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STATE of SOUTH CAROLINA

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ATTORNEY GENERAL

Office of the Attorney General
Columbia 29211

December 21, 1998

The Honorable James S. Klauber
Member, House of Representatives
406 E. Henrietta Avenue
Greenwood, South Carolina 29649

Dear Representative Klauber:

In a letter to this Office, you state that "over 200 municipalities have adopted a 'model' business license tax ordinance which was drafted, distributed, and recommended by the Municipal Association of South Carolina (MASC) to its members." You indicate that you are considering legislation which would address this issue on a statewide basis. By way of background, you further note that

> [t]his model ordinance, passed by over 200 municipalities, imposes a tax of 3% of gross receipts on all telecommunications companies doing business within the municipality. The model ordinance imposes the 3% gross receipts rate on telecommunications services and also imposes a penalty of 5% per month on delinquent payments. This rate is substantially in excess of and disproportionate to the rate for other business license classifications.

In addition, you advise that

> [t]he model ordinance is a vital part of the MASC's "Telecommunication Tax Collection Program." Under this program, known as "TTCP," each municipality enters into an agreement with the MASC, under which the municipality delegates to the Municipal Association virtually all powers regarding adminis-

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Request Letter

> tration, collection and enforcement of the tax, including the power to institute suits on behalf of the municipality without further approval. In addition, the agreement provides that the Municipal Association will retain 4% of all tax funds collected by it as compensation for services rendered.

Based upon this background, you have posed the following questions:

1. Does a municipality's adoption of a disproportionate license tax rate on a segregated classification of industry, such as the telecommunications industry, with no underlying reasoning or any basis for the disparate treatment of such classification in that particular municipality violate the Constitution or laws of South Carolina?

2. If the answer to Question 2 above is "yes," is the language of the model ordinance which attempts to assess a tax of "3% of gross receipts from all communications activities conducted in the municipality and for communication services billed to customers located in the municipality on which a business license tax has not been paid to another municipality" a disproportionate business license tax rate on a segregated classification of industry?

Law / Analysis

We start with the proposition that an ordinance of a municipality will be presumed valid in the same way that a statute enacted by the General Assembly is entitled to a presumption of correctness. As this Office stated in an Opinion dated May 23, 1995,

> [a]ny municipal ordinance adopted pursuant to Section 5-7-30 [of the Code] is presumed to be valid. Town of Scranton v. Willoughby, ___ S.C. ___, 412 S.E.2d 424 (1991). Within the limits of a municipality, an ordinance has the same local force as does a statute. McCormick v. Cola. Elec. St. Ry. Light and Power Co., 855 S.C. 455, 675 S.E. 562 (1910). Any ordinance must be demonstrated to be unconstitutional beyond all reason-

> able doubt. Southern Bell Tel. and Tel. Co. v. City of Spartanburg, 285 S.C. 495, 331 S.E.2d 333 (1985). The presumption of validity especially applies to legislation relating to a city or a town's police powers. Town of Hilton Head v. Fine Liquors, Ltd., 302 S.C. 550, 397 S.E. 662 (1990).

In Williams v. Town of Hilton Head Island, 311 S.C. 417, 429 S.E.2d 802 (1993), our Supreme Court reaffirmed the considerable degree of autonomy that municipalities now enjoy. The Court held in Williams that the so-called "Dillon's Rule," long-recognized in previous cases to limit substantially the power of municipalities to specific statutory authorization for fair implication therefrom was, in keeping with the Home Rule amendments and their implementing statutory authority, no longer valid. Recognizing that Home Rule meant just that, the Court left no doubt as to the intent of the General Assembly:

> This Court concludes that by enacting the Home Rule Act, S.C. Code Ann. § 5-7-10 et seq. (1976), the legislature, intended to abolish the application of Dillon's Rule in South Carolina and restore autonomy to local government. We are persuaded that, taken together, Article VIII and Section 5-7-30, bestow upon municipalities the authority to enact regulations for government services, deemed necessary and proper for the security, general welfare and convenience of the municipality or for preserving health, peace, order and good government, obviating the requirement for further specific statutory authorization so long [as] . . . such regulations are not inconsistent with the Constitution and general law of the state.

