IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2017-000847

Shred with Us, LLC,

Appellant,

v.

Steffanie Dorn, City of Greenwood
Business License Official,

Respondent.

AMENDED FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court properly conclude that the findings of the City Council concerning the multiple business activities of Shred with Us were supported by the greater weight of the evidence?

II. Did the circuit court properly interpret S.C. Code Ann. § 58-23-620 concerning the circumstances under which an exemption from municipal business license taxes applied?

III. Did Shred with Us, by failing to state the ground in its notice of appeal to circuit court, waive further argument on appeal that the City Council erred in finding the collection and shredding activities of the business were separate and distinct from its transportation activities?

STATEMENT OF THE CASE

Appellant Shred with Us, LLC ("Shred with Us") operates a mobile document shredding service within the City of Greenwood, and holds a Class E-L Certificate of Compliance for the Operation of Motor Vehicle Carriers issued by the South Carolina Department of Public Safety. (R. p. 70). Following the discovery by the City of the business activities of Shred with Us within the City, Shred with Us contended that, as the holder of Class E-L certificate for freight hauling, it was exempt from **all** City business license taxes by reason of S.C. Code Ann. § 58-23-620. Following a due process hearing (R. pp. 33-64), the Greenwood City Council, by written decision (R. pp. 23-32), found as fact and concluded that Shred with Us "is engaged in multiple business operations" that are "not incidental to the transportation of freight" and are "separate and

distinct" from freight transportation. (R. pp. 30-31). The City Council determined that Shred with Us was required to obtain a City business license and pay a business license tax for its business activities that are separate and distinct from the business activity of transportation of freight. However, the City Council upheld the determination of the City Business License Official that the City was **not** seeking business license tax for gross income attributable to the transportation of freight. On appeal by Shred with Us from the City Council decision, the circuit court affirmed. (R. pp. 1-13). This appeal involves a review of the circuit court's Orders.

Procedural History

The underlying controversy was commenced by service on Shred with Us of a Uniform Ordinance Summons for operating in the City without a business license. (R. pp. 54-55). Subsequently, the parties agreed that, in lieu of a criminal proceeding in Municipal Court, Shred with Us would (1) pay under protest a business license tax on its gross income (as self-apportioned) from its collection and shredding activities within the City (but not on its income from its transportation activities) and (2) request an appeal of the determination of the Business License Official as to the liability for a business license tax to the City Council pursuant to Section 10-83 of the City Business License Ordinance. (R pp. 85, 86 and 93). A hearing was held before the City Council, in open session at a regular Council meeting, on October 17, 2016, at which both the City Business Official Steffanie Dorn and Shred with Us were represented by counsel. (R. pp. 33-64). At the close of the evidence and argument of counsel, the City Council deliberated in open session and then voted unanimously to uphold the determination of the City Business License Official that Shred with Us was liable for a business license

tax on its non-transportation business activities. In keeping with the further provisions of Section 10-83, the City Council subsequently voted on and signed a written decision. (R. pp. 23-32). The Order of City Council was served on the attorney for Shred with Us by hand-delivery on December 7, 2016.

Shred with Us filed a Notice of Appeal on January 6, 2017. (R. pp. 15-16). The Notice listed four specific grounds for appeal. (R. pp. 15-16). The City Business License Official and the City filed in the circuit court and served a written Response to the Notice of Appeal on January 31, 2017 (R. pp. 17-19), and filed in the circuit court and served, on February 3, 2017, a Certified Copy of the Original Record of Proceedings and Evidence before the City Council. (R. pp. 21-95).

A hearing on the appeal was held on February 17, 2017, before the Honorable Frank R. Addy, Jr., Circuit Court Judge. (R. pp. 97-113). The circuit court filed a Form 4 Order on February 23, 2017 (R. pp. 1-2) and a formal Order on March 27, 2017. (R. pp. 3-13). The Orders affirmed the City Council Order and entered judgment in favor of the Business License Official as the named Respondent in the appeal to circuit court. Shred with Us filed this appeal to the Court of Appeals by letter dated April 4, 2017, which was received by counsel for Respondent on April 6, 2017.

STATEMENT OF THE FACTS

Respondent believes the undisputed facts of the case are well stated in the "Factual and Procedural Background" portion of the circuit court Order. (R. pp. 4-6). Respondent adopts the circuit's court's statement of facts. Further discussion of the facts is contained in the arguments below.

