THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

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

Greenville Hospital System .....Appellant,

v.

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

INITIAL REPLY BRIEF OF APPELLANT

Arthur F. McLean III
Frank W. Cureton
Charles M. Sprinkle III
HAYNSWORTH SINKLER BOYD, P.A.
One North Main Street, Second Floor
Greenville, South Carolina 29601
(864) 240-3200

Attorneys for Appellant
Greenville Hospital System

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The language of the sales tax exemption statute at issue in this case, Section 12-36-2120(41), is plain and unambiguous. It exempts from sales tax:

> (41) items sold by organizations exempt under Section 12-37-220A(3) and (4) and B(5), (6), (7), (8), (12), (16), (19), (22), and (24), if the net proceeds are used exclusively for exempt purposes and no benefit inures to any individual.

GHS applied for and is entitled to the sales tax exemption because it is exempt from property tax under Sections 12-37-220(A)(4) and (B)(16)—two provisions expressly listed in Section 12-36-2120(41). GHS has never claimed that it should be granted the sales tax exemption for any other reason than that it falls squarely within the express terms of Section 12-36-2120(41) and Sections 12-37-220(A)(4) and (B)(16).

Rather than apply the statute according to its plain language, the Department asks this Court to engraft an entirely new requirement into Section 12-36-2120(41), whereby an organization may qualify for the sales tax exemption only if it is exempt from property tax ***solely*** or ***exclusively*** under one of the 11 provisions of Section 12-37-220 listed in Section 12-36-2120(41). According to the Department, simply because GHS may qualify for property tax exemptions *in addition to those listed in Section 12-36-2120(41)*, GHS should—as a matter of law—be automatically disqualified from the sales tax exemption.

In its Respondent's Brief, the Department does not dispute there is no such requirement contained in the plain language of Section 12-36-2120(41). Nor does the Department dispute that the interpretation of Section 12-36-2120(41) it urges the Court to adopt in this case is contrary to the Department's long-standing, published, and binding public guidance in its Revenue Procedure # 03-6—a fact discussed at length in GHS's opening brief, but which the

Department leaves essentially unrebutted in its Respondent's Brief. Instead, as discussed below, the Department rests its argument on a textbook-case example of the misapplication of the "*expressio unius*" maxim of statutory construction which would have this Court rewrite both Section 12-36-2120(41) and Section 12-37-220.

Despite the Department's misplaced arguments and apparent willingness to abandon its own long-standing public guidance, Section 12-36-2120(41) means just what it says: an organization exempt from property tax under one of the 11 listed provisions of Section 12-37-220 can qualify for the sales tax exemption. GHS meets the requirements under at least two of those 11 listed provisions and simply asks for the opportunity to present facts in support of its application for the sales tax exemption. Accordingly, the ALC's ruling below should be reversed and this case should be remanded for an evidentiary hearing on the merits of GHS's application.

I. The Department's arguments disregard the plain language of the statute.

In arguing that GHS is foreclosed as a matter of law from qualifying for the sales tax exemption under Section 12-36-2120(41), the Department sidesteps the crucial starting point of any statutory analysis: "the plain language of the statute itself." *King v. Am. Gen. Fin., Inc.*, 386 S.C. 82, 90, 687 S.E.2d 321, 325 (2009). Unmoored from the text of the statute, the Department maps out a dangerous course that departs from the Legislature's express intent.

A. The Department cannot point to any language in the text of the statute to support its arguments.

In its Respondent's Brief, the Department asserts that "the sole dispositive issue in this appeal" is whether GHS can qualify for the sales tax exemption "even though GHS is *denied* the exemption as a political subdivision under § 12-37-220(A)(1) and as a charitable institution in the nature of a hospital under § 12-37-220(A)(2)." (Respondent's Brief at 6 (emphasis in original)). However, the Department does not and cannot point to any word, phrase, or clause in

Section 12-36-2120(41) or Section 12-37-220 which provides that GHS or any other organization is "denied" the sales tax exemption because it may also be exempt from property tax under Sections 12-37-220(A)(1), (A)(2), or any other provision of Section 12-37-220. The statute simply does not say that.

