THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM
Administrative Law Court

The Honorable Deborah Brooks Durden, Administrative Law Judge

---

Case No.: 12-ALJ-17-0126-CC

Mitul Enterprises, L.P.....Appellant

-vs-

Beaufort County Assessor.....Respondent

APPELLANT'S INITIAL BRIEF

J. Ashley Twombley
Twenge + Twombley Law Firm
S.C. Bar #72916
311 Carteret Street
Beaufort, SC 29902
Telephone: (843) 982-0100
Facsimile: (843) 982-0103
www.twlawfirm.com
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

I. Whether the Administrative Law Court erred in limiting the long standing rule of construction requiring that taxpayers should receive the benefit of the doubt in the enforcement of tax statutes solely to cases involving either the amount of the tax or determining whether the tax payer is subject to the tax.

II. Whether the Administrative Law Court erred in applying S.C. Code Ann. § 12-39-220 to this case when a computer error by the Assessor's office caused the mistake on the Assessment Notice and the 2009 Beaufort County Property Tax Bill.

III. Whether the Administrative Law Court erred in allowing the Beaufort County Assessor to use authority of S.C. Code Ann. § 12-39-220 since South Carolina Code Ann. § 12-39-220 gives authority to County Auditors only.

IV. Assuming *arguendo* that the Beaufort County Assessor can exercise the authority of S.C. Code Ann. § 12-39-220, whether the Administrative Law Court erred in finding that the new construction was omitted from the duplicate.

V. Assuming *arguendo* that the Beaufort County Assessor can exercise the authority of S.C. Code Ann. § 12-39-220, whether the Administrative Law Court erred in applying S.C. Code Ann. § 12-39-220 when the Beaufort County Assessor testified that there is no duplicate as required by S.C. Code Ann. § 12-39-220.

VI. If S.C. Code Ann. § 12-39-220 applies to this case, whether the Administrative Law Court erred in allowing additional 2009 property tax to be collected without an assessment notice.

STATEMENT OF THE CASE

Appellant Mitul Enterprises, L.P., (hereinafter Mitul Enterprises) owns real property in Beaufort County identified as TMS # R122 001 000 0001 0000. (Assessment Notice dated 10/15/09; Appeal Form dated 11/23/09). In 2008 and 2009, Mitul Enterprises added a Holiday Inn and Suites on the property, and Respondent Beaufort County Assessor sent out an Assessment Notice Dated 10/15/09 that included the new construction in the market value of $11,775,674.00. (Assessment Notice dated 10/15/09). Mitul Enterprises appealed the assessed value of $11,775,674.00 and estimated the value

of the parcel at $9,000,000.00. The Beaufort County Assessor subsequently changed the value of the property to $9,000,000.00. (Notice of Action – Value Change).

The Beaufort County Treasurer Office then sent a 2009 Beaufort County Property Tax Bill to Mitul Enterprises with a total tax due of $14,290.10. (2009 Beaufort County Property Tax Bill). After receiving the 2009 Beaufort County Property Tax Bill, Mitul Enterprises timely paid the taxes due, and Beaufort County accepted the tax payment in January 2010. (Hearing Transcript p.44, lines 9-25; p.50, lines 22-25).

After Mitul Enterprises paid its 2009 property tax bill in January 2010, it received a letter dated June 23, 2010 (five months after the taxes were paid and accepted) from the Beaufort County Assessor stating that the taxable value was not based on the correct market value and asked for additional 2009 property taxes to be paid in the amount of $105,282.48. (6/23/10 Tax Notice Correction Letter; Hearing Transcript p. p.50, lines 22-25). Mitul Enterprises timely appealed the attempt to assess additional 2009 property taxes first to the Beaufort County Assessor. (7/22/10 Appeal Letter to Assessor). The Beaufort County Assessor denied the appeal. (9/27/10 Letter Denying Appeal). Mitul Enterprises then filed an appeal with the Beaufort County Tax Equalization Board. (10/15/10 Letter to Assessor). The appeal was denied, and Mitul Enterprises then sought a contested case hearing before the Administrative Law Court.

A hearing was held before the Administrative Law Court on November 12, 2012. After the hearing, the Administrative Law Court filed a Final Order and Decision on December 14, 2012 that upheld the imposition on additional 2009 property taxes on the parcel. Mitul Enterprises timely filed a Notice of Appeal. (Notice of Appeal).

ARGUMENT

I. The Administrative Law Court erred in limiting the long standing rule of construction requiring that taxpayers should receive the benefit of the doubt in the enforcement of tax statutes solely to cases involving either the amount of the tax or determining whether the tax payer is subject to the tax.

Under the Administrative Procedures Act, a reviewing court "may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(5).

