

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY

S.C. SUPREME COURT

Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2018-000794
Trial Court Case No. 2016-CP-40-02875

South Carolina Public Interest Foundation, Edward D. Sloan, Jr., and William B. DePass, Jr., individually, and on behalf of all others similarly situated, Appellants,

v.

Richland County, Respondent,

And

Central Midlands Regional Transit Authority Intervenor/Respondent

APPELLANTS' MOTION FOR
CERTIFICATION UNDER SCACR 204

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SC Court of Appeals

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NOW COME the Appellants, South Carolina Public Interest Foundation (“SCPIF”), Edward D. Sloan, Jr., and William B. DePass, Jr., by their undersigned attorney, and move the Court pursuant to SCACR 204(b) for certification of this case before the Court of Appeals has determined it. Appellants suggest that this case involves “an issue of significant public interest or legal principle of major importance.”

Appellants are appealing two orders of the Circuit Court. (R. pp. 1-18). The Circuit Court granted Summary Judgment to the Central Midlands Regional Transportation Authority (“CMRTA”). (R. pp. 10-18). The Circuit Court also dismissed the Appellants’ case against Richland County for failure to prosecute. (R. pp. 4-9).

This case arises out of the same factual background as *Richland County v. South Carolina Department of Revenue*, 422 S.C. 292, 811 S.E.2d 758 (S.C. 2018). The Supreme Court opinion provides a well-developed statement of the background facts.

Through the Optional Methods for Financing Transportation Facilities Act (Transportation Act), the General Assembly has authorized the governing body of a county to “impose by ordinance a sales and use tax in an amount not to exceed one percent within its jurisdiction for a single project or for multiple projects and for a specific period of time to collect a limited amount of money.” S.C. Code Ann. § 4-37-30(A) (Supp. 2017). This is commonly referred to as the “penny tax.” The types of projects permitted to be funded with such a tax are “highways, roads, streets, bridges, mass transit systems, greenbelts, and other *transportation-related projects*.” *Id.* § 4-37-30(A)(1)(a)(i) (emphasis added). The revenues generated from such a tax must be used in accordance with statutory restrictions imposed by the General Assembly—namely, proceeds must be used for the capital costs of the types of transportation projects identified in the Transportation Act. *Id.* § 4-37-30(A)(15).

To implement a transportation penny tax, “[t]he governing body of a county may vote to impose the tax authorized by this section, subject to a referendum, by enacting an ordinance.” *Id.* § 4-37-30(A)(1). The local ordinance must specify the projects for which the proceeds of the tax are to be used; the length of time for which the tax is to be imposed; “the estimated *capital cost* of the project or projects to be funded in whole or in part from proceeds of the tax;” and the “anticipated year the tax will end.” *Id.* § 4-37-30(A)(1) (emphasis added). At issue in this case is whether and to what

extent certain costs qualify as “capital costs” and thus are considered proper expenditures of penny tax revenues.

* * *

Under these enabling provisions of the Transportation Act, on July 18, 2012, the County enacted Ordinance No. 039-12HR (Ordinance) scheduling a referendum on November 6, 2012, for the purpose of seeking approval from voters for a penny sales and use tax (Penny Tax). The Ordinance referenced various provisions of the Transportation Act and proposed the imposition of a tax for twenty-two years for the following projects:

(d) The Sales and Use Tax shall be expended for the costs of the following projects ... for the following purposes:

(i) Improvements to highways, roads (paved and unpaved), streets, intersections, and bridges including related drainage system improvements. Amount: \$656,020,644;

(ii) Continued operation of mass transit services provided by Central Midlands Regional Transit Authority including implementation of near, mid and long-term service improvements. Amount \$300,991,000; and

(iii) Improvements to pedestrian sidewalks, bike paths, intersections and greenways. Amount: \$80,888,356.

* * *

The referendum passed. The Penny Tax became effective beginning May 1, 2013, and is authorized to run for twenty-two years (through April 30, 2035) to raise over \$1 billion for specified transportation projects throughout Richland County. Since taking effect, the Penny Tax has generated around \$5 million in revenues per month for Richland County. Prior to this dispute, and in accordance with its statutory mandate, DOR allocated and remitted net revenues to the State Treasurer on a monthly basis.