As discussed on Pages 8 - 10 of GHS's opening brief, the ***only way*** this Court can accept the Department's position and affirm the ALC's ruling in this case is to go beyond the plain language of the statute and infer a new, additional requirement—*not expressed by the Legislature*—that the sales tax exemption granted in Section 12-36-2120(41) is restricted to organizations which qualify for a property tax exemption "solely" or "exclusively" under the property tax exemptions listed in subsection (41). In other words, the Department asks this Court to rule as a matter of law that an organization which meets all of the requirements for the sales tax exemption expressly stated in Section 12-36-2120(41) must nevertheless be "denied" the exemption merely because that organization *may also qualify* for one or more other property tax exemptions *in addition* to those listed in Section 12-36-2120(41). However, as this Court recently stated, "we are not at liberty, under the guise of construction, to alter the plain language of a statute by adding words which the Legislature saw fit not to include." *First Citizens Bank and Trust Co., Inc., v. Blue Ox, LLC,* Op. No. 5532 (S.C. Ct. App. filed Jan. 31, 2018) (Shearouse Adv. Sh. No. 5 at 24) (internal quotations and alterations omitted).

Notably, the Department does not dispute or respond to GHS's arguments on the key points GHS has raised concerning the plain language of Section 12-36-2120(41), including:

- The Department does not dispute that the express language of Section 12-37-2120(41) contains no restriction or limitation suggesting that an organization exempt from property tax under Section 12-37-220(A)(4) or (B)(16) should be denied the sales tax exemption

because it may also be exempt from property tax under Sections 12-37-220(A)(1), (A)(2), or any other provision of Section 12-37-220 not listed in Section 12-36-2120(41). (*See* Appellant's Brief at 8-10.)

- The Department does not dispute that, had the Legislature intended that the sales tax exemption be limited to organizations exempt from property tax "solely" or "exclusively" under the listed provisions of Section 12-37-220, it could have easily said so. (*See id.* at 9.)
- The Department does not and cannot dispute that the Legislature actually used the term "exclusively" in Section 12-36-2120(41) when limiting the exemption to organizations which use the sale proceeds "exclusively" for exempt purposes—further demonstrating that the Legislature could and would deploy such a limitation had it intended to. (*See id.* at 9-10.)

The Department cannot overcome the fact that its arguments find no support in the express terms of Section 12-36-2120(41) by avoiding the plain language of that statute.

B. The Department does not dispute that its interpretation of Section 12-36-2120(41) is contrary to its own public guidance in its S.C. Revenue Procedure # 03-6.

Pages 11 - 13 of GHS's opening brief contain a detailed discussion explaining that the ALC's ruling and the Department's position in this case are contrary to the Department's long-standing public guidance on the interpretation and application of Section 12-36-2120(41) set out in S.C. Revenue Procedure # 03-6. In that advisory opinion, the Department explains that an organization may be exempt from property taxation under provisions of Section 12-37-220 not listed in Section 12-36-2120(41), yet still qualify for the sales tax exemption if it is also exempt under one of the provisions listed in Section 12-36-2120(41). *See* S.C. Rev. Proc. # 03-6 (p. 4).

In its Respondent's Brief, the Department fails to address this critical inconsistency between its published advisory opinion and the position it now urges this Court to adopt in the present case. The Department also does not dispute that S.C. Revenue Procedure # 03-6 is binding on Department personnel, and the Department does not explain why it should be excused from following its own public guidance in this case. Again, as with the plain language of the statute, while S.C. Revenue Procedure # 03-6 may be something the Department would prefer to overlook, this advisory opinion has been relied upon by GHS and other taxpayers and remains binding on Department personnel.

C. The Department's reliance on the "*expressio unius*" maxim violates the "cardinal rule of statutory construction" by subverting the plain language of Section 12-36-2120(41).

Rather than address the plain language of the statute or provide an explanation or excuse for why it has now abandoned its own public advisory opinion, the Department instead invokes the maxim "*expressio unius est exclusio alterius*," which means "to express or include one thing implies the exclusion of the other." BLACK'S LAW DICTIONARY (10th ed. 2014). The Department argues that, under the *expressio unius* maxim, this Court should conclude—***purely by negative inference***—that, by granting the sales tax exemption to "organizations exempt under Section 12-37-220(A)(3) and (4) and B(5), (6), (7), (8), (12), (16), (19), (22), and (24)," the Legislature intended to ***affirmatively exclude*** any organization which, although exempt under one or more of the property tax exemptions listed in the statute, ***may also be exempt*** under Sections 12-37-220(A)(1), (A)(2), or other subsections of Section 12-37-220 not listed in Section 12-36-2120(41). This is a textbook-case example of the misapplication of the *expressio unius* maxim.

