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OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

March 4, 2005

Mr. Steven E. Thomas
City Administrator, City of Conway
Post Office Drawer 1075
Conway, South Carolina 29528

Dear Mr. Thomas:

This opinion follows in response to a letter dated January 31, 2005. In your letter you requested clarification of S.C. Code Ann. § 5-7-30 and our opinion, *Op. S.C. Atty. Gen.* Op. No. 89-114, dated October 13, 1989. Specifically, your inquiry is as follows:

> [i]f a wholesaler establishes a place of business within a particular municipality, does the wholesaler pay to the municipality a business license fee based upon the gross income for business generated just within the corporate limits of that municipality or is the business license fee for that location based upon the total gross income received by the wholesaler from all sources to include business done outside of the corporate limits of that municipality?

Law / Analysis

The relevant portion of S.C. Code Ann. § 5-7-30 provides as follows:

> [e]ach municipality of the State ... 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 or mercantile establishment for the distribution of wholesale goods.

By way of background, we note that our Supreme Court addressed the application of a municipality's business license tax in *Triplett v. City of Chester,* 209 S.C. 455, 40 S.E.2d 684, 685 (1946). There, the Court noted that in imposing a business license tax, "[i]t is the privilege of doing business within the municipality that is sought to be taxed." In *Triplett*, the taxpayer was a general contractor who resided in Chester, where he maintained an office and stored his equipment. All contracting work, however, was performed outside the city limits.

The Supreme Court noted that "[i]t 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.* Citation was made by the *Triplett* Court to its earlier decision in *Crosswell & Co., Inc. v. The Town of Bishopville*, 172 S.C. 26, 172 S.E. 698 (1934), a case in which the Court had held that the Town of Bishopville could validly tax pursuant to its business license tax a wholesale grocery business located in Sumter even though the only business done at Bishopville consisted of the delivery of merchandise into the Town by trucks sent once or twice each week for a period of two years. In the Court's view, "[t]he right of a municipal corporation to impose a tax of this kind upon a corporation or business conducted within the city limits, although a portion of the business is carried on or the transaction is factually completed outside such municipality is generally recognized." *Id.* at 686. Thus, the Court in *Triplett* concluded as follows:

> [w]e find no reasonable justification for a construction of this ordinance which would make the liability for the payment of a license contingent upon *all* of the functions of the taxpayer's business being performed within the City of Chester. It was not contemplated that the various phases of a business should be segregated and only that part taxed which was actually carried on within the corporate limits. 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.

40 S.E.2d. at 687.

And, in *Eli Witt Company v. City of West Columbia*, 309 S.C. 555, 425 S.E.2d 16 (1992), the Court examined the question of whether the City of West Columbia's business license ordinance was constitutional. Witt, a wholesale distributor, which owned and operated a warehouse in West Columbia, challenged the constitutionality of the West Columbia ordinance on the basis of Equal Protection and Due Process. The wholesaler contended that the Ordinance's definition of "gross income" was arbitrary. "Gross income" was defined by the West Columbia ordinance as

> the total revenue of business received or accrued for one calendar year, collected or to be collected by a business within the city, excepting therefrom income done from business wholly outside the city, on which a license tax is paid to some other municipality....

309 S.C. at 557-558. *Witt* argued that "the tax should be limited to income earned within the City," basing its Equal Protection contention upon the fact that "it is not taxed by any other municipality and, therefore is treated differently than a business which is taxed by another municipality in that Eli Witt cannot deduct income from sales made outside the City." 309 S.C. at 557.

The Court noted that "Eli Witt concedes that a business license tax is imposed for the privilege of maintaining and conducting a place of business within the municipality." *Id.* No violation of the Equal Protection Clause occurred by virtue of enforcement of the Ordinance, concluded the Court, because the Ordinance's classification bore a reasonable relation to the legislative purpose, the members of the class were treated alike under similar circumstances, and the classification rested upon some reasonable basis. *Id.*, citing *Medlock v. S.C. State Family Farm Dev. Auth.*, 279 S.C. 316, 306 S.E.2d 605 (1983). The Court stated:

> [a]n ordinance violates the equal protection clause if it is arbitrary and there is no hypothesis to support the classification .... Obviously, the City classifies a business which already pays a similar tax to another city differently. This classification, however, is not arbitrary, as all businesses which pay another city a similar tax are treated alike and allowed a deduction from their gross receipts. Conversely, all businesses which do not pay another city a similar tax are not allowed any deductions. These classifications are reasonably related to the purpose of avoiding duplicative taxation. Therefore, this ordinance does not violate the equal protection clause.

