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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

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

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APPELLANTS' PETITION FOR REHEARING

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STATEMENT OF THE CASE

Appellants South Carolina Public Interest Foundation and William B. DePass, Jr.[1] petition the court for rehearing pursuant to SCACR 221(a). "A petition for rehearing . . . shall state with particularity the points supposed to have been overlooked or misapprehended by the court."

This case addresses the Optional Methods for Financing Transportation Facilities Act (Transportation Act)[2] and Richland County Ordinance Number 039-12HR, the penny tax ordinance.

In *Richland County v. South Carolina Department of Revenue, et al.*, the Supreme Court also addressed the Transportation Act and Ordinance Number 039-12HR. The Court made several specific rulings that penny tax funds **must** be used for **capital** costs. *Id.*, 422 S.C. 292, 811 S.E.2d 758 (2018).

> **The revenues generated from [the penny] 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).
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> **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." *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.

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[1] Appellant Edward D. Sloan died during the pendency of this appeal.
[2] S.C. Code Ann. §§ 4-37-10 to -50 (Supp. 2017).

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

The Supreme Court also said, "**[T]he Transportation Act**, . . . **requires a nexus between expenditures and a transportation-related capital project**." *Id.*, 422 S.C. 292, 311, 811 S.E.2d 758, 768 (emphasis added).

Ordinance Number 039-12HR purported to use the penny tax to fund "continued operation of mass transit services provided by the Central Midlands Regional Transit Authority." *Id.*, Section 2. (c), Project 2. The "continued operation of mass transit services provided by Central Midlands Regional Transit Authority" is not a capital cost by **any** definition. The Court of Appeals does not suggest that.

Nevertheless, the Court of Appeals ruled that "continued operation of mass transit services" was a proper use of penny tax revenues. At the beginning, the Court of Appeals stated its thesis: "Put simply, we believe running a mass transit system falls under 'the administration of a specific transportation project.'" *South Carolina Public Interest Foundation, et al., v. Richland County, et al.*, Opinion No. 5865 filed October 6, 2021, p. 2. The Court discussed the facts and the statute and then concluded: "the statute authorizes spending funds on operating transportation-related projects, not just transportation-related facilities." *Id.* p. 5.

Twice in its 9-page opinion, the Court of Appeals quoted a sentence from *Richland County v. SCDOR,* stating that proper expenditures from the penny tax "must be tethered to a specific transportation-related capital project *or* the administration of a specific transportation project." Both times, the Court of Appeals added emphasis to the word "or," and both times the Court of Appeals focused on the phrase "the administration of a specific

transportation project." The Court of Appeals relies on one ambiguous, alternative object of a preposition, in an opinion that says repeatedly that **all** penny tax expenditures **must** relate to **capital** costs.

Accordingly, Appellants respectfully suggest the Court of Appeals "overlooked" the main holding of *Richland County v. SCDOR* and "misapprehended" one part of one ambiguous phrase in the Supreme Court opinion.

ARGUMENT

"CONTINUED OPERATION OF MASS TRANSIT SERVICES" IS NOT A PROPER ADMINISTRATIVE CAPITAL EXPENDITURE.

Richland County v. SCDOR demonstrates that funding the continuing operations of a multi-million-dollar, multi-county bus system for many years is not an administrative expense permitted by the Transportation Act.

I. The Ordinance Authorizes Certain Administrative Costs.

The Richland County Ordinance Number 039—12HR authorized the payment of certain administrative costs.

> Subject to annual appropriations by County Council, sales and use tax revenues shall be used for the **costs of the projects** established in this Ordinance, as it may be amended from time to time, *including, without limitation, payment of administrative costs of the projects*, and such sums as may be required in connection with the issuance of bonds, the proceeds of which are applied to pay costs of the projects.

Richland County v. SCDOR, 422 S.C. 292, 300, 811 S.E.2d 758, 762 (S.C. 2018) (*italics in the Supreme Court opinion*; *bold and underlining added*).

The proper definition of "administrative costs" was at the heart of the dispute between Richland County and the SCDOR. The County asserted that all of its "dubious costs" were "administrative costs." During the dispute, "**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**." *Id.*, 422 S.C. 292, 302, 811 S.E.2d 758, 763-64 (2018) (emphasis added).

II. *Richland County v. SCDOR* Defines Proper Administrative Costs as Costs that Can Be Capitalized.

DOR contended that the "administrative costs" must relate to capital expenditures. Allowable costs had to be "administrative costs" that could be properly "capitalized," not "expensed." The SCDOR **equated** "administrative costs [that] may be properly allowable under the law" with "capital costs." *Id.* 422 S.C. 292, 303, 811 S.E.2d 758, 763-64 (2018).

Then DOR explained to Richland County how to define "capital costs." The SCDOR suggested to the County that IRC §§ 263 and 263A, or a similar definition, which defined capital costs, should guide the County's allowable expenditures from the Penny Tax Fund. *Id.*, 422 S.C. 292, 312, 811 S.E.2d 758, 768 (2018).

IRS Code sections 263 and 263A distinguish between capital and non-capital expenditures. SCDOR suggested these sections could help the County determine which costs were proper administrative capital costs under the Transportation Act.