429 S.E.2d at 805.

This same standard was enunciated by the Supreme Court in Hospitality Assoc. v. Town of Hilton Head, 320 S.C. 219, 464 S.E.2d 113 (1995). There the Court articulated the analysis necessary for determining the validity of a municipal ordinance:

> [d]etermining if a local ordinance is valid is essentially a two-step process. The first step is to ascertain whether the county or municipality that enacted the ordinance had the power to do so. If no such power existed, the ordinance is

> invalid and the inquiry ends. However, if the local government had the power to enact the ordinance, **the next step is to ascertain whether the ordinance is inconsistent with the Constitution or general law of this State**. . . . (Emphasis added).

Id.

Applying the Williams and Hospitality Assn. test, this Office has not hesitated to so advise where we are of the opinion that a particular municipal ordinance crosses the constitutional line. Only recently, we concluded that a municipal ordinance which authorizes a municipal traffic court pretrial program was constitutionally suspect and that a statewide statute was necessary to correct such deficiency. Referencing Article VIII, § 14 of the State Constitution which provides that the structure for the State's judicial system and state services not be set aside by local ordinance, we concluded:

> [t]o summarize, . . . no statute appears to directly authorize a pretrial program at the instigation of a municipal judge. While it can be argued that a municipal ordinance serves that same purpose, our Court, in the Brittian case, indicates that the contrary is true, and that a state statute is necessary to empower a judge to dismiss a criminal case where such overrides the wishes of the prosecutor. Moreover, state policy, as expressed in the state pretrial statutes, forbids pretrial diversion for traffic offenses. Thus, the present statutory scheme may well preempt further action by a municipal council. Then too, is the requirement in Article V of the State Constitution, requiring a unified judicial system. While a local prosecutor is probably able to divert offenders as part of his prosecutorial discretion, at the very least, a state statute authorizing the municipal judge to do so is necessary, particularly where the municipal judge generally hears traffic offenses established by state criminal statutes. Finally, the Tootle case [State v. Tootle, 330 S.C. 512, 506 S.E.2d 481 (1998)] recognizes that the power to dismiss a case prior to the impanelment of the jury generally lies with the prosecutor and that such decision is not reviewable by a court. See, State v. Ridge, . . . [269 S.C. 61, 236 S.E.2d 405 (1977)]

> . . . State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994) [judicial department cannot infringe upon unfettered prosecutorial discretion]. In short, absent a ruling from our courts to the contrary, for the foregoing reasons, I believe such an Ordinance would be legally suspect.

Op. Atty. Gen., (Informal Opinion) (August 19, 1998).

Over the years, the Supreme Court of South Carolina has been sensitive to the constitutional requirement of equal protection of the law. The Court has frequently noted that the equal treatment required by the Equal Protection Clause [of the 14th Amendment and Art. I § 3 of the South Carolina Constitution] must extend to both the privileges conferred and liabilities imposed. Samson v. Greenville Hosp. System, 295 S.C. 359, 368 S.E.2d 665 (1988). The Court has stressed that equal protection requires that the classification in question not be arbitrary and that there be a reasonable relationship between the classification and proper legislative purpose. Robinson v. Richland County, 293 S.C. 27, 358 S.E.2d 392 (1987).

Our Supreme Court has been particularly cognizant of unequal and disparate treatment at the local level. Recently, in Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272 (1996), the Court concluded that a statute providing for a "local option" referendum concerning the legality of video poker payouts was unconstitutional because "[g]aming and betting are activities subject to statewide criminal laws" and, therefore "local governments may not criminalize conduct that is legal under a statewide criminal law." The Court found that the statute violated Art. III, § 34 of the Constitution (special legislation), which it deemed similar to the Equal Protection Clause, advising that

> [t]he local option law before us in this case, § 12-21-2806, allows the counties to opt out of the exemption provided in § 16-19-60 for these non-machine cash payouts. . . . In the counties that voted for the elimination of this exception, the effect is to criminalize conduct that remains legal elsewhere under State law.

Id. See also, State v. Hammond, 66 S.C. 219, 44 S.E. 797 (1903); Ruggles v. Padgett, 240 S.C. 494, 126 S.E.2d 553; Thompson v. S. C. Comm. on Alcohol and Drug Abuse, 267 S.C. 463, 229 S.E.2d 718 (1976); Daniel v. Cruz, 268 S.C. 11, 231 S.E.2d 293 (1977).

