THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKLEY COUNTY
Court of Common Pleas
R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2017-000297
Court of Appeals Opinion No. 5454
Trial Court Case No. 2011-CP-08-2814

Todd Olds, ... Petitioner,

v

City of Goose Creek, ... Respondent.

Petitioner's Brief

January 1, 2018

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that he filed a Petition for Rehearing on November 16, 2016, and the Court of Appeals finally ruled on the Petition for Rehearing by Order dated January 20, 2017. (Appendix Vol. I, page 12)

QUESTION PRESENTED

Did the Court of Appeals err in its interpretation of the term "gross income" as defined and used in the City of Goose Creek's business license ordinance, §§ 110.001-022?

STATEMENT OF THE CASE

In December 2010, Petitioner, Olds, became involved in a construction dispute with the City of Goose Creek unrelated to the issues raised in this case. (Vol. II, Appendix, page 348 [R.O.A. page 177]). After Petitioner prevailed in the construction dispute, four months later, the City notified him, on May 23, 2011, that it audited his business license returns (Vol. II, Appendix, page 384 [R.O.A. page 213]), and as a result, the City asserted he owed additional taxes: "It has come to our attention that you sold 123 Evergreen Magnolia Avenue. . . The **sale price** of 123 Evergreen Magnolia Avenue must be claimed as **revenue** on your 2011 City of Goose Creek Business License." (emphasis added) The City informed the Petitioner that he faced serious penalties, and that in addition to other financial penalties, the City could also "issue a Uniform Ordinance Summons in the amount of $1,092.50, [and] this includes State assessments, or 30 days in jail, each day in violation will be deemed a separate offense." (Appendix, Vol. II, page 384) The City asserted Petitioner faced these civil and criminal penalties because he failed to report his "gross income" because he reported "income" and not the "sale price." (By way of illustration, Goose Creek contends that if a taxpayer buys a house for $100,000.00 and sells it for $100,000.00, he or she has $100,000 "gross income" because Goose Creek argues that "income" or "gain" is the same thing as "sale price.")

Petitioner disagreed with the City's calculations, pointing out that the City defines "gross income" and that the City's definition requires that the "gross income" reported to the City must match the figures reported to the I.R.S. and the State Department of Revenue. The Petitioner asserted that "gross income" is a well-defined and commonly understood

accounting term. On June 7, 2011, Petitioner paid the excess taxes under protest and appealed the City's recalculation, following the procedure outlined in the City's ordinances. (Appendix, Vol. II, pages 385-387) As required by the City's ordinance, Petitioner first appealed to the City Administrator, Dennis Harmon. (Appendix, Vol. II, [R.O.A. page 214]) After Mr. Harmon denied the appeal, petitioner appealed that decision to the City Council. (Appendix, Vol. II, page 385 [R.O.A. page 229]) On September 27, 2011, the City Council took up petitioner's appeal (App., Vol. II, page 191 [R.O.A. page 20]); however, the City Council did not allow petitioner to participate. The circuit court found the City's exclusion of petitioner's to be a constitutional violation, but ordered no relief for petitioner. See trial court Order at App. Vol. II, page 179 [R.O.A. page 8]. The trial court found that the City "invited Mr. Olds or his counsel to appear prior to the meeting, but Mr. Olds' counsel declined. . ." This statement is not correct as may be seen by Petitioner's September 15, 2011, letter: "Thank you also for reminding me that neither Mr. Olds nor I are permitted to participate in the process." (App. Vol. 2, page 403 [R.O.A. page 232]) In fact, the Petitioner and counsel attended the September 27, 2011, City Council meeting, but there is no record of this fact for the reasons set forth by the City—neither Petitioner nor counsel were permitted to participate. The City Council affirmed the City Administrator's decision that "sale price" is "gross income." The City Council's deliberation is contained in the Appendix at Vol. II, pages 406-408 (Minutes) [R.O.A. pages 235-239] and the transcript is found at pages Vol. II, pages 191 – 193 [R.O.A. 20 – 22].

The Petitioner appealed to the circuit court on October 12, 2011 (App., Vol. II, page 212 [R.O.A. page 41]), and after amending the complaint, alleged 8 causes of action in

addition to the appeal. See Amended Complaint at App. Vol. II, page 235 [R.O.A. page 64].

On January 16, 2013, the Petitioner moved for summary judgment. The Petitioner also sought leave of court to amend his complaint. (App., Vol. II, R.O.A. page 280 [R.O.A. page 109]) On July 2, 2014, the Respondent moved for Summary Judgment. (App., Vol. II, R.O.A. page 369 [R.O.A. page198])

On June 16, 2014, the trial court deferred any action on the parties' cross motions for summary judgment, but granted Petitioner's request to amend the complaint adding two parties and two causes of action (conspiracy and breach of contract). (App. Vol. II, page 187 [R.O.A. page 16])

The circuit court granted summary judgment for Respondent on September 5, 2014, (App. Vol. II, page 172 [R.O.A. page 1]), and after the circuit court denied Petitioner's motion for reconsideration on October 8, 2014 (App. Vol. II, page 185 [R.O.A. page 14]), the Petitioner timely appealed to the Court of Appeals. The Court of Appeals issued Opinion Number 5454 on November 16, 2016, (App. Vol. I, page 1) and thereafter denied Petitioner's Petition for Rehearing on January 20, 2017. (App. Vol I, page 12) On February 15, 2017, the Petitioner requested the Supreme Court to grant certiorari to review Opinion 5454.

