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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable S. Phillip Lenski, Administrative Law Judge

Case No. 14-ALJ-17-0602-CC
Appellate Case No. 2021-000082

Fairfield Waverly .....Respondent,

v.

Dorchester County Assessor .....Petitioner.

GS Windsor Club, LLC, ...Respondent,

v.

Dorchester County Assessor, ...Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Was the Court of Appeals correct to affirm the Administrative Law Court's decision and hold that the Respondents were eligible for the property tax exemption available under S.C. Code Ann. § 12-37-3135 beginning in the 2014 Tax Year?

COUNTER STATEMENT OF FACTS

This consolidated matter came before the South Carolina Administrative Law Court ("ALC") pursuant to S.C. Code Ann. § 12-60-2540(A) (2011) for a contested case hearing requested by the Fairfield Waverly, LLC and GS Windsor Club, LLC (collectively "Respondents").

This action began when the Respondents filed a request for a contested case hearing with the Administrative Law Court on March 16, 2015. After notice to the parties, a hearing was held on May 20, 2015 at the ALC in Columbia, South Carolina. The issue that was decided by the court is whether, for property tax purposes, Respondents were entitled to benefit from the alternate property valuation available under S.C. Code Ann. § 12-37-3135 (the "ATI Exemption") on a prospective basis for the sales of two real property parcels which occurred in 2012. Both Respondents and Petitioner agreed that Respondents properly filed for and claimed the exemption for the 2014 tax year and following. Respondents failed to file for the exemption by January 31 of the year immediately following the 2012 sales, which in both cases was in 2013.

The two separate cases were consolidated before the ALC. The parties entered into Stipulations of Facts and both sides moved for summary judgment (App. pp. 153-55). The ALC ruled in favor of the Respondents on February 1, 2017 (the "ALC Order") and the Petitioner timely appealed.

The Court of Appeals affirmed the ALC Order by Opinion filed August 26, 2020. Both the Petitioner and Respondents filed Motions for Reconsideration with the Court of Appeals, which were denied. However, the Court of Appeals withdrew, substituted, and refiled its Opinion on December 23, 2020. In its subsequent Opinion, the Court of Appeals clarified that a taxpayer may claim the ATI Exemption for any tax year following the purchase of qualifying property, so long as it is claimed by January 31st of the year in which a countywide reassessment is implemented. *See Fairfield Waverly, LLC v. Dorchester Cnty. Assessor*, Op. No. 5769 (S.C. Ct. App. filed Dec. 23, 2020) (App. pp. 001-009) ("The natural result of reading these statutes together is that a taxpayer who purchases qualifying property before an implementation year may claim the ATI Exemption by January 31 of the implementation year or may also use the appeal procedure in the Revenue Procedures Act.") (the "Order"). In response, the Petitioner filed a timely Petition for Writ of Certiorari with this Court on January 22, 2020 (the "Petition").

ARGUMENT

A. Petitioner Has Not Established Any Basis for Granting its Petition for Certiorari under Rule 242(b), SCACR.

The County's Petition fails to present any reason for this Court to issue a writ of certiorari. South Carolina Appellate Court Rule 242(b) provides that "[a] writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." The Rule then identifies five factors that the Court will consider when determining whether to grant the petition. Simply put, Petitioner has not alleged - - much less demonstrated – in its Petition that it has met any of the five. Rule 242(b), SCACR. This Court has held it will grant certiorari to the court of appeals only where special reasons justify the exercise of that discretion. *S.C. Dep't of Soc. Servs. v. Benjamin*, 430 S.C. 235, 236, 844 S.E.2d 373, 373 (2020) (*citing Haggins v. State*, 377 S.C. 135, 136, 659 S.E.2d 170, 170 (2008) and *In re*

Exhaustion of State Remedies in Criminal Post-Conviction Relief Cases, 321 S.C. 563, 564, 471 S.E.2d 454, 454 (1990)). Here, there are no "special and important reasons" warranting the exercise of this Court's discretion, and Petitioner has not alleged any. Rather, the Petition merely rehashes arguments previously presented to and rejected by both the Administrative Law Court and the Court of Appeals.