In addition, the Due Process and Equal Protection Clauses of the Fourteenth Amendment prohibit the delegation of legislative functions to private persons or associations. Prudential Property and Gas. Co. v. Insurance Comm. of S. C. Dept. of Ins., 534 F.Supp. 571, affirmed 699 F.2d 690 (4th Cir. 1983). As our Supreme Court recognized in Ashmore v. Greater Grvlle. Sewer Dist., 211 S. C. 77, 44 S.E.2d 88, 96 (1947), an improper delegation to a private group or association is discriminatory to the degree of violation of the State Constitution, Art. I, Sec. 5 which contain our 'equal protection' and 'due process' clauses. This Office likewise has concluded that a governmental agency may not delegate its functions to private entities without specific legislative authority. See, Op. Atty. Gen., April 4, 1996 [MUSC may not delegate operation of its hospital to private, for profit corporation.]

Turning now to the specific issue of an instance where a business license tax has been held to violate the Equal Protection Clause, the case of United States Fidelity and Guaranty Co. v. City of Newberry, 257 S.C. 433, 186 S.E.2d 239 (1972) is important to note. There, the plaintiff was engaged in writing fire and casualty insurance in the City of Newberry. The City imposed a 2% business license tax upon U.S.F. & G.'s gross receipts earned in the City of Newberry. The record demonstrated that the license tax rate charged U.S.F. & G. and other property insurers in its class was "nearly seven times as great as that charged the two next highest categories and approximately twenty or more times as much as charged all other categories or classifications."

The Court noted that "[i]t is conceded that the city had the right to classify for the purpose of license taxes and considerable discretion as to the rate to be imposed upon the respective classifications. . . ." However, the "cardinal issue here is whether the city had any rational basis for such a gross disparity and differentiation between the rate charged property insurers, such as the plaintiff, and those charged to the various other business and professional licensees." In the Court's view, while differences in organization, management and type of business might justify a particular classification, "' . . . acts or ordinances which arbitrarily impose different rates of taxation or different occupations or privileges, without any reasonable basis for such distinction are void as a denial or equal protection of the law.'" In order to pass constitutional muster, a classification must not be "arbitrary and [must] bear a reasonable relation to the legislative purpose sought to be effected, and . . . all members of each class must be treated alike under similar circumstances." Id. at 241.

The Newberry tax, concluded the Court, did not meet the constitutional Equal Protection test. Based upon the facts before it, the business license tax upon U.S.F. & G. unlawfully discriminated against the company. The Court reasoned:

> [i]n addition to the admitted facts tending to prove that there was no rational basis for the imposition of a grossly disproportionate tax upon plaintiff's classification, counsel for plaintiff sought to elicit through the depositions of key city officials the existence or nonexistence of any factual basis known to them, which would rationally justify the classification and grossly disproportionate rate of taxation. Such officials relied, largely, upon Code Sec. 37-133, which provides that the license fee charged to a fire insurer by a city the size of Newberry shall not exceed 2% of the premiums. Such Code provision was first enacted in 1917. 31 Stat. 361. It is argued that the license tax here imposed upon plaintiff's classification is reasonable and valid since it does not exceed the foregoing statutory limitation. The fact, however, that the tax rate here does not exceed such limitation with respect to fire insurers does not form a rational basis for charging these particular taxpayers at a rate twenty times as much for a business license as most other business enterprises pay. Moreover, more than 93% of plaintiff's premiums were received on casualty insurance business, rather than fire insurance, and the statute relied on makes no mention of such casualty insurance. Indeed, the casualty insurance business as we know it today was in its virtual infancy in 1917 when the particular statute was first enacted.

Id. at 242-243.

The U.S.F. & G. rationale and analysis was followed by the Court in Southern Bell Tel. and Tel. v. City of Aiken, 279 S.C. 269, 306 S.E.2d 220 (1983) and Southern Bell Tel. and Tel. Co. v. City of Sptg., 285 S.C. 495, 331 S.E.2d 333 (1985). In Aiken, the Court clearly recognized that a municipality's power to impose a license tax "implies a power to classify business and differentiate as to rates of taxation." Such authority to make "'distinctions between different trades'" by imposing a reasonable license fee, said the Court, "'must depend largely upon the sound discretion of the city council.'" [quoting Hill

v. City Council of Abbeville, 59 S.C. 396, 427, 38 S.E.11]. Neither the South Carolina Constitution, nor § 5-7-30, barred a municipality "from imposing a graduated license tax. . . ."