On November 15, 2017, this Court granted the petition for certiorari on a single question:

> **Did the Court of Appeals err in its interpretation of the term "gross income" as defined and used in the City of Goose Creek's business license ordinance, §§ 110.001-022?**

Argument

The Court of Appeals fails to recognize that the City of Goose Creek defines "Gross Income" and "Gross Receipts" separately—and correctly—but uses the terms interchangeably and thus erred in its interpretation of the term "gross income" as defined and used in the City of Goose Creek's business license ordinance."

A. The Court of Appeals' Interpretation of "Gross Income" does not conform to the definition used by the City in its ordinance.

B. The Court of Appeals' Interpretation of "Gross Income" does not conform to the definition used by the I.R.S. or the State Department of Revenue even though the Goose Creek ordinance requires that "Gross Income" conform to the gross income reported to the I.R.S. and the Department of Revenue.

C. The Court of Appeals' Interpretation of "Gross Income" does not conform to the term as defined in ordinary use.

A.
The Court of Appeals' Interpretation of "Gross Income" does not conform to the definition used by the City in its ordinance.

It is a testament to the ingenuity of lawyers that this simple issue generates so much debate. First, as Professor Kristen Ball Gutting, an expert in taxation, demonstrated to the Court of Common Pleas on pages 353 - 359 of the Appendix (Vol. II), the City of Goose Greek correctly defines "Gross Income" but fails to apply its correct definition to the Petitioner:

> Under the Goose Creek Code, each business is required to pay a license fee. See Goose Creek Code § 110.006, "License Required." App. Vol. II, page 418 [R.O.A. page 247] The license fee is "based on gross income [it] shall be computed on the

gross income for the preceding calendar or fiscal year, and on a 12-month projected income base on the monthly average for a business in operation for less than one year." Goose Creek code § 110.009 "License Fee According To Classification; Due Date; Separate License; Computation Of Fee. § 110.009. Appendix Vol. II, page 420 [R.O.A. page 249].

Professor Gutting explains at page 358 of the Appendix (Vol. II) [page 187 of R.O.A.] that while Goose Creek either erroneously or maliciously believes that Old's license fee should be computed on "gross receipts" ("sale price") rather than "gross income," the City of Goose Creek defines "gross receipts" in § 110.001. (Petitioner demanded a trial by jury, and only a jury can decide if Goose Creek sincerely believes "sale price" equals "gross income," or if Goose Creek misused its governmental authority to pay back the Petitioner for besting the City in an unrelated dispute.) However, setting aside the City's motivation as a question that can be decided only by a jury, the record demonstrates that the City **defines** and **distinguishes** "gross receipts" from "gross income," and Petitioner is obligated to pay a business license tax on his "gross income." Moreover, because the City defines "gross receipts" in relation to activities unconnected with the Petitioner, the term, "gross receipts" should disappear from this controversy because, again as Professor Gutting pointed out, the term "gross receipts" is never again used in the Goose Creek Code. Specifically, the City defines "gross receipts" as:

> . . . the value proceeding or accruing from the sale of tangible personal property, including merchandise and commodities of any kind and character and all receipts, by the reason of any business engaged in, including interest, dividends, discounts, rental

of real estate or royalties, without any deduction on account for the cost of the property sold, the cost of the materials used, labor or service cost, interest paid or any other expenses whatsoever and without any deductions on account of losses. Goose Creek § 110.001.

"Two things are important about this definition: (1) it does not link to any other section in Chapter 110 of the Goose Creek Code in regard to the business license fee or the definition of gross income and (2) assuming a link can be established, it is inapplicable as it pertains to Mr. Olds, as he is selling real property and not personal property." (Affidavit of Professor Gutting at page 358, Appendix Vol. II [R.O.A. page 187]) Neither the Court of Common Pleas nor the Court of Appeals gave Professor Gutting's explanation any weight, and neither court explained how the City of Goose Creek can correctly define "gross income," but then fail to apply it to Petitioner. In short, the City of Goose Creek does not follow its own ordinance because the record demonstrates that Petitioner is not reporting "interest, dividends, discounts, rental of real estate or royalties," which the City defines as "gross receipts" under § 110.001

B.

The City of Goose Greek's ordinance and definition of "Gross Income" requires that "Gross Income" reported to the City match the "Gross Income" reported to the I.R.S. and the Department of Revenue.