Id. at 559.

Citing *Triplett, supra* in support of its conclusion, the *Eli Witt* Court distinguished *Southern Bell Tel. and Tel. Co v. City of Sptg.*, 285 S.C. 495, 331 S.E.2d 333 (1985), which had been relied upon by Witt to support its argument. In the *Witt* Court's view, *Southern Bell* was inapplicable. The Court noted that

> [i]n *Southern Bell*, this Court held there is no rational basis for including intrastate calls in gross income for license tax purposes. This Court merely held intra-state phone calls should not be included in gross income for license tax purposes. The holding in *Southern Bell* is limited to the facts of that particular case.

Id. at 559.

In previous opinions, we have recognized, consistent with the above-referenced authorities, that

> [t]he prevailing case law holds that a gross receipts or gross income tax, such as that authorized by Section 5-7-30, CODE OF LAWS OF SOUTH CAROLINA, 1976, can be imposed by a municipality upon the gross receipts of a business collected within the municipality, but earned both within and without the taxing municipality. See, e.g., *Dravo Corp. v. Tacoma*, 496 P.2d 504; *Stork Diaper Service, Inc. v. Richmond*, 173 S.E.2d 859; *Suburban Title & Investment Corp. v. District of Columbia*, 124 F.2d 286; *Food Center of St. Louis, Inc. v. Village of Warson Woods*, 277 S.W.2d

> 573; *New Yorker Magazine, Inc. v. Gorosa*, 144 N.E.2d 367 ('all receipts paid at home office for sale of advertising space in nationally circulated magazine were subject to gross receipts tax levied by municipality in which home office was located, without allocation as to source of payment); 16 McQUILLIN MUNICIPAL CORPORATIONS § 44.190 (1972 revised vol.).

Your apparent concern is our 1989 opinion, *Op. S.C. Atty. Gen.*, Op. No. 89-114 (October 13, 1989). In that opinion, we addressed the issue of whether the delivery of goods to retailers by a wholesaler into a municipality sufficiently constitutes "doing business" for purposes of that municipality's imposing a business license tax upon the wholesaler. We referenced § 5-7-30 and noted that "[a] wholesaler who delivers goods to a retailer within a municipality is not subject to the business license tax of the municipality unless he maintains within the municipality a warehouse or mercantile establishment for the distribution of wholesale goods."

As to the issue of "[w]hether a person who delivers goods to users or consumers is liable for payment of the tax," we stated that resolution of this issue "is dependent upon all facts surrounding the delivery." In addition, we stated that

> [w]hile our statute does not now contain the words "doing business", the same is necessarily implied. If there is no income from business within the municipality, there is no tax. (See *Southern Bell Tel. and Tel. Co. v. City of Spartanburg*, 285 S.C. 495, 331 S.E.2d 333 (1985).)
>
> In *Pee Dee Chair Co. v. City of Camden*, 165 S.C. 86, 162 S.E. 771 (1934), our Court held that company that manufactured and sold chairs in Darlington and made one delivery without charge to a furniture store in Camden was not subject to the business license tax of the City of Camden.
>
> In *Crosswell & Co. v. Town of Bishopville*, 172 S.C. 26, 172 S.E. 698 (1934), a wholesale grocer who for two years sent a truck once or twice a week to deliver merchandise to retailers within Bishopville was held liable for the payment of the town's business license tax.
>
> It is thus evidence that the imposition of the tax is generally governed by the frequency of the deliveries.

CONCLUSION:

(a) An isolated delivery of goods into a municipality and in the absence of other business activities within the municipality would not subject the persons making the delivery to the business license tax of the of the municipality. ...

(b) Frequent deliveries of goods into a municipality would subject the person making the deliveries to the business license tax of the municipality.

(c) A wholesaler who delivers goods to a retailer within a municipality is not subject to the business license tax of the municipality unless he maintains within the municipality a warehouse or mercantile establishment for the distribution of wholesale goods.

Thus, the entire thrust of the 1989 Opinion, Op. No. 89-114, was to define the standard for determining the degree of activity within a municipality necessary to constitute "doing business" for purposes of a municipality levying a business license tax upon a wholesaler for such privilege. The opinion did not address the issue raised in *Triplett* and *Witt* – whether a wholesaler which is "doing business" within a municipality may be taxed as part of the business license for income from activities occurring outside the corporate limits. The opinion recognized that § 5-7-30 itself requires that a wholesaler must maintain "within the corporate limits of the municipality a warehouse or mercantile establishment for the distribution of wholesale goods" in order for the municipality to impose any business licence tax. The Opinion did not conclude, however, that a business license tax may be imposed only on that portion of business activity conducted exclusively within the corporate limits of a municipality.