The real issue, in the Court's mind, was whether the graduated tax was imposed and applied at "an unreasonable and discriminatory rate" with respect to Southern Bell. Indeed, it was, concluded the Court:

> [t]he record reveals that the City of Aiken in 1979 adopted a revised licensing ordinance. Seven classifications of business were designated and rates of taxation established for each category. This portion of the ordinance was drafted for the City of Aiken by a consulting firm. An eighth category was thereafter created which, in the words of the trial court, presented a "hodge podge" assortment of occupations and businesses. We are struck by the fact that at no point does the trial court find any rational basis for this residual classification nor does the record, in our view, support it. Even more striking is the undisputed fact that the appellant was taxed at twenty-four (24) times the average rate imposed upon other businesses under the ordinance. The trial judge finds the tax "high and potentially disproportionate" and yet nowhere articulates a finding that such discrimination rests upon any rational basis. . . .

The Aiken Court found the U.S.F. & G. case controlling:

> [a] comparable situation was presented to this Court in United States Fidelity and Guaranty Company v. City of Newberry, supra, 257 S.C. 433, 441, 186 S.E.2d 239, in that we found a "grossly disproportionate" rate of taxation where the respondent insurers paid taxes at a rate twenty times that paid by other enterprises. While the appellant here raises a number of objections to the Aiken ordinance, we look no further than the disproportionality just noted and the lack of any rational basis therefor in concluding that a denial of equal protection has here occurred.

306 S.E.2d at 222.

The Spartanburg case likewise involved an instance where our Supreme Court deemed a business license tax ordinance to violate the Equal Protection Clause. In that instance, the City of Spartanburg required electric power companies to pay 3% of gross receipts for supplying electrical power in municipal limits. Gas companies were taxed at a rate of 1% of gross receipts for "'supplying gas within city limits'", and telephone companies, 1% of gross receipts for "'intrastate and local business done in whole or in part in the city.'"

The lower court had concluded that the city lacked power to tax revenues earned from intrastate long distance calls which were made from the city or which were charged to a local number. Rejecting the City's argument to the contrary, the Supreme Court referenced Aiken and concluded that "there is no rational basis for including intrastate calls in gross income for license tax purposes." In response to the City's contention that all revenues earned from serving customers in the Spartanburg exchange must be taxed, the Court held that "[t]he city lacked power to tax revenues from services the company rendered to customers residing outside the city limits. See, City of Spartanburg v. Public Service Commission, 281 S.C. 223, 314 S.E.2d 599 (1984)."

Next, the Court addressed Southern Bell's Equal Protection argument. Applying the rule that an ordinance is a legislative enactment and is presumed to be constitutional, the Court reaffirmed its holding in U.S.F. & G., requiring the need for a "reasonable basis" for disparate treatment. Concluded the Court:

> [t]he gross disparity in the license tax rate imposed by the Spartanburg ordinance is reflected by the fact that Southern Bell pays a tax of 1% of its gross receipts ($238,875 in 1981 and $267,262 in 1982), while a textile mill or manufacturing plant with the same revenue as Southern Bell pays a maximum of $725. . . . The city has advanced no reasonable basis for the differential treatment. The amendment was not part of any overall reform of the ordinance. Nor did the city prove that Southern Bell benefited more from city services than did other businesses. United States Fidelity and Guaranty Co. v. City of Spartanburg, 263 S.C. 169, 209 S.E.2d 36 (1974). Moreover, since Southern Bell is the highest ad valorem taxpayer in the

> city, it contributes greatly to the cost of city government. Apparently, the sole consideration in drastically increasing the tax on Southern Bell was that, since Duke Power had agreed by contract to pay the city 3% of its gross revenues, Southern Bell's taxes should be increased.
>
> We conclude that the rate disparity between Southern Bell and other companies not parties to contracts with the city is palpably unreasonable and violative of equal protection of the laws.

