ALAN WILSON
ATTORNEY GENERAL

July 26, 2023

The Honorable Cody T. Mitchell
Member
South Carolina House of Representatives
Post Office Drawer 1408
Hartsville, South Carolina 29550

Dear Representative Mitchell:

We received two opinion requests from you asking us to address issues involving the City of Myrtle Beach's ("City's") business license tax. One request asks us to address whether City's business license tax violates the Commerce Clause, Privileges and Immunities Clase, and Equal Protection Clause of the U.S. Constitution. It is the policy of this Office not to address issues involving federal law. Op. Att'y Gen., 2021 WL 3703910 (S.C.A.G. Aug. 2, 2021) ("Interpreting federal law is beyond the scope of our opinions."). Therefore, we must decline to address the constitutionality of the business license tax under the Federal Constitution.[1] Your other request asks us to address the application of City's business license tax to Turo, Inc. ("Turo") and its "Hosts." Specifically, you ask:

(1) Does Turo have nexus with City to require registration for a business license or be subject to City's business license tax?

(2) Does Turo have gross receipts in City if it were to have nexus?

Law/Analysis

A. Application of City's business license to Turo and its Hosts

Section 5-7-30 of the South Carolina Code (Supp. 2022) grants municipalities authority to enact ordinances and "levy a business license tax on gross income." As our Supreme Court explained "A license tax upon persons and businesses is an excise tax on the privilege of doing business." Carter v. Linder, 303 S.C. 119, 122, 399 S.E.2d 423, 424 (1990). Accordingly, City enacted the following ordinance:

[1] You cite to prior opinions of this Office concerning the constitutionality of various taxes. Ops. Att'y Gen., 2010 WL 1808719 (S.C.A.G Apr. 9, 2010); 2006 WL 3877519 (S.C.A.G. Dec. 14, 2006); 2004 WL 736921 (S.C.A.G Mar. 23, 2004); 1995 WL 803323 (S.C.A.G. Feb. 16, 1995); 1979 WL 42835 (S.C.A.G Mar. 2, 1979). While we decline to address federal law in this opinion, we "will not overrule a prior opinion unless it is clearly erroneous or a change occurred in the applicable law." Op. Att'y Gen., 2013 WL 3762706 (S.C.A.G. July 1, 2013). We have not overruled these opinions, but due to our policy must decline to address these issues.

> Sec. 11-21. - License required.
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> (a) Every person engaged or intending to engage in any business, calling, occupation, profession, or activity engaged in with the object of gain, benefit, or advantage, in whole or in part within the limits of the City of Myrtle Beach, South Carolina, is required to pay an annual license tax for the privilege of doing business and obtain a business license as herein provided.
> (b) A business license shall not be required for (i) a promoter or vendor that is a participant in an event or convention that is contained within the interior meeting or convention space of a hotel or motel and where said event or convention is not open to the public and attendance is by registration only; and (ii) those operating under a paid convention center use license obtained for the Myrtle Beach Convention Center, and only for those times and dates as set forth in convention center use license.

Myrtle Beach, South Carolina Code of Ordinances § 11-21 (emphasis added).

In accordance with section 5-7-30 and City's ordinance, whether a particular person or entity is subject to the business license tax depends upon whether that person or entity is "doing business" in the City. The question of whether someone is doing business "must be determined upon the attendant facts." Sanders v. Columbian Protective Ass'n of Binghampton, N. Y., 208 S.C. 152, 155, 37 S.E.2d 533, 534 (1946). As we stated in numerous opinions, this Office cannot make factual determinations in an opinion. Op. Att'y Gen., 2023 WL 3034522 (S.C.A.G. Apr. 6, 2023). "Whether it is appropriate for a county to levy a business license tax in a particular case is a factual question beyond the scope of a legal opinion of this Office." Op. Att'y Gen., 1999 WL 387066 (S.C.A.G. May 19, 1999). Therefore, a court would need to decide whether Turo or its Hosts are doing business in City. However, we look to the facts you provide us as well as case law and prior opinions of this Office in hopes of providing you with some guidance.

