

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
The Honorable R., Markley Dennis, Jr.

S.C. SUPREME COURT

Appellate Case No. 2017-000297
Lower Court Case No. 2011-CP-08-02814

Todd Olds Petitioner,

v.

City of Goose Creek Respondent.

**AMICUS CURIAE BRIEF OF THE
MUNICIPAL ASSOCIATION OF SOUTH CAROLINA**

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STATEMENT OF THE QUESTION ON APPEAL

In accord with the Court's Order granting the petition for a writ of certiorari, the Municipal Association, as Amicus, addresses the sole question of whether the Court of Appeals erred 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 INTERESTS OF THE AMICUS

The Municipal Association is a nonpartisan, non-profit association of the State of South Carolina's incorporated cities and towns with 270 member municipalities. The Municipal Association, in addition to offering services and programs to its members, promotes and represents the collective interests of municipalities throughout the State.

Municipalities have a substantial and vital interest in judicial determinations pertaining to local business license taxation given the potential statewide impact on local ordinances. The Municipal Association believes the Court of Appeals correctly interpreted the term "gross income" as defined and used in the City of Goose Creek ordinance. The Court of Appeals correctly considered and analyzed the language of the ordinance as a whole and in the context of the ordinance's character as an excise tax, rather than as a local income tax. The grafting into the ordinance of the Federal income tax definition of "gross income," as sought by Petitioner, is without legal precedent in our State, and would have the incongruous and constitutionally suspect result of favoring one type of business (sole proprietorships) over corporations and partnerships. In the understanding of the Municipal Association, only businesses that are sole proprietorships use a Federal income tax return that refers to "gross income," so that

only sole proprietorships would be benefitted by this Court's adoption of Petitioner's argument.

Municipalities have broad authority to enact ordinances pursuant to S.C. Code §5-7-30 (1976). South Carolina jurisprudence has long established that municipalities have authority to define the terms to levy a business license tax if those definitions are consistent with state and federal law. South Carolina does not define "gross income" for business license tax purposes; however, our courts have upheld ordinances that define the use of "gross income" as "gross receipts" or "total revenue." In the absence, as here, of State and Federal requirements for use of the Federal income tax definition of "gross income," State and Federal income tax definitions should not dictate or control municipal business license tax definitions.

STATEMENT OF THE CASE

The Municipal Association adopts the Statement of the Case in the Respondent's Brief.

ARGUMENT

THE COURT OF APPEALS CORRECTLY INTERPRETED THE TERM "GROSS INCOME" AS DEFINED AND USED IN THE CITY BUSINESS LICENSE ORDINANCE.

The Municipal Association, as Amicus, agrees with the clear arguments set forth in Respondent's Brief, and makes the following additional arguments.

Petitioner Olds ("Olds") seeks a judicial mandate from this Court that a city must accept, as the basis for computation of the city's business license tax, the "gross income" figure used by his sole proprietorship business in the Schedule C of its Federal income tax return. Such a judicial mandate would (1) legislate by case law the

imposition of definitions not imposed by State or Federal statutory law, (2) restructure the business license tax from an excise tax into an income tax, (3) overrule almost one hundred years of State case law equating “gross income” with “total revenues” and similar “total income” concepts, and (4) favor (without rhyme or reason) sole proprietorships (the only business form that uses a “gross income” figure in its Federal income tax return) over the other business forms of corporations and partnerships. This Court should resist the opportunity to create such unprecedented and dubious changes in the business license tax law of our State. The Municipal Association, as Amicus, urges that this Court affirm the decision of the Court of Appeals in this case.

Throughout his briefs to this Court and to the Court of Appeals, Olds ignores several fatal shortcomings of his argument that the Internal Revenue Code definition of “gross income” must be applied to the calculation of municipal business license tax. The first such shortcoming is that Olds’ argument is not supported by any provision of State or Federal statutory law or by any holding of Federal or State courts.

By its express language, S.C. Code § 12-6-1110(A) adopts the Federal Internal Revenue Code calculations of “gross income” only “[f]or South Carolina income tax purposes.” The City’s business license tax is neither the State income tax nor a local income tax. It is clearly established in this State that the municipal business license tax is not an income tax at all but is an excise tax on the privilege of doing business within a municipality. This excise tax is measured, not by taxable income for income tax purposes or by net income, but by the amount of a business’ gross income. Carter v. Linder, 303 S.C. 119, 122, 399 S.E.2d 423, 425 (1990); Town of Hilton Head Island v.