In the instant case, the Administrative Law Court erred in holding that the long standing rule of construction that taxpayers should receive the benefit of the doubt in enforcement of tax statutes is limited solely to (1) the amount of tax or (2) whether a taxpayer is subject to the tax.

While the rule of construction that taxpayers should receive the benefit of the doubt in the enforcement of tax statutes has certainly been applied to the two scenarios posited by the Administrative Law Court, it has been applied to other situations as well. For example, in Atlantic Coast Lumber Corp. v. Query, 171 S.C. 441, 172 S.E. 432 (1934), the Supreme Court was asked to determine if an agreement between Atlantic Coast Lumber Corporation and Internal Revenue Service to waive a time limit relating to payment of taxes should also apply to the South Carolina Tax Commission. The Supreme Court held that the waiver did not apply to the South Carolina Tax Commission,

stating that "[n]umerous cases hold that the taxpayer should receive the benefit in cases of doubt in the enforcement of tax statutes, and this is a typical case for the application of that rule." Id. at 444, 172 S.C. at 433.

Additionally, the Supreme Court has applied this rule of statutory construction to determine whether S.C. Code Ann. § 12-54-80(2) may be applied retroactively to validate an assessment which was untimely under S.C. Code Ann. § 12-35-1370. South Carolina National Bank v. S.C. Tax Commission, 297 S.C. 279, 376 S.E.2d 512 (1989). In its analysis of whether the statute of limitations should have retroactive or prospective application, the Supreme Court stated that "[i]n the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt." Id. at 281, 376 S.E.2d at 513.

In Hadden v. S. Carolina Tax Comm'n, 183 S.C. 38, 190 S.E. 249, 252 (1937), the Supreme Court was asked to determine whether income received by trustees of a trust came into the hands of the trustee as "income from fiduciaries" or as "dividends and interest." In finding that the tax statute at issue could not be extended by implication, and that any doubt must be resolved in favor of the taxpayer and against the government, the Supreme Court stated as follows:

> It is a well-established principle of law that tax statutes cannot be extended by implication beyond the clear import of the language used, and in case of doubt, such doubt must be resolved against the government, and in favor of the taxpayer. On behalf of the government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the word employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer.

> Mr. Justice Sutherland, in delivering the opinion of the court in the last-mentioned case, quoted from an old case: I am not at all sure that in a case of this kind form is not amply sufficient; because, as I understand the principle of all physical legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, is there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

Hadden v. S. Carolina Tax Comm'n, 183 S.C. 38, 190 S.E. 249, 251-52 (1937) (internal citations and quotations omitted).

In its Order, the Administrative Law Court relies upon Cooper River Bridge, Inc. v. S.C. Tax Commission, 182 S.C. 72, 188 S.E. 508 (1936), and Alltel Communications, Inc., v. S.C. Dept. of Revenue, 399 S.C. 313, 731 S.E.2d 869 (2012), to support its decision to limit the application of the rule that taxpayers should receive the benefit of doubt in enforcement of tax statutes. However, such reliance is misplaced.

In Cooper River Bridge, the Court was asked to determine whether the Cooper River Bridge, Inc., was a public service corporation or a domestic non-public utility corporation. The classification would determine whether the Cooper River Bridge, Inc., could deduct the interest on its bonded indebtedness from its income. In its analysis, our Supreme Court stated:

> In construing the statutes under which the tax has been assessed, our Supreme Court has pointed out in numerous cases that **the taxpayer must receive the benefits in cases of doubt in the enforcement of tax statutes**. *Atlantic Coast Lumber Corporation v. Derham,* 171 S.C. 441, 172 S.E. 432; *Columbia Railway, Gas & Electric Co. v. Carter,* 127 S.C. 473, 121 S.E. 377; *Columbia Gaslight Company*

> *v. Mobley,* 139 S.C. 107, 137 S.E. 211. And has said that where the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor. *Fuller v. South Carolina Tax Commission,* 128 S.C. 14, 121 S.E. 478. And this likewise is the rule of construction laid down by the Supreme Court of the United States in the case of *United States v. Merriam,* 263 U.S. 179, 44 S.Ct. 69, 68 L.Ed. 240, 29 A.L.R. 1547, where that court said that in statutes levying taxes, **the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used, and if the words are doubtful, the doubt must be resolved against the government and in favor of the tax payer.**

Id. at 76, 188 S.E. at 509-10 (emphasis added).