As we stated in prior opinions, municipal ordinances are binding upon all persons and property within a municipality's boundaries regardless of whether they are residents or not. Op. Att'y Gen., 1988 WL 485210 (S.C.A.G. Jan. 7, 1988). Moreover, "[m]erely because an individual is involved in interstate commerce does not remove him from the liability of municipal taxes." Op. Att'y Gen., 1972 WL 26059 (S.C.A.G. Nov. 21, 1972). But whether a person or entity is subject to licensing is dependent upon their activities within the municipality. Id.

In Pee Dee Chair Co. v. City of Camden, 165 S.C. 86, 162 S.E. 771 (1932), our Supreme Court explored what qualifies as "doing business" subjecting a person or entity to licensure by a municipality. That case addressed whether a nonresident furniture manufacturer was subject to a municipality's business license tax by virtue of making a single delivery to the municipality. Id. The Court began with the presumption that "[a] statute or an ordinance requiring a business license or imposing a license or occupation tax must be construed liberally in favor of the citizen and

strictly against the government, and no one can be held to payment of the tax unless he comes clearly within the terms of the particular statute or ordinance." Id. at 772. The Court also noted, "It is not always an easy matter to give a satisfactory definition of 'business' or 'occupation,' as used in a statute or ordinance like the one before us, but the terms ordinarily carry with them some idea of custom or continuity as opposed to an isolated or sporadic act." Id. at 772. Relying on caselaw from other jurisdictions, the Court concluded:

> While, as suggested, a single act might, under some conditions, constitute the carrying on of a "business" within the contemplation of a license tax statute or ordinance (see the Tennessee case of Trentham v. Moore, 111 Tenn. 346, 76 S. W. 904), we find nothing in the circumstances of the case at bar to bring it within such class. Admittedly, only one load of chairs was delivered, and there is no suggestion that plaintiff intended to make any further deliveries. There is nothing whatever in the record to show that the delivery relied upon as constituting a taxable "business" was other than it appears on the surface, an isolated incidental or casual one, and there is an utter lack of circumstances to "raise a presumption of other such acts" or to indicate any intention on plaintiff's part to engage in the business of hauling merchandise by trucks in the city of Camden.

Id. at 774.

In Triplett v. City of Chester, 209 S.C. 455, 40 S.E.2d 684 (1946), our Supreme Court considered whether a construction company that maintained its office in the City of Chester, but carried out its construction work elsewhere was subject to Chester's business license tax. The Court provided the following analysis in determining the company was liable for the tax:

> It is the privilege of doing business within the municipality that is sought to be taxed. The administrative and executive work, an indispensable phase of respondent's business, was conducted in the office established, maintained and operated in the City. His equipment when not in use was stored in the City. This portion of his business enjoyed all the advantages afforded by the municipal government of Chester to any other business conducted within its corporate limits. We cannot dissociate the managerial features of the business which were conducted within the City, along with the storing of equipment, from the manual execution of the work which was done without the City. All are essential functions of the general contracting business in which respondent is engaged. It frequently happens that there is a business located within a municipality that does not do all of its business within the corporate limits of such town or city.

Id. at 459; 40 S.E.2d 684, 685.

Most recently, our Supreme Court considered whether a bail bondsman, whose only connection to a municipality was providing a bond to a resident who was arrested in the municipality, was subject to the municipality's business license tax. Wrenn Bail Bond Serv., Inc. v. City of Hanahan, 335 S.C. 26, 515 S.E.2d 521 (1999). The Court explained its determination that the bail bondsman was not liable for the tax as follows:

> The only fact connecting City with the actual transaction between the parties is that Wrenn provided a service to one of its residents which City argues constitutes doing business under the business license ordinance. In Pee Dee Chair Co. v. City of Camden, 165 S.C. 86, 162 S.E. 771 (1932), this Court held a single act does not constitute doing business for purposes of a business license fee where there are no facts to indicate it is not an isolated instance but an intention to engage in business. We find nothing in this record to indicate Wrenn's intent to engage in a continuing business as bail bondsman for residents of City.

Id. 29-30, 515 S.E.2d at 523.

