



ALAN WILSON
ATTORNEY GENERAL

December 10, 2015

Ms. Prina C. Maines, Esq.
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Post Office Box 609
Hardeeville, South Carolina 29927

Dear Ms. Maines:

You have requested the opinion of this Office regarding the validity of a certain provision of a business license ordinance in place in the City of Hardeeville. The City imposes an annual business license tax on business owners for the privilege of doing business. The amount of the business license tax is determined by the classification of the business and, if the business has been in operation for a full year preceding the levy, the business's total gross income from the preceding year.

The section of the ordinance resulting in your concern addresses business license taxes imposed during the year that a business closes or changes ownership. In part, the applicable section provides that "[t]he owner of the old business is responsible for paying a business license tax on gross income incurred for the calendar year up until the day ownership has changed. This would also apply to a business that has closed." Hardeeville, S.C., Code of Ordinances § 11-25(b) (Nov. 21, 2013). In light of this provision, you question "whether the Hardeeville Business license ordinance violates the nature of a privilege tax, or, in the alternative, whether a South Carolina Municipality is allowed to charge a business license tax upon every dollar of earned gross income earned by a business." In other words, you question the authority of the City to impose a business license tax on gross income collected in the year that a business closes or transfers ownership. Our analysis follows.

Law / Analysis

Chapter 11 of the Hardeeville Code of Ordinances pertains to Licenses, Permits and Miscellaneous Business Regulations, and several sections therein are applicable to this opinion. See Hardeeville, S.C., Code of Ordinances Ch. 11. The City requires "[e]very person engaged or intending to engage in any calling, business, occupation or profession, in whole or in part, within the limits of the City of Hardeeville, South Carolina, . . . to pay an annual license tax for the privilege of doing business and obtain a business license as herein provided." *Id.* at § 11-15 (Nov. 21, 2013). Furthermore, the purpose and duration of the business license tax levied "is for the purpose of providing such regulation as may be required for the business subject thereto and for the purpose of raising revenue for the general fund through a privilege tax. Each license shall be issued for one calendar year beginning January 1 [and] ending December 31. . . ." *Id.* at § 11-17 (Nov. 21, 2013).

In regards to the basis for the license tax, Section 11-18 provides that:

[t]he required license tax shall be paid for each business subject hereto according to the applicable rate classification on or before the 15th day of April in each year. . . . [And,] [a] license tax based on gross income shall be computed on the gross income *for the preceding calendar year*. The tax for a new business shall be computed using estimated gross receipts for the calendar year. The initial tax for an annexed business shall be calculated based on the gross receipts from the prior year, prorated for the number of months remaining in the license year.

Id. at § 11-18 (Nov. 21, 2013) (emphasis added). As referenced above, Section 11-25(b) of the Ordinance addresses businesses that are closing or transferring ownership, providing in part that:

[a] business license shall not be transferable and a transfer of controlling interest shall be considered a termination of the old business and the establishment of a new business requiring a new business license, based on estimated gross income through the end of the current year. The owner of the old business is responsible for paying a business license tax on gross income incurred for the calendar year up until the day ownership changed. This would also apply to a business that has closed. However, upon approval of the city manager, an exception may be made for financial hardships due to a business closing.

Id. at § 11-25(b) (Nov. 21, 2013).

With the applicable Hardeeville Ordinances in mind, we turn to the provision of the South Carolina Code granting municipalities the power to levy a business license tax. Under S.C. Code Ann. § 5-7-30 (Supp. 2014), each municipality may:

levy a business license tax on gross income, but a wholesaler delivering goods to retailers in a municipality is not subject to the business license tax unless he maintains within the corporate limits of the municipality a warehouse of mercantile establishment for the distribution of wholesale goods. . . .

S.C. Code Ann. § 5-7-30 (Supp. 2014).