Cooper River Bridge analyzed whether the Cooper River Bridge, Inc., was a domestic non-public utility corporation or a public service corporation and thus discussed that, if there were a doubt as to whether a tax applied to Cooper River Bridge, Inc., it should be given the benefit of the doubt. However, the Court did not limit the application of the rule of statutory construction that taxpayers must receive the benefit of the doubt in the enforcement of tax statutes to cases involving whether the taxpayer is subject to a tax. In fact, the Court cited the broad version of the rule at least twice in its analysis.

Further, as discussed above, the South Carolina appellate courts have applied the benefits of the doubt rule to situations other than whether a taxpayer is subject to a tax since 1936. See South Carolina National Bank, 297 S.C. at 279, 376 S.E.2d at 512.

Likewise, the court in Alltel Communications did not limit the application of the rule solely to questions of (1) whether a taxpayer is subject to the tax or (2) the amount of the tax. In Alltel Communications, the question before the Court was whether Alltel Communications was a telephone company for purposes of tax law. Finding that there

was ambiguity as to whether Alltel Communications was a telephone company, the Court resolved the ambiguity in favor of Alltel Communications. Id. at 321, 379 S.E.2d at 873. In doing so, the court cited the rule that any doubt in the application of a tax statute must be resolved in favor of the taxpayer. For example, the court noted that "[h]ere, the ALC referenced the settled principle that any substantial doubt in the application of a tax statute must be resolved in favor of the taxpayer." Id. at 318; 379 S.E.2d at 872.

In addition, the court stated the issue and its result as follows: "[i]n this regard, Petitioners contend the court of appeals erred in failing to construe **any** ambiguity in the tax statute against DOR. It necessarily follows, according to Petitioners, that such ambiguity must be construed in the taxpayers' favor. We agree." Id. at 321, 379 S.E.2d at 873 (emphasis added).

During its analysis, the Supreme Court stated:

> However, "**[i]n the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt.**" *S.C. Nat'l Bank v. S.C. Tax Comm'n,* 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989) (citing *Cooper River Bridge, Inc. v. S.C. Tax Comm'n,* 182 S.C. 72, 188 S.E. 508 (1936)). "[W]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor." *Cooper River Bridge, Inc.,* 182 S.C. at 76, 188 S.E. at 509-510; *see also SCANA Corp. v. S.C. Dep't of Revenue,* 384 S.C. 388, 394 n. 3, 683 S.E.2d 468, 471 (2009) (*Beatty*, J., dissenting) (noting **general rule that where substantial doubt exists as to the construction of tax statutes, the doubt must be resolved against the government**).

Id. (emphasis added).

In Alltel Communications, the Court applied the general rule that doubt in the application of a tax statute must be resolved in favor of the taxpayer in a case which

raised the question of whether Alltel Communications fell within the purview of a tax statute. However, Alltel Communications in no way limited the scope of the rule to only such situations. In fact, as quoted above, the court reiterated the broad scope of the rule several times in its opinion.

Accordingly, the Administrative Law Court erred in limiting the scope of the rule of construction that taxpayers should receive the benefit of the doubt in the enforcement of tax statutes solely to (1) the amount of tax or (2) whether a taxpayer is subject to the tax and thus erred in failing to apply the rule to the instant case.

II. The Administrative Law Court erred in applying S.C. Code Ann. § 12-39-220 to this case when a computer error by the Assessor's office caused the mistake on the Assessment Notice and the 2009 Beaufort County Property Tax Bill.

Ed Hughes, the Beaufort County Assessor, testified that a computer error was the cause of the mistakes on the Assessment Notice dated October 15, 2009, and the 2009 Beaufort County Property Tax. (Hearing Tran. p.40, line 4-p.41, line 3; p.84, line 14-p.85, line 25). Therefore, the Administrative Law Court erred in allowing the Beaufort County Assessor to use S.C. Code Ann. § 12-39-220, the omitted property statute, to fix that mistake.

The Assessment Notice dated October 15, 2009 states a market value that includes the new hotel building. (Assessment Notice; Hearing Transcript p.45, lines 1-14). In addition, the Notice of Action – Value Change also states a market value that includes the new hotel building. (Notice of Action; Hearing Transcript p.45, lines 15-24). However, the computer program that fills in the values for taxable values and capped values incorrectly remained static. Therefore, the taxable value and capped value for the property did not change when the market value changed. (Hearing Transcript

p.84, line 14-p.85, line 25). This mistake occurred when the market value changed due to the addition of the new hotel building, and when the appeal was resolved that changed the market value from $11,775,674.00 to $9,000,000.00.

No one from the Assessor's Office noticed the error on the October 15, 2009 Assessment Notice. (Assessment Notice). No one from the Assessor's Office noticed the error in the course of resolving the appeal of the market value for the property that was filed by Mitul Enterprises, Inc. (Appeal Form). No one from the Assessor's Office noticed the error when preparing the Notice of Action – Value Change. (Notice of Action). No one noticed the error when sending out the 2009 Beaufort County Property Tax Bill. (Property Tax Bill).

