



HENRY McMASTER
ATTORNEY GENERAL

April 1, 2009

Ray N. Stevens, Director
South Carolina Department of Revenue
Post Office Box 125
Columbia, South Carolina 29214

Dear Mr. Stevens:

We understand you desire an opinion of this Office regarding “the fire sprinkler tax credit against real property taxes and subsequently against state taxes under Act 357, Fire Suppression Act.” Specifically, you are interested in whether an ordinance passed by the City of Columbia is valid. You state: “As we read the ordinance, some features of the property tax credit exceed the bounds of the authorization granted in Section 12-6-3622 and, thus, call into question the validity of the ordinance.”

Law/Analysis

We must begin with the presumption that the ordinance is valid. Town of Scranton v. Willoughby, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991). “The exercise of police power under a municipal ordinance is subject to judicial correction only if the action is arbitrary and has no reasonable relation to a lawful purpose.” Id. Moreover, only a court, not this Office, may declare an ordinance invalid. Op. S.C. Atty. Gen., January 22, 2008. Accordingly, this ordinance remains in force until a court declares it invalid. Op. S.C. Atty. Gen., October 19, 2007.

Determining whether a local ordinance is valid is a two-step process. The first step is to determine whether the county had the power to adopt the ordinance. If no power existed, the ordinance is invalid. If the county had the power to enact the ordinance, the second step is to determine whether the ordinance is consistent with the Constitution and general law of the State.

Riverwoods, LLC v. County of Charleston, 349 S.C. 378, 384, 563 S.E.2d 651, 654 (2002). In 2008, the Legislature specifically authorized local governments to enact tax credits against real property

taxes through its passage of section 12-6-3622 of the South Carolina Code via act 357. 2008 S.C. Acts 3601. This provision states:

(A)(1) Subject to the terms and conditions of this section, a taxpayer who installs a fire sprinkler system in a commercial or residential structure, whether the structure or fire sprinkler is new or existing, when such installation is not required by law, regulation, or code is eligible for a credit against real property taxes levied by a local taxing entity equal to twenty-five percent of the direct expenses, not including any type of fee charged by the publicly or privately owned utility, incurred by the taxpayer if the local taxing entity has consented to the tax credit.

(2) In any year in which the local taxing entity consents to a tax credit, the taxpayer also may claim an income tax credit equal to the amount of the credit against real property taxes.

(3) The credit earned pursuant to this subsection by an "S" corporation owing corporate level income tax must be used first at the entity level. Any remaining credit passes through to each shareholder in a percentage equal to each shareholder's percentage of stock ownership.

(4) The credit earned pursuant to this subsection by a general partnership, limited partnership, limited liability company, or any other entity taxed as a partnership must be passed through to its partners and may be allocated among any of its partners, including without limitation, an allocation of the entire credit to one partner, in a manner agreed by the partners that is consistent with Subchapter K of the Internal Revenue Code. As used in this subsection, the term "partner" means a partner, member, or owner of an interest in the pass-through entity, as applicable.

(B) The Department of Revenue shall develop a form on which a taxpayer may claim the credit against real property taxes. The taxpayer may claim the credit against real property taxes by submitting the form with the payment of real property taxes to the local taxing entity. The taxpayer may claim the credit against income taxes by submitting the form with the taxpayer's return.

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(C) The owner of the structure may transfer, devise, or distribute any unused credit to the tenant of the eligible site. To be effectual, the local taxing entity must receive written notification.

(D) For purposes of this section, fire sprinkler system has the same meaning as in Section 40-10-20.

S.C. Code Ann. § 12-6-3622 (Supp. 2008).

As section 12-6-3622 provides specific authority for the City of Columbia (the “City”) to adopt the ordinance in question, in order to assess the ordinance’s validity, we must determine whether the ordinance is consistent with the Constitution and general law of the State. According to your letter, the Department of Revenue believes that several provisions contained within the ordinance are contrary to state law. This Office, like the courts of this State, “generally gives deference to an administrative agency’s interpretation of an applicable statute or its own regulation.” Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003). Furthermore, courts will reject an agency’s interpretation only when the plain language of the regulation is contrary to the agency’s interpretation. Brown v. South Carolina Dep’t of Health and Env’tl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 415 (2002). Thus, in reviewing the ordinance, we give strong consideration to the Department of Revenues interpretation of the applicable provisions governing the fire sprinkler tax credit.

In your letter, you point out three specific portions of the ordinance passed by the City that you believe exceed the authorization granted in section 12-6-3622. First, you point out that the ordinance allows the property tax credit to be claimed in a year other than the year the credit is earned. In our review of the ordinance, which you provided with your letter, we found the following provision: “The taxpayer applies for the tax credit by submitting the statutory South Carolina Department of Revenue form along with complete documentation evidencing the costs of installation for which the taxpayer seeks the tax credit, a copy of the building permit issued for the installation and the amount of the tax credit claimed within one (1) year after installation.” You are concerned that this provision is inconsistent with sections 12-6-3622 and 12-6-3310(A) of the South Carolina Code.

Section 12-6-3622 does not specifically state when a taxpayer must claim the property tax credit. However, as you indicate, section 12-6-3310(A) of the South Carolina Code (Supp. 2008), states “[c]redits allowed in this article are nonrefundable and may be used only in the year generated unless otherwise provided.” (emphasis added). Sections 12-6-3622 and 12-6-3310 are both located in article 25 of chapter 6 of title 12 of the South Carolina Code. Because section 12-6-3622 does not provide otherwise, we agree with your assessment that section 12-6-3310(A) requires the tax credit offered in section 12-6-3622 be used in the tax year it is generated.