Of course, this Court need not rely on the expert opinion of Professor Gutting or anyone else because the Goose Creek ordinance defines "gross income" by requiring that it conform to the gross income reported to the I.R.S. and to the State Department of Revenue, and both those agencies are crystal clear that "gross income" and "gross receipts" ("sale price") are not the same:

The *GROSS INCOME* for business license purposes shall conform to the

> **gross income reported to the State Tax Commission or the State Insurance Commission. . . . The *GROSS INCOME* for business license purposes may be verified by inspection of returns and reports filed with the Internal Revenue Service, the South Carolina Department of Revenue, the South Carolina Insurance Commission or other governmental agency.**
> Ordinance § 110.001, quoted in its entirety in the 18th paragraph of Opinion No. 5454, App. Vol. I, page 7, emphasis added here, except that emphasis on "GROSS INCOME" is in the original ordinance. Ordinance 110.001 is in the Appendix at Vol. 2, page 416.

Even though the Court of Appeals recited this definition in its 18th paragraph, it ignored it, relying instead on its erroneous conclusion that "gross income" is a term of art that means different things in different contexts: "The term 'gross income' does not carry the same definite and inflexible meaning under all circumstances and wherever used." (Court of Appeals Opinion 5454 at ¶ 20, page 7 Appendix, Vol. I) This is an obvious error of law, refuted by the ordinance's definition and, as discussed below, the City's requirement that gross income for the City matches gross income reported to the I.R.S. and the State. (Moreover, the enabling statute, § 5-7-30 requires that the City calculate Petitioner's Business License tax based only on gross income. This Court instructed the parties to brief the issue as it relates only to the City's ordinance. The parties did, however, fully brief the effect of § 5-7-30 to the Court of Appeals, and this discussion is found at pages 44 - 46 and 110 - 118 of the Appendix, Vol. I.) The *Internal Revenue Code* § 61 and a plethora of Treasury Regulations—and the South Carolina General Assembly—leave no doubt how a taxpayer computes her gross income. See the tax forms contained in Vol. II of the Appendix at pages 394-399, which walk a taxpayer through the arithmetic steps to derive "gross income." It is not "sale price."

Instead of applying the Goose Creek ordinance as it is written, the Court of Appeals

searched for a basis to justify a flexible definition for "gross income." To do this, it relied almost entirely upon *Bogan v. Bogan*, a family court dispute, for an erroneous legal proposition that conflicts with statutory law, tax regulations, caselaw, and the plain and ordinary meaning of the words "Gross Income" when applied to the calculation of income tax. The Court of Appeals reliance upon *Bogan* is misplaced. *Bogan* is not a business license tax case and does not come close to the issue here. In *Bogan*, a physician tried to convince a Family Court that it should not consider the portion of his earnings that were direct contributions to his profit sharing, his retirement, and his automobile allowance in calculating the value of the Wife's 10% share of the marital estate. Dr. Bogan asked the Family Court to ignore and exclude these contributions because the money did not come to him directly. Neither the Family Court nor the Court of Appeals accepted this frivolous argument, holding: "The language used in a [divorce] decree must be given its ordinary and commonly accepted meaning." *Bogan v. Bogan*, 298 S.C. 139, 378 S.E.2d 606 (Ct. App. 1989) The Court of Appeal's reliance on *Bogan* for authority in a business license tax case is illogical and plain error.

The Court of Appeal's reliance on *Bogan* is, of course, an error because when it comes to paying taxes, there is an absolute definition of "gross income," and it is contained right in Goose Creek's ordinance, quoted above, that the Court of Appeals misinterpreted to the point of ignoring it. Goose Creek concedes that its ordinance requires the Petitioner to report the same "gross income" to the City that he reports to the I.R.S. and the State of South Carolina. The government requires a taxpayer to use the mandated forms to file returns, and it is impossible to examine the tax forms the government requires taxpayers to use in

reporting gross income and not comprehend immediately the indisputable fact that the Court of Appeals' erred in finding that "gross income" is a "flexible" concept. (See sample tax forms in the Appendix at Vol. II, pages 565 – 570.) The gross income figures reported to the I.R.S. must match the gross income figures reported to Goose Creek, or a taxpayer will find himself or herself in perpetual audit with the I.R.S. and the Department of Revenue because a taxpayer's gross income figures will never match if gross income "does not carry the same definite and inflexible meaning under all circumstances and wherever used." (Court of Appeals' Opinion at ¶ 20) The issue here involves **one** circumstance and only one: the computation of "gross income" for income tax purposes, and Goose Creek's ordinance makes clear how a taxpayer computes "gross income."

One thing is indisputably certain, and that is that "sale price" and "gross income" are not the same thing, and yet the Court of Appeals' entire conclusion is built on this false premise. Moreover, since Goose Creek threatened the Petitioner with jail in its first May 23, 2011, communication to him over this issue, it is vitally important that the definition have sufficient certainty to apprise a taxpayer of the potential for criminal penalties, so he can conform his behavior to the law

§ 61 of the *Internal Revenue Code*, defining gross income, is one of the few sections of the *Internal Revenue Code* that is elegantly simple, and since Goose Creek's ordinance requires that the "gross income" reported to the City must match the "gross income" reported to the I.R.S. and to the State Department of Revenue, it is astonishing that this dispute exists or that a taxpayer must invest almost seven years of his life in preserving his right to pay a fair share. § 61 says:

§ 61. Gross income defined

(a) **General definition**. —Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property; . . .

