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THE STATE OF SOUTH CAROLINA

OFFICE OF THE ATTORNEY GENERAL

COLUMBIA

OPINION NO. _____ October 4, 1994

SUBJECT: Taxation and Revenue - Imposition of a surcharge under S.C. Code Ann. Section 56-31-50 (Supp. 1993).

SYLLABUS: The five percent surcharge imposed by Section 56-31-50 is a tax since it is an enforced contribution of money under the State's exercise of its taxing power to raise revenue for a public purpose.

TO: Honorable John C. Land, III
Senator, District No. 36

FROM: Ray N. Stevens
Chief Deputy Attorney General

QUESTION: Is the surcharge imposed by Section 56-31-50 a tax?

APPLICABLE LAW: S.C. Code Ann. Section 56-31-50 (Supp. 1993).

DISCUSSION:

A. Background

In 1989, S.C. Code Ann. Sections 56-31-10 through 56-31-40 (Rev. 1991) were added to the Code by Act No. 177, 1989 S.C. Acts. Section 1 of Act No. 177 states the purpose of the Act is "to regulate advertising by rental car companies [by providing] for restrictions to be placed on mandatory fees and surcharges . . . ." The term "rental company" is defined by Section 56-31-20(1) as a person in the business of providing private passenger automobiles to the public under the terms of a rental agreement. In general, Act No. 177 seeks to impose specific duties on rental companies as to the advertisement of rental rates.

In 1992, rental companies, pursuant to the addition of Section 56-31-50, by Act No. 501, 1992 S.C. Acts, Part II, Section 64, became subject to a new duty relating to

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surcharges. Rental companies began to "collect . . . a five percent surcharge" on each vehicle rental, with such charge calculated on the "total amount stated in the rental agreement."

Airport authorities typically require a rental company to pay fees on the revenues of the rental company. According to the facts presented, airport authorities typically do not require the rental company to pay a fee on revenues which consist of "taxes." The issue here is whether the surcharge imposed by Section 56-31-50 is a tax.

B. Analysis And Law

Powell v. Chapman, 260 S.C. 516, 197 S.E.2d 287, 289 (1973), states the following:

> The essential characteristics of a tax are that it is not a voluntary payment or donation, but an enforced contribution, enacted pursuant to legislative authority, in the exercise of the taxing power, the contribution being of a proportional character, payable in money, and imposed, levied, and collected for the purpose of raising revenue, to be used for public or governmental purposes. 84 C.J.S. Taxation section 1, at page 32. The question of whether a particular contribution, charge, or burden is to be regarded as a tax depends on its real nature and not on its designation. Whether revenue shall be raised by one system or plan or by another, are matters committed necessarily to the discretion of the General Assembly of this State.

Thus, a tax must be an enforced contribution of money under the State's exercise of its taxing power to raise revenue for a public purpose. Each element is examined below.

1. Required Contribution

A charge is not a tax if the charge is voluntary. Among others, a voluntary charge may arise from a service per-

formed by the government,[1] a contractual arrangement with the government,[2] and the use of governmental facilities.[3]

Here the surcharge is not voluntary. There are no specific services rendered or facilities furnished by the government to the rental company for which a charge is imposed. Likewise, there is no contract between the rental company

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[1]In In re South Atlantic Packers Ass'n., Inc., 28 B.R. 80, 82, 10 Bankr. Ct. Dec. 254 (Bankr.D.S.C. Jan. 19, 1983), the South Carolina Department of Agriculture (SCDA) charged fees for grading services for poultry processed within the State. SCDA contended that the grading charges were entitled to priority status as excise taxes. The court disagreed by stating "[t]he SCDA charges are the result of the debtor's voluntary utilization of SCDA's poultry grading services [which services are not] . . . required under . . . South Carolina statutes nor SCDA rules . . . ."

[2]In Legum v. Goldin, 55 N.Y.2d 104, 432 N.E.2d 772, 773, 447 N.Y.S.2d 900 (1982), a contract between the city and its employees required any employee that became a nonresident of the city to pay to the city an amount equal to the employee's tax liability computed as though the employee were a resident. In a challenge asserting that the payment was a tax, the court disagreed and held the following:

> Petitioner's argument confuses the fundamental distinction between a tax imposed by the sovereign and a contractual provision agreed to by two parties. We have said that "[t]axes, unlike debts, are not contractual, but are enforced contributions levied by the authority of the state for the support of its government and other public needs . . . . (cites omitted)

[3]In Orbison v. Welsh, 242 Ind. 385, 179 N.E.2d 727, 743 (1962), fees for use of a port facility were under review and held not to be taxes because the fees were "merely compensation for the use of the property and the improvements of the port and can in no sense be considered a tax."

and the State. Rather, Section 56-31-50 makes the imposition of the surcharge mandatory. The statute uses the term "shall" in reference to the imposition of the surcharge. "Shall" typically means mandatory. Montgomery v. Keziah, 277 S.C. 84, 282 S.E.2d 853 (1981). Further, under Section 56-31-40, if a rental company violates a provision of Chapter 31, the Attorney General may institute an action to force compliance, and a court may impose a civil penalty for the rental company's failure to comply. Such requirements and penalties render the surcharge mandatory.

2. Taxing Power

A tax has its origin in the State's taxing power as opposed to the State's police power.[4] In some instances, a charge may have signs of being both regulatory and revenue raising.[5] In fact, the mere imposition of a tax has regulatory overtones.[6] When required, however, the clas-

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[4]In Maryland Theatrical Corp. v. Brennan, 180 Md. 377, 24 A.2d 911 (1942), the court stated:

> In general, . . . where the fee is imposed for the purpose of regulation, and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum, such sum is a license proper, imposed by virtue of the police power, but where it is exacted solely for revenue purposes and its payment gives the right to carry on the business without any further conditions, it is a tax.