STANDARD OF REVIEW

In considering the appeal of Shred with Us from the decision of the City Council, the circuit court was acting in its appellate capacity under Rules 74 and 75 of the South Carolina Rules of Civil Procedure with a deferential standard of review of factual findings by the City Council. (R. p. 6). In that context, as correctly cited by the circuit court, the standard of review for factual findings is that the court will not disturb on appeal such findings of the city council unless they are without evidentiary support or against the clear preponderance of the evidence. Gay v. City of Beaufort, 364 S.C. 252, 254, 612 S.E.2d 467, 468 (Ct. App. 2005), citing Bob Jones University, Inc. v. City of Greenville, 243 S.C. 351, 363, 133 S.E.2d 843, 848 (1963). The standard of review for the Court of Appeals is the same when, as here, the findings of city council are concurred in by a circuit judge. Id. An issue of statutory construction is a question of law for the courts. Sloan v. Greenville County, 380 S.C. 528, 534, 670 S.E.2d 663, 667 (Ct. App. 2009). An appellate court reviews questions of law de novo and without deference to the court or decisional body below. Id.

ARGUMENT

I.

The circuit court properly concluded that the findings of the City Council concerning the multiple business activities of Shred with Us were supported by the greater weight of the evidence.

The circuit court correctly determined that the documentary evidence and testimonial evidence before the City Council fully supported the Council's findings and conclusions by the greater weight of the evidence. (R. p. 12). The circuit court's conclusions were based on a careful analysis of the evidence before the City Council as

indicated by the circuit court's summary in its Order of the hearing testimony of Eric Ragsdale (the principal of Shred with Us, LLC), City Business License Official Dorn, and the City Business License Officer David Price, as well as the circuit court's summary of the documents introduced into evidence by Shred with Us and by the Business License Official. That evidence clearly supports the factual findings by the City Council and clearly supports the conclusions of the circuit court that those findings should be affirmed.

By its own description, through the testimony of its principal at the City Council hearing, Shred with Us is in the business of "document destruction." (R. p. 38). The business has approximately 11 or 12 customers in the City. (R. p. 41). It provides document receptacles of varying sizes to its customers within the City (some bins are rented to customers and some are provided without charge), collects the receptacles from the offices of regular customers on a predetermined schedule, empties the receptacles in its truck, shreds the paper documents in its truck (for some 98% of its customers) while at the customer sites, returns the empty receptacles to the customer offices, and then transports the shredded paper in its truck to its home office in West Columbia. (R. pp. 38-46). In response to questions from his own attorney, Mr. Ragsdale testified that "primarily, we do destruction" and then get the destroyed paper to West Columbia for recycling as pulp by "transportation." (R. p. 40).

The concept of "multiple business operations" or "multiple business activities" has long been recognized in South Carolina law. See Wood-Mendenhall Co. v. City of Greer, 88 S.C. 249, 70 S.E. 724 (1911), cited by the Business License Official to the City Council (R. pp. 71-75), by the City Council in its Order (R. p. 26), and by the City to

the circuit court (R. pp. 102-104), and discussed by the circuit court in its Order (R. pp. 8-9). An early business license case, Wood-Mendenhall recognized that, while some activities of a business may be incidental (or related or subsidiary) to other activities of the business, some are not. Those business activities that are not incidental to the activity for which the license was issued, determined the Court in Wood-Mendenhall, would be subject to a separate business license. The particular business activities involved in Wood-Mendenhall were blacksmithing (for which a business license had been issued) and painting. Both the City Council (R. p. 26) and the circuit court (R. p. 9) quoted the explanation concerning the licensing of multiple business activities drawn by Wood-Mendenhall:

> It is true that the painting which is merely incidental to the finishing job of blacksmithing might properly be included in and covered by a license to carry on the business of "blacksmithing"; but it appears that plaintiff did painting outside of and not connected with the business of "blacksmithing." That was a business separate from and independent of that of "blacksmithing," and was not covered by the license.
>
> 88 S.C. at 249, 70 S.E. 2d at 725.

This concept of multiple business activities and multiple business operations by a single business also is expressly recognized in the City's Business License Ordinance. (R. pp. 87-95). The Ordinance provides that all businesses (resident and nonresident) that do business within the City are required to obtain a business license and pay an annual business license tax for the privilege of doing business within the City (Section 10-50). (R. p. 88). The business license tax is based on a rate schedule for different classifications of businesses according to a national business classification system (Sections 10-52(a) and 10-54(b)). (R. pp. 88 and 90). The Ordinance specifically

requires a separate business license for each place of business and "for each classification or business conducted at one place." (Section 10-52(b)). (R. p. 88). The City business license official is charged with determining "the appropriate classification for each business in accordance with the latest issue of the North American Industry Classification System (NAICS) for the United States published by the Office of Management and Budget." (Section 10-54(b)). (R. p. 90).