Kigre, 408 S.C. 647, 649, 760 S.E.2d 103, 103-104 (2014), cert. denied sub nom. Kigre, Inc. v. Town of Hilton Head Island, 135 S. Ct. 959, 190 L.Ed.2d 832 (2015).

As noted by the Court of Appeals in footnote 2 of its Opinion, the State's income tax returns do not contain any reference to "gross income." For example, the 2017 Individual Income Tax Return (Form SC 1040) begins its "Income and Adjustments" section with the direction on line 1 to "Enter federal taxable income from your federal form." South Carolina's "C" Corporation income tax return (Form SC 1120) for 2017 has a similar entry required on its line 1. The 2017 form for a partnership return (SC1065) calls for entries for "ordinary business income" from the federal Schedule K on line I of its Schedule SC-K and of "Total Sales or Gross Receipts" on line 18 of its Schedule SC-K. The State income tax return for 2017 for an "S" Corporation (Form SC 1120 S) calls, on its line 1, for the entry of a figure from the Federal Form 1120S Schedule K, and, for multi-state corporations calls for entries in Schedule H-1 for "Total Sales" and in Schedule H-2 for "South Carolina Gross Receipts."

Olds' reliance on language from Beard v. South Carolina Tax Commission, 230 S.C. 357, 95 S.E.2d 628 (1956), is misplaced. See, for example, Petitioner's Reply Brief at 19. The "rule" stated in Beard that "the word 'income' as used in a tax statute is to be taken in its ordinary sense of gain or profit" (230 S.C. at 368, 95 S.E.2d at 634) refers to the interpretation of State income tax statutes, and not the interpretation of business license tax statutes. Beard's citation for this principle was to Southern Weaving Company v. Query, 206 S.C. 307, 34 S.E.2d 51 (1945). Southern Weaving involved the recovery of State income taxes.

Of course, the General Assembly, if it wished, could specify use of the Federal definition of “gross income” for municipal business license purposes. For example, S.C. Code § 11-44-30(5)(d), in defining a “qualifying business” for purposes of the High Growth Small Business Job Creation Act of 2013, specifies a certain requirement for “gross income as determined in accordance with the Internal Revenue Code.” However, the State legislature has imposed no such specification for reference to the Internal Revenue Code for purposes of the municipal business license tax.

In the absence of any use of the “gross income” term in State income tax returns, and in the absence of any requirement in State law for municipal use of the Federal “gross income” definition, Olds advances the argument that “gross income” is an overarching and controlling Federal concept. However, such an argument simply is not supported by a review of the federal income tax returns for the three business forms of sole proprietorships, corporations and partnerships.

The Federal Schedule C (Form 1040) for “Profit or Loss From Business (Sole Proprietorship),” referenced by Olds, begins its computation (in the 2017 form) with “Gross receipts or sales” in line 1. From that gross figure, the return then calls for subtraction of “Returns and allowances” in line 2 and “Cost of goods sold” in line 4, to arrive at “Gross profit” in line 5. “Gross profit” is then combined with “Other income, including federal and state gasoline or fuel tax credit or refund (see instructions)” in line 6 to arrive at “Gross income” in line 7.

Although used for individuals doing business as sole proprietorships, the term “gross income” is **not** used in the Federal income tax return forms for businesses that are corporations or partnerships. For example, the 2017 Federal U.S. Corporation

Income Tax Return (Form 1120) begins its computation with “Gross receipts or sales” on line 1. From that gross figure, the return then calls for subtraction of “Returns or allowances” in line 1b and subtraction of “Cost of goods sold” in line 2, to arrive at “Gross profit” in line 3. The “Gross profit” figure is then added to other types of income (such as dividends, interest, rents, and royalties) in lines 4-10, to arrive at “Total income” in line 11. The term “Total income” also is the term used in the 2017 Federal U.S. Return of Partnership Income (Form 1065). That return for partnerships follows a computation very similar to the computation for the “Total income” figure for corporations.

The “gross income” computation on the Federal Schedule C to Form 1040 (which utilizes a deduction for the cost of goods sold) applies **only** to businesses that are sole proprietorships. This means that the ruling sought in this appeal by Olds would benefit only the class of businesses that are sole proprietorships. Olds offers no sound basis in law or public policy for a judicially created principle of business license taxation that only would benefit the class of sole proprietorships, as opposed to all three business classes.