Comparing this clear, succinct, and simple definition against Ms. Althoff's May 23, 2011, assertion: "The sale price of 123 Evergreen Magnolia Avenue must be claimed as revenue on your 2011 City of Goose Creek Business License" that touched off this litigation demonstrates how capricious local government can be and how important courts are as the only barrier between arbitrary government action against its citizens. "The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion." *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803). A taxpayer, such as Petitioner, has every right to challenge unlawful, excessive taxation, or as Learned Hand said it: "Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes. *Helvering v. Gregory*, 69 F.2d 809, 810-11 (2nd Cir. 1934) *Helvering* is an interesting case, leading to the often quoted "substance over form" legal principle. In *Helvering*, Learned Hand reversed the tax court's decision and imposed a dividend tax on taxpayer after she created a Delaware corporation—that existed for three days—for the sole purpose of allowing her to transfer

value of stock untaxed under the pretext that the 3-day corporation was a "reorganization. In other words, the taxpayer in *Helvering* advanced the Court of Appeals' "flexibility" doctrine, arguing that "reorganization" is a loose term and a corporation existing for three days and set up for the sole purpose of allowing her to pay herself free of tax should count as a "reorganization." Here, Ms. Althoff's unsupported assertion that "sale price" = "gross income" is a similar example of asserting form over substance and is refuted by the City's admission that § 61 controls. The record reveals that the City of Goose Creek agrees with Petitioner that Internal Revenue Code § 61 delineates Goose Creek's ordinance: "Furthermore, the City's definition of gross income is in accord with the Internal Revenue Code ("IRC"). IRC Section 61 defines gross income. IRC Section 61(a) states that '[e]xcept as otherwise provided in this subtitle, gross income means **all income from whatever source derived,**' which is consistent with the broad definition of 'total revenue' used by the City's ordinance." (Appendix, Vol. 2, pages 395-396, City's Brief to City of Goose Creek, emphasis added.) No one mistakes "sale price" with "gains derived from dealings in property" without being deliberately obtuse, malicious, or both. The City's ordinance requires that "gross income" conform to the "gross income" reported to the I.R.S. and the state. This indisputable fact should end the debate.

Thus, this Court need go no further than applying the plain meaning of the City's ordinance to detect the Court of Appeals' error. However, even if there were some ambiguity in the term "gross income," there is a galaxy of statutes, regulations, tax instructions, tax forms, and even case law from which to choose. Professor Gutting covered these in her affidavit (Appendix Vol. II, pages 353 – 359 [R.O.A. page 182 – 188]) The brightest star in

this galaxy of authority is Internal Revenue Code § 61 surrounded by numerous less luminous, but equally authoritative, Tax Regulations that **carefully** and **precisely** define "gross income" to make sure no one confuses "gross income" with "gross receipts" and to make sure that "gross income" does have a precise and inflexible meaning for tax collection." Professor Gutting explained all this, citing, among other authorities, *Treasury Regulation* § 1001(b). (Appendix Vol. II, page 353) Without a precise and established definition for "gross income," standardized tax collection would be impossible. Goose Creek's ordinance makes certain that there is no room for ambiguity: "The GROSS INCOME FOR BUSINESS LICENSE PURPOSES MAY BE VERIFIED BY INSPECTION OF RETURNS AND REPORTS FILED WITH THE INTERNAL REVENUE SERVICE, THE SOUTH CAROLINA DEPARTMENT OF REVENUE, THE SOUTH CAROLINA INSURANCE COMMISSION OR OTHER GOVERNMENTAL AGENCY." § 110.001 (Appendix Vol. II, page 416 [R.O.A. page 245] The Court of Appeals ignored the fact that these agencies must agree on "gross income" as required by the Goose Creek ordinance. If the definition is "flexible" as the Court of Appeals mistakenly thought, then the entire enterprise is doomed. Looking to the taxpayer in this case, it requires little imagination—especially where Goose Creek threatened the Petitioner with jail and fines in its initial May 23, 2011, salvo—to anticipate the nightmare for Petitioner when Goose Creek reports higher "gross income" figures to the I.R.S. and to the State Department of Revenue. The record demonstrates how far the City was willing to go to challenge this Petitioner, including impersonating a police officer, trespassing on the Petitioner's property (App. Vol. II, page 337), or shutting off his water supply (App. Vol. II, page 339), so the inference is clear that the City is highly motivated to cause mischief for the

taxpayer by reporting higher gross income figures to the State and the federal government.

C.

The Court of Appeals' Interpretation of "Gross Income" does not conform to the term as understood in plain and ordinary use.

By conflating "receipts" ("sale price") with "income," not only is the Court of Appeals' reasoning a palpable error of law, but also it is a repudiation of the universal compact that words have agreed upon definite meanings. The verbal definition of "gross income" is translated into an arithmetical definition of "gross income" by following the steps of any of the sample tax forms contained in the Appendix, Vol. II, at pages 565 -570. Petitioner's form, Schedule "C" (page 568) requires no advanced accounting skill in computing "gross income." Goose Creek's ordinance (Appendix Vol. II, page 397) arrives at the same definition of "gross income" as derived by inserting the figures into the required tax reporting form. Ms. Althoff's "sale price" goes on line 1, the basis goes on line 4, and subtracting line 4 from line 1 yields "gross income," which goes on line 7. It cannot be any simpler, which demonstrates the Court of Appeals' error and refutes its conclusion that the term "gross income" is "flexible."