285 S.C. at 496.

Opinions of this Office are in accord. In Op. Atty. Gen., Op. No. 89-26 (March 3, 1989), we concluded that "the business license ordinance of Jasper County is highly suspect because of the disparity between the tax rates of the different classifications, which in all probability denies equal protection of the laws to all businesses within the county." Referencing the U.S.F. & G., Aiken and Spartanburg cases, we noted that, in Spartanburg, "[t]he court went on to hold the business license tax upon South Bell to be invalid because of the gross disparity in the license tax rate." Commenting further, we advised

> Such a problem exists in this ordinance. In example, the tax on class one businesses that includes, among others, abattoirs and grocery stores, the tax on gross income of $50,000 would be $19.50. The tax on timber tracts from the $50,000 in sales of timber is $1,050.00. On sales of $300,000, the tax on class one businesses is still $19.50, while on timber sales of the same amount, the tax is $11,050.00. From such, it is apparent that the constitutionality of the ordinance is highly suspect. The disparity in rates between the classes is quite large and we have no factual information that would justify the disparity.

And, in Op. Atty. Gen., Op. No. 4376 (June 22, 1976), this Office stated that whether or not an ordinance imposing business license taxes on insurance companies going business in the City of Allendale is constitutional depends upon "whether there was a rational basis for the differentiation."

I am advised that the South Carolina Municipal Association had previously recommended to its members, through the MASC Business Licensing Handbook (1997 Revised), a sample business license ordinance. Such Model Ordinance establishes various classes thusly:

> [a] sample ordinance using the classification system based on SIC code groups assembled according to indexes of ability to pay is included in Appendix A. The sample ordinance is based on 1987 SIC Manual codes and 1991 IRS statistics. Use of this sample ordinance requires a basic understanding of the concept and necessity for maintaining the integrity of the system.
>
> The following steps used to develop the classification system based on indexes of ability to pay explain the basis for the system:
>
> 1. Businesses were grouped according to major groups in the Standard Industrial Classification (SIC) Manual, 1987, published by the United States Office of Management and Budget. Each business is required to indicate the appropriate SIC number on federal tax returns.
>
> 2. IRS statistics on nationwide business income through the Government Printing Office were used to calculate a ratio or index of ability to make a profit for each SIC group to be included in the business license ordinance.

Handbook, at p. 48.

As we understand it, municipalities, which have adopted the Model Ordinance, define a "classification" as

> . . . that division of businesses by major groups subject to the same license rate as determined by a calculated index of ability to pay based on national averages, benefits, equalization of tax

burden, relationships of services, or other basis deemed appropriate by Town Council.

Typically, telecommunications would be placed in Class 4 by the uniform objective standard of calculated index of ability to pay, as follows:

RATE CLASS 4

SIC	BUSINESS GROUP
27	Printing, Publishing & Allied Products
28	Chemicals and Allied Products
35	Machinery, except Electrical
48	Communication (Except Telephone)
76	Miscellaneous Repair Services

Pursuant to the Model Ordinance, a town (e.g. Whitmire) imposes a business license tax on a Class 4 business at the rate of $40.00 for the first $2,000 of gross income and $1.15 per $1,000 for each additional 1,000. Declining rates apply where income exceeds $1,000,000. In other words, only 75% of the normal rate is payable on amounts in excess of $9,000,000. Assuming a Class 4 business earns 1,000,000 of gross income, it would pay a license tax of $1,147.70 under the Model Ordinance formula.

Strikingly, however, we are advised that many municipalities are now departing from this procedure, singling telephone and telecommunications companies out for reclassification at the rate of 3% of gross receipts, with no provision for declining rates, as a condition for continuing to do business in that municipality. It is our information that the business license tax is being increased on the telecommunications industry by as much as 2700%. We are informed that tax rates are not being raised upon other businesses in this manner. It is our information that a municipality following this procedure is imposing a business tax of $30,000 upon a telephone company which earns $1,000,000 of gross income. This is approximately 30 times the amount of business license tax which the telecommunications company would pay under the Class 4 classification pursuant to the Model Ordinance, discussed above.

Such disparate treatment of the telecommunications industry is remarkably similar to what was done by the City of Aiken in the Southern Bell case, referenced above. As noted previously, the Court, in striking down the application of the business license tax to

Southern Bell as unconstitutional, said that "we look no further than the [disproportionality] . . . just noted and the lack of a rational basis therefore in concluding that a denial of equal protection has here occurred." 306 S.E.2d at 221.