First, as a threshold matter, this Court and other appellate courts have repeatedly warned of the dangers of using *expressio unius* to discern the intent of a legislature by negative inference:

> The maxim [*expressio unius*] should be used to accomplish legislative intent, not defeat it. The maxim is a rule of statutory construction; it is not a rule of substantive law. Accordingly, it should be used with care.

State v. Leopard, 349 S.C. 467, 473, 563 S.E.2d 342, 345 (Ct. App. 2002) (quoting *S.C. Dep't of Consumer Affairs v. Rent-A-Ctr., Inc.*, 345 S.C. 251, 256, 547 S.E.2d 881, 884 (Ct. App. 2001)); *see also, e.g., Director v. Bethlehem Mines Corp.*, 669 F.2d 187, 197 (4th Cir. 1982) (warning that "[t]he maxim [*expressio unius*] is to be applied with great caution and is recognized as unreliable"); *Wachovia Bank, N.A. v. Nat'l Student Mktg. Corp.*, 650 F.2d 342, 354-55 (D.C. Cir. 1980) (warning that "[t]he ancient maxim '*expressio unius est exclusio alterius*' is a dangerous road map with which to explore legislative intent"); 2A N. Singer & S. Singer, SUTHERLAND ON STATUTORY CONSTRUCTION § 47:25 (7th ed. 2017) ("Courts must apply the maxim *expressio unius* with great caution, and only under certain conditions.").

In the present case, resort to *expressio unius* or any other maxim or canon of statutory construction is improper because there is no ambiguity or vagueness in the express terms of the statute. As this Court is aware, the "cardinal rule of statutory construction" requires that courts look first to the plain, express terms of the statute and if those terms are clear, the inquiry ends and there is no need to call on the maxims or canons of construction. *See Fullbright v. Spinnaker Resorts, Inc.*, 420 S.C. 265, 272, 802 S.E.2d 794, 797 (2017). As recently emphasized by our Supreme Court:

> Appellate courts must follow a statute's plain and unambiguous language, and ***when the language is clear, the rules of statutory interpretation are not needed and the court has no right to***

> ***impose another meaning***. This Court looks beyond a statute's plain language only when applying the words literally would lead to a result so patently absurd that the General Assembly could not have intended it.

S.C. Dep't of Soc. Servs. v. Boulware, Op. No. 27759 (S.C. Sup. Ct. filed Jan. 3, 2018) (Shearouse Adv. Sh. No. 1 at 15) (emphasis added; internal quotations and citations omitted). In its Respondent's Brief, the Department admits that the plain language of the statute controls above all else and that, "[w]hen a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." (Respondent's Brief at 11 (quoting *Doe v. S.C. Dep't of Soc. Servs.*, 407 S.C. 623, 633-34, 757 S.E.2d 712, 717 (2014)).

Neither the Department nor GHS has claimed there is any ambiguity or vagueness in Section 12-36-2120(41) that would permit resort to *expressio unius* or other rule or maxim of statutory interpretation. *Expressio unius* should not be applied because GHS does not seek to imply into Section 12-36-2120(41) an additional ground for exemption based on Sections 12-37-220(A)(1) or (A)(2). The sole basis on which GHS has applied for the sales tax exemption is GHS's contention that it meets all requirements prescribed by law to qualify for exemption under Section 12-37-220(B)(16) (charitable organizations) and Section 12-37-220(A)(4) (charitable trusts and foundations). Both of these provisions are among those expressly identified as qualifying for the sales tax exemption under Section 12-36-2120(41). GHS has not—*at any time*—asserted it is entitled to the sales tax exemption based on its qualification for a property tax exemption under Section 12-37-220(A)(1), (A)(2), or any other provision of Section 12-37-220. Accordingly, there is no need for this Court look beyond the plain language of Section 12-36-2120(41) to "interpret" whether the Legislature intended to exempt organizations from sales tax based on the Section 12-37-220(A)(1) or (A)(2) exemptions. Therefore, the plain language

of Section 12-36-2120(41) is where this Court's inquiry begins, and the plain language is where this Court's inquiry ends.

However, even if this Court could apply the maxim, the correct application of *expressio unius* does not support the Department's and the ALC's interpretation of the statute. In order to conclude, by negative inference, that the Legislature intended to exclude from the sales tax exemption any organization which may *additionally* qualify for a property tax exemption under one or more other provisions of Section 12-37-220 not listed in Section 12-36-2120(41), the Court must first find that each of the property tax exemptions listed in Section 12-37-220 are mutually exclusive of the other exemptions listed. In other words, the Court must find that qualifying for a property tax exemption under one subsection of Section 12-37-220 necessarily precludes qualification under any other subsection.