At the hearing before the City Council, the City Business License Official testified, in detail, on the basis for her determination that Shred with Us was engaged in multiple business activities or multiple business operations that required distinct classifications. (R. pp. 47-54). Ms. Dorn offered into evidence copies of the NAICS entries for the two separate classifications of transportation of property (NAICS 484) and document shredding services (NAICS 561990). (R. pp. 76-80). These NAICS entries illustrated the basis for her conclusion that the NAICS system treats the two business activities as "completely separate" categories of business in different business sectors. (R. pp. 48-51). As accurately described by the circuit court (R. p. 8), the further determination of the Business License Official was that the two business activities are separate and not necessarily related. (R. pp. 49-50). The City Council, after considering this testimony and the testimony of the principal of Shred with Us, made the same factual finding and reached the same conclusion. (R. pp. 24 and 28-31). The circuit court applied the correct standard of review and properly affirmed these factual findings by the City Council.

II.

The circuit court properly interpreted S.C. Code Ann. § 58-23-620 to provide for an exemption from municipal business license tax only for business activities directly related to, and not separate and distinct from, transportation of freight.

The circuit court also concluded that the Council's construction and interpretation of Code § 58-23-620 was appropriate and reasonable and in accord with the general purpose of the motor vehicle carrier statutes of which Section 58-23-620 was a part. The circuit court, after undertaking its own review of the question of law, also agreed with the City Council's construction and interpretation of Section 58-23-620. (R. p. 12).

As noted by the circuit court (R. pp. 4-5, 11), the Class E-L Certificate provides, on its face, that Shred with Us "is hereby authorized to transport freight other than household goods and hazardous waste for disposal over irregular routes between points and places in South Carolina." (R. p. 70). It is similar to the Class E certificate described in S.C. Code Ann. Section 58-23-260 (R. p. 82) that the Office of Regulatory Staff and the Public Service Commission may issue for "the property-carrying vehicles which will not operate upon any particular route or schedule."

Section 58-23-620 is part of a Code chapter that creates Certificate E and the other Certificates for motor carriers of property and passengers. (R. p. 82). Neither Section 58-23-620 nor Certificate E-L specifically authorizes or references any other business activity by the certificate holder. Neither the Certificate E-L nor Section 58-23-620 expressly exempts motor carriers from business licenses for all other activities. Section 58-23-620 is logically and reasonably limited to exemptions only for

the activity for which it is issued. It is not, as the circuit court noted, reasonably construed as a carte blanche for any certificate holder to avoid a business license.

Appellant, in Brief and in argument before the City Council and the circuit court, placed great emphasis on a 1989 Attorney General Opinion (1989 S.C. Op. Atty. Gen. 354 (S.C.A.G.) (No. 89-130), 1989 WL 406219)). That Opinion concluded that S.C. Code § 58-23-620 precluded the imposition by a county of its business license tax on the holder of a Class E certificate issued under authority of Section 58-23-510, et seq. The circuit court fully considered the cited 1989 Attorney Opinion, and correctly concluded in its Order:

> The 1989 Opinion essentially restated portions of the text of Section 58-23-620 and did not address a factual situation of multiple business operations or multiple business activities by the Certificate holder. No background facts concerning the business at issue were provided in the Opinion. Because the Opinion did not address a situation of multiple business operations or multiple business activities by a Certificate holder, it provides no interpretative guidance in our situation and is distinguishable on its facts (or lack of facts) from our situation.
>
> (R. p. 10).

Similarly, the 2008 State Attorney General Opinion cited by Appellant in Brief (at pages 4-5) (2008 WL 317743 (S.C.A.G.)) relates factually only to a towing company and not to a business with multiple business activities.

The case of Southern Liquor Distributors, Inc. v. Daniel, 179 S.C. 219, 183 S.E. 765 (1936), cited by Appellant in Brief at 5, involved wholesale liquor distributing companies and a statute prohibiting certain taxes on such businesses. The court in Southern Liquor, which heard the case in its original jurisdiction, determined that the delivery of liquor in trucks by wholesalers to retailers was a necessary part of the

wholesale-to-retail sales transaction. The case did not involve Certificate E or section 58-23-620, and did not establish or suggest that the business activity of collecting and shredding of paper is a necessary part of the business of hauling paper. Likewise, the Appellant's introduction, in Brief at page 6, of the concept of "implied field preemption" by way of citation to Aakjer v. City of Myrtle Beach, 388 S.C. 129, 694 S.E. 2d 213 (2010) does not assist in its argument of express statutory prohibition.

In its Brief, at footnote 2 at page 7, Shred with Us acknowledges, apparently inadvertently, that Certificate E is not a blanket exemption from business license tax if the business using a Certificate E "engages in a completely different business." This acknowledgement of a necessary relation between transportation and the business activity that is the subject of the business license tax contradicts Appellant's claim elsewhere that a Certificate E provides a blanket exemption to the business with no exceptions. The footnote implicitly recognizes the same principle set out in the 1962 Attorney General Opinion (1962 WL 11964 (S.C.A.G.)) relied upon by the City and by the circuit court in its Order. (R. pp. 10-12).