In Aiken, the Court did approve the use of the uniform objective ability to pay standard which was used to form the first seven classes in the Model Ordinance. Placing telecommunications companies in Class 4 by that standard would, in other words, pass constitutional muster. What the Aiken Court rejected as unconstitutional was applying an entirely different standard to telecommunications companies. The Court's language bears repetition here:

> [t]he record reveals that the City of Aiken in 1979 adopted a revised licensing ordinance. Seven classifications of business were designated and rates of taxation established for each category. This portion of the ordinance was drafted for the City of Aiken by a consulting firm. An eighth category was thereafter created which, in the words of the trial court, presented a "hodge podge" assortment of occupations and businesses. We are struck by the fact that at no point does the trial court find any rational basis for this residual classification nor does the record, in our view, support it. Even more striking is the undisputed fact that the appellant was taxed at twenty-four (24) times the average rate imposed upon other businesses under the ordinance.

Id.

Thus, in our opinion, the Spartanburg and Aiken cases are controlling here. Based upon the information provided, the business license tax imposed upon telecommunications referenced in your letter is virtually indistinguishable from that struck down by our Supreme Court in Aiken and Spartanburg. While our Court has upheld other applications of the business license tax against an Equal Protection assault in cases such as Hospitality Assn., supra, these cases are not controlling here. In Hospitality Assn., the Equal Protection issue was addressed by the Court in a single paragraph, with the Court making the conclusory statement that "the classification under each ordinance bears a reasonable relation to the legislative purpose to be effected." 320 S.C. at 229. By contrast, the Court in both Aiken and Spartanburg carefully detailed precisely the manner in which the city's treatment of

Southern Bell operated disparately. The Court documented how in Aiken, Southern Bell was taxed at "24 times the average rate imposed upon other businesses" and concluded: "We look no further than the [disproportionality] ... just noted and the lack of any rational basis therefore in concluding that a denial of equal protection has here occurred." Similarly, in Spartanburg, the Court compared Southern Bell's license tax payment of over $200,000 upon its gross receipts while "a textile mill or manufacturing plant with the same revenue pays a maximum of $725." In a footnote, the Court further found that "the record reveal[ed] a great disparity between the tax rate imposed on Southern Bell and the rate imposed on retail businesses, hospitals, and others." 331 S.E.2d at 334 n. 3.

Moreover, both Aiken and Spartanburg stress that the Constitution of South Carolina requires that taxes on businesses must be fairly apportioned so as to fairly reflect that proportion of the taxed activity which is being conducted within the municipality. In Spartanburg, for example, the Court stated that "[t]he appellant [municipality] contends that the trial court erred in holding that the city lacked power to tax revenues earned from intrastate long-distance calls made from Spartanburg or charged to a Spartanburg number. We disagree and hold there is no rational basis for including intrastate calls in gross income for license tax purposes." 331 S.E.2d at 334. Aiken and Spartanburg also conclude that due process requires that a municipality may not tax income earned from business activity conducted beyond the city limits. In order to be taxed, the income must be fairly attributable to activity which was conducted in the corporate limits. Accordingly, it is our opinion that the model ordinance referenced in your letter which imposes a 3% business license tax upon the proceeds earned by telecommunications companies is constitutionally suspect and a court would strike down such ordinances as unconstitutionally depriving telecommunications companies of Equal Protection of the Laws and Due Process of Law.

There are other constitutional concerns apparent here as well. The most troublesome is the issue of whether municipalities have unlawfully delegated their taxing and tax collection authority to a private organization, the Municipal Association. The Municipal Association of South Carolina possesses no statutory status. It certainly has not been authorized by the General Assembly to either levy, assess, impose or collect taxes. As we understand it, each of the municipalities which have adopted the referenced Ordinance has delegated to the Municipal Association the authority to audit, determine and assess the tax as well as to sue in the City's name. The Ordinance specifies that if the 3% tax on gross proceeds is not paid by December 31, 1998 a penalty of 5% per month will be added. It is our information that the Municipal Association will retain 4% of all taxes and penalties collected.

In addition to the Model Ordinance, which applies to all telecommunications providers, we understand that on July 17, 1998, the Municipal Association announced its Telecommunications Tax Collection Program (TTCP) which dealt with long distance providers. Long distance providers have been informed as follows:

> You will receive a single billing from MASC (Municipal Association) on behalf of the participating municipalities. Then MASC will distribute the taxes collected to each municipality.