[5]See Miami Herald Pub. Co. v. City of Hallandale, 734 F.2d 666, 671 (8th Cir. 1984), where the court stated, "[i]n some cases a single provision will be both revenue raising and regulatory in purpose."

[6]The court stated in Sonzinsky v. United States, 300 U.S. 506, 513-514, 57 S.Ct. 554, 555-556, 81 L.Ed. 772 (1937):

> Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with

sification of a charge as being under the taxing power versus the police power is based upon the dominant purpose of the statute.[7] If regulation is the primary purpose of a statute, revenue raised under the statute is considered a fee rather than a tax. United States v. Stangland, 242 F.2d 843, 848 (7th Cir. 1957); Rodgers v. United States, 138 F.2d 992, 994 (6th Cir. 1943).

In the instant case, Act No. 177, 1989 S.C. Acts, stated the purpose of that Act was "to regulate advertising by rental car companies [by providing] for restrictions to be placed on mandatory fees and surcharges . . . ." Act No. 501, 1992 S.C. Acts, Part II, Section 64, however, deals exclusively with revenue raising. There is no element in the 1992 enactment addressing fees for policing advertisement by the rental companies, nor is there any term promoting the welfare of the public. Rather, the 1992 Act addresses only the raising of revenue. Thus, the surcharge is based upon the taxing power of the State and is not a regulatory fee

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> others not taxed. But a tax is not any the less a tax because it has a regulatory effect. . . .

[7]In Montgomery County v. Maryland Soft Drink Ass'n, Inc., 281 Md. 116, 377 A.2d 486, 496, 10 ERC 1854 (1977), the court stated:

> In our view, Bills No. 14-76 and 22-76 are revenue measures, since the raising of revenue is their dominant thrust. Stripped of the imposition of the tax itself and the necessary accompanying definitions, the bills would be virtually meaningless. In no real sense is any effort made in the bills to regulate those distributors directly affected by the tax. Nor is it properly our concern that a possible collateral economic effect of the tax may be to regulate the consumer's purchasing habits. . . .

under the State's police power.[8]

3. Public Purpose

The levying of a tax requires the presence of a public purpose.[9] The determination of whether a public purpose is served by a statute is a decision to be made in the first instance by the General Assembly. Park v. Greenwood County, 174 S.C. 35, 176 S.E. 870, 872 (1934). When public purpose, however, is called into question, a court inquires into the use to be made of the revenue derived from the tax.[10] Where the use of the tax is for the support of the government or for any of the recognized objects of government, the tax is within the requirement of establishing a public purpose. Green v. Kitchin, 229 N.C. 450, 50

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[8]It is not uncommon for statutes to have both regulatory provisions as well as taxing provisions. See Mobil Oil Corp. v. Tully, 639 F.2d 912 (2d Cir. 1981), where a statute taxed gasoline under taxing power, but under the police power, prohibited the taxpayer from passing the tax on to the consumer; also see Miami Herald, supra, where a license tax was imposed under taxing powers on vending machine operators and police powers regulated other activities of the vending machine owners.

[9]It is universally accepted that the presence of a public purpose is necessary to invoke the taxing power of the State. 71 Am.Jur.2d, State and Local Taxation, Section 3; 84 C.J.S., Taxation, Section 14. The rule is no different in South Carolina. Pickelsimer v. Pratt, 198 S.C. 225, 17 S.E.2d 524, 527 (1941).

[10]See A. Magnano Co. v. Hamilton, 292 U.S. 40, 54 S.Ct. 599, 601, 78 L.Ed. 1109 (U.S. Wash. 1934).

> That the tax is for a public purpose is equally clear, since that requirement has regard to the use which is to be made of the revenue derived from the tax . . . .

For examples in South Carolina, see cases identifying the uses of funds listed in Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986).

S.E.2d 545 (1948); 84 C.J.S., Taxation, Section 15.

In the instant matter, there are two uses. First, a fund "must be retained by the . . . rental company [and] . . . used only . . . for reimbursement of the . . . personal property taxes imposed and paid upon these vehicles . . . as provided by law." Section 56-31-50(B). Second, "all surcharge revenues collected in excess of the total amount of personal property taxes on private passenger motor vehicles must be remitted to the Department of Revenue and Taxation for deposit in the state general fund." Section 56-31-50(C). The first use establishes a fund to pay property tax liabilities, and the second use increases the State's general revenue fund.

Both uses are within the realm of a public purpose, since both further the object of government to raise revenue to satisfy the general needs of the public.[11] The required application of the funds to the property tax liability generated by the vehicles creates a fixed and certain method to assure the collection of such taxes. Such a plan furthers the role of government to collect taxes. To the extent that the surcharge tax exceeds the vehicle property tax, the excess is paid into the general fund, and thus serves to increase the funds available through the General Fund. Again such a plan assures the raising of revenue for the general needs of the public and is well within the public purpose requirement.

CONCLUSION:

The five percent surcharge imposed by Section 56-31-50 is a tax since it is an enforced contribution of money under the State's exercise of its taxing power to raise revenue for a public purpose.

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[11]See generally Columbia Gaslight v. Mobley, 139 S.C. 107, 137 S.E. 211, 212 (1927), where the court identified the raising of revenue as consistent with a public purpose.