ALAN WILSON
ATTORNEY GENERAL

November 14, 2018

Mr. Raymond G. Farmer, Director
South Carolina Department of Insurance
P.O. Box 100105
Columbia, SC 29202-3105

Dear Director Farmer:

You seek our opinion "regarding South Carolina Department of Insurance's interpretation on the method for calculating insurance premium taxes for surety insurers transacting business in South Carolina." You note that "[a]t issue is the interpretation of §§ 38-7-20 and 38-7-60 of the South Carolina Insurance Law." Further, you state that "[a] member of the surety industry argues that insurance premium taxes for the surety industry should be calculated based on premiums 'collected' by an insurer as set forth in § 38-7-60 as opposed to the 'total premiums written' as set forth in § 38-7-20." You state that "[h]istorically, the Department has required surety insurers to pay taxes based on the total premiums written as required by § 38-7-20." Your question centers upon the issue as to whether "surety insurers that write bail bonds" are different from other surety insurers for purposes of calculating insurance premium taxes for surety insurers.

We conclude that they are. Thus, we agree that insurance premium taxes for the surety who writes bail bonds should be calculated based upon the premiums collected. We will more fully explain our interpretation below.

First, however, we would note that your letter sets forth in considerable detail the legal positions of both the surety industry and the Department of Insurance as to the proper interpretation of §§ 38-7-20 and 38-7-60. We believe it is appropriate to quote this analysis which you have submitted in full:

> *I. The Surety Industry's Position*
> The industry argues that insurance premium taxes should be calculated based on the premiums actually collected by the insurer, not total premiums written. Insurance premium taxes for bail bond insurers are currently calculated the same way as they are for all other property and casualty insurers. The bail bond insurers believe that this creates an undue burden for their industry as opposed to other types of insurance companies.

All insurers currently pay taxes on the full amount of the premium written and not on the net amount after subtraction of the commission paid to the involved agents. However, a bail bondsman calculates the premium charged to his client differently than a typical or traditional property/casualty insurance agent. The bondsman calculates the premium by considering factors like flight risk of the individual bonded defendant. Consequently, different defendants with the same bond face amount, may pay different premiums to the bail bondman based upon this calculation. In either case, the bail bondsman sends a percentage of the face amount to the bail bond surety company. However, the bail bond surety company currently pays taxes based upon the total amount collected by the bail bondsman (i.e., written premium). The industry argues that the money paid to the bondsman over and above what the bondsman remits to the bail bond surety company is not for an insurance premium, but instead is for the services the bondsman provides such as monitoring the defendant, making sure the defendant shows up for court appearances, or finding the defendant if he absconds, etc.

The bail bond insurance industry argues that Section 38-7-60 imposes the taxes on "premiums collected by the insurer" and not on "gross premium," "total premiums charged" or "gross premiums collected by both the agent and the insurer."

Section 38-7-60 provides:

> Not later than March first of each year, every insurer licensed by the director or his designee shall file with him a return of premiums collected by the insurer in the state during the immediately preceding calendar year and ending on December thirty- first. The return must be made on forms prescribed by the director or his designee and must be made under oath by the insurer's employee or representative responsible for the preparation of fee and tax returns, as well as an officer of the insurer.

Further, the industry cites language from Bulletin 2010-11 in support of its argument:

> The South Carolina Department of Insurance (Department) finds that a significant portion of bail bond premiums is retained by the licensed bail bond agents or licensed managing general agents. For purposes of reporting in financial statements required to be filed with the Department pursuant to S.C. Code Ann. § 38-13-80 (2008), insurers writing bail bond premiums may report, in lieu of compliance with SSAP No. 53 of the Accounting Practices and Procedures Manual of the National Association of Insurance Commissioners (NAIC), direct written premiums bail bonds in this state net of any amounts retained by the licensed bail bond agents or licensed managing general agents. The insurer may also recognize the total premiums as earned on the effective date of the bonds.

The bulletin is attached as Exhibit 1 .