Another shortcoming of Olds’ argument, overlooked throughout his briefs, is the import of the clear language of the first sentence of the City’s definition of “gross income” as “[t]he **total revenue** of a business, received or accrued, for one calendar year, collected or to be collected by a business within the city, excepting, therefrom, business done wholly outside of the city on which a license tax is paid to some other municipality or county and fully reported to the city or county.” (Emphasis supplied). The “total revenue” language of the first sentence of the definition plainly provides for only

one deduction from income (for business revenue for which a license tax is paid in another jurisdiction) and, unlike the Federal “gross income” figure on a Form 1040 Schedule C, provides for no deduction from gross for cost of goods sold. The meaning and application of the concept of “total revenue” as used in the Goose Creek ordinance is clear and plain and is not subject to serious debate.

Despite Olds’ intimations, the “gross income” definition in Internal Revenue Code section 61(a) was not adopted or expressly referenced in the ordinance definition of “gross income.” Olds also contends, repeatedly, that the City’s definition of “gross income” requires that the gross income figure used for business license tax computation must “match” the gross income figure used by sole proprietorships for Federal income tax purposes. (Olds does not discuss what figure is to be used by corporations or partnerships.) See, for example, Petitioner’s Brief at 22 and 23. However, this is not the language of the City’s “gross income” definition. That definition’s reference to “conformity” is to “gross income” as reported to the State Tax Commission. This portion of the definition has no real meaning or viability, since the Tax Commission no longer exists by that name and since even the return forms of its successor entity (the South Carolina Department of Revenue) do not call for reporting of a “gross income” figure. Additionally, according to the City’s Brief at 17, Goose Creek removed that sentence from the text of the business license ordinance by amendment in July 2017.

The conclusion of the Court of Appeals was that the City’s “gross income” definition, considered as a whole, revealed a clear legislative intent by the City not to allow deductions from gross for cost of goods sold. This definition and interpretation are fully supported by our State case and other pertinent legal authorities.

Several principles of statutory interpretation, cited by the City in its Reply to Appellant's Petition for Rehearing in the Court of Appeals at pages 1-2, also should come into play for this Court. "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992). In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Hitachi Data Systems Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." Bennett v. Sullivan's Island Board of Adjustment, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993).

South Carolina jurisprudence on the municipal business license tax historically has used the terms "gross income," "total revenue," "total receipts," and "gross receipts" interchangeably and as synonyms. In reviewing municipal business license ordinances, this Court has defined "gross income" or upheld definitions of "gross income" as meaning "total receipts" or "gross receipts" or "total revenue." By way of example, in the business license tax case of Carter v. Linder, 303 S.C. 119, 122, 399 S.E.2d 423, 425 (1990), this Court quoted Hay v. Leonard, 212 S.C. 81, 46 S.E.2d 653 (1948),¹ for the principle that "gross receipts" is a "familiar and valid" method of measuring the value of an excise tax, such as the business license tax. More recently, in Eli Witt Company v. City of West Columbia, 309 S.C. 555, 559, 425 S.E.2d 16, 18 (1992), and Town of Hilton Head Island v. Kigre, Inc., *supra*, 408 S.C. at 650, 760 S.E.2d at 103-104 (2014),

¹ Superseded on other grounds by Constitutional Amendment as stated in Home Builders Association of South Carolina v. Sch. Dist. No. 2 of Dorchester County, 405 S.C. 458, 748 S.E.2d 230 (2013).

this Court upheld, as within municipal authority and as valid, municipal business license ordinances that defined “gross income” as “total revenue.”

As noted by the Court of Appeals below, the interchangeable use by this Court of the terms “gross income” and “total receipts” dates back to the early twentieth century and prior to the establishment of state or federal income taxes. In discussing an excise or privilege tax in Columbia Railway, Gas & Electric Co. v. Jones et al., 119 S.C. 480, 494, 112 S.E. 267, 272 (1922), this Court, citing Black’s Law Dictionary and German Alliance Ins. Co. v. Van Cleave, 191 Ill. 410, 413-415, 61 N.E. 94, 96 (1901), determined that the measure of the excise tax was gross income and that “Gross income means the total receipts from a business before deducting expenditures for any purpose.”

The synonymous nature of such terms continues to be recognized in general jurisprudence. Black’s Law Dictionary, 10th edition (2014), defines the terms “gross income” and “gross receipts” and “revenue” as follows:

- Gross income: Total income from all sources before deductions, exemptions, or other tax reductions.
- Gross receipts: The total amount of money or other consideration received by a business taxpayer for goods sold or services performed in a taxable year, before deductions.
- Revenue: Income from any and all sources; gross income or gross receipts.

GROSS INCOME, GROSS RECEIPTS, REVENUE, Black’s Law Dictionary (10th ed. 2014).