After receiving the 2009 Beaufort County Property Tax Bill, Mitul Enterprises timely paid its taxes, and Beaufort County accepted the tax payment in January 2010. (Hearing Transcript p.44, lines 9-25; p.50, lines 22-25). It was not until June 18, 2010 (5 months after the taxes were billed, paid and accepted), that Henry Copeland of the Assessor's Office discovered the error that the taxable value and capped value for the property listed on the assessment notice did not change when the market value changed. (June 18, 2010, Emails; Hearing Transcript p.40, line 4 – p.41, line 3; p.84, line 14-p.85, line 25).

Since the Beaufort County Assessor did not discover this computer error until **after** Mitul Enterprises paid its property tax, the Beaufort County Assessor cannot simply correct the error and assess additional property taxes for 2009 by simply writing a desk letter to Mitul Enterprises demanding additional taxes. Under S.C. Code Ann. § 12-39-250(A), "**[a]t any time prior to payment of the tax** the auditor shall also correct upon the duplicate for any tax year any errors that may be discovered that were made by

county or state officers. **At any time during the current tax year and before payment of the tax** the auditor further shall correct other errors that may appear in the duplicate." (Emphasis added). Accordingly, once Mitul Enterprises paid its property tax for 2009, no one had the ability to assess additional 2009 property taxes based on the computer error.

Thus, the evidence of the case clearly established that a computer error was responsible for the error on Mitul Enterprises' assessment and tax bill. Since a computer error was the cause and since Mitul Enterprises has paid its 2009 property taxes, the Administrative Law Court erred in allowing the Beaufort County Assessor to use S.C. Code Ann. § 12-39-220, the omitted property statute, to fix the error.

III. S.C. Code Ann. § 12-39-220 gives authority to County Auditors, and the Administrative Law Court erred in allowing the Beaufort County Assessor to use authority of S.C. Code Ann. § 12-39-220.

The Administrative Law Court erred in allowing the Beaufort County Assessor to use the authority of S.C. Code Ann. § 12-39-220 in this matter since S.C. Code Ann. § 12-39-220, by its literal terms, applies only to County Auditors.

Ed Hughes testified before the Administrative Law Court that he is the Beaufort County Assessor and was the Assessor during all times relevant to this matter. (Hearing Transcript p.15, lines 10-23). Mr. Hughes stated that Sharon Burris is the Beaufort County Auditor and has been for the past twenty years. (Hearing Transcript p.15, line 24-p.16, line 11). According to Mr. Hughes, the Auditor's office and the Assessor's office are separate entities, do not share employees, and have different duties and responsibilities. (Hearing Transcript p.39, line 20-p.40, line 3). Ed Hughes testified that he has never been an auditor. (Hearing Transcript p.16, lines 11-14).

Beaufort County's separation of the duties and responsibilities of the auditor and assessor is mandated by the South Carolina Code of Laws and mirrors the separation

between the offices in the Code itself. Chapter 39 of Title 12 of the Code is devoted to County Auditors. Among other duties, County Auditors are charged with entering the county duplicate list. S.C. Code Ann. § 12-39-150. County Auditors "shall enter the taxes on the duplicate retained in [their] own office[s] in the number of columns as the department directs." S.C. Code Ann. § 12-39-190. Further, "[i]f the county auditor shall at any time discover that any real estate or new structure, duly returned and appraised for taxation, has been omitted from the duplicate, he shall immediately charge it on the duplicate with the taxes of the current year and the simple taxes of each preceding year it may have escaped taxation." S. C. Code Ann. § 12-39-220.

Chapter 27 of Title 12 addresses the assessment of property taxes and the duties of County Assessors. Each county must have a full-time Assessor. The Assessor's "responsibility is appraising and listing all real property." S.C. Code Ann. § 12-37-90. The Assessor is responsible for the operations of his office and shall:

> (a) maintain a continuous record of recorded deed sales transactions, building permits, tax maps, and other records necessary for a continuing reassessment program;
>
> (b) diligently search for and discover all real property not previously returned by the owners or their agents or not listed for taxation by the county auditor, and list such property for taxation in the name of the owner or person to whom it is taxable;
>
> (c) when values change, reappraise and reassess real property so as to reflect its proper valuation in light of changed conditions, except for exempt property and real property required by law to be appraised and assessed by the department, and furnish a list of these assessments to the county auditor;
>
> (d) determine assessments and reassessments of real property in a manner that the ratio of assessed value to fair market value is uniform throughout the county;

> (e) appear as necessary before an appellate board to give testimony and present evidence as to the justification of an appraisal;
>
> (f) have the right of appeal from a disapproval of or modification of an appraisal made by him;
>
> (g) perform duties relating to the office of tax assessor required by the laws of this State;
>
> (h) be the sole person responsible for the valuation of real property, except that require by law to be appraised and assessed by the department, and the values set by the assessor may be altered only by the assessor or by legally constituted appellate boards, the department, or the courts;
>
> (i) have the right to enter and examine all new nonresidential buildings and structures and those portions of an existing nonresidential building or structure covered by a building permit for renovations or additions.