II. The Department's Interpretation

The Department has historically calculated premium taxes for all types of property and casualty insurers based on total premiums written. In 2003, the South Carolina

General Assembly amended the insurance statutes via Act No. 73 of 2003 (S.C. Code Ann. § 38-7-20, effective June 25, 2003), as follows:

Premium tax based on policies written

SECTION 2. Section 38-7-20 of the 1976 Code is amended to read:

"Section 3 8-7-20. (A) In addition to all license fees and taxes otherwise provided by law, there is levied upon each insurance company licensed by the director or his designee an insurance premium tax based upon total premiums, other than workers' compensation insurance premiums, and annuity considerations, written by the company in the State during each calendar year ending on the thirty-first day of December. For life insurance, the insurance premium tax levied herein is equal to three-fourths of one percent of the total premiums written. For all other types of insurance, the insurance premium tax levied in this section is equal to one and one-fourth percent of the total premiums written. In computing total premiums, return premiums on risks and dividends paid or credited to policyholders are excluded.

(B) The insurance premium taxes collected by the director or his designee pursuant to this section must be deposited by him in the general fund of the State."

2003 S.C. Acts No. 73. Attached as Exhibit 2 are copies of the relevant pages of the Act for your ease of reference.

The change effected by this legislation was to strike the word "collected" wherever it appeared in the Code section and to replace it with "written," thereby eliminating any possibility that the Legislature intended that insurers and the Department calculate the premium tax on anything other than the premiums written, without regard to whether they were "collected." The Department acknowledges that Section 38-7-60 does use the word "collected" in S.C. Code Ann. § 38-7-60(1) (2015). However, subparagraph (3) of that same Code section specifically requires the payment of the "premium and other taxes imposed on insurers pursuant to [Section] 38-7-20." The Department has construed these statutes together to produce a single, harmonious result and applied Section 38-7-20 because it is the more recent enactment and specific statute. Porter v. South Carolina Pub. Serv. Comm'n, 327 S.C. 220, 489 S.E.2d 467 (1997).

As to the language in Bulletin 2010-1 1 the industry relies upon in support of its argument, the Department points out that the bulletin's subject matter does not address the calculation of premium taxes; instead, it addresses how an insurer records premiums on the annual statement for accounting purposes. Bulletin 2010-1 1 gave insurers writing bail bond premiums the option of reporting on the financial statement (annual statement) bail bond premiums net of commissions instead of reporting as required by SSAP No. 53. SSAP No. 53 required insurers to establish an unearned premium reserve for certain property lines of business. Based upon this

bulletin, a surety company did not have to allocate premiums over 12 months as specified in the SSAP.

Bulletin 2010-1 1 did not change the way premium taxes are calculated. The second paragraph of Bulletin 2010-1 1 also instructs insurers that report using the aforementioned method (i.e., direct premiums net of commission) to also file a supplemental Schedule T with their annual statement setting forth the gross premiums by state for insurance premium purposes. This Supplemental Schedule T is the information (total written premiums) used to calculate premium taxes.

Additionally, the Department has contended that even if the surety insurance industry's interpretation of the method of calculation were correct, premiums collected by the insurer's agent should viewed as being collected by the insurer. This is because the bondsman is the agent of the principal, in this instance, the surety insurer. A "surety bondsman" is "any person who is approved by and *licensed by the director or his designee as an insurance agent, appointed by an insurer* by power of attorney to execute or countersign bail bonds *for the insurer* in connection with judicial proceedings, and receives or is promised money or other things of value for the execution or countersignature. S.C. Code Ann. § 38-53-10(12) (2015) (italics supplied). Accordingly, when a licensed bondsman appointed by a surety company executes a power of attorney and collects premium, he does so as an insurance agent on behalf of his principal and alter ego, i.e., the insurer. Therefore, as a matter of law, collection of premium by the agent is no less collection by the appointing surety insurer than if the insurer had received the funds directly. That the bondsman may retain a portion as compensation or for any other purpose is irrelevant. Accordingly, the use of "collected" in Section 38-7-60 in no way conflicts with the mandate in Section 38-7-20 that the tax be imposed on written premium, particularly in view of the amendments to Section 38-7-20 during the 2003 Legislative Session.

III. Conclusion

We all agree that this is an issue of statutory construction. Hence, I am submitting this issue to you and requesting that your staff review the respective interpretations and let me know whether the Department's interpretation of the statutes is correct. This letter summarizes the issues and arguments presented by counsel on this matter, but I have attached copies of their opinion and my response to aid your review. See Exhibits 3 and 4. I am trying to bring an immediate, nonlegislative resolution to an issue that has been batted about for years and appreciate any assistance your office can provide. The Department's interpretation has been appealed to the Administrative Law Court.