Of course, the exemptions recognized under Section 12-37-220 are ***not*** mutually exclusive. Instead, they overlap and are not designed to constitute limitations one upon the other. Beyond the fact that there is no language in Section 12-37-220 which provides that the property tax exemptions are mutually exclusive, the point is illustrated by the Department's own argument in its Respondent's Brief. In its brief, the Department vigorously asserts that GHS can and does qualify for a property tax exemption under ***multiple provisions*** of Section 12-37-220:

> There is no dispute that GHS is a political subdivision exempt from property taxes pursuant to § 12-37-220(A)(1), which exempts "all property of the State . . . and other political subdivisions." There is also no dispute that GHS is a hospital and may be exempt from property tax under 12-37-220(A)(2), which exempts the property of "charitable institutions in the nature of hospitals."

(Respondent's Brief at 11.) Likewise, nothing in Section 12-37-220 prevents GHS from showing that it might also qualify for and obtain a property tax exemption under subsections (A)(4) or (B)(16), thus allowing GHS to qualify for the sales tax exemption. Because the

exemptions listed in Section 12-37-220 are not mutually exclusive, it is illogical and incorrect to deploy the *expressio unius* maxim to leap to the negative inference that the omission of (A)(1) and (A)(2) from the sales tax exemption statute signals legislative intent that any organization qualifying for the property tax exemption under those subsections should be precluded, as a matter of law, from demonstrating its qualification under (B)(16) or (A)(4).

Therefore, in the present case, by undertaking a careful application of *expressio unius* as instructed by our appellate courts, it is clear that the maxim should not be used in the first instance and that, if it is used as urged by the Department, it will lead this Court to legal error.

D. The Department's argument that Sections 12-37-220(A)(1) and (A)(2) "control over" other exemptions contained in Section 12-37-220 is belied by the express terms of the statute and the Department's own public advisory opinion.

The Department next attempts to argue that, within Section 12-37-220, this Court should interpret the property tax exemptions granted to political subdivisions under subsection (A)(1) and "charitable institutions in the nature of hospitals" under (A)(2) as being "more specific descriptors" which "control over" the exemptions granted under subsections (A)(4) and (B)(16). (Respondent's Brief at 12.) The Department cites the rule of statutory interpretation whereby if two statutes dealing with the same subject matter conflict, "the general statute must yield to the specific statute involving the same subject." 2B N. Singer & S. Singer, SUTHERLAND ON STATUTORY CONSTRUCTION § 51:5 (7th ed. 2017); *see also, e.g., Bolin v. S.C. Dep't of Corr.*, 415 S.C. 276, 282, 781 S.E.2d 914, 917 (Ct. App. 2016). In the present case, however, there is no conflict between or among subsections (A)(1), (A)(2), (A)(4), or (B)(16). As discussed above, an organization may qualify for a property tax exemption under multiple provisions of Section 12-37-220, and they are not mutually exclusive. Moreover, each of these provisions is governed by specific and unique requirements that an organization must satisfy in order to

qualify for the respective exemption. For example, according to the Department's Final Department Determination issued in this case, in order to qualify as a charitable organization under Section 12-37-220(B)(16), an organization must satisfy a litany of requirements based on federal and state tax law. (*See* Appellant's Brief at 16-17; Department Determination, p. 20). On the other hand, the Department has promulgated a different analysis for determining whether and to what extent a hospital may qualify for the property tax exemption granted under Section 12-37-220(A)(2). *See* S.C. Rev. Ruling # 05-18 ("Property Tax Exemption for Nonprofit Hospitals").

Perhaps most tellingly, the Department's argument on this specific point is again contradicted by its own binding public advisory opinion. In addition to "charitable institutions in the nature of hospitals," Section 12-37-220(A)(2) also specifically exempts from property tax "schools, colleges, and other institutions of learning." Under the reasoning the Department now urges this Court to adopt in the present case, the fact that "schools" are listed in Section 12-37-220(A)(2) means that a school could not also qualify for the exemption for under subsection (B)(16)(a) for "any religious, charitable, eleemosynary, educational, or literary society, corporation, trust, or other association." However, in S.C. Revenue Procedure # 03-6, the Department states the opposite is true. As explained in GHS's opening brief, the Department's S.C. Revenue Procedure # 03-6 explains that:

> Code Section 12-37-220 provides specific property tax exemptions for the State of South Carolina, its counties, municipalities, school districts, and other political authorities or subdivisions; ***private schools, colleges and other institutions of learning***; nonprofit hospitals and nonprofit institutions which care for the infirmed, the handicapped, the aged, children or indigent persons; and nonprofit museums.