S.C. Code Ann. § 12-37-90.

By its literal terms, S.C. Code Ann. § 12-39-220 applies only to County Auditors. "If the **county auditor** shall at any time discover that any real estate or new structure, duly returned and appraised for taxation, has been omitted from the duplicate, he shall immediately charge it on the duplicate with the taxes of the current year and the simple taxes of each preceding year it may have escaped taxation." S. C. Code Ann. § 12-39-220 (emphasis added). Moreover, the statutory section is located in the County Auditors chapter of Title 12. Thus, it is clear that the General Assembly intended that the County Auditor and only the County Auditor have the authority to act under S.C. Code Ann. § 12-39-220.

In addition, the General Assembly did not authorize County Assessors to utilize the powers of S.C. Code Ann. § 12-39-220. In S.C. Code Ann. § 12-37-90, the General Assembly listed the duties of the County Assessor. This list of powers and

responsibilities does not include the powers given to the County Auditor in S.C. Code Ann. § 12-39-220. By enumerating the responsibilities of the County Assessor, the General Assembly listed the complete responsibilities of the County Assessor. "The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that to express or include one thing implies the exclusion of another, or of the alternative." Riverwoods, LLC, v. County of Charleston, 349 S.C. 378, 384, 563 S.E.2d 651 (2002). Thus, when certain things or powers are specified in a law, "an intention to exclude all others from its operation may be inferred." Evins v. Richland County Historic Preservation Comm'n, 341 S.C. 15, 19, 532 S.E.2d 876, 878 (2000).

Accordingly, by specifically listing the duties of the County Assessors, the General Assembly excluded other duties not listed. Since the authority of S.C. Code Ann. § 12-39-220 is not included in the list of County Assessors' responsibilities, the Beaufort County Assessor simply does not have the authority to add omitted property to the duplicate. As established by S.C. Code Ann. § 12-39-220, that authority is held solely by County Auditors.

The Beaufort County Assessor has argued that S.C. Code Ann. § 12-39-220 is an antiquated statute that reflects an antiquated system. This may be the case. However, the General Assembly has the power to amend the statute to reflect the current system. Despite the fact that the statute was originally enacted in 1881, to date, no such amendment has been made.

Nevertheless, even if the Assessor's contention has merit, the contention combined with the statute's language certainly creates ambiguity as to which county official has the authority to act under S.C. Code Ann. § 12-39-220. As established in

Section I, above, where there is ambiguity, the benefit of the doubt must be given to the taxpayer.

Therefore, the Administrative Law Court erred in allowing the Beaufort County Assessor to collect additional property taxes from Mitul Enterprises for tax year 2009.

IV. Assuming *arguendo* that the Beaufort County Assessor can exercise the authority of S.C. Code Ann. § 12-39-220, the Administrative Law Court erred in finding that the new construction was omitted from the duplicate.

Assuming that the Beaufort County Assessor can exercise the authority of S.C. Code Ann. § 12-39-220, the Administrative Law Court erred in finding that the improvements on the parcel were omitted from the duplicate.

First, the Administrative Law Court has erroneously relied on Columbia Developers, Inc v. Elliott, 269 S.C. 486, 238 S.E.2d 169 (1977) to support application of the omitted property statute to the instant case. The issue before the Columbia Developers Court was whether the taxpayer should be allowed to file a lawsuit in the Court of Common Pleas to challenge a property tax assessment without exhausting his administrative remedies (like the Appellant properly did here). All of the analysis of the facts and law contained in the opinion relates to the exhaustion of administrative remedies issue. In a single sentence at the end of the opinion, the Supreme Court states, without any analysis, that "the trial judge reached a conclusion of which the evidence is susceptible, and thus this Court would be bound by his finding that the subject property escaped taxation in 1972 and 1973." Id. at 491, 238 S.E.2d at 171. In fact, the Supreme Court specifically noted that "[b]ecause of our affirmation of the lower court on the doctrine of exhaustion of administrative remedies we need not discuss the substantive issues presented on appeal." Id. Since there was no analysis or discussion regarding S.C. Code Ann. § 12-39-220 in the Columbia Developers opinion and the Administrative Law

Court erred in relying on it to determine that the Beaufort County Tax Assessor had the authority to use S.C. Code Ann. § 12-39-220 to impose additional taxes on Mitul Enterprises.