The Court of Appeals' assertion that "gross income" is a flexible concept introduces a complicating uncertainty that is inimical to both the letter and spirit of the law. A so-called "flexible" definition cannot survive the application of agreed upon definitions to discern the "plain and ordinary" meaning of Goose Creek's ordinance, and it cannot conform to the required certainty necessary for tax reporting forms unless we are prepared to abandon arithmetic. Any taxpayer who hired an accountant to prepare her tax returns would

immediately seek the services of a different professional upon being presented with a return that calculated a tax owed on $100,000.00 of gross income on the following hypothetical:

1. Tax payer purchases house for $100,000.00.

2. Tax payer sells house for $100,000.00.

3. Tax payer incurs a $100,000.00 "gross income" because that is the "sale price." Taxpayer owes taxes on $100,000.00 of gross income. (See Schedule C at Vol. II, page 397 of Appendix, which demonstrates that the gross income is 0.)

Professor Gutting made this point as clear as she could by pointing out that Goose Creek acknowledges the difference between "gross income" and "gross receipts," and requires the business license tax calculated on income, not receipts:

> Interestingly, the term "gross receipts" is defined in Chapter 110 of the Goose Creek Code. See Goose Creek Code § 110.001. However, it is unclear the reason "gross receipts" is defined as the term "gross receipts" is never again used in the Goose Creek Code. . . . Two things are important about this definition: (1) it does not link to any other section in Chapter 110 of the Goose Creek Code in regards to the business license fee or the definition of gross income and (2) assuming a link can be established, **it is inapplicable as it pertains to Mr. Olds, as he is selling real property, not personal property**.
> Appendix, Vol. 2, page 358 [R.O.A. page 187] (emphasis added)

One does not need be a lawyer or an accountant to understand the plain meaning of "gross income," especially because the government mandated tax reporting form walks the taxpayer through the calculation to "gross income." All the definitions are consistent: "income" = "gain." (See Schedule "C" page 397.) Even the Court of Appeals acknowledged this, but veered off its own observation to determine that "gross income" is a "flexible" definition.

The third paragraph of Opinion 5454 contains this footnote: "The City's business license renewal form uses the term 'actual gross receipts,' rather than 'gross income.' **However, the form also includes a section where the applicant certified he or she has accurately reported the business's gross income."** Footnote 1 of Opinion 5454, emphasis added, Appendix page 2, Vol. I. This footnote is a one-sentence summary of the Petitioner's legal position and explodes the Court's erroneous conclusion. The Court of Appeals is correct: what the Petitioner reports is "gross income," and this term is **not** flexible.

(In Footnote 2 of Opinion 5454, page 8, the Court of Appeals states a palpable error of fact and law. In Footnote 2, the Court of Appeals places great weight on its conclusion that "We note the standard income tax forms from the South Carolina Department of Revenue do not include a space for gross income to be reported." This is not correct. Line 1 of the South Carolina Income Tax Return instructs the taxpayer to enter "federal taxable income from your federal form." No one disputes that, except for a small number of exemptions from income that are not implicated here, the income figures reported to the I.R.S. are the same figures reported to the State.)

This case presents a clear misapplication of the well-settled rules of statutory construction. In *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015), this Court examined a first cousin of income tax—the user fee. There, the City of Columbia deployed a similar definitional ingenuity to circumvent the statutory limitations on the uses for money collected by ratepayers. In *Azar*, the City attempted to avoid the restrictions the General Assembly imposed on water and sewer collections by arguing that the money was not "imposed" but rather proceeds from "voluntary contracts" with the City's water customers. By

conflating the word "imposed," the City of Columbia employed the same Goose Creek strategy of pliable—flexible—construction as involved here. The City of Columbia "generates approximately $110 million in revenue from user fees each year by providing water and sewer services." Notwithstanding the General Assembly's statutory limitation placed on the disbursement of this money, the City of Columbia tortured the plain and ordinary meaning of the controlling statutes to justify its decision to divert funds to the City's "general fund" to create what this Court called a "slush fund." By redefining the revenues as "voluntary payments," the City justified redistributing the water and sewer money to its "General Fund" even though the General Assembly requires the money to be set aside to maintain and improve the infrastructure that generates the payments. Columbia adopted a "flexible" definition of "imputed" in order to increase its general fund at the expense of ratepayers. For a look at the same strategy employed by a taxpayer, Mrs. Helvering, whom we met above on page 14, sought to avoid a tax on her dividends by creating a Delaware corporation—that lasted for three days—to "reorganize her out of state corporation, transfer the stock, and avoid a tax. *Helvering v. Gregory*, 69 F.2d 809, 810-11 (2nd Cir. 1934), affirmed by U.S. Supreme Court at 293 U.S. 465 (1935), Judge Learned Hand was having none of that subterfuge, concluding, like this Court did in *Azar* that Mrs. Helvering was not really reorganizing her company; rather, she was manipulating language or creating a "subterfuge" to disguise her economic reality, just like Mrs. Althoff does here via municipal alchemy changing "sale price" to "gross income." When the Supreme Court affirmed the 2nd Circuit, it adopted the 2nd Circuit's conclusions that substance is more important than form, the same conclusion reached by this Court in *Azar*.