* * *

In April 2015, DOR initiated an audit to determine the County’s compliance with state tax laws, specifically including the Transportation Act.

* * *

Following the audit, DOR informed the County that it had uncovered (1) evidence of public corruption; (2) evidence of criminal violations of state tax laws and (3) unlawful expenditures of Penny Tax revenues by County Council.

DOR identified specific expenditures it believed were problematic.

* * *

Nevertheless, the day following the audit, the County responded that it was “shocked and alarmed” and expressed a willingness to “immediately invoke measures to protect and preserve county money and assets” and reimburse any inappropriate expenditures of Penny Tax funds that may have occurred. Over the next several months, officials from DOR and the County continued written and in-person discussions regarding the results of DOR’s audit.

Id., 422 S.C. 292, 297-302, 811 S.E.2d 758, 761-63 (footnotes omitted) (italics in original; bold and underlining added).

Eventually, the DOR stopped remitting the tax proceeds to Richland County, and Richland County filed suit against the DOR requesting mandamus relief ordering the DOR to remit the monthly payments. The DOR counterclaimed for declaratory judgment that certain expenditures were unlawful.

Shortly thereafter, SCPIF, Sloan and DePass filed a Complaint and an Amended Complaint against Richland County (R. pp. 69-79, 106-115) alleging seven causes of action arising from the same Penny Tax program:

1. Ordinance Number 039-12HR exceeds the scope of S.C. Code Ann. § 4-37-30.
2. Violation of S.C. Code Ann. § 11-35-50.
3. Procurements Exceed the Scope of S.C. Code Ann. § 4-37-30.
4. No Annual, Independent, Public Audit.
5. No Annual Budget.
6. No Annual, Independent Audits of Agencies Receiving Appropriations.
7. Violation of S.C. Code Ann. § 4-37-25.

CMRTA moved to intervene as a Defendant. (R. pp. 80-92). The Circuit Court granted CMRTA’s Motion for Summary Judgment and dismissed the case against the County for failure to prosecute. (R. pp 4-18). Just prior to its Conclusion, the Circuit Court summarized its findings:

The Court finds that the legislative intent is clear from the enabling Act itself. **There is no statutory language that states expenditures of penny tax revenues are limited to “capital costs”.** Further, the legislature’s preamble and findings lead to an opposite result -- penny tax revenues may be expended on the **operation** of transportation-related projects, which the statute specifically defines to include mass transit systems, such as the CMRTA.

(R. p. 18) (emphasis added).

Appellants moved to alter or amend both rulings. (R. pp. 285-296). While those were pending, this Court issued *Richland County v. South Carolina Department of Revenue, et al.*, 422 S.C. 292, 811 S.E.2d 758 (S.C. 2018). Appellants filed a Supplemental Memorandum in Support of Motions to Alter or Amend (R. pp. 301-307), based upon the Supreme Court opinion, but the Circuit Court denied both Motions to Alter or Amend. (R. pp. 1-3). Appellants appealed.

Now Appellants move the Court for certification pursuant to Rule 204(b) because this case involves “an issue of significant public interest or a legal principle of major importance.” whether using Penny Tax funds for the “continued operation” of the CMRTA bus system involves a proper expenditure of the Penny Tax revenues. Richland County has been distributing about 30% of the proceeds of the Penny Tax to CMRTA to be used, not for capital expenditures or transportation facilities, as required by the statute, but rather, for the continuing operations of the bus system. Based on the rationale of this Court’s ruling in *Richland County v. South Carolina Department of Revenue*, 422 S.C. 292, 811 S.E.2d 758 (S.C. 2018), this expenditure is unlawful, and this issue is one of major public importance.

After the *Richland County* case was remanded to the Circuit Court, the Circuit Court entered a Consent Order in the *Richland County* case, explicitly allowing the expenditure of Penny Tax funds for the continued operation of the bus system.

Appellants contend that the South Carolina Supreme Court’s opinion in *Richland County v. South Carolina Department of Revenue* is directly **contrary** to the analysis of the Circuit Court, both in the case at bar and in the Consent Order in the *Richland County* case after remand. *Id.*, 422 S.C. 292, 811 S.E.2d 758 (S.C. 2018). The Supreme Court ruled that **only capital expenditures** qualify as lawful uses of the Penny Tax funds. Under the Supreme Court analysis, and the plain language of the Transportation Act, Penny Tax Revenues may not be used for the “continued operation” of the bus system. Appellants respectfully submit that the Circuit Court’s ruling in this case must be reversed in light of the Supreme Court’s ruling.