It is well settled that “[a] license tax upon persons and businesses is an excise tax on the privilege of doing business, and no prohibition against the utilization of excise taxes exists.” Carter v. Linder, 303 S.C. 119, 122, 399 S.E.2d 423, 424 (1990) (citing Hay v. Leonard, 212 S.C. 81, 46 S.E.2d 653 (1948) *superseded on other grounds by Constitutional Amendment as stated in Home Builders Ass’n of South Carolina v. Sch. Dist. No. 2 of Dorchester County*, 405 S.C. 458, 748 S.E.2d 230 (2013)). The understanding that a business license tax is imposed for the *privilege* of doing business rather than a tax on the gross income by which the tax is measured has been consistent among our courts. See Eli Witt Co. v. City of West Columbia, 309 S.C. 555, 558, 425 S.E.2d 16, 17 (1992) (“[A] business license tax is imposed for the privilege of

maintaining and conducting a place of business within the municipality”); Triplett v. City of Chester, 209 S.C. 455, 462-63, 40 S.E.2d 684, 687 (1946) (“The tax was imposed for the privilege of maintaining and conducting a place of business within that municipality and it was intended that the business should be considered as a whole. The gross income or volume of such business is merely made the basis on which the tax is graduated”).

More recently, in Town of Hilton Head Island v. Kigre, Inc., 408 S.C. 647, 760 S.E.2d 103 (2014), the Supreme Court reiterated the nature of a business license tax imposed by a municipality. It provided that: “[t]he legislature has specifically granted municipalities the authority to enact ordinances and ‘levy a business license tax on *gross income*.’ S.C. Code Ann. § 5-7-30 (Supp. 2013) (emphasis added). We emphasize that the business license fee is an excise tax—not an income or sales tax.” Id. at 649, 760 S.E.2d at 103. And, speaking specifically to the license tax in question in the case, the Court explained that: [a] business license fee is a tax on the privilege of doing business within the Town, and therefore, it is the manufacturing activity of Appellant . . . which occurs wholly within the Town limits, and not [Appellant’s] receipt of income or sales of its products in interstate commerce that is the business activity being taxed.” Id. Accordingly, as the aforementioned authorities make clear, a business license fee is a tax on the privilege of doing business. It is not a tax on the gross income collected by the business that is typically used as the measure for the tax.

Turning to the validity of Section 11-25(b) of the Hardeeville Code of Ordinances imposing a business license tax on gross income received during a business’s final year, we begin by noting that a municipal ordinance is a legislative enactment and is presumed to be constitutional. North Charleston Land Corp. v. City of North Charleston, 281 S.C. 470, 474, 316 S.E.2d 137, 139 (1984). A court will not declare an ordinance invalid unless it is clearly in conflict with the general law. Hospitality Ass’n of S.C. v. County of Charleston, 320 S.C. 219, 224, 464 S.E.2d 113, 116-17 (1995). Further, the burden of proving the invalidity of an ordinance is on the party attacking it. Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 425, 593 S.E.2d 462, 467 (2004). Thus, as we have previously opined,

while this Office may comment upon constitutional problems or a potential conflict with general law, only a court may declare an ordinance void as unconstitutional, or preempted by or in conflict with state law. Accordingly, an ordinance must continue to be enforced unless and until set aside by a court of competent jurisdiction.

Op. S.C. Att’y Gen., 2003 WL 21043502 (March 21, 2003).

Helpful to our analysis of the applicable portions of Section 11-25(b) of the Hardeeville Code of Ordinances is City of Columbia v. Niagara Fire Insurance Co., 249 S.C. 388, 154 S.E.2d 674 (1967) where the Supreme Court was asked to interpret a City of Columbia Ordinance imposing a license fee for businesses. The ordinance, which imposed similar requirements as the City of Hardeeville Ordinance in question does, provided that “every person, firm, or corporation engaged or intending to engage in any business in the City of Columbia ‘shall obtain or pay for on or before the first day of April, a license therefor.’” Id. at 390, 154 S.E.2d at 675. It also

provided that “ ‘where the amount of the license is dependent upon the volume of business done, the computation shall be on the basis of the volume of business done during the preceding year.’” Id.