Based upon the foregoing, it would appear that the Court's analysis in *Eli Witt* and *Triplett* are controlling. Clearly, the Court upheld the municipal ordinance in *Eli Witt*, which defined "gross income" for purposes of imposition of the business license tax as total revenue received during the calendar year, collected or to be collected by a business located within the city "excepting therefrom income done from business wholly outside of city, on which a license is paid to some other municipality...." 309 S.C. at 557, *supra*.

The Municipal Association, in its Business License Handbook, recommends such a practice to municipalities, in drafting a legally valid business license ordinance. Therein, it is stated that "[m]unicipal ordinances usually provide for such an exemption [income received from activities in another county or municipality to which a business license tax is paid] to meet the test of reasonableness and avoid payment of two or more license fees calculated on the same income. This treatment was approved in *Eli Witt Co. v. City of West Columbia*, 309 S.C. 555, 425 S.E.2d 16 (1992)." Handbook, *Id.*, at 15.

As noted, such an approach has the approval of our Supreme Court. Moreover, it allows a municipality to receive sufficient revenue for the privilege of doing business in a municipality, while at the same time avoiding the situation in which a taxpayer is paying dual taxation. The Court's conclusion in *Southern Bell*, while troubling, has been limited by our Court in *Eli Witt* to the facts of that specific case. Too, the central issue in *Southern Bell* was the "gross disparity in the license tax rate imposed by the Spartanburg ordinance" when compared with the tax on "a textile mill or manufacturing plant with the same revenue as Southern Bell ...." 285 S.C. at 497. Thus, the *Witt*

Court does not believe *Southern Bell* stands for the principle that a municipality may impose a business license tax only on that income resulting from activities which take place completely within the corporate limits of the municipality.

Of course, as we stated in Op. No. 89-114, each situation depends upon the particular facts involved. Your letter indicates that the wholesaler has established "a place of business" in the municipality. Based upon this description, we presume that the wholesaler is engaging in substantial business activity from such location.

Moreover, we have been provided a copy of Conway's Business License Ordinance. The Ordinance defines "gross income" similarly to the definition used by the Town of West Columbia in the *Eli Witt* case. Conway's definition of "gross proceeds" reads as follows:

> Sec. 1. ...
>
> > D. "Gross Income" means the total revenue of a business, received or accrued, for one calendar year collected or to be collected by a business located within the City, excepting therefrom income from business done wholly outside of the City on which a license tax is paid to some other municipality or a county and fully reported to the City. The gross income for business license purposes shall conform to the gross income reported to the Internal Revenue Service, the South Carolina Tax Commission for income tax purposes, or the South Carolina Insurance Commission. In the case of broker or agents, gross income shall mean gross commissions retained.

Conclusion

We stress that each situation depends upon its own facts and that this Office may not make factual determinations in an opinion. See, *Op. S.C. Atty. Gen.*, December 12, 1983. Moreover, we assume for purposes of your inquiry that the business in question "maintains within the corporate limits of the municipality a warehouse or mercantile establishment for the distribution of wholesale goods" in accordance with § 5-7-30. With these caveats in mind, we also concur with the Municipal Association Handbook's statement that language such as that adopted in the Conway Ordinance in defining 'gross proceeds" for purposes of the Business License Tax has been approved by our Supreme Court in *Witt*. Such language permits Conway's inclusion as "gross income" all income generated by the business referenced in your letter, excepting "income from business done wholly outside the City on which a license tax is paid to some other municipality or a county and fully reported to the City."

Moreover, we do not believe our 1989 opinion, Op. No. 89-114 conflicts with the application of Conway's Ordinance. The 1989 opinion sought to provide guidance as to how the minimum threshold of "doing business" is to be determined in order to apply a business license tax to a

wholesaler in the first instance. The opinion did not seek to determine how income generated by the business is to be apportioned for purposes of levying the tax.

In any event, like the Municipal Association, we deem the Supreme Court's decision in *Witt* to be controlling as to the apportionment issue. We are enclosing a copy of the *Witt* case for your guidance. If you have any specific questions in this area, it is suggested that you contact the Municipal Association.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

Enclosure