Both *Azar* and *Helvering* refute the rationale of the Court of Appeals here. Goose Creek cannot escape the limitation the General Assembly places on municipalities to collect a business license tax on gross income, and Goose Creek drafted its business license ordinance in conformity with this statutory limitation. The plain and ordinary meaning of "gross income" cannot be rendered so "flexible" as to be transmuted into something it is not. No one can read Goose Creek's ordinance applying the plain and ordinary meaning of the words used and derive that the "sale price" of real property is Petitioner's "gross income."

To justify what the General Assembly forbade, Goose Creek attempts an *Azar/Helvering* variety sleight of hand to restate "gross income" as "sale price" in the same manner the City of Columbia restated "imposed" as "voluntary contracts." However, in *Azar*, this Court recited the well-developed rules of statutory construction, reaching the only logical result possible, holding:

> The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation.
>
> Simply put, the statutes do not allow these revenues to be treated as a slush fund. *Azar* at pages 317 and 320.

Here, the record demonstrates that the City of Goose Creek went to much effort to pay petitioner back for besting the City on an unrelated construction issue. Not only did it torture the plain meaning of its own ordinance, but also it repeatedly threatened him—and his wife—with garnishment and with incarceration (App., Vol. II, page 384 [R.O.A. page 213]), refused to allow him to speak at his own administrative appeal (App. Vol. II, page402 [R.O.A. page 231]: "City Council shall review the records and without further oral argument or

presentation of evidence will affirm, modify, or deny the appeal."), shut off his water (App. Vol. II, page 339 [R.O.A. page 168]), invaded his property without a warrant, and impersonated police officers at Petitioner's property. (App. Vol. II, page 337-338 [R.O.A. pages 166-167])

Thus, the holding of *Azar* is doubly important, not only for its analysis of the rules of statutory construction as applied to a tax case—technically a "user fee" case—but also for the statement that courts will not tolerate government manipulating language to get a higher return. Here, the Court of Appeals misinterpreted the ordinance citing *Bogan* as authority for a principle of law of flexibility that does not exist. Instead of addressing the unambiguous requirement of the City's ordinance as this Court did in *Azar*, the Court of Appeals avoided the issue by sleight of hand, which can stand only if this Court allows the Court of Appeals to evade its duty under the rules of statutory construction. The Court of Appeals abandoned the rules of statutory construction. (The Petitioner not only briefed this issue, but pointed out in his November 19, 2016, Petition for Rehearing, that the Court of Appeals did not apply the rules of statutory construction. Appendix Vol. I, pages 19 – 24) The City's business license tax ordinance requires that the "gross income" reported to the City must match the "gross income" reported to the I.R.S. and provides further **that the City will communicate with the I.R.S. to verify these figures**! As the above explanation demonstrates, the figure reported to Goose Creek is the figure taken from line 7 of Schedule C, the line for "gross income."

The parties agree that the City of Goose Creek has no power to tax its citizens except as granted by the State. Here, the parties agree—and the Court of Appeals said—that the rules of statutory construction require "a practical, reasonable, and fair

interpretation consonant with the purpose, design, and policy of the lawmakers." Opinion 5454, App. Vol. I, page 6. If applying a "practical, reasonable, and fair interpretation" to "Gross income," then "gross income" cannot be equated to "sale price" without abandoning the rules of statutory construction. In Opinion 5454, the Court of Appeals erred because gross income has a precise, not a flexible, meaning. If there is any doubt, the *Internal Revenue Code*, Treasury regulations, state law, generally accepted accounting procedures, mandatory government tax reporting forms, *Webster's Dictionary*, or any other outside source are readily available for consultation, and none of them equate "sale price" with "income." Even if there were no precise definition readily available, the ordinance **requires** that Olds' "gross income" matches the "gross income" reported to the I.R.S. and the South Carolina Department of Revenue. As plaintiff's expert in accounting (L.L.M. in taxation) explained: ". . . Mr. Olds should calculate his business license for purposes of § 110.001 of the Goose Creek Code by including the portion of his gross income as reported to the South Carolina Department of Revenue on his South Carolina tax return for his business that is properly sourced to Goose Creek." (App. Vol. II, page 355 [R.O.A. page 184], affidavit of Prof. Gutting.)

