court stated in *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 716 S.E.2d 877 (2011):

“This rule of strict construction simply means that constitutional and statutory language will not be strained or liberally construed in the taxpayer’s favor. It does not mean that we will search for an interpretation in [the Appellant]’s favor where the plain and unambiguous language leaves no room for construction.” It is “[o]nly when the literal application of the statute produces an absurd result will we consider a different meaning.”

395 S.C. at 74-5, 716 S.E.2d at 881 (citing *State v. Sweat*, 379 S.C. 367, 376, 665 S.E.2d 645, 650 (Ct. App. 2008)). There is no absurd result with respect to the literal application of the statute’s plain language and use of the statutorily defined terms utilized within the ATI Exemption. Moreover, the “exemption” in this case is no more than an alternate valuation of the property for certain eligible periods. It is not a true “exemption” as that term is traditionally used.

4. Economic Development Tax Incentives Should Not Be Strictly Construed Against the Taxpayer.

Finally, the rule of strict construction against the taxpayer is not always applied as narrowly when the interpretation of economic tax incentive statutes is involved. Such statutes should not be so strictly construed against the taxpayer as to defeat or destroy the legislative intent and should further, not frustrate, the policy of rewarding investment and spurring economic development. Courts often have concluded that the general rules that tax exemptions be strictly construed against the taxpayer and doubt resolved in favor of taxability must yield to the intent of the legislature. See *Arizona v. Capitol Castings, Inc.*, 88 P.3d 159, 160 (Ariz. 2004) (concluding machinery exempt from tax by emphasizing the purpose of the tax exemptions was to “stimulate business investment in Arizona in order to improve the state’s economy and increase revenue from other

taxes” and that the exemptions “should further, not frustrate, the policy of encouraging investment and spurring economic development”). *See also Sharp v. Tyler Pipe Indus., Inc.*, 919 S.W.2d 157, 161 (Ct. App. Tex. 1996) (terms “liberal” and “strict” as applied to statutory construction can be misleading where other principles are at work; construing tax exemption statutes too narrowly could defeat legislative purpose of economic development); *Idaho State Tax Comm’n v. Haener Bros.*, 828 P.2d 304, 307 (Idaho 1992); and *Amoena Corp. v. Strickland*, 283 S.E.2d 894, 897 (Ga. 1981) (construing the Georgia sales tax exemption for machinery and equipment in which the Georgia Supreme Court stated that “it is true that tax exemptions are to be strictly construed against the taxpayer and doubts resolved in favor of taxability. However, this should not impinge on the other rule that a statute is to be construed in accordance with its real intent and meaning and not so strictly as to defeat the legislative purpose.” 283 S.E.2d at 897.)

Indeed, in its Technical Advice Memorandum (TAM) 89-14, the South Carolina Department of Revenue stated this rule of statutory construction with regard to the Infrastructure Tax Credit:

It is ambiguous whether the language “any one infrastructure project” means that only one project § qualify for the credit per year or whether the credit is merely limited to 50% or \$10,000 of expenses paid. Many South Carolina cases have held that tax statutes are not to be extended beyond the clear import of their language, *and any substantial doubt as to its meaning is to be resolved in favor of the taxpayer.* (*Southeastern Fire Ins. Co. v. South Carolina Tax Commission*, 253 S.C. 407, 171 S.E.2d 355 (1969); *Deering Milliken, Inc. v. South Carolina Tax Commission*, 257 S.C. 185, 184 S.E.2d 711 (1971)).

It therefore appears that the appropriate interpretation of this statute should be the one most favorable to the taxpayer. Section 12-7-1250(A) should thus be construed to mean that a taxpayer is not limited to the number of projects which will qualify for the credit.

S.C. TAM 89-14 (emphasis added).

The South Carolina Supreme Court has previously recognized the importance of economic development incentives in a number of sales and property tax exemption cases. In one case dealing with a sales tax exemption, the Court noted that the purpose of exempting the purchase of machinery is “to promote new industry within the State and encourage expansion of present industry.” *Southeastern-Kusan, Inc. v. S.C. Tax Comm’n*, 276 S.C. 487, 490, 280 S.E.2d 57, 59 (1981); *see also Hercules Contractors & Engineers v. S.C. Tax Comm’n*, 280 S.C. 426, 435, 313 S.E.2d 300, 306 (Ct. App. 1984); and *Anon. Corp. v. S.C. Dep’t of Rev.*, 99 ALJ-17-0153 (1999) (noting that “[c]ourts of other jurisdictions have recognized that construing tax exemption statutes too narrowly could defeat the legislative purpose of such statutes”).