Section 263 is entitled: "Capital Expenditures." It governs federal income tax and disallows deductions from federal income tax for capital expenditures. The "General Rule" is "No deduction shall be allowed for . . . Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate." *Id.* It distinguishes in great detail between capital expenditures which must be "capitalized," and expenses, which may be deducted from income as they are incurred.

Similarly, section 263A addresses **costs** and distinguishes between those costs that must be capitalized and those costs that may be deducted as "expenses." Section 263A is entitled "Capitalization and inclusion in inventory costs of certain expenses." *Id.* It addresses the "Nondeductibility of certain direct and indirect costs." *Id.*

The Supreme Court agreed with the SCDOR that the same distinction as to deductibility applied generally to those costs that were allowable expenditures from the penny tax (those that could be capitalized) and those costs that were classified as expenses (and could not be capitalized). Those costs that could not be capitalized were not permitted expenditures from the penny tax.

The Supreme Court explained what it meant by administration, or proper administrative costs:

> 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). Again, the Supreme Court ruled that the SCDOR "correctly asserted" these matters.

The Supreme Court ordered the parties to develop guidelines such as the Internal Revenue Code §§ 263 and 263A, "or some other acceptable alternative," which explained the meaning of capital expenditures. In other words, the allowable administrative expenditures must be properly categorized as capital expenditures under IRC 263/263A or some acceptable alternative.

> 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).

The Transportation Act was for "financing transportation **facilities**." The "continued operation" of the CMRTA is not "facilities. It is not a "one-time cost." It is not an administrative cost that can be capitalized. *Id.* at 292, 302-03. Accordingly, it is not a proper administrative capital expenditure, and it violates the Transportation Act.

III. The Context of the Phrase at Issue Defines Proper Administrative Costs as Costs that Can Be Capitalized.

As noted above, the Court of Appeals quoted a particular phrase twice and relied heavily upon it. Appellants suggest it would be helpful to examine the context of the ambiguous phrase. The paragraph containing the phrase is as follows:

> It is axiomatic that **the County's Ordinance may not expand** the scope of expenditures authorized in the enabling provisions of **the Transportation Act**, which **requires a nexus between expenditures and a transportation-related capital project**. *See, e.g.*, S.C. Code Ann. § 4-37-30(A)(1)(a)–(c); *Sinkler v. County of Charleston*, 387 S.C. 67, 76–78, 690 S.E.2d 777, 781–82 (2010) (invalidating a county ordinance that failed to establish a development scheme as contemplated by the relevant enabling legislation and rejecting the county's argument that the flexibility and authority conferred by the enabling legislation authorized the county to employ measures beyond the scope of the enabling legislation); *Holler v. Ellisor*, 259 S.C. 283, 287, 191 S.E.2d 509, 510 (1972) (observing that local government enactments and regulations "must be authorized by the enabling act, at least, where they are enacted pursuant to the authority conferred by such act, and they can be no broader than the statutory grant of power"). **A proper expenditure of Penny Tax funds must be tethered to** a specific transportation-related **capital project** or the **administration** of a specific transportation project.

Id., 422 S.C. 292, 311-312, 811 S.E.2d 758, 768 (S.C. 2018) (emphasis added).

With the Supreme Court's repeated declarations that the penny tax may be used only for capital expenditures, the context of the ambiguous phrase in question suggests that it should be understood as follows: "A proper expenditure . . . must be tethered to a . . . project or the administration of a . . . project." What kind of "project?" A **capital** project, as stated repeated throughout the opinion. Such an understanding is consistent with the rest of the opinion, especially those parts that are clear.

The Supreme Court ruled that although some "administrative costs" were allowed under the Transportation Act, those "administrative costs" must be directly related to specific "capital costs." In the case at bar, **continued operation** of the Transit Authority

is not a capital project, nor is it a proper administrative expenditure that can be capitalized. 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. Accordingly, the Court of Appeals' holding conflicts with the Supreme Court's holding in *Richland County v. South Carolina Department of Revenue*, 422 S.C. 292, 811 S.E.2d 758 (S.C. 2018).

CONCLUSION

Appellants pray the Court to rehear this matter, reverse the summary judgment ruling in favor of CMRTA, and rule that the funding of the "continued operations" of the CMRTA from the Penny Tax is not a proper administrative capital expenditure under the Transportation Act, in accordance with *Richland County v. South Carolina Department of Revenue*, 422 S.C. 292, 811 S.E.2d 758 (S.C. 2018).

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served a copy of the foregoing Appellants' Petition for Rehearing upon the following counsel for the Respondents by email, along with the electronic filing to the Court, as allowed by the emergency appellate court rules, this October 15, 2021:

Elizabeth Gray
Rob Tyson
Alexis K. Lindsay

Andrew Lindemann

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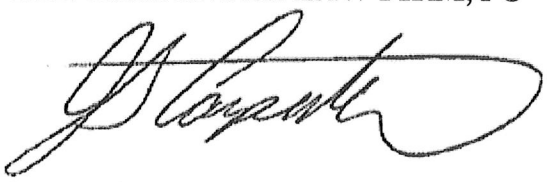

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