This Office has on occasion also considered the application of various business license ordinances to particular persons and entities. In a 1971 opinion, we considered whether a nonresident automobile dealer is subject to a municipality's business license tax if they deliver cars to the municipality or if the cars pass through the municipality while being test-driven. Op. Att'y Gen., 1971 WL 17513 (S.C.A.G. Jun. 15, 1971). Citing Triplett, 209 S. C. 455, 40 S.E. 2d 684, we noted, "[i]t seems clear that the business is not required to conduct all of its transactions within the municipal limits before being subjected to the business license tax." Id. We continued, "[i]t is equally clear, however, that a municipal corporation has no[] inherent power to impose revenue license charges on activities, such as businesses and occupations, that are carried on exclusively outside the municipality's geographical limits." Id. We cited to several cases holding businesses who made regular deliveries to municipalities were subject to those municipalities' license taxes. Id. (citing Crosswell & Co. v. Town of Bishopville, 172 S.C. 26, 172 S.E. 698 (1934); American Bakeries Co. v. City of Sumter, 173 S. C. 94, 174 S.E. 919 (1934)). But we cited Pee Dee Chair Company v. City of Camden, 165 S.C. 86, 162 S.E. 771, 772 (1932) for the premise that a single delivery was not sufficient to impose a business license on a nonresident manufacturer. Id. We determined,

> it appears likely that isolated acts of individuals driving an automobile into a municipality for purposes of testing it would not be sufficient 'carrying on of a business' to subject the nonresident retailer to a business license tax. Neither does it appear that isolated acts of delivering automobiles into a municipality by a nonresident retailer would be sufficient unless such deliveries were regularly made within the municipality. The delivery is a mere incident to the business so long as successive acts or continuity of habit is not present.

Id. As such, we concluded,

> it is the opinion of this office that the test-driving an automobile into a municipality in isolated instances is not in itself sufficient to subject the automobile retailer to a business license tax. If, however, the delivery is made within the municipality on a regular basis, it apparently would constitute the 'doing of business,' and a business license could be imposed.

Id.

In 1980, we addressed whether a contractor whose only business within a municipality consisted of a "one shot" contract was subject to licensing. Op. Att'y Gen., 1980 WL 121166 (S.C.A.G. Apr. 14, 1980).

> [I]f the contractors in fact contract within the corporate limits of a municipality only once, then, perhaps, a business license tax cannot be imposed upon them. If, however, contractors contract within the corporate limits of a municipality more than once, even though it may occur only once each tax year, or, unlike Pee Dee Chair, Co., if there is evidence to suggest that the contract is not an 'isolated incidental or casual one' [165 S.C. at 93], then, in my opinion, a business license tax can be imposed upon them. In any event, any strong reliance upon the Pee Dee Chair Co. decision in this case would, I think, be misplaced because of the critical difference in the nature of the respective business, i.e., an incidental delivery of purchased goods and the construction of a building. See generally, 9 McQUILLIN MUNICIPAL CORPORATIONS §§ 26.48 et seq. (3rd ed. 1964).

Id.

Similarly in 1988, we were asked whether a nonresident relator is subject to a municipal business license if their only contact with the municipality consists of showing, listing, advertising, and soliciting buyers constitutes. Op. Att'y Gen., 1988 WL 485210 (S.C.A.G. Jan. 7, 1988). We determined,

> if the nonresident realtor advertises the property from his nonresident office and has no activity within the municipality, then such would not constitute doing business. Should the realtor, however, actively participate in the showing, listing, advertising or other solicitation of buyers within the municipality, then under such circumstances, the realtor would most probably be doing business within the municipality and subject to its license fees.

Id.