Law/Analysis

As you indicate, your question involves one entirely of statutory interpretation. In interpreting statutes, the following guidelines are usually applicable:

> [w]hen interpreting the meaning of a statute, certain basic principles must be observed. The cardinal rule of statutory interpretation is to ascertain and give effect

> to legislative intent. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). Typically, legislative intent is determined by applying the words used by the General Assembly in their usual and ordinary significance. Martin v. Nationwide Mutual Insurance Company, 256 S.C. 577, 183 S.E.2d 451 (1971). Resort to subtle or forced construction for the purpose of limiting or expanding operation of a statute should not be undertaken. Walton v. Walton, 282 S.C. 165, 318 S.E.2d 14 (1984). Courts must apply the clear and unambiguous terms of a statute according to their literal meaning and statutes should be given a reasonable and practical construction which is consistent with the policy and purpose expressed therein. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991); Jones v. South Carolina State Highway Department, 247 S.C. 132, 146 S.E.2d 166 (1966).

Op. S.C. Att'y Gen., 2007 WL 4284643 (September 17, 2007). Moreover, it is also a well-recognized rule of statutory interpretation that "[h]owever plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention." Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005).

Furthermore, "[i]t is a settled rule . . . that the tax laws are to be strictly construed against the State and in favor of the taxpayer and where there is reasonable doubt as to the meaning of a revenue statute, the doubt is resolved in favor of those taxed." Op. S.C. Att'y Gen., 2013 WL 1803941 (April 23, 2013) (quoting Op. S.C. Att'y Gen., Op. No. 82-41, 1992 WL 155010 (June 9, 1982)). As our Court of Appeals has recognized, "tax statutes cannot be extended by implication beyond the clear import of the language used." Greenville Baptist Assn. v. Greenville Co. Treas., 281 S.C. 325, 328, 315 S.E.2d 163, 165 (Ct. App. 1984).

Of primary importance to your question is the case law recognizing the uniqueness of the bail bonding industry. We have stated in a previous opinion the following:

> . . . a [bail] bondsman acts as an agent of a defendant for whom he posts bond. Lee v. State, 368 N.E. 1172 (1977). Moreover, instead of serving as an officer for the State, the relationship between a bondsman and the State is that of a contractual nature. U.S. v. Jackson, 465 F.2d 964 (9th Cir. 1969).

Op. S.C. Att'y Gen., 1986 WL 19180 (No. 86-18) (February 6, 1986). Further, it is written elsewhere that

> [a] bail bond agreement is a contract where the bondsman is the surety, the defendant is the principal, and the State is the creditor. If the State, without notice to or without the consent of the bondsman, alters the terms of the bond agreement in a manner that material increases the bondsman's risk, the alteration operates as a discharge of the bondsman's obligation, since a bondsman's agreement is to discharge the bondsman's obligation.

8 C.J.S. Bail, § 195.

The decision of our Supreme Court, in Wilson v. McLeod, 274 S.C. 525, 265 S.E.2d 677 (1980), is very instructive in this regard. There, the Court recognized the bondsman's unique status, specifically rejecting the notion that a bondsman is an insurer. The Court stated the following: "[w]hile it is true that a bail bondsman is a surety, it does not necessarily follow that an insurance relationship, as contemplated by the statute, is created."

In Wilson, the Court noted that the bail bondsman did not meet the definition of "insurance" as then set forth in § 38-1-30 (now found in identical form at § 38-1-20(25)). Thus, the Supreme Court explained that

> It is evident that the bail bonding business does not meet that definition [of "insurance"] for several reasons. The purpose of the bond is not to indemnify the government.
>
> "The object of requiring bail and the principle [sic] obligations of sureties on a bail bond, is to secure the appearance of the principal to answer the call of the court in accordance with the requirements of the bond, and to submit to the prosecution of the charges that have been made against him until such charges have been disposed of according to law." 8 Am.Jur.2d Bail and Recognizance 126 (1963). . . .
>
> The inherent differences between the ordinary surety insurance company and the bail bondsman as surety cannot be ignored. The business of bail bonding involves a principal charged with some crime being released from government custody into the custody of his bailor. Should he fear that he may lose custody of the principal, he is entitled, ". . . as a matter of right, at any time during the return term of the writ against them to surrender their principal, in discharge of their liability. . . ." Breeze v. Elmore, 4 Rich. 436, 38 S.C. Law 176 (1851). Surely, this is beyond the scope of actions all owed by a surety insurance company.