This Court ruled that the Transportation Act limited Penny Tax expenditures to “*transportation-related projects.*” [S.C. Code Ann.] § 4-37-30(A)(1)(a)(i) (emphasis added).” *Richland County v. South Carolina Department of Revenue*, 422 S.C. 292, 298, 811 S.E.2d 758, 761 (S.C. 2018). This Court continued:

The revenues generated from such a tax **must be used** in accordance with **statutory restrictions** imposed by the General Assembly—namely, proceeds **must be used for the capital costs** of the types of **transportation projects** identified in the Transportation Act. *Id.* § 4-37-30(A)(15).”

Id., (emphasis added). This Court continued: “At issue in this case is whether and to what extent certain costs qualify as ‘**capital costs**’ and thus are considered **proper expenditures of penny tax revenues.**” *Id.*, (emphasis added). This Court ruled that although some “administrative costs” were allowed under the Transportation Act, those “administrative costs” must be directly related to specific “capital costs.” This Court ruled:

Primarily, **DOR correctly asserted** the County’s expenditure of Penny Tax funds on “**administrative costs**” that were **unrelated to any specific transportation project were improper as they exceeded the scope of the Transportation Act.** DOR informed the County that regardless of what “administrative costs” the County’s Penny Tax Ordinance purported to allow, **only those costs allowable under the Transportation Act were**

proper expenditures of Penny Tax funds. However, DOR also acknowledged this might include certain limited transportation-related administrative costs:

While some administrative costs may be appropriate expenditures under the [T]ransportation [Act], the use of the term “capital costs” in the statute gives some guidance on what administrative costs may be properly allowable under the law. The term “capital cost” is not defined in the law. However, **“capital costs” are generally considered one-time costs incurred for the creation or improvement of tangible property, either real or personal, such as buildings, infrastructure[,] and equipment** The concept of “capitalized costs” for tax purposes is described in detail in Internal Revenue Code (IRC) §§ 263, 263A, and the accompanying regulations Since the [Transportation Act] does not define “capital costs,” these Internal Revenue Code principles can be used to provide guidance as to which costs are properly allowable under the [T]ransportation [Act].

Id., 422 S.C. 292, 302-03, 811 S.E.2d 758, 763-64 (S.C. 2018) (emphasis added). The “continued operation” of the CMRTA is not a “one-time cost,” and therefore it is not a capital expenditure. *Id.* at 292, 302-03.

To provide clarity on what expenditures from the Penny Tax are permissible, the Supreme Court endorsed the Internal Revenue Code §§ 263 and 263A, which explains the meaning of capital expenditures.

In light of the County’s many suspect expenditures of Penny Tax funds, DOR requested an injunction against the County prohibiting the further expenditure of Penny Tax funds **until the County “adopts IRC 263/263A or some other acceptable alternative** as a standard to be used to determine when expenditures are proper within the [Transportation] Act.” **Under these compelling circumstances, we find an injunction is appropriate.** To ensure objective criteria establishing compliance with the Transportation Act, **the County shall be subject to guidelines** for determining whether expenses are properly allocable to a specific transportation project, or the direct administration of a specific transportation project. Accordingly, the County is hereby enjoined from violating the Transportation Act. We direct the circuit court, no later than thirty days following remand, to enter the preliminary injunction in accordance with this opinion.

Id., 422 S.C. 292, 311, 811 S.E.2d 758, 768-69 (S.C. 2018) (emphasis added).

CMRTA is being funded from the Penny Tax proceeds at a rate of about \$3.5 million per quarter. (R. p. 212).¹ Now, according to the CMRTA website, the Penny Tax is not only providing “continued operations” of the bus system for Richland County, it is also providing bus service in Lexington County. The bus system has announced plans to expand into Newberry County. The Penny Tax now also appears to be subsidizing Uber and Lyft fares between 9:00 PM and 3:00 AM. The bus system provides free rides from Five Points to the Vista during daytime hours. It subsidizes bicycle rentals. It subsidizes van pools through Enterprise car rentals. The CMRTA appears to have more money than it knows how to spend, and none of these expenditures are “capital expenditures.”