Second, the Richland County's Assessor's Office was not even a party to the Columbia Developers lawsuit. Only the "Treasurer of Richland County," the "City of Columbia" and the "Treasurer of said City" were party defendants. Moreover, it is unclear from the Court's opinion who in Richland County government discovered the error, who corrected the error, or how the error was corrected. The Court's opinion simply states that "the Richland County Assessor notified appellant of the error and resulting failure to tax the five new floors during 1972 and 1973, and informed appellant that the Richland County Auditor was being advised to take appropriate remedial steps." Columbia Developers, 269 S.C. at 489, 238 S.E.2d at 170. The primary arguments Appellant is relying on here were apparently not even raised by the tax payer in Columbia Developers. Therefore, this case should not have been relied upon by the Administrative Law Court.

The case the Administrative Law Court should have relied upon is Long Cove Home Owners' Association, Inc., v. Beaufort County Tax Equalization Board, 327 S.C. 135, 488 S.E.2d 857 (1997). In Long Cove, the Beaufort County Assessor assessed the value of common areas of planned unit developments, and then attempted to levy an additional assessment on the property in a non-reassessment year. These common areas, which included golf courses, lagoons, club houses, roadways, and administrative buildings, had previously been assessed with a market value of $0. Id. at 137-38, 488 S.E.2d at 859. However, in 1991, the facilities on the common property were reassessed at a value higher than was assigned in previous years. Id. The planned unit developments

challenged the imposition of the taxes, and the Beaufort County Tax Equalization Board relied on S.C. Code Ann. § 12-39-220, the omitted property statute, to allow the additional taxes.

In finding that the property at issue in Long Cove was not omitted property, the Court stated:

> this property was not omitted property as Beaufort County contends. Because the parcels were assigned tax map numbers and had been assessed a market value of zero or near zero in prior tax years, the Department found the properties were listed on the tax rolls and were not omitted property. Substantial evidence supports this finding of fact. The Department further found the power to assess omitted property does not carry with it the power to revalue property already assessed. Further, there was no change in condition of these properties warranting a reassessment. Therefore, the Tax Assessor lacked the authority to reassess these properties.

Id. at 140, 488 S.E.2d at 860 (internal citation omitted) (underling added).

This is analogous to the situation here. Mitul Enterprises' property was assigned a tax map number and has been assigned a market value for 2009 of $11,775,674.00, which included the value of the new motel. (Assessment Notice dated 10/15/09). The property, including the new motel, was therefore listed on the tax rolls and was not omitted property. There was no change in the condition of the property in between the October 15, 2009 Assessment Notice and the June 23, 2010 letter from the Beaufort County Assessor attempting to assess additional taxes. (6/23/10 Tax Notice Correction Letter). As recognized by the Supreme Court, even if the Assessor had the authority to access omitted property, "the power to assess omitted property does not carry with it the

power to revalue property already assessed." Therefore, the Tax Assessor lacked the authority to reassess the property.[1]

Other state supreme courts have followed the same method of analysis in Long Cove. For example, the Kansas Supreme Court faced a very similar issue to the instant case in In Re: United AG Services, Inc., 159 P.3d 1050 (Kan. 2007). In United AG Services, the taxpayer replaced two storm-damaged metal grain elevators on the property with two concrete grain elevators. In 2000, three years after the replacement grain elevators were built, the county appraiser discovered that the value of the replacement grain elevators had not been added to the property valuation. The county then sent out an additional tax bill for 1998 and 1999 to tax the value of the newly replaced grain elevators. In doing so, the county relied on the Kansas omitted property statute (K.S.A. 79-1475). Id. at 1053.

In its opinion, the Kansas Supreme Court set forth a detailed analysis of what is omitted property. Specifically, the Court had to determine the meaning of "omitted from the tax rolls" and whether the replacement grain elevators constituted omitted property. The Court concluded that "[b]ecause some improvements of UAS were assigned a parcel number, listed on the tax rolls and assessed for the tax years in question, the parcel of realty itself did not 'escape' taxation within the meaning of K.S.A. 79-1475 despite the

[1] Significantly, the Assessor appears to have had a legal option to correct the mistake which he chose not to exercise. Pursuant to the statutory scheme governing the South Carolina Department of Revenue (hereinafter the "Department"), the problem could have been reported by the Assessor to the Department who had the power to direct the assessor to reassess real property because of an error of law. S.C.Code § 12-4-520(3) (Supp.1995) (directing the Department "to take any action necessary to insure the proper assessment, equalization, and taxation" of property in each county in South Carolina); see also S.C.Code Ann. § 12-4-510(3) (Supp.1995) (granting Department power to order reassessment to insure property is assessed in compliance with the law). These statutes provide the Department with the power to order spot reassessments in non-reassessment years. Of course, this procedure was not followed here, and the assessor simply wrote a desk letter to the taxpayer instructing him to pay over $105,000 in additional taxes, without even sending a new assessment notice.

absence of any value attributable to the *new* grain elevators." Id. at 1058 (underlined added).