In your letter, you explain the operations of Turo as follows:

> Turo is a technology company based in California that offers a peer-to-peer car sharing platform through its website and mobile app. Turo's platform allows vehicle owners ("Hosts") to share their vehicles with travelers and others who need a car ("Guests"). Turo does not own or maintain the vehicles shared on its platform. Turo has no employees, salespersons, property, vehicles, or offices in City (i.e. Turo has no physical presence in City). Turo is not registered in City for a business license.
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> Turo's platform allows Hosts and Guests to transact on their own terms. Hosts set prices and availability, and Hosts and Guests decide on a location for the vehicle exchange. For example, a Host in Charleston may deliver their vehicle to a Guest in Myrtle Beach, or a Guest may pick up a vehicle from a Host in Myrtle Beach but then use it outside Myrtle Beach.
>
> Turo is not involved in the transactional decisions between the Hosts and Guests (e.g. prices, availability, handoff location, etc.). Turo earns revenue by charging fees to its Hosts and Guests for use of its platform. Stripe, Inc., a third-party payment processing company processes all Guest payments, remitting to Turo and Hosts separate payments for their respective share of fees.

As stated in Pee Dee Chair Co., 165 S.C. at 86, 162 S.E. at 772, a court would start with the presumption that the business license ordinance be construed liberally in favor of Turo and its Hosts and against City unless they clearly come within the terms of the ordinance. However, we note that ordinances are presumed valid and must be followed until a court sets it aside or subsequent legislative action revokes or amends its application. Op. Att'y Gen., 2017 WL 6629070 (S.C.A.G. Dec. 18, 2017). Additionally, we believe a court would afford great deference to City's interpretation of its own ordinance. Gurganious v. City of Beaufort, 317 S.C. 481, 487, 454 S.E.2d 912, 916 (Ct. App. 1995). Regarding Turo, you indicate it does not have an office in City, does not maintain vehicles in City, does not employ any salespeople in City, or own any property in City. While Turo is not required to be a resident of City to be subject to its business license tax, the information you provide indicates Turo has no physical presence in City. Additionally, the information you provided does not include evidence that Turo intends to conduct business in City. Without a physical presence or evidence of additional activity within City or intent to conduct business in City, a court may find Turo is not doing business within City. However, a court, not this Office, would need to make this determination based on facts available to it.

The Hosts, however, are more difficult to assess. First, we are not aware as to whether the individual Hosts have a presence in City. Moreover, without considering each Host individually, we cannot determine what level of activity they have in City or their intent to do business in City. As discussed in our 1971 opinion, if the Host's activity in City consists solely of dropping a car off one time or sporadically with no intention of supplying the vehicle or vehicles to customers on

a continuous basis in City, a court may find in accordance with its holding in Pee Dee Chair Co., 165 S.C. 86, 162 S.E. 771 that the connection is not sufficient to constitute doing business in City. Nevertheless, a court would also need to consider facts such as whether vehicle is kept within the City and how often the Host rents it out to determine if the Host is doing business in City. This determination must be made by a court on a case-by-case basis considering the facts surround each individual Host and their specific activities.

B. Turo's Gross Receipts in City

You also inquire as to whether Turo has gross receipts in City. The City's Code defines "gross income" as follows:

> Gross income means the gross receipts or gross revenue of a business, received or accrued, for one calendar or fiscal year collected or to be collected from business done within the municipality. If the licensee has a domicile within the municipality, business done within the municipality shall include all gross receipts or revenue received or accrued by such licensee. If the licensee does not have a domicile within the municipality, business done within the municipality shall include only gross receipts or revenue received or accrued within the municipality. In all cases, if the licensee pays a business license tax to another county or municipality, then the licensee's gross income for the purpose of computing the tax within the municipality must be reduced by the amount of revenues or receipts taxed in the other county or municipality and fully reported to the municipality. Gross income for business license tax purposes shall not include taxes collected for a governmental entity, escrow funds, or funds that are the property of a third party. The value of bartered goods or trade-in merchandise shall be included in gross income. The gross receipts or gross revenues for business license purposes may be verified by inspection of returns and reports filed with the Internal Revenue Service, the South Carolina Department of Revenue, the South Carolina Department of Insurance, or other government agencies. In calculating gross income for certain businesses, the following rules shall apply:
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> (1) Gross income for agents shall be calculated on gross commissions received or retained, unless otherwise specified. If commissions are divided with other brokers or agents, then only the amount retained by the broker or agent is considered gross income.
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> (2) Except as specifically required by S.C. Code § 38-7-20, gross income for insurance companies shall be calculated on gross premiums written.