The Petition does not indicate that the case involves novel questions of law or that the Court of Appeals' decision is in conflict with a prior decision of this Court. Rule 242(b), SCACR. While Petitioner requests that this Court "asses the gravity of the affects it may inflict upon the counties," Petition at 10, there is nothing in the Record reflecting the impact of this decision on Dorchester Counties or on other counties. Likewise, the decision was unanimous, there is no dissenting opinion, and the decision does not include a federal question, which conflicts with a decision of the United States Supreme Court. *Id.* Accordingly, as the Court of Appeals correctly interpreted the ATI Exemption statute, there is no "special and important reason" to grant the Petition.

1. There is no novel question of law.

The Court of Appeals' determination of the applicability of a statute to the Respondents in this case does not involve a novel question of law. The Court of Appeals correctly interpreted the plain language of the statute which, according to the court, "implicitly, if not directly" acknowledged that taxpayers may apply for the exemption after the first year of eligibility. Order at 6. According to the Court of Appeals:

> First, we find section 12-37-3135's language envisions a taxpayer might not claim the ATI Exemption immediately. As noted above, subsection (C) explains that the ATI Exemption does not apply unless the county has notice "before January thirty-first for the tax year for which the owner first claims eligibility for the exemption." § 12-37-3135C). That language implicitly, if not directly,

> acknowledges an owner might not claim the exemption immediately. It plainly is not an affirmative requirement that a property owner claim the ATI Exemption during the first year of eligibility.
>
> Section 12-37-3135 (B)(1) supports this reading as well. That subsection explains the ATI Exemption "applies at the time the ATI fair market value first applies." This suggests the legislature intended the ATI Exemption's value to be set and established at the time the assessable transfer of interest occurs. *See Beaufort Cty. v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) ("The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly.").

Order at 6.

While the plain meaning and literal language rule normally is applicable, the real purpose and intent of the lawmakers will prevail over the literal import of the words. *Caughman v. Cola. Y.M.C.A.*, 212 S.C. 337, 47 S.E.2d 788 (1948); *Walton v. Walton*, 282 S.C. 165, 318 S.E.2d 14 (1984). The context of the statute must also be examined as part of the process of determining the intent of the General Assembly. *Hancock v. Southern Cotton Oil Co.*, 211 S.C. 432, 45 S.E.2d 850 (1948).

The Court of Appeals correctly identified the legislative intent behind the ATI Exemption statute. Although the General Assembly provides no written record of the legislative intent, the General Assembly's intent in its adoption of § 12-37-3135 was to limit the effect an assessable transfer of interest defined under § 12-37-3150

("ATI") has on the property tax liabilities in the tax years immediately following the ATI. South Carolina law caps the increase of the current fair market value/taxable value in the reassessment year at 15% unless there is an ATI. Prior to the enactment of § 12-37-3135, an ATI would trigger the uncapping of the current fair market value/taxable value of the property in the tax year following the ATI; this would allow for the current fair market value/taxable value to approach the sale price of the property. In many cases, the sale price was *significantly* higher than

the current fair market value, resulting in property tax increases that hurt investors and limited their ability to invest in South Carolina in the future, and created significant competitive disadvantages. The legislature responded by implementing § 12-37-3135 to encourage investment and level the competitive playing field by limiting property tax increases for commercial property in the tax years following an ATI. In both of the cases at issue, if the alternate valuation is not applied for in the 2013 Tax Year, then the taxable values will exceed the sale prices when the properties are reassessed; this is contrary to the legislative intent behind § 12-37-3135.

Further, we note the Court of Appeals properly rejected Petitioner's arguments because its interpretation of the phrase "current property tax year" creates absurd and unintended results. The General Assembly grants taxpayers until January 30 of the tax year for which the owner first claims eligibility for the exemption (Presumably, this is in recognition of the numerous year end closings of real estate for those applying in the first year of eligibility.) Read literally, if a taxpayer purchased a property on February 1, 2020, and applied for the ATI Exemption on January 30, 2021, then under Petitioner's rationale, the taxpayer would never be entitled to the ATI Exemption because the Assessor would have to use the "current fair market value" based on the date of filing – i.e., 2021. By the 2021 tax year, the Assessor would have already reassessed the property, again leaving no difference between the "ATI fair market value" and the "current fair market value."

i. The Court of Appeals properly construed the tax exemption statute.

The construction of a tax exemption statute is not a novel question of law. While Petitioner correctly notes that South Carolina's tax exemption statutes are strictly construed against taxpayers, *see, e.g., CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (stating that South Carolina courts have a long-standing policy of "strictly construing tax exemption statutes against the taxpayer") and Petition at 9-10, this rule does not automatically bar

the grant of tax exemption. As the Supreme Court stated in *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 716 S.E.2d 877 (2011)):

> "This rule of strict construction simply means that constitutional and statutory language will not be strained or liberally construed in the taxpayer's favor. It does not mean that we will search for an interpretation in [the Appellant]'s favor where the plain and unambiguous language leaves no room for construction." It is "[o]nly when the literal application of the statute produces an absurd result will we consider a different meaning."