In reaching this decision, the Kansas Supreme Court noted the importance of finality in taxation:

> If [79-1475 applies here] where would one stop? If a county appraiser learns that an income producing property was valued using the income approach to value assuming rents of $15 per square foot and the property is actually leased at $16 per square foot, should the court find an 'escaped' valuation and allow the appraiser to issue an escaped assessment? What if a home is valued at $150,000 and sells for $175,000, should the court find an 'escaped' valuation and allow the appraiser to issue an escaped assessment? Clearly, the answer is no as any other answer would lead to all kinds of mischief, uncertainty and chaos.

Id. Thus, the South Carolina Supreme Court and the Kansas Supreme Court agree that properties that are assigned tax map numbers and some improvements are assessed a value, with no change in condition to the property in between the first assessment and the would-be new assessment, are not omitted. Just as in the Long Cove case, the parcel at issue in the instant case had been assigned a tax number and had been assessed a market value in prior tax years that included some improvements. (2008 Beaufort County Tax Bill). Even worse, the new structure here was valued, with the value of the new structure appearing on the 2009 Assessment Notice and Notice of Action – Value change. (Assessment Notice dated 10/15/09; 4/7/10 Notice of Action – Value Change). Accordingly, the new structure should not be considered omitted property.

Finally, allowing the Beaufort County Assessor to use S.C. Code Ann. § 12-39-220 under these circumstances would open Pandora's box and allow any county assessor to reassess a parcel or property under a myriad of circumstances. Moreover, it would allow the County Assessor to use the omitted tax statute as a catch all provision to correct

any number of mistakes that might be made during the assessment process. Nothing suggests that the Legislature intended for S.C. Code Ann. § 12-39-220 to be used to fix such problems, particularly in light of the fact that other statutes outline appropriate channels for the taxing authorities to follow.

Accordingly, the Administrative Law Court erred in applying S.C. Code Ann. § 12-39-220 in the instant case.

V. Assuming *arguendo* that that the Beaufort County Assessor can exercise the authority of S.C. Code Ann. § 12-39-220, the Administrative Law Court erred in applying S.C. Code Ann. § 12-39-220 when the Beaufort County Assessor testified that there is no duplicate as required by S.C. Code Ann. § 12-39-220.

The Administrative Law Court erred in applying S.C. Code Ann. § 12-39-220 because the Beaufort County Assessor testified that there is no duplicate as required by S.C. Code Ann. § 12-39-220.

South Carolina Code Ann. § 12-39-220 states that "[i]f the county auditor shall at any time discover that any real estate or new structure, duly returned and appraised for taxation, has been **omitted from the duplicate**, he shall immediately charge it **on the duplicate** with the taxes of the current year and the simple taxes of each preceding year it may have escaped taxation." (emphasis added).

Ed Hughes, the Beaufort County Assessor, testified that the duplicate used to be a written or book listing created by the auditor. The book listed "separate accounts, by ownership name and tax liability." The auditor then had "to produce for the county treasurer to collect those taxes a copy." (Hearing Trans. p.69, lines 15-22). Mr. Hughes also testified that the Beaufort County tax roll is now produced electronically. (Hearing Trans. p. 70, lines 17-22).

The testimony of the Beaufort County Assessor establishes that Beaufort County no longer maintains or keeps the duplicate. The authority to use S.C. Code Ann. § 12-39-220 is predicated on there being an actual duplicate, and property being omitted from the duplicate. Since Beaufort County no longer has a duplicate, S.C. Code Ann. § 12-39-220 simply does not apply to the instant case.[2]

VI. The Administrative Law Court erred in allowing additional 2009 property tax to be collected without an assessment notice.

The Administrative Law Court erred in allowing Beaufort County to collect additional taxes from Mitul Enterprises for tax year 2009 when Mitul Enterprises never received a proper and correct Assessment Notice for those taxes.