(emphasis added). The Department then explains in the Revenue Procedure that, although "[t]he property tax exemptions for these organizations are not specifically listed in Code Section 12-36-2120(41) . . . . some of these organizations ***may also qualify*** for a property tax exemption listed in Code Section 12-36-2120(41)." (emphasis added). To illustrate this point, the Department provides a specific example, explaining that a private school may qualify under multiple sections of Section 12-37-220:

> For example, a private school may qualify for the property tax exemption under Code Section 12-37-220(B)(16)(a) established for certain religious, charitable, eleemosynary or educational organizations.

S.C. Rev. Proc. # 03-6, p. 4. Private schools can be, and often are, charitable nonprofit organizations which are eligible for property tax exemptions under both Sections 12-37-220(A)(2) and (B)(16)—just like GHS. Following the Department's own long-standing public guidance therefore demonstrates that no provision of Section 12-37-220 should "control over" any other provision.

E. The Department cannot defend the ALC's erroneous ruling that Section 12-36-2120(41) applies only to "private corporations."

On Pages 17 - 20 of its opening brief, GHS addresses the ALC's holding that the exemption granted under Section 12-36-2120(41) and Section 12-37-220(B)(16) should be limited to "private corporations." In its Respondent's Brief, the Department does not dispute or otherwise address the specific points raised by GHS demonstrating the error of the ALC's holding, including the following:

- Most significantly, nothing in the plain language of Section 12-36-2120(41) or Section 12-37-220(B)(16) limits its application to "private corporations." (*See* Appellant's Brief at 18.)

- None of the cases in what the ALC described as the "long history of jurisprudence in this state distinguishing government entities ('public corporations') from private entities" (Final Order, p. 7) address whether a corporation or other type of organization is entitled to the sales tax exemption or property tax exemption. (*See id.* at 17-18.)
- The 1970 Attorney General Opinion relied upon by the ALC concerns an inapposite provision of the superseded 1962 South Carolina Code issued many years before Section 12-36-2120(41) was enacted. (*See id.* at 18-20.)

Therefore, as discussed more fully in GHS's opening brief, the ALC's holding finds no support in the text of the statute, and the inapposite and outdated cases cited and relied upon by the ALC—which the Department does not attempt to defend in its Respondent's Brief—do not suggest otherwise.

II. The rule requiring liberal construction of tax exemptions in favor of government entities adopted by our Supreme Court is not limited to property tax exemptions.[1]

The Department argues that the rule adopted by the South Carolina Supreme Court in *Town of Myrtle Beach v. Holliday,* 203 S.C. 25, 30, 26 S.E.2d 12, 14 (1943), mandating liberal construction of tax exemption statutes in favor of government entities does not apply to sales tax

[1] As discussed above and in GHS's opening brief, the narrow issues of statutory interpretation presented in this appeal concerning whether the ALC's ruling that, as a matter of law, GHS should be denied the sales tax exemption under Section 12-36-2120(41) because it is exempt under Sections 12-37-220(A)(1) and (A)(2) can and should be decided based on the plain language of the statute with no need for resort to rules, maxims, or canons of construction. Accordingly, whether the sales tax exemption statute should be construed liberally in favor of granting the exemption to GHS is not dispositive of the issues raised in this appeal. However, if this Court grants GHS's request for remand for an evidentiary hearing, it is possible that factual and legal issues will arise for which the rule of construction announced in *Holliday* will be pertinent. GHS, therefore, submits that it is appropriate for this Court to correct the ALC's erroneous ruling in order to provide instruction to the ALC upon remand and to prevent that ruling from becoming "the law of the case." *See, e.g., Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case.").

exemptions. However, the Supreme Court's opinion in *Holliday* shows that the Court's reasoning did not rest on the specific type or category of tax exemption at issue (property, sales, income, etc.), but was instead grounded on the principle that "it has never been the policy of this state to tax its own agencies or instrumentalities of government." *Id.* at 14. Therefore, based on the Supreme Court's express reasoning, there is no basis to draw arbitrary distinctions between sales tax and property tax when applying the rule of liberal construction.