In construing this ordinance, the Court provided that “[t]he license ordinance being a tax measure, its scope may not by implication be extended beyond the clear import of its language.” Further, the Court explained that:

[t]he obvious purpose of the license ordinance is to impose a tax, or license fee, upon the privilege of doing business in the city during the current year. Implicit in that purpose is the requirement that the tax be fair and nondiscriminatory. In many classes of business the license fee is calculated on gross receipts reasonably to be expected during the license year, using the amount of such receipts during the preceding year as a measure for computing the amount of the fee. . . Basic to the purpose of the ordinance, and therefore to our interpretation of its meaning, is the fact that the volume of business for the preceding year is not the subject of the tax, but is merely a reasonably fair basis upon which to estimate the volume of such business during the license year; it is in respect of the latter that the license tax is imposed.

Id. at 392, 154 S.E.2d at 676. From the Court’s reasoning, it follows that a business license tax based on the previous year’s gross income is a tax in prospect of the privilege of doing business during the upcoming license year rather than a tax imposed retroactively for the privilege of doing business in the year in which the gross income deriving the basis of the tax was collected.

Other jurisdictions interpreting similar business license tax statutes have likewise concluded that the business license tax was paid in prospect of the privilege of doing business in the year in which the tax was paid. See City of Pittsburg v. Dravo Corp., 563 A.2d 940, 942 (Pa. Commw. Ct. 1989) (stating that the business privilege tax is a current year’s estimated tax based on previous business activity. Thus, “[b]y definition in the tax ordinance, the delay effect will always preclude a taxpayer from paying present year business privilege taxes based on present year business activity for the entire present year”); Fund American Cos. v. Guglielmo, 225 So.2d 265, 267 (La. Ct. App. 1969) (finding license tax is paid in prospect of the privilege of doing business in the year in which the tax is paid rather than the year in which the premiums forming the basis of the taxes are collected); Eastern Life & Cas. Co. v. Commonwealth, 136 S.E.2d 838, 840 (Va. 1964) (holding that the payment of the business license tax was a condition precedent to the privilege of doing business).

In Hardeeville, business licenses taxes must be paid for license renewal by April 15th. Hardeeville, S.C., Code of Ordinances § 11-18(a) (Nov. 21, 2013) (“The required license tax shall be paid for each business subject hereto according to the applicable rate classification on or before the 15th day of April in each year”). However, licenses are valid from the first to last day of the year, January 1st to December 31st. Id. at § 11-17 (Nov. 21, 2013) (“Each license shall be issued for one calendar year beginning January 1 ending December 31”). In accordance with Niagara, as well as similar rulings from other jurisdictions outlined above, it is our opinion that a

Court would interpret the Hardeeville business license tax as a prospective tax for the upcoming license period calculated by the business's classification and the gross income collected during the previous license year. As we have emphasized, courts have determined that the gross income collected is not the subject of a business license tax, rather, it is the privilege of doing business. Thus, the prior year's gross income is only the basis for the tax's calculation as an estimate for the volume of business that will be done during the current license year; it is not the subject of the tax.

By interpreting the Hardeeville ordinance in question as a prospective tax on the privilege of doing business in the upcoming license year, we believe the requirement that the owner of the old business, or owner of a business no longer in operation, be responsible for paying a business license tax *on gross income incurred for the calendar year up until the day ownership changes*, contradicts with the general law as explained above. At the close or transfer of the business, it appears the City of Hardeeville is imposing a business license tax on gross income rather than the privilege of doing business. This is so because if a business tax was paid by April 15th, we believe the prospective nature of the tax would cover the privilege of doing business for the upcoming year. Thus, taxing gross income in the final year of the business, when there is no extended benefit of the privilege of conducting business in the next license year, would be, in our opinion, contradictory to the intended purpose the tax.