It is our information that each of the municipalities has entered into a 10 year agreement with the Municipal Association. Pursuant to the agreement, municipalities have adopted "uniform rates and, delinquent penalties . . . and a uniform due date of December 31."

Under the agreement, the Municipal Association is to carry out a number of functions on behalf of the municipalities. Among them are:

1. make necessary investigations;
2. establish procedures for determining amount of business license tax due.
3. communicate with the establishments subject to the tax;
4. collect all current and delinquent taxes due;
5. serve as exclusive agent of the municipality for assessment and collection using all procedures authorized by law in the name of the municipality without its further approval.

Pursuant to the agreement, the taxes may not be accepted, waived or compromised by the municipality.

This Office has repeatedly emphasized in its opinions that neither the State nor its agencies or subdivisions may contract away essential powers. As we stated in Op. Atty. Gen., Op. No. 85-81 (August 8, 1985),

> "[t]he State's power to contract is subject to the further limitation that a state cannot by contract divest itself of the essential attributes of sovereignty and its governmental powers."

> (Quoting 81 C.J.S. States s 155). In essence, no governmental agency can by contract or otherwise suspend its governmental functions.

And, we opined in an Opinion of March 6, 1980, a municipality "... is powerless to contract with a private security agency for law enforcement purposes ... [N]o municipality may by contract part with the authority delegated it by the State to exercise the police power. Sammons v. City of Beaufort, 225 S.C. 490, 83 S.E.2d 153." While we have noted that a governmental entity may subdelegate purely administrative or ministerial duties to a private entity by contract, such must be based upon specific statutory authority. Op. No. 85-81, supra. As we concluded in the Opinion of April 4, 1996,

> [a] state agency ... derives its power solely from the statutes enacted by the Legislature. State officers, therefore, cannot with the stroke of a pen unilaterally turn over the operation of a state institution to a private corporation. They may not with the vote of a board delegate their legal authority to sell and lease away their responsibilities.

Clearly, the taxing authority is not one which may simply be delegated away to a private entity. As our Supreme Court held in Watson v. City of Orangeburg, 229 S.C. 367, 93 S.E.2d 20 (1956),

> [t]he power of taxation, being an attribute of sovereignty vested in the legislature subject to constitutional restrictions, taxes can be assessed and collected only under statutory authority. 51 Am.Jur., Taxation, Section 44, p. 74. Grier v. City Council of City of Spartanburg, 203 S.C. 203, 26 S.E.2d 690. It follows that in the absence of statute so providing, the power to collect taxes due to the municipality may not be delegated by it without express statutory authority ... and a fortiori cannot be exercised by a private citizen.

93 S.E.2d at 24.

While it may be argued that § 5-7-300 provides statutory authorization ["a municipality may by ordinance contract with an individual, firm or organization to assist ...

in collecting property or business license taxes"], this Office has heretofore read this provision as relating to the collection of delinquent taxes. See, Op. Atty. Gen., Op. No. 92-50 (September 3, 1992); Op. No. 89-126 (November 8, 1989). Of course, in any event, the statute does not relate to levying or determining the tax. For municipalities to simply delegate this sovereign function to the Municipal Association - a private entity - is itself constitutionally suspect.

By contrast, § 12-54-227 authorizes the Department of Revenue to contract with a collection agency to collect delinquent taxes owed by persons residing outside South Carolina. This statute, however, specifies a number of guidelines to prevent misuse or abuse. For example, the taxpayer must be given at least three notices including at least one by certified or registered mail. Delinquency must be for more than six months. Further, it is a criminal offense for any person to breach the confidentiality of a tax return. In the case of a collection agency, termination of the state contract is required. See, § 12-54-240. In addition, § 12-54-227 also permits the collecting agent to initiate a suit in the agency's name and at the agency's expense. Such authority is not expressly mentioned in § 5-7-300 even if applicable.

Accordingly, the municipalities' delegation of the foregoing tax assessment, levy and collection functions to the Municipal Association is likewise constitutionally suspect. Such delegation may well be deemed by a court to constitute an unlawful delegation of the municipalities' sovereign governmental taxing functions and, thus, constitutionally invalid.