As observed by the Court of Appeals in this case, neither S.C. Code § 5-7-30 nor Title 5 defines “gross income.” However, a State statute in Title 6 of the State Code that

deals specifically with municipal and county business licenses does provide some insight into State legislative intent. That Code section actually substitutes the terms “gross receipts” and “gross proceeds” for “gross income” in describing the basis for the business license tax. S.C. Code § 6-1-315, enacted in 1997 and 2008 and subsequent to the enactment of § 5-7-30, provides, in its subsection (A), that a business license tax can be imposed or increased by the local governing body of a municipality or county by a positive majority vote. That subsection (A) specifically refers to the “business license tax, authorized by Section 4-9-30(12) and 5-7-30” (the basis for that tax in both statutes, of course, is “gross income”). Subsection (B)(1) of § 6-1-315 limits the imposition of municipal and county business license taxes on real estate agents to the broker-in-charge at the agent’s principal or branch office, and subsection (B)(2) circumscribes the nexus for taxation of sales by out-of-jurisdiction real estate agencies to transactions on property within the taxing jurisdiction. Both subsections (B)(1) and (B)(2) expressly refer to the basis for such business license taxes as “gross receipts.” Additionally, subsection (B)(3) places limitations on the business license tax on “the gross proceeds of an auctioneer.”

A long and unbroken line of South Carolina Attorney General (“Attorney General”) Opinions also supports the interchangeability in our State’s jurisprudence of the terms “gross receipts” or “total receipts” or “total revenue” for “gross income.” For example, a 1979 Attorney General Opinion described S.C. Code § 5-7-30 as authorizing a “gross receipts or gross income” tax. 1979 WL 42955 (S.C.A.G.). In a 1983 Opinion, the Attorney General responded to the inquiry “When interpreting the Business License Ordinance of the Town of Leesville, does the term ‘gross income’ for license tax

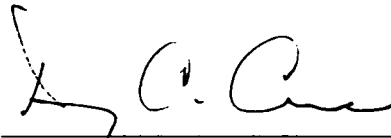
purposes exclude the costs of goods sold?" The Attorney General concluded that, giving the term its common meaning, "Gross income is interpreted as total receipts from a business before deductions." 1983 S.C. Op. Atty. Gen. 121 (S.C.A.G.), 1983 S.C. Op. Gen. No. 83-76, 1983 WL 142745.

In a 2012 Opinion, the Attorney General considered the business license tax of Beaufort County authorized by § 4-9-30(12) and based (as in § 5-7-30 for municipalities) on "gross income." Citing the 1922 Columbia Railway case, the Attorney General began its analysis with the statement that, "In general, gross income in the context of business license taxes 'means the total receipts from a business before deducting expenditures for any purpose.'" The Attorney General noted that the County's business license ordinance appeared to use the terms "gross income" and "gross receipts" interchangeably, and included the sentence in the definition [similar to that used by Goose Creek in this case] that "Gross income for business license purposes, [sic] may be verified by inspection of returns filed with the Internal Revenue Service, the South Carolina Department of Revenue, the South Carolina Insurance Commission, or other government agency." The Attorney General concluded, "Because a business license tax is not a tax upon the income itself, income that is exempt from income tax will not necessarily be exempt from use in calculating a license tax." Rather, according to the Attorney General, "gross income for business license tax purposes should be calculated according to the definition in the license tax ordinance, provided that definition is not inconsistent with constitutional or statutory law." 2012 WL 1615813 (S.C.A.G.). This reasoning and conclusion also was cited in the Attorney General Opinion at 2012 WL 1561868 (S.C.A.G.)

CONCLUSION

For the reasons stated above, and for the reasons stated by the City of Goose Creek in its Respondent's Brief, the Municipal Association, as Amicus, urges that this Court should affirm the decision of the Court of Appeals in this case. The Goose Creek ordinance should be considered as a whole and considered in a manner consistent with its character as an excise tax, rather than as an income tax. Neither the Federal income tax definition of "gross income" nor the State's use of that Federal definition for purposes of State income tax should be grafted into the law of municipal business license tax. Rather, the City's ordinance should be interpreted in the context of our State's jurisprudence, which equates "gross income" with "total revenue" and "gross receipts" and "total receipts." The ordinance's definition of "gross income" as "total revenue" clearly contemplates no deductions for costs of goods sold or for other expenditures, as are sought by Petitioner. The Court of Appeals correctly affirmed the Circuit Court and correctly interpreted the City's business license ordinance.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The Municipal Association's counsel hereby certifies that the Amicus Curiae Brief of The Municipal Association of South Carolina as required by Rule 213, SCACR, complies with Rules 208(b) and 211, SCACR.



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