The Department attempts to argue that the court's holding in *Hampton Friends of Arts v. S.C. Department of Revenue*, 401 S.C. 372, 737 S.E.2d 628 (2013), where the court rejected an argument that "*Holliday's* reach extends beyond government entities," somehow proscribes the rule of liberal construction set out in *Holliday*. It does not. GHS has not argued *Holliday* should extend beyond government entities. GHS is a government entity. In making this argument, the Department refutes a straw man.

Additionally, the Department argues that this Court, in *Lexington County Health Services v. S.C. Department of Revenue*, 384 S.C. 647, 682 S.E.2d 508 (Ct. App. 2009), "had an opportunity to extend *Holliday's* liberal construction to a sales tax exemption sought by a government entity, but declined to do so." (Respondent's Brief at 9.) However, it does not appear that the question of whether the rule of liberal construction should apply was raised as a contested issue in that case, and "[i]t is well-settled that even though an appellate court has decided a case containing a certain issue, unless that issue was actually raised on appeal those cases are not dispositive." *Theisen v. Theisen*, 394 S.C. 434, 446, 716 S.E.2d 271, 276-77 (2011); *see also, e.g., Bursey v. S.C. Dep't of Health and Envt'l Control*, 369 S.C. 176, 190, 631 S.E.2d 899, 907 (2006) (Pleicones, J., dissenting) ("[T]he fact that we have applied the APA standard in

a previous Mining Council appeal where the parties did not contest the standard of review does not bind us in this case where the matter is properly preserved and presented for our review.").

CONCLUSION

For these reasons, and those set forth in Appellant's opening brief, the Final Order of the Administrative Law Court should be reversed and the case should be remanded for an evidentiary hearing.

Respectfully submitted,

Arthur F. McLean, III, S.C. Bar No. 11794
Frank W. Cureton, S.C. Bar No. 10087
Charles M. Sprinkle III, S.C. Bar No. 70630
HAYNSWORTH SINKLER BOYD, P.A.
One North Main Street, Second Floor
Greenville, S.C. 29601
Telephone: (864) 240-3200
Facsimile: (864) 240-3300

Attorneys for Appellant
Greenville Hospital System

February 1, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

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

Appellate Case No.: 2017-01548

Greenville Hospital System .....Appellant,

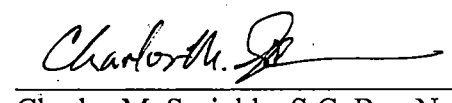
v.

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

PROOF OF SERVICE

I certify that I have served the ***Initial Reply Brief of Appellant*** in the above-captioned matter on counsel for Respondent South Carolina Department of Revenue by depositing a copy of the Reply Brief in the United States Mail, postage prepaid, on February 1, 2018, addressed to their attorneys of record as follows:

Renee Madden, Esq.
Jason P. Luther, Esq.
South Carolina Department of Revenue
Office of General Counsel for Litigation
P.O. Box 12265
Columbia, South Carolina 29211



February 1, 2018

Charles M. Sprinkle, S.C. Bar. No. 70630
Haynsworth Sinkler Boyd, P.A.
One North Main Street, Second Floor
Greenville, S.C. 29601
(864) 240-3200
Attorney for Appellant

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

ONE NORTH MAIN, 2ND FLOOR (29601-2772)
POST OFFICE BOX 2048 (29602-2048)
GREENVILLE, SOUTH CAROLINA
TELEPHONE 864.240.3200
FACSIMILE 864.240.3300
WEBSITE www.hsblawfirm.com

CHARLES M SPRINKLE
DIRECT DIAL NUMBER 864.240.3212
EMAIL csprinkle@hsblawfirm.com

February 1, 2018

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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

Dear Ms. Kitchings:

Please find enclosed for filing the original and one copy of the Initial Reply Brief of Appellant, together with our Proof of Service. After filing, please return a file-stamped copy to me in the enclosed self-addressed stamped envelope provided for your convenience.

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

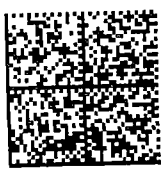
Please feel free to contact me should you have any questions or concerns.

Sincerely,

HAYNSWORTH SINKLER BOYD, P.A.

Charles M. Sprinkle
Attorney for Appellant

CMS/mlw
Enclosure
cc: Jason P. Luther, Esq.
Renee Madden, Esq.
Patrick McCabe, Esq.
South Carolina Department of Revenue
P.O. Box 12265
Columbia, South Carolina 29211
Attorneys for Respondent



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Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

POST OFFICE BOX 2048
GREENVILLE, SOUTH CAROLINA 29602-2048

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211