In discussing the 1962 Attorney General Opinion, the circuit court explained: "Unlike the 1989 Opinion cited by Shred with Us, the 1962 Opinion involved and dealt squarely with the situation of multiple business operations/multiple business activities and a Certificate E." (R. p. 10). The 1962 Opinion was in response to the question from the City of Marion of whether a municipality may impose a business license tax on the nonresident holder of a Class E certificate because of the activity of the holder in moving a building from the municipality. The Assistant Attorney General who authored the Opinion concluded that Section 58-1442 of the 1952 Code (the predecessor to

Section 58-23-620) prohibited the imposition of the tax on the holder of a Class E certificate:

> **so long as** the activity in which he engages is **incidental and necessary** to the business of transporting property in accordance with the authority granted by his certificate. It is the opinion of this office that **such business tax may not be imposed if the activity of the holder of the certificate is restricted to work related directly to transportation of the building on a highway from one point to another.** (Emphasis supplied).

The 1962 Opinion, in assessing whether the business license tax was precluded by the Certificate E statute, clearly distinguished between business activities that are "directly related" and "incidental and necessary" to transportation under the certificate (which are not subject to taxation) and business activities that are "not directly related" and are "not incidental and necessary" to such transportation (which are subject to taxation).

The reasoning of the 1962 Attorney General Opinion illustrates that the exemption of Section 58-23-620 is not a blanket exemption as contended by Shred with Us but is necessarily a qualified exemption, arising from the nature and purpose of the certificate, and based on the relationship of the business activity sought to be taxed to the transportation activity authorized by the certificate. This interpretation of qualified exemption, rather than blanket exemption, avoids the potentially absurd results indicated by the circuit court:

> Moreover, if construed without limitation arising from its context and purpose, Section 58-23-620 would provide a carte blanche for a freight hauler to sell retail goods from its truck or to operate a food truck without the necessity for a municipal business license for plainly unrelated business activities. Such a statutory construction and interpretation could not have been intended by the Legislature.
>
> (R. p. 12).

The circuit court correctly discerned that the language of Section 58-23-620, although apparently broad, must be construed in accord with applicable principles of statutory interpretation. These include the principles, cited in the circuit court Order (R. pp. 6-7 and 11-12), that "language must be construed in light of the intended purpose of the statute," Broadhurst v. City of Myrtle Beach Election Commission, 342 S.C. 373, 380, 537 S.E. 2d 543, 546 (2000), and that "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." Lambries v. Saluda County Council, 409 S.C. 1, 10, 760 S.E.2d 785, 790-791 (2014).

III.

By failing to state the ground in its notice of appeal to the circuit court, Appellant waived further argument on appeal that the City Council erred in finding the collection and shredding activities of the business were separate and distinct from its transportation activities.

In its four listed grounds for appeal in its Notice of Appeal to the circuit court (R. p. 15-16), Shred with Us complains only of error by the City Council in failing to provide it with a blanket exemption from business license tax under Code § 58-23-620. The Notice of Appeal to circuit court contains no specification of error related to the factual findings by the City Council that Shred with Us was engaged in multiple business activities that were separate, distinct and not incidental to its transportation activities. Having failed to assert such error on appeal to the circuit court, Shred with Us waived any further argument that such factual findings were erroneous.

The Business License Official and the City, in their filed Response to the Notice to Appeal, raised this issue of waiver in their Fourth Defense ("Shred with Us, in this appeal, is limited in its assertions of error by the City Council to those assertions of error enumerated in its Notice of Appeal filed with this Court."). (R p. 18). In its Order, the circuit court agreed:

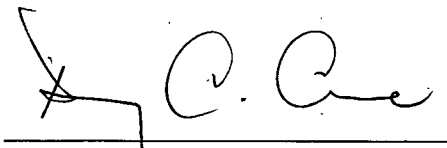
> Shred with Us does not contest that it did business, and does business, within the City. It also does not contest, in its listed Notice of Appeal grounds, that it engages in the multiple business operations or multiple business activities of transportation and collection/shredding that are separate and distinct business activities. Although Shred with Us argued at the Council hearing that all of its business activities involved transportation or were incidental to transportation (Record, pages 33-34 and 39), that argument was not re-stated as a ground in the Notice of Appeal to this Court. Accordingly, Shred with Us has waived any argument of error below based on those findings of Council. However, to the extent any such argument was not waived, the evidence presented to the City Council fully supports the City's finding of fact that the activity of collecting and shredding paper is separate and distinct from the transportation activity for which the Class E-L Certificate was issued.
>
> (R. pp. 9-10).

For this reason, Shred with Us is precluded, in this appeal, from arguments that the factual findings of the City were erroneous.

CONCLUSION

For the reasons stated herein, this Court should affirm the decision of the circuit court.

Respectfully submitted,



January 24, 2018

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Amended Final Brief of Respondent complies with Rule 211(b).

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