395 S.C. at 74-5, 716 S.E.2d at 881 (*citing State v. Sweat*, 379 S.C. 367, 376, 665 S.E.2d 645, 650 (Ct. App. 2008)). There is no absurd result with respect to the literal application of the statute's plain language and use of the statutorily defined terms utilized within the ATI Exemption, which now has been adopted by both the Administrative Law Court and the Court of Appeals. In fact, the Court of Appeals correctly noted that Petitioner's construction of the statute is flawed and "would create a disorderly process rather than an orderly one." Order at 7. The Court of Appeals correctly ruled that Petitioner's interpretation viewed § 12-37-3135 (C) in isolation and failed to read the statutory language as a whole. Order at 6 (*citing S.C. State Ports Auth. v. Jasper Cty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) ("In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect."); *Duke Energy Corp. v. S.C. Dep't of Rev.*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) ("[T]he [c]ourt should not concentrate on isolated phrases within the statute, but rather, read the statute as a whole and in a manner consonant and in harmony with its purpose.").

Moreover, while tax exemptions are generally construed against the taxpayer, this rule is not always applied as narrowly when the interpretation of economic tax incentive statutes is involved. Courts in South Carolina, courts in other jurisdictions, and even our very own

Department of Revenue have repeatedly held that such statutes should not be so strictly construed against the taxpayer as to defeat or destroy the legislative intent and should further—not frustrate—the policy of rewarding investment and spurring economic development. *See Southeastern-Kusan, Inc. v. S.C. Tax Comm'n*, 276 S.C. 487, 490, 280 S.E.2d 57, 59 (1981); *Hercules Contractors & Engineers v. S.C. Tax Comm'n*, 280 S.C. 426, 435, 313 S.E.2d 300, 306 (Ct. App. 1984); *Anon. Corp. v. S.C. Dep't of Rev.*, 99 ALJ-17-0153 (1999) (noting that "[c]ourts of other jurisdictions have recognized that construing tax exemption statutes too narrowly could defeat the legislative purpose of such statutes"); *Duke Power Co. v. Bell*, 156 S.C. 299, 301, 152 S.E. 865, 868 (1930), ("'[t]he theory of the transaction is that a public benefit will accrue to the town and its inhabitants by the introduction of the business enterprise. . . . The property of a town is benefitted, both in value and income, by the introduction of business, and the consequent increase of inhabitants.'"). *See also Arizona v. Capitol Castings, Inc.*, 88 P.3d 159, 160 (Ariz. 2004) (concluding machinery exempt from tax by emphasizing the purpose of the tax exemptions was to "stimulate business investment in Arizona in order to improve the state's economy and increase revenue from other taxes" and that the exemptions "should further, not frustrate, the policy of encouraging investment and spurring economic development"); *Sharp v. Tyler Pipe Indus., Inc.*, 919 S.W.2d 157, 161 (Ct. App. Tex. 1996) (terms "liberal" and "strict" as applied to statutory construction can be misleading where other principles are at work; construing tax exemption statutes too narrowly could defeat legislative purpose of economic development); *Idaho State Tax Comm'n v. Haener Bros.*, 828 P.2d 304, 307 (Idaho 1992); and *Amoena Corp. v. Strickland*, 283 S.E.2d 894, 897 (Ga. 1981) (construing the Georgia sales tax exemption for machinery and equipment in which the Georgia Supreme Court stated that "it is true that tax exemptions are to be strictly construed against the taxpayer and doubts resolved in favor of taxability. However, this

should not impinge on the other rule that a statute is to be construed in accordance with its real intent and meaning and not so strictly as to defeat the legislative purpose." 283 S.E.2d at 897.) For Department guidance on point, see Technical Advice Memorandum (TAM) 89-14; S.C. Private Letter Ruling (PLR) 95-3; and S.C. Rev. Rul. 96-11.

ii. The Court of Appeals' decision properly and implicitly finds that the Department's position, first articulated in its 2019 *Amicus* Brief, is not entitled to deference

Petitioner argues the Court of Appeals' Order "overlooks deference afforded to the Department charged with the statute's administration." Petition at 10. The Court of Appeals properly refused to give deference to the Department's opinion in this matter.

