

7845 Liberty



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

April 17, 2002

The Honorable Hugh K. Leatherman, Sr.
Senator, District No. 31
111 Gressette Building
Columbia, South Carolina 29202

Re: Informal Opinion

Dear Senator Leatherman:

You have requested on behalf of a constituent of yours an opinion concerning the constitutionality of a particular exemption from collection of the sales tax. Your constituent believes that the state law which allows a sales tax exemption for non-profit corporations which sell religious materials is unconstitutional, constituting unlawful discrimination in violation of the Equal Protection Clause.

Law / Analysis

S. C. Code Ann. Sec. 12-36-2120 enumerates various exemptions to the collection of state sales tax. Section 12-36-2120(41) exempts items sold by non-profit organizations. Such Section provides for an exemption as follows:

items sold by organizations exempt under Section 12-37-220A(3) and (4) and B(5), (6), (7), (8), (12), (16), (19), (22), and (24), if the net proceeds are used exclusively for exempt purposes and no benefit inures to any individual. An organization whose sales are exempted by this item.¹

¹ Section 12-37-220 provides a long list of general exemptions from ad valorem taxation. Among property exempted is property of charitable trusts and foundations used exclusively for charitable purposes, property of groups such as the YMCA or Salvation Army, property of the Boy's or Girl's Scouts, property of fraternal societies, and property of eleemosynary associations or organizations. Thus, § 12-37-220 makes items sold by organizations exempt from taxation for ad valorem taxation also exempt from the sales tax.

request letter

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A Bill has been introduced in the General Assembly (S.841) which would add a sentence to 12-36-2120(41). This Amendment states that "the exemption provided by this item does not extend to religious bookstore sales." In other words, the proposed legislation would eliminate the sales tax exemption for religious bookstore sales by non-profit organizations.

It is the fact that such exemption currently applies to nonprofit organizations which operate religious bookstores, as well as the sales of religious literature by such organizations which concerns your constituent. He believes such distinction between sales by for-profit corporations and non-profit organizations violates the Equal Protection Clause of the Constitution.

Of course, in considering an act of the General Assembly, it is presumed that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional or to make necessary findings of fact prior to finding a legislative enactment unconstitutional. Op. Atty. Gen., No. 87-62 (June 15, 1987).

In Senn Trucking Co. v. Wasson, 280 S.C. 279, 312 S.E.2d 252 (1984), our Supreme Court commented upon the issue of whether sales tax exemptions violate the Equal Protection Clause. The Court noted that

[o]ur Supreme Court in State v. Byrnes, 219 S.C. 485, 66 S.E.2d 33 (1951) explained the role of equal protection in evaluating the sales tax exemptions.

To invalidate a tax statute for discrimination, in the absence of specific constitutional inhibition, exemption from its terms must be purely arbitrary, which cannot be fairly said of the exemptions contained in the Act before us. It was said in Marshall v. Tax Comm., supra, (178 S.C. [57] at page 62, 182 S.E. [96] at page 98) upon the authority of numerous cited decisions of the U.S. Supreme Court: "The plaintiff must be able to satisfy the court that the classification (of income for State taxation) has its origin in nothing better than whim and fantasy and tyrannical exercise of arbitrary power, before the tax in question will be stricken down."

In the Byrnes case, referenced by the Court in Senn, the Court provided the following additional analysis concerning exemptions from the sales tax:

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[i]n Gregg Dyeing Co. v. Query, *supra*, this Court quoted with approval the following from the leading case of Hart Refineries v. Harmon, 278 U.S. 499, 49 S.Ct. 188, 189, 73 L.Ed. 475:

Statutes which tax one class of property while exempting another class necessarily result in imposing a greater burden upon the property taxed than would be the case of the omitted property were included. But such statutes do not create an inequality in the constitutional sense. Nor is the imposition of an excise tax upon one occupation or one activity from which other and different occupations ... are exempt, a denial of equal protection. It is enough if all in the same class are included and treated alike.

66 S.E.2d at 45.

Thus, the Court has made it quite clear that an Equal Protection argument made against a particular sales tax exemption will, in all likelihood, not be successful. Based upon the strong presumption of constitutionality which must be given to any act of the General Assembly, the Senn and the Byrnes cases and the fact that a rational distinction exists between a non-profit organization and a for-profit business, it is my opinion that a constitutional attack upon the exemption contained in subsection (41) of § 12-36-2120(41) would fail. In other words, the referenced provision (§ 12-36-2120(41)) would likely be upheld as constitutional. Of course, the General Assembly could change or modify such exemptions and your constituent may wish to pursue that option.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an