Goose Creek's ordinances, § 110.003 and § 110.008, require the taxpayer to turn over his state and federal returns for inspection to make sure the figures match. These ordinances authorize the Finance Director to "disclose gross income of licenses to the Internal Revenue Service, South Carolina Department of Revenue and other municipal or county offices for the purpose of assisting tax assessments, tax collections and enforcement." Because it is undisputed that the figure reported to the I.R.S. and the state

Department of Revenue is gross income—and **not** gross receipts, or as Ms. Althoff says, "sale price"—and **must match** the figures provided to the City, Olds calculated his tax correctly and the City fails to do so by the very definition adopted by the City. See also Appendix Vol. II, page 359 [R.O.A. page 187]: ". . . for business license purposes [gross income] shall conform to the gross income reported to the State Tax Commission," citing § 110.001. In Opinion 5454, the Court overlooks that, by its very definition, § 110.001 requires that the definition of gross income match what the State of South Carolina and the Federal Internal Revenue Service require. Applying the plain and ordinary meaning to these words compel the Court of Appeals to reach the opposite conclusion than it reached.

Even though the Court of Appeals recites the correct standard for construing Goose Creek's ordinance, citing *Historic Charleston Foundation v. Krawcheck*, 313 S.C. 500, 504, 443 S.E.2d 401, 404 (Ct. App. 1994) and *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 412, 526 S.E.2d 716, 719 (2000), the Court fails to apply the standard enunciated in those cases by torturing the word "receipts" to inflate it to mean "gain" or "income." When the words "gross income" and "sale price" are used in in their "plain and ordinary meaning," it is indisputable that the gross income from the sale of real property is the gain realized on the sale and not the "sale price." The Court of Appeals failed its obligation to apply the rules of statutory construction to the Goose Creek ordinance, which distinguishes the two terms: "The term **GROSS RECEIPTS** means the value preceding or accruing from the sale of tangible personal property, . . ." (App. Vol. II, page 300 [R.O.A. page 129] § 110.001 DEFINITIONS.) The Court of Appeals' reliance on cases like *Historic Charleston* and *I'On* only confuses the simple issue raised by this case. *Historic Charleston* involved a

dispute over what the City meant by "nonconforming" in a zoning case, and likewise, *I'On* involved the question of whether citizens could rezone by referendum. If the Court is searching for a case offering guidance on how to interpret an unambiguous tax statute, a more appropriate authority is the case relied upon by Goose Creek: *Purdy v. Moise*, 223 S.C. 298, 75 S.E.2d 605 (1953), when, in deciding that the City of Sumter was being obtuse in arguing over the meaning of "tourist court" vs. "motor court," the Supreme Court said: "We have, however, as our guide the well-founded principle of law that statutes or ordinances in derogation of natural rights of a person over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly with their scope and purpose." This Court said something similar regarding the "voluntary" user fee in *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015). Likewise, the utility case, *Municipal Association of South Carolina v. AT&T Communications*, 361 S.C. 576, 606 S.E.2d 468 (2004) is a closer case, where, in construing the limits of § 5-7-30, this Court said: ". . . the words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. [citation omitted] The language must also be read in a sense which 'harmonizes with its subject matter and accords with its general purpose." (Word, "fine," used in statute means criminal, not civil fine.)

In order to justify torturing the plain and ordinary meaning of gross income to turn it into "sale price," or "receipts," or "revenue," not only did the Court of Appeals have to ignore the plain meaning of Goose Creek's ordinance, and ignore Professor Gutting's

accounting evidence, the Court had to reach all the way back to 1922, citing *Columbia Ry. Gas & Elec. Co. v. Jones*, 119 S.C. 480, 494, 112 S.E.267, 272 (1922). The Court of Appeals' reliance on this case is misplaced for two reasons. First, § 5-7-30 did not exist in 1922, making its first appearance in the 1962 Code. Second, the issue in *Columbia Ry.* Was the company's deduction of income from other sources prior to computing its reported "gross income." Or, as the Supreme Court explained it:

> But the Columbia company during said period in making and filing its own reports deducted from or did not include in its gross income the amount so paid over or credited to the power company. It also failed to return as income of either the power company or the Columbia Company the sum of $123,074 received from the Winnsboro contracts of the power company and from miscellaneous earnings, upon which amount the appellant concedes that it is liable for the 3-mill tax.
>
> Page 269

The Supreme Court determined that it was bound by the "metes and bounds" of the *Southern Express Co. v. Hood* case, cited as 15 Rich 66, 94 Am. Dec. 141, construing a business license statute that permitted a tax on "an income tax statute imposing a tax on gross incomes, measured in the case of express companies, by the 'gross amounts of the receipts.'"

> Page 270

Thus, it turns out that *Columbia Ry.* is a case supporting Petitioner's legal position and eviscerating the Court of Appeals' reasoning because § 5-7-30's authorization of taxing "gross income" is about as far from a statute authorizing taxing "gross receipts" as a statute can be. If § 5-7-30 authorized a tax on "gross receipts," then perhaps Columbia Ry. might have some bearing on the case even though it would conflict with § 61 of the *Internal Revenue Code* and the myriad of tax regulations and the government mandated tax reporting forms. Here, the City's ordinance, the *Internal Revenue Code*, the Treasury Regulations, and § 5-7-30 are all in harmony, and the Court of Appeals erred in torturing a clear and concise municipal ordinance into something out of harmony with all the other

authoritative statements on income. In fact, the holding of the Supreme Court in *Columbia Ry.* dovetails seamlessly with these authorities and with the testimony of Professor Gutting, which both courts ignored, and the Court of Appeals erred in failing to adhere to traditional rules of statutory construction.