As an initial matter, note the Department plays absolutely no role in the receipt, review, or grant of ATI Exemption applications. Instead, each county Assessor is tasked with "determin[ing] assessments and reassessments of real property in a manner that the ratio of assessed value to fair market value is uniform throughout the county." § 12-37-90

. Each county is responsible for accepting and determining the applicability of ATI Exemption applications. *See* S.C. Regs. § 117-1740 ("The purpose of these regulations are to define the *general administrative requirements applicable to the counties in the administration of the property tax law* and to *provide information to be requested or used in county forms for purposes of administering the property tax laws of this State*" (emphasis added).) Note the Department has issued no ATI Exemption Application, has provided no regulation regarding the applicability of the ATI Exemption, and has published no written guidance (either formal or informal) regarding the applicability of the ATI Exemption.

Further, while it is true that the long-standing interpretation of a statute by an agency tasked with its administration may be afforded deference, *Media Gen. Comm'cns, Inc. v. S.C. Dept. of*

Revenue, 388 S.C. 138, 149, 694 S.E.2d 525, 530 (2010), the rule of deference is not implicated where the language of the statute speaks directly to the issue. The agency deference doctrine is explained as follows:

> Interpreting and applying statutes and regulations administered by an agency is a two-step process. First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. If the statute or regulation is silent or ambiguous with respect to the specific issue, the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference.

Kiawah Dev. Part., II, v. S.C. Dept. of Health and Envtl. Control, 411 S.C. 16, 33, 766 S.E.2d 707, 717 (2014) (internal citations omitted) ("*Kiawah II*"). "[T]he deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. [Courts] defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Kiawah II* at 34-35, 766 S.E.2d at 719 (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). Where the interpretation is contrary to the plain language of the statute, "the Court will reject the agency's interpretation." *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003); *see also Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 651 (4th Cir. 2018) ("We accord no deference to an agency's improper interpretation of a decidedly unambiguous regulation.")

In this case, the agency's interpretation was in no way published or even uttered before this litigation began. The Department's informal position was only formalized by means of an *Amicus* brief filed almost five years after the Respondent filed for the ATI Exemption in this matter. "Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law." S.C. Code Ann. § 1-23-10(4); *see also S.C. Dept. of Revenue v. Eugene T. Spann, d/b/a*

Spann's Market, Docket No. 18-ALJ-17-0050, 2018 WL 3328152 *5 (S.C. Admin. Law J. Div. June 21, 2018) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference. Instead, interpretations contained in formats such as opinion letters are entitled to respect but only to the extent that those interpretations have the power to persuade.") (Internal quotations omitted). Giving deference to the Department's position whenever it files an *Amicus* brief with a court would set a dangerous precedent consolidating far too much power in state agencies. If courts were required to defer to an agency's position articulated after-the-fact in briefs before this Court, then State agencies could effectively dictate the outcome of cases before South Carolina courts with the stroke of a pen.

Even if the Department's interpretation of § 12-37-3135 was a long-standing one, the agency deference doctrine is not reason to perpetuate an agency's improvident interpretation of the law. "This Court is free to read the statute based on its plain language without deference to the [agency]'s position." *State v. Sweat*, 379 S.C. 367, 384, 665 S.E.2d 645, 655 (Ct. App. 2008). The Department's interpretation of § 12-37-3135 as providing only a limited window to apply for the ATI Exemption is similar to an interpretation of the Department in *The Fellowship Society v. South Carolina Department of Revenue* rejected by this Court. *See* Docket No. 07-ALJ-17-0258, 2008 WL 2362843 (S.C. Admin. Law J. Div. May 5, 2008). In that case, the Department determined that a "fraternal society" eligible for exemption from property tax pursuant to Section 12-37-220(B)(12) "must have both a fraternal and a charitable component." *Id.* at *3. Based on its belief that the Society had not demonstrated it "was suitably engaged in charitable work," the Department denied the request for property tax exemption. *See Id.* On review, this Court evaluated the statutory language and explored the meaning of "fraternal" for purposes of the exemption, a word

not defined in the statute, in response to the Department's assertion that "a charitable requirement be read into [the exemption]." *Id* *4. This Court concluded,

> Here, Section 12-37-220 (B)(12) contains no specific charitable requirement. To the contrary, Section 12-37-220 (A)(4) provides that 'charitable trusts and foundations used exclusively for charitable and public purposes' may receive an exemption for the 'buildings and premises actually occupied by the owners of the real property.' Therefore, looking at the statute as a whole, it is clear that if the General Assembly had intended for Section 12-37-220 (B)(12) to contain a charitable component, it certainly could have imposed that condition as it did in Section 12-37-220(A)(4). For these reasons, the Court concludes that Section 12-37-220(B)(12) does not contain a charitable component.