> (3) Gross income for manufacturers of goods or materials with a location in the municipality shall be calculated on the lesser of (i) gross revenues or receipts received or accrued from business done at the location, (ii) the amount of income allocated and apportioned to that location by the business for purposes of the business's state income tax return, or (iii) the amount of expenses attributable to the location as a cost center of the business. Licensees reporting gross income under this provision shall have the burden to establish the amount and method of calculation by satisfactory records and proof. Manufacturers include those taxpayers reporting a manufacturing principal business activity code on their federal income tax returns.

Myrtle Beach, South Carolina Code of Ordinances § 11-22 (emphasis added). According to this definition, gross income is based on the individual or entity's business performed within the municipality. As such, we cannot conclude whether Turo or its Hosts have gross income for purposes of the ordinance until a determination has been made as to what, if any, of its activities are considered "doing business" in City. A court would need to make this determination based on the facts. If a court were to find Turo is not doing business within City, then obviously, it would not generate gross income attributable to City. However, if a court were to find Turo or its Hosts are doing business in City, it would then need to determine the gross receipts attributable to those activities for purposes of assessing the business license tax.

Conclusion

Section 5-7-30 of the South Carolina Code allows municipalities to levy a business license tax on the gross income of businesses operating within their boundaries. This licensing requirement and the taxes imposed apply to all who are engaging in business within the municipality and are binding on residents and nonresidents alike. Op. Att'y Gen., 1999 WL 387066 (S.C.A.G. May 19, 1999). As such, City has authority to enact a business license tax on those doing businesses within its boundaries regardless of whether the business is a resident of City, but such individuals or entities must be "doing business" within the municipality. Advertising or making a single delivery of goods to a municipality likely does not constitute doing business. See Pee Dee Chair Co., 165 S.C. 86, 162 S.E. 771 (finding a single delivery of furniture is not sufficient to impose a business license tax); Op. Att'y Gen., 1988 WL 485210 (S.C.A.G. Jan. 7, 1988 (determining advertising property for sale in a municipality without other activities likely is insufficient to impose a business license tax). However, maintaining an office or conducting regular business-related activities within the municipality does constitute doing business. See Triplett, 209 S.C. 455, 40 S.E.2d 684 (concluding that maintaining an office in the municipality was sufficient to impose a business license tax regardless of whether the construction work is performed elsewhere); Op. Att'y Gen., 1971 WL 17513 (S.C.A.G. Jun. 15, 1971) (indicating that businesses that make regular deliveries a municipality are subject to its business license tax). Moreover, our courts also consider the individual's or entity's intent to conduct business in the municipality. Pee Dee Chair Co., 165 S.C. at 86, 162 S.E. at 774.

Based on the information provided in your letter, it does not appear that Turo has a physical presence in City or engages in regular business-related activity in City. However, whether Turo is doing business within City is a question of fact that must ultimately be determined by a court that can consider all the evidence surrounding Turo's activities in relation to City. Moreover, as for Turo's Hosts, a court would have to evaluate their activity in relation to City on a case-by-case basis to determine if they are doing business in City.

You also inquired as to whether Turo has gross receipts in City. A court would first need to evaluate Turo's activity within City to determine what, if any, activities constitute doing business. If a court determines Turo is not doing business in City, it will not have gross receipts. However, if a court were to find some aspect of Turo's activities constitute doing business in City, the gross receipts for business license tax purposes would be based on such activity. Nevertheless, a court must ultimately make this determination, keeping in mind that a municipal ordinance, like a statute, carries with it the presumption of validity. Op. Att'y Gen., 1998 WL 993679 (Dec. 21, 1998).

In summary, this Office may provide you with the applicable law, but only a court may apply that law to the relevant facts. Factual findings are beyond the scope of an opinion of this Office. Most importantly, this Office cannot substitute its view for the findings of a municipality, such as City, or second guess City's interpretation or application of its own ordinance. City is statutorily authorized to apply its business license tax. Whether it has done so within the appliable law, as referenced above, or consistent with the facts, is exclusively within the province of the judicial branch.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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