Similarly, in *Duke Power Co. v. Bell*, 156 S.C. 299, 301, 152 S.E. 865, 868 (1930), a county treasurer argued that a statute providing property tax exemptions to manufacturers who located in certain South Carolina counties was unconstitutional. In rationalizing its decision, the Court stressed the importance of tax incentives for attracting manufacturing industry investment. *Id.* at 303, 152 S.E. at 871-72. Further, the Court noted that “[t]he theory of the transaction is that a public benefit will accrue to the town and its inhabitants by the introduction of the business enterprise. . . . The property of a town is benefitted, both in value and income, by the introduction of business, and the consequent increase of inhabitants.” *Id.* at 303, 152 S.E. at 871-72 (quoting *Crafts v. Ray*, 22 R.I. 179, 46 A. 1043 (1900)).

The Department of Revenue took a similar position in S.C. Private Letter Ruling (PLR) 95-3 regarding a similar Title 25 economic development incentive, the Job Tax Credit Act. At that time, as noted in the PLR, the Job Tax Credit was limited to a “[c]orporation” [which] means a business entity which is **subject to** South Carolina taxes as contained in Section 12-7-230 and Chapter 7, Title 38. (Emphasis in original.)”

As an S corporation, the taxpayer “paid no corporate level taxes.” *Id.* The PLR nevertheless held the taxpayer was entitled to the credit, stating:

In reviewing Code Section 12-7-1220 in its entirety, the legislature intended the job tax credit to be available as an economic incentive to encourage businesses subject to corporate level taxes to expand work forces in South Carolina. Although it is rare that S corporations are subject to corporate level taxes and it is rare that S corporations convert to C corporations, S corporations may earn and carryover a job tax credit.

Id.

Similarly, at issue in S.C. Rev. Rul. 96-11 was whether an eligible project had to meet the requirements of four—or only one—tax credit provisions in order to be entitled to incentives found in the utility tax credit statute, Section 12-6-3490 (now codified as Section 12-20-105). The statute reads: “(A) Any company subject to a license tax under Section 12-20-100 may apply for a credit against its tax liability for amounts paid in cash to provide infrastructure for a project qualifying for income tax credits under Chapter 6 of Title 12, withholding tax credits under Chapter 10 of Title 12, income tax credits under Chapter 14 of Title 12, *and* fees in lieu of property taxes under Chapter 12 of Title 4.” (Emphasis added.)

In holding that “and” in the statute meant “or” (so that an eligible project only had to satisfy any one of the tax credit provisions and not all four), the Department stated:

As a general rule, the use of the word “and” within a statute connotes that all the requirements listed must be met in order to qualify under the statute, while the use of “or” within a statute means that only one of the requirements needs be met in order to satisfy the particulars of the statute. However, when those meanings are inconsistent with the perceived intent of the legislature or the purpose of the legislation itself, “and” has been construed to mean “or”, and “or” has been construed to mean “and”

Section 12-6-3490 of the Code was enacted as part of the South Carolina Rural Development Act of 1996. The stated purposes of the Rural Redevelopment Act include promoting positive economic

development momentum in rural areas of the State and encouraging significant incentives to induce capital investment and job creation within rural counties. *To read the provision of Code Section 12-6-3490(A) narrowly to require a project to meet all the requirements listed in the statute would severely limit the number of projects that could qualify and would exclude projects located in eleven of the least developed and underdeveloped counties from qualifying under the statute.*

Id. (emphasis added) (citations omitted).

The clear objective of the ATI Exemption is to encourage and reward investment in South Carolina and to level the competitive commercial property playing field. Respondents collectively invested close to \$40 Million in this State, which ultimately will benefit taxpayers of the county and State. Thus, the statute should be construed in a way that furthers its objectives, rewards Respondents for making their investments and continues to encourage investments in the State.

II. Conclusion

The ALC Order in this case plainly states:

The [Appellant] also argues that since the [Respondents] did not file for the exemption in the year after the sale, prior to January 31, 2013, that their eligibility for the exemption was permanently erased. Under the plain terms of the statute, however, the statute allows the owner of the property, or the owner's agent, to apply for the ATI Exemption anytime "before January thirty-first for the tax year for which the owner first claims eligibility for the exemption." There is no such limitation provided in either statute or regulation that conditions eligibility for the exemption upon the time the application is filed.

The General Assembly made clear its intention – the exemption applies "for the tax year for which the owner just claims eligibility for the exemption."

Based on the foregoing, Respondents ask that the ALC Order be affirmed.

Respectfully submitted,



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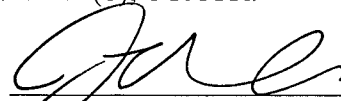
The Honorable S. Phillip Lenski, Administrative Law Judge

Case No. 2014-ALJ-17-0602-CC
Appellate Case No. 2016-001642

Fairfield Waverly, LLC,	v.	Respondent,
Dorchester County Assessor,		Appellant.
GS Windsor Club, LLC		Respondent,
Dorchester County Assessor,	v.	Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondents Fairfield Waverly, LLC and GS Windsor Club, LLC complies with Rule 211(b), SCACR.



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