Furthermore, if a business license was properly renewed by April 15th based on the prior year's gross income, it is our opinion that the license would be valid for the entire upcoming year since business licenses in the City of Hardeeville are valid from January 1st to December 31st. To require a business that has ceased operation or that has changed owners to pay "a business license tax on gross income incurred for the calendar year up until the day the ownership changes" in addition to the license tax paid by April 15th would, in our opinion, result in duplicate business privilege taxation, paid first prospectively by April 15th for the renewal of the license for the final business year and then again retroactively at the close or transfer of the business. Citing Bell v. Watson, 3 Lea (Tenn.) 328, our Supreme Court has stated:

[w]hatever the power the Legislature may have to levy double taxes, the presumption is against such an intent. A statute will not be construed so as to impose duplicate taxation, unless the construction is required by the express words or necessary implication. ***The safe and sound rule of construction of revenue laws is to hold, in the absence of express words plainly disclosing a different intent, that they were not intended to subject the same property to be twice charged for the same tax, *nor the same business to be twice taxed for the exercise of the same privilege.*

Wingfield v. South Carolina Tax Commission, 147 S.C. 116, 144 S.E. 846, 855 (1928) (emphasis added).

Applying the presumption against double taxation as set forth above to S.C. Code Ann. § 5-7-30 (Supp. 2014), and the interpretation by our courts that a business license tax is an excise tax on the privilege of doing business, it appears Section 11-25(b) of the Hardeeville Code of

Ordinances requires a business to be “twice taxed for the exercise of the same privilege.” Again, it is our belief that the privilege of doing business in the final year would first be taxed based on gross income collected during the preceding year due by April 15th. And, the privilege of doing business in the final year of business would be taxed a second time based on gross income incurred for the calendar year up until the day ownership changes or the business closes. Because we do not believe it was the intent of the Legislature for S.C. Code Ann. § 5-7-30 to permit municipalities to impose double taxes for the same privilege, we question the validity of Hardeeville Ordinance Section 11-25(b) for this reason also.

Conclusion

It is well settled that a business license tax is an excise tax on the privilege of doing business. Like the City of Hardeeville’s business license tax, business license taxes are often calculated on gross receipts reasonably to be expected during the license year, using the amount of receipts during the preceding year as a measure for computing the amount of the fee. Business license taxes based on the previous year’s gross income have been interpreted as a prospective tax on the privilege of doing business in the current year. As the City of Hardeeville requires business license fees to be paid by April 15th and a business license is valid from January 1 to December 31st, we believe a court would find the business license tax imposed by the City of Hardeeville is a prospective tax on the privilege of doing business in the upcoming business license year.

By interpreting the City of Hardeeville’s business license tax in this manner, it is also our opinion that Section 11-25(b) of the Hardeeville Code of Ordinances – providing that the owner of the old business or the owner of a business that has closed is responsible for paying a business license tax on gross income incurred for the calendar year up to the day the ownership changes or the business closes – contradicts the intended purpose of the tax. As it is our opinion that a tax paid by April 15th would be prospective, or a tax for the privilege of doing business in the upcoming license year, the final tax on gross income for the calendar year up until the day the ownership changes or business closes would be considered a tax directly on gross income, not on the privilege of doing business because the business will have changed owners or will not be in operation in the upcoming license year.

In addition, we believe that a Court would find Section 11-25(b) requires a business to be taxed twice for the exercise of the same privilege. This results because the privilege of doing business in the final year would first be taxed based on gross income collected during the preceding year due by April 15th. And, the privilege of doing business in the final year of business would be taxed a second time based on gross income incurred for the calendar year up until the day ownership changes or the business closes. We do not believe this was the legislature’s intent in providing municipalities with the authority to impose a business license tax as provided in S.C. Code Ann. § 5-7-30 (Supp. 2014).

For these reasons, we believe a court would determine the applicable provision of Section 11-25(b) of the City of Hardeeville Code of Ordinances as discussed above conflict with general law. However, we reiterate that this Office is only rendering a legal opinion of how a court may

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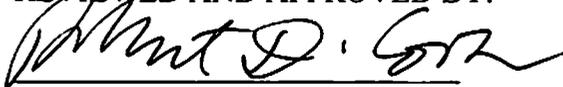
rule. Because only a court may declare an ordinance void as unconstitutional, or preempted by or in conflict with state law, the ordinance in question must continue to be enforced unless and until set aside by a court of competent jurisdiction.

Very truly yours,



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REVIEWED AND APPROVED BY:



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