“Continued operation of mass transit services” is not a “capital cost” under Internal Revenue Code (IRC) §§ 263, 263A. *Richland County v. South Carolina Department of Revenue*. The Circuit Court’s ruling in this case granting Summary Judgment to CMRTA was contrary to the Supreme Court ruling. In addition, the parties in the *Richland County* case and the Circuit Court, upon remand, all agreed to a Consent Order allowing the Penny Tax to fund the “continued operations” of the bus system, also contrary to this Court’s ruling.

This case is pending at the South Carolina Court of Appeals, having been fully briefed. Each month that passes involves the expenditure of large sums of taxpayer money, in violation of the state statute and contrary to this Court’s ruling. Once these monies are

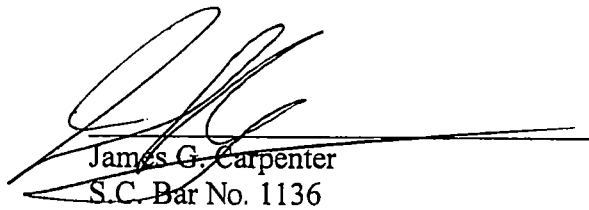
¹ In addition to being unlawful, these provisions are unsustainable. The statute authorizes this Penny Tax only for twenty-two years. The source of the “continued funding” will expire with the statutory authorization for the Penny Tax.

spent, they will be next to impossible to recoup. This Court accepted the *Richland County* case under Rule 204(b), and the case at bar is equally important.

CONCLUSION

This case presents “an issue of significant public interest or a legal principle of major importance.” SCACR 204 (B). Appellants pray the Court to grant their motion under SCACR 204(b) ; to reverse the summary judgment ruling in favor of CMRTA allowing the funding of the “continued operations” of the CMRTA, because it conflicts with the ruling of the Supreme Court in *Richland County v. South Carolina Department of Revenue*, 422 S.C. 292, 811 S.E.2d 758 (S.C. 2018), to remand this case for further proceedings, and to grant Appellants such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC



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Attorney for the Appellants

CERTIFICATE OF SERVICE

The undersigned attorney certifies that he served a copy of the foregoing Appellants' Motion for Certification under SCACR 204 upon counsel for the Respondents by first class mail, postage prepaid, this April 2, 2019, addressed as follows:

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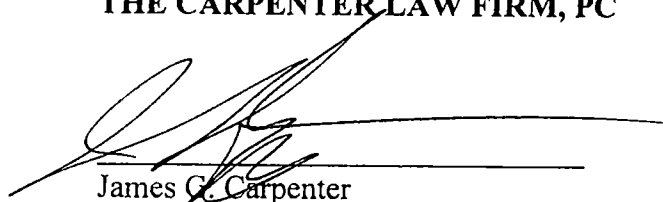
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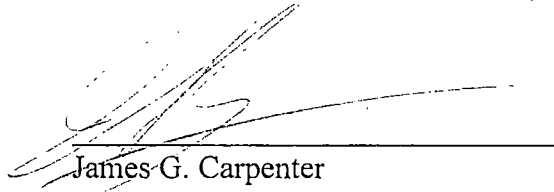
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CERTIFICATE OF SERVICE

The undersigned attorney certifies that he served a copy of the foregoing Appellants' Motion for Certification under SCACR 204 upon the Court of Appeals by first class mail, postage prepaid, this April 9, 2019, addressed as follows:

The Honorable Jenny A. Kitchings
Clerk, SC Court of Appeals
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Respectfully submitted,
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WHEN IT'S WORTH FIGHTING FOR

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April 9, 2019

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SC Court of Appeals

Re: *South Carolina Public Interest Foundation et al. vs. Richland County, et al*
Appellate Case Number 2018-000794

Dear Ms. Kitchings:

I enclose a copy of Appellants' Motion for Certification under SCACR 204, filed at the Supreme Court.

If you need anything else, please telephone me.

Sincerely yours,
THE CARPENTER LAW FIRM, PC



James G. Carpenter

CC w/o encl.: All opposing counsel



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