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We understand that requiring taxpayers to claim the credit within the tax year creates an issue for taxpayers who install such systems at the end of the tax year because local taxing entities require any adjustments to the taxpayers property taxes be made prior to the issuance of the tax notice. However, because the section 12-6-3622 does not provide for an extended time for the taxpayer to claim the credit, we do not believe the local taxing entity may allow for such an extension. Thus, if the Legislature desires to allow taxpayers additional time to claim the credit, we suggest that it amend section 12-6-3622 to allow taxpayers to claim the credit in a year outside of the year in which the fire sprinkler system is installed.

Next, you are concerned with the fact that the ordinance allows the property tax credit to be applied rateably over four years in four equal installments. The ordinance states: "The tax credit will be allowed in four (4) equal amounts for a period of four (4) consecutive years against the actual amount of real property taxes paid in each year unless consent has been withdrawn as provided for herein." Section 12-6-3622 is silent as to whether the property tax credit can be spread out over a period of time. However, as quoted above, section 12-6-3310(A) states that tax credits provided for under article 25 can only be used in the year generated. Thus, as we previously concluded, this provision appears to prevent the property tax credit provided for under section 12-6-3622 from being applied outside of the tax year in which the tax credit is generated. As such, we believe section 12-6-3310(A) prevents taxpayers from rateably applying the tax credit over four years.

We recognize that requiring local entities to give taxpayers the full amount of the tax credit in one year could place a financial burden on the local entity if multiple taxpayers take advantage of the tax credit in a particular year. However, we cannot ignore section 12-6-3310(A). Therefore, we suggest that if it so desires, the Legislature amend section 12-6-3622 to allow the local taxing entities to spread the credit out over a period of years.

Lastly, you are concerned with the fact that the ordinance allows taxpayers to receive a rebate in lieu of a tax credit against the taxpayer's property taxes. According to the ordinance:

In lieu of the tax credit being credited against the taxpayers real property taxes for the years claimed, the City will rebate the amount of the credit to the taxpayer within ninety (90) days after submittal of paid real property tax receipt for the year in which the credit is claimed unless consent has been withdrawn as provided for herein.

You assert that section 12-6-3622 does not provide for a rebate and thus, the City is only authorized to implement a tax credit and not a rebate.

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Tax credits generally entitle the taxpayers to subtract the tax credit amount from their total tax liability. Black's Law Dictionary, 1501 (8th ed. 2004). Furthermore, in an opinion of this Office, we described tax credits as follows:

“A tax credit . . . relieves the taxpayer from direct payment of all or a portion of the particular tax on the theory that it has been satisfied by some other method. The taxpayer remains subject to all of the requirements of the tax law and is only permitted to set off against his tax liability any amount with which he has been properly credited.”

Op. S.C. Atty. Gen., February 1, 1996 (quoting Kupper v. Fiscal Court of Jefferson County, 346 S.W.2d 766, 767 (Ky. Ct. App. 1961)). We also acknowledged that “tax credits do not constitute a right to a payment of money, have no independent value, and are not freely transferable upon receipt.” Id. (quoting City of Chicago v. Michigan Beach Housing Cooperative, 609 N.E.2d 877, 886 (Ill. App. Ct. 1993)).

Section 12-6-3622 does not specifically allow the tax credit to be refunded to the taxpayer subsequent to his payment of the property tax owed. This provision simply entitles taxpayers to a tax credit against property taxes owed. Moreover, subsection (B) of section 12-6-3622, describing the form to be used to claim the credit, states: “The taxpayer may claim the credit against real property taxes by submitting the form with the payment of real property taxes to the local taxing entity.” This provision indicates the Legislature’s intent for the credit to be applied against current real property taxes. Furthermore, section 12-6-3310(A) states that unless provided otherwise tax credits in article 25 are nonrefundable. Thus, we are of the opinion that real property tax credits permitted under section 12-6-3622 must be applied against the current amount of taxes due and cannot be refunded to the taxpayer after the payment of the tax.

Conclusion

As the City relies on section 12-6-3622 to implement a credit against real property taxes, we believe the City has sufficient authority to enact an ordinance establishing the credit. However, giving deference to the Department of Revenue’s interpretation of sections 12-6-3622 and related statutes, we agree that several provisions contained in the ordinance appear contrary to State law. While section 12-6-3622 does not specifically state a time frame for claiming the tax credit, as you point out, section 12-6-3310(A) restricts the use of the credit to the year it is generated. Thus, the provisions in the ordinance allowing the credit to be claimed within a year of the fire sprinkler system’s installation and the provision calling for the credit to be applied ratably over a period of four years appear contrary to section 12-6-3310(A). Moreover, section 12-6-3622 does not allow for a rebate to be given in lieu of a tax credit. To the contrary, subsection (B) in section 12-6-3622 indicates that the credit must be claimed against the taxes owed. In addition, section 12-6-3310(A)

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specifies that tax credits are nonrefundable. Therefore, we believe the provision in the ordinance calling for the taxpayer to receive a rebate equal to the amount of the credit subsequent to paying the property taxes due is contrary to State law.

We realize that the provisions of the ordinance discussed above were enacted by the City in an effort to aid taxpayers and the City in implementing the tax credit on real property taxes. However, we agree with your assessment that these provisions run afoul of sections 12-6-3622 and 12-6-3310(A) and render the ordinance in jeopardy of being declared invalid by a court. Nonetheless, this Office, unlike a court, does not have jurisdiction to declare the ordinance invalid. Accordingly, unless and until a court comes to this conclusion, the ordinance remains valid.

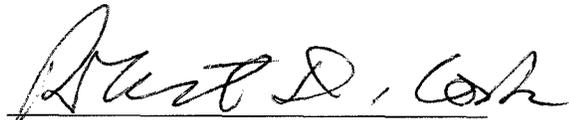
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