Id. at *7.

Respondent submits that as in the analysis of Section 12-37-220 (B) in response to the Department's assertion that a charitable requirement *be read into* the exemption, so too should the Court conclude that § 12-37-3135 does not contain an implicit, shortened eligibility requirement, given the direct language of § 12-37-3135 (C), which the Court of Appeals characterizes as "plainly [] not an affirmative requirement that a property owner claim the ATI Exemption during the first year of eligibility." Order at 6. Had the General Assembly saw fit to include a limited window for application in the property tax exemption, it would have provided a more explicit limitation in the plain language of the statute. With these obvious and intentional acts of the Legislature in mind, it cannot be affirmed that there also exists an unwritten, implicit requirement.

2. Petitioner has not established any exceptional circumstances that would justify granting the Petition of Certiorari.

"[A] writ of certiorari may be issued when exceptional circumstances exist." *Lafitte v. Bridgestone Corp.*, 381 S.C. 460, 471, 674 S.E.2d 154, 160 (2009). In the civil context, this Court has only granted a writ of certiorari based on exceptional circumstances twice. First, *In re Breast Implant Product Liability Litigation*, 331 S.C. 540, 503 S.E.2d 445 (1998), this Court was faced

with considering appeals of numerous product liability cases, all of which had been affected by a single order of the assigned judge. While this Court granted certiorari, it noted that it will "not generally accept matters on a writ of certiorari that can be entertained in the trial court or on appeal" and "will not issue a writ of certiorari merely to relieve a circuit court's burden of deciding difficult issues in high profile cases." *Id.* at 543 n.2.

Later, in *Lafitte*, this Court employed the exceptional circumstances test to grant certiorari because the trial court had ordered the production of confidential information which appeared to be protected by the South Carolina Trade Secrets Act. Given the potential irreparable and immediate damage the production of confidential information may cause, the Court recognized the limited applicability of the "exceptional circumstances" standard in civil litigation.

Based on this standard, "exceptional circumstances" do not exist in this case to warrant a grant of certiorari. The issues of statutory construction and interpretation of legislative intent surely are matters which can be "entertained" appropriately by the Court of Appeals. Further, there is comparable irreparable harm or immediate damage that will result from the Court of Appeals' ruling.

B. Assessing the Gravity the Court's Decision on the Counties

The Petition asks: "Petitioner would respectfully request review of the Opinion . . . and assess the gravity of the affects it may inflict upon the Counties." Petition at 10. Appellate Courts rule upon the wordings—not revenue impact—of legislation.

In addition, there is nothing in the record establishing the "gravity" of the decision upon the Counties (other than the revenue impact of the two cases before the Court). Indeed, the only reference to other Counties in this matter is the Realtor's Amicus which notes that Charleston County has followed the procedure argued by Respondents (i.e. to allow property owners to

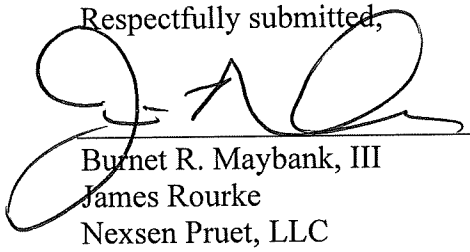
receive the ATI Exemption prospectively, so long as they notify the County in the year following its first year of eligibility).

And what is the revenue impact of Respondents' filing? Suppose a property owner does not notify the County regarding its ATI Exemption eligibility for three years following its first year of eligibility. Since the statute explicitly disallows refunds, the filing is purely prospective. This means the taxpayer has over-paid property taxes for three years! When a property owner files its ATI Exemption Application after its first year of eligibility, that later filing is actually a revenue positive to the County, since no refunds are allowed for prior years.

CONCLUSION

Based on the foregoing, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari filed by the Petitioner on January 22, 2021. A writ of certiorari must be granted in limited circumstances and only for "special and important reasons." The Petition fails to present any reason for this Court to issue a writ of certiorari.

Respectfully submitted,



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