Thus, when the Court of Appeals said in paragraph 20, "The term 'gross income does not carry the same definite and inflexible meaning under all circumstances and wherever used." (Appendix, Vol. I, page 7), its statement conflicts with the well-developed body of law on statutory construction. In addition, the Court of Appeals' statement in paragraph 17, "We find the City's power to levy a business license tax is not limited by section 5-7-30," could not be more incorrect. It is an indisputable and correct statement of law that municipalities can tax only what the State allows them to tax. This is a well-settled legal point overlooked by the Court of Appeals. "The structure and organization, powers, duties, functions, and responsibilities of the municipalities shall be established by general law. . ." Article VIII, § 9, *South Carolina Constitution.*

In saying that the words "receipts" and "income" do not "carry the same definite and inflexible meaning under all circumstances," Opinion 5454 jettisons the rules of statutory construction completely, and then compounds the error by re-writing the State's unambiguous legislative rule to comport with the Court of Appeals' view of what it should have said:

Notwithstanding the ordinance's later explanation that gross income for business license purposes shall conform to the gross income reported to the State Tax Commission and that gross income may be verified by the inspection of state and federal tax returns, we find the city intended to define gross income for business license tax purposes as the total revenue of the business."
(Opinion at paragraph 21, App. Vol. I, page 8)

This sentence in the Opinion, aside from being wholly unsupported, leaps the separation between the legislative and judicial branches of government, and rewrites the State Constitution, the General Assembly's enabling ordinance, and the City's ordinance to conform to the Court's view of what it thinks the City of Goose Creek **ought** to be allowed to tax. Opinion 5454 abandoned its judicial function to enforce the law as it is written.

It is, therefore, clear that Opinion 5454 overlooks and misapprehends the City's clear expression that gross income in the City of Goose Creek means the same as gross income in the rest of the world, and even if it did not, the City is not free to torture langue to enhance its collections. See *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015):

> The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation.
>
> Simply put, the statutes do not allow these revenues to be treated as a slush fund.

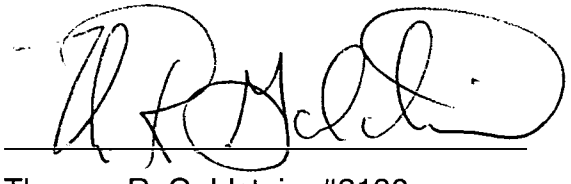
Thus, the Court of Appeals failed to apply the well-settled rules of statutory construction, and this error requires that the Court apply the clear and unambiguous terms of the City's ordinance as written (and as limited by § 5-7-30, S. C. Code, ann.) and reverse Opinion Number 5454.

CONCLUSION

Thus, as set forth in the appellant's briefs to the Court of Appeals, appellant's petition for rehearing to the Court of Appeals and petition for certiorari, and this brief, the lower court failed to consider the appellant's evidence in the light most favorable to him as the party resisting summary judgment and failed to apply the mandatory rules of statutory construction to an ordinance that requires the Petitioner to pay a tax on his "gross income." The lower court never applied the "plain and ordinary" meaning to the words used by Goose Creek, let alone considered how Goose Creek's interpretation transcends the Constitutional/statutory limitation on a municipality's ability to tax Petitioner's income. The Court of Appeals did not apply the proper rules of statutory construction that require it to apply the words in the statute in their plain and ordinary meaning. In affirming the lower court, the Court of Appeals overlooked the numerous instances in which the City of Goose Creek links its definition of "gross income" to the universally accepted definition as must be reported in State and Federal tax returns. As the Supreme Court said in *Beard v. S. C. Tax Commission*, 230 S.C. 357, 95 S.E.2d 628 (1956): "Equally well settled is the rule that the word 'income' as use in a tax statute is to be taken in its ordinary sense of gain or profit." In searching the record for the existence of a genuine issue of material fact, the Court is required to read the words of the tax statute in their "plain and ordinary meaning." The City is not permitted to re-write the definitions to expand the City's powers beyond the clear import of the enabling statute, and any doubt must be resolved in the Petitioner's favor. The lower court did the opposite, and the Court of Appeals winked at the City's mistreatment of Petitioner. The lower court substituted its interpretation of the applicable state statutes instead of applying the clear and

unambiguous meaning. Based on the foregoing, this Court should reverse the grant of summary judgment against Petitioner and remand the entire case back to the Court of Common Pleas for a trial on the merits.

Respectfully submitted,



January 1, 2018

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2017-000297
Case No. 2011-CP-08-2814
Court of Appeals' Opinion No. 5454

Todd Olds..... Petitioner,

vs.

City of Goose Creek ..... Respondent,

PROOF OF SERVICE

I certify that I have served the Petitioner's Brief on the Respondent, City of Goose Creek, by depositing a copy of it in the United States Mail, postage prepaid, on January 2nd, 2018, addressed to its attorney of record, Timothy A. Domin, 126 Seven Farms Drive, Suite 200, Daniel Island, S. C. 29492.

January 2, 2018

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