Conclusion

It is our opinion that the referenced Model Ordinance requiring a 3% business license tax on gross proceeds on all telecommunications companies doing business within the municipality is constitutionally suspect and would likely be declared unconstitutional by a court as violative of Equal Protection and Due Process. Like the Ordinance which we concluded was constitutionally defective in Op. No. 89-26, this Model Ordinance is highly suspect for the same reason - there is no factual basis to justify the disparity in business license taxes. Moreover, it is also our opinion that the Telecommunications Tax Communications Program (TTCP) is constitutionally defective in that a court would likely conclude that the TTCP unlawfully delegates governmental powers such as the administration, collection and enforcement of the business license tax to a private entity - the Municipal Association.

In response to your two specific questions, therefore, the answer to your Question #1 is "yes." The answer to your question #2 is also "yes." In other words, a municipality's adoption of a disproportionate business license tax rate on a segregated classification of industry, such as the telecommunications industry, with no underlying reason or any basis for the disparate treatment of such classification in that particular municipality, violates the Constitution and laws of South Carolina. No rational basis for discriminatory treatment is apparent. Also, the language of the Model Ordinance which attempts to assess a tax of "3% of gross receipts from all communications activities conducted in the municipality and for communications services billed to customers located in the municipality on which a business license tax has not been paid to another municipality" is a disproportionate license tax rate on a segregated classification of industry.

Our Supreme Court has consistently recognized that it is the duty of the Attorney General to enforce the Constitution. As the Court stated in State ex rel. McLeod v. McInnis, 278 S.C. 307, 295 S.E.2d 633 (1982),

> [t]he Attorney General has heretofore, without contest, litigated similar issues in this Court using similar proceedings. State ex rel. McLeod v. Edwards, 269 S.C. 75, 236 S.E.2d 406 (1977) and State ex rel. McLeod v. Martin, 274 S.C. 106, 262 S.E.2d 404 (1980). While it is true that his right to bring the action was not directly attacked in these cases, the precedents established and our rulings are persuasive for the conclusion that the Attorney General does have a right to bring an action and that a controversy ripe for decision does exist. The Attorney General, by brining the action in the name of the State, speaks for all of its citizens and may, on their behalf, bring to the Court's attention for adjudication charges that there is an infringement in the separation-of-powers area.

295 S.E.2d at 634.

At the same time, legislation to provide guidelines for the amounts which may be charged by municipalities with respect to telecommunications providers for business license taxes could be enacted. Such legislation by the elected representatives of South Carolina would insure that such charges are fair and reasonable and imposed on a competitively neutral and non-discriminatory basis. This Office is of the opinion that legislation could

establish guidelines which would eliminate the excessive and discriminatory taxes which have been imposed by municipalities upon the telecommunications providers of South Carolina and prevent such an action in the future. Moreover, such legislation could prevent the delegation of taxing powers to a private entity such as the Municipal Association. Legislation, through elected representatives, rather than litigation, decided by unelected courts, is the best way to solve this problem.

However, if legislation is not forthcoming, this Office will not stand by and allow an unconstitutional and discriminatory tax to stand. This tax is projected to cost taxpayers more than 40 million dollars with no new services provided as part of its imposition. The high price of the tax will obviously be passed on to the average citizen who will feel the pinch. Telephone bills cannot help but rise when telecommunications providers' license tax rates skyrocket by as much as 2700%. Moreover, the 4% being taken off the top by the Municipal Association at taxpayer expense subsidizes a private entity to levy and collect a tax - a clearly governmental, rather than private, function. This amounts to nothing more than the taxpayers being required to pay a private association to administer upon them an unconstitutional tax. That system is unconstitutional going and coming.

Low taxes are the engine for economic development driving a healthy business climate in South Carolina. Excessive and discriminatory taxes stifle and choke off a thriving economy. The framers of our Constitution did not envision that a single industry could have imposed upon it a tax thirty times that of comparable businesses for the privilege of operating within a city's limits. This Office favors economic development, particularly where a state-of-the-art communications network is so integral to a 21st century business environment.

Accordingly, if no corrective legislation establishing guidelines and limitations upon municipalities in this area is forthcoming within a reasonable period of time, this Office will defend and enforce the Constitution by initiating litigation to have this excessive, unfair and discriminatory tax declared unconstitutional and set aside.

Sincerely,

Charles M. Condon
Attorney General