The Beaufort County Assessor prepared and sent the October 15, 2009, Assessment Notice. This Assessment Notice listed a market value of $11,775,674.00, a taxable value of $1,069,868.00, and a total assessment of $64,190.00. (10/15/09 Assessment Notice). This is the only Assessment Notice that Mitul Enterprises has ever received for 2009 property taxes at issue. Mitul Enterprises received a Notice of Action – Value Change to resolve its appeal. This Notice of Action listed a taxable value of $1,069,868.00 and a total assessment of $64,190.00. (4/7/10 Notice of Action – Value Change). After receiving the 2009 Beaufort County Property Tax Bill, Mitul Enterprises timely paid its taxes, and Beaufort County accepted the taxes in January 2010. (Hearing Transcript p.44, lines 9-25; p.50, lines 22-25).

On June 23, 2010, the Beaufort County Assessor sent a desk letter and a new 2009 Beaufort County Property Tax Bill to Mitul Enterprises. The new 2009 Beaufort

[2] If the Court concludes that the electronic list is equivalent to the duplicate, then the value of the new hotel building was not omitted from the duplicate. As established by the Assessment Notice dated 10/15/09, the value of the new hotel building was included on the electronic list. As discussed in Section II, the error on the tax bill was due to a computer error.

County Property Tax Bill listed a market value of $9,000,000.00, a taxable value of $540,000.00, and a total assessment of $540,000.00. However, the Beaufort County Assessor never sent a revised Assessment Notice that included an assessment of $540,000.00. (6/23/10 Letter from Beaufort County Assessor and New 2009 Property Tax Bill). To date, Mitul has never received an assessment notice that shows an assessment of $540,000.00.

Under S.C. Code Ann. § 12-60-2510(A)(1), the County Assessor must send the taxpayer a Property Tax Notice Assessment. "A property tax assessment notice under this subsection must be in writing and must include: (a) the fair market value; (b) value as limited by Article 25, Chapter 37, Title 12; (c) the special use value, if applicable; (d) the assessment ratio; (e) **the property tax assessment**; (f) the number of acres or lots; (g) the location of the property; (h) the tax map number; and (i) the appeal procedure." S.C. Code Ann. § 12-60-2510(A)(1) (emphasis added).

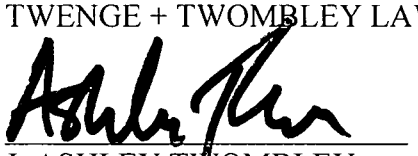
In the instant case, the County Assessor failed to provide Mitul Enterprises with a Property Tax Assessment Notice that contained the taxable value and assessed value listed on the new Beaufort County Property Tax Bill. The Assessor simply skipped this required step and sent a desk letter demanding more than $105,000.00 in taxes along with a new tax bill. (6/23/10 Tax Notice Correction Letter). Since the Assessor failed to follow S.C. Code Ann. § 12-60-2510(A)(1), he cannot collect taxes based on an assessment that was not noticed to Mitul Enterprises through a Property Tax Notice Assessment.

Accordingly, the Administrative Law Court erred in allowing the Beaufort County Assessor to collect additional 2009 property taxes from Mitul Enterprises when the Beaufort County Assessor failed to follow S.C. Code Ann. § 12-60-2510(A)(1).

CONCLUSION

For the reasons contained herein and as may be raised in any Reply Briefs or Supplemental Briefs and at oral arguments, the Final Order and Decision of the Administrative Law Court should be reversed as stated herein and judgment entered on behalf of Mitul Enterprises, L.P.

TWENGE + TWOMBLEY LAW FIRM

BY: 

J. ASHLEY TWOMBLEY
S.C. Bar #72916
311 Carteret Street
Beaufort, SC 29902
Telephone: (843) 982-0100
Facsimile: (843) 982-0103
www.twlawfirm.com
Attorneys for Appellant

Beaufort, South Carolina

April 24, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM
Administrative Law Court

The Honorable Deborah Brooks Durden, Administrative Law Judge

---

Case No.: 12-ALJ-17-0126-CC

Mitul Enterprises, L.P.....Appellant

-vs-

Beaufort County Assessor.....Respondent

CERTIFICATE OF SERVICE

The undersigned, Andrea Smith, hereby avers that she is a Paralegal with TWENGE + TWOMBLEY LAW FIRM, Attorneys for Appellant, and that on the 24th day of April 2013 a true and accurate copy of the attached Appellant's Initial Brief and Designation of Matter was placed in an envelope with first class postage thereon prepaid through the United States Postal Service and mailed to the following:

Stephen P. Hughes, Esquire
Howell Gibson & Hughes, PA
P.O. Box 40
Beaufort, SC 29901
Telephone: (843) 522-2400
Facsimile: (843) 522-2429
hghpa@islc.net
Attorney for Respondent

BY: Andrea Smith
Andrea Smith, Paralegal to
TWENGE + TWOMBLEY LAW FIRM