274 S.C. at 527-28, 265 S.E.2d at 678-9.

In addition, in Allied Fidelity Corp. v. Comm. of Internal Revenue, 572 F.2d 1190 (7th Cir. 1978), the Seventh Circuit reached much the same conclusion. The Court of Appeals affirmed the Tax Court's decision that a business primarily engaged in the business of writing fidelity and surety bonds is not an "insurance company" for federal tax purposes. Almost two thirds of the business "was in surety bail contracts" even though the business also wrote other insurance such as automobile insurance. Moreover, Allied's name included the word "insurance." Yet, in reaching its decision, the Court importantly noted that "in the final analysis, [we must] review the nature of the system of bail and how it relates to the characteristics of an insurance contract. . . ." 572 F.2d at 1192. The Court undertook an analysis of the bail system, which is highly instructive. We quote much of it below:

> [a]s the bail system has developed in the United States, the accused may enjoy his freedom prior to trial if he gives sufficient monetary security as assurance that he will appear. If he fails to appear, the security is forfeited as a penalty. Stack v. Boyle, 342

U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951). It has become a practice for commercial institutions such as Allied to provide the amount of that monetary security upon payment of a fee by the accused. The theory adopted by the courts was that the bondsman's contract with the court requires him to produce the accused or suffer forfeiture of the monetary security as a penalty. Due to the bondsman's potential liability, he originally had broad powers over the person of the accused in order to assure his appearance before the court. Taylor v. Taintor, 16 Wall. 366, 21 L.Ed. 287 (1872). While appellant argues that this analysis of bail is outdated and contrary to modern realities of the industry, we must disagree. As recently as United States v. Holmes, 452 F.2d 249, 261 (7th Cir. 1971), we cited Taylor v. Taintor for the proposition that although an accused may be at large as a result of his having been admitted to bail, in contemplation of the law he remained in custody. See also Continental Casualty Co. v. United States, 314 U.S. 527, 62 S.Ct. 393, 86 L.Ed. 426 (1942); United States v. Davis, 202 F.2d 621, 625 (7th Cir. 1953).

Appellant also contends that the interest of the United States or the particular state exercising criminal jurisdiction over the accused is wholly pecuniary consisting of a purely financial arrangement. It seems to us that the exact opposite is true. The interest of the government is impecuniary and non-financial. That interest can be defined as seeing that those accused of crimes are tried and, if convicted, punished by the courts. Upon forfeiture, the payment to the United States, or to the courts of a state, is simply a penalty against the surely for failing to perform on its contract to produce the accused for trial. The interest in the criminal justice system is not economic but, rather, is the socially desirable end of properly punishing those convicted of crimes. The payment of a forfeiture by a surety cannot compensate the government for the loss of that goal.

On the other hand, the common definition for insurance is an agreement to protect the insured against a direct or indirect economic loss arising from a defined contingency whereby the insurer undertakes no present duty of performance but stands ready to assume the financial burden of any covered loss. 1 Couch on Insurance 2d s 1:2 (1959). As the tax court below noted, an insurance contract contemplates a specified insurable hazard or risk with one party willing, in exchange for the payment of premiums, to agree to sustain economic loss resulting from the occurrence of the risk specified and, another party with an "insurable interest" in the insurable risk. It is important here to note that one of the essential features of insurance is this assumption of another's risk of economic loss. 1 Couch on Insurance 2d s 1:3 (1959).

Appellant argues that the insurable risk of the state in a criminal bail contract is an economic one. We cannot agree. The fallacy to appellant's approach is that they have analyzed the bail arrangement only from the point of view of Allied, ignoring the other two parties to what is essentially a tri-party arrangement. From Allied's position as surety, the transaction may appear to be essentially a pecuniary one but, as we have stated above, the loss to the state by an accused fleeing, which is the "risk" to the state, may be societal, legal, or moral, but certainly is not merely a pecuniary one. This is best exemplified by the fact that if a forfeiture payment by Allied were true insurance, that payment would make the state whole, fully compensated for its loss. Yet, as is obvious, the state can only be made whole by the recapture of the accused and the resulting vindication of the rights of society. For it

> is society that the criminal process protects and the payment of a sum by Allied does not satisfy that interest until the state regains the ability to punish those who break the law. Allied's principal obligation is to produce the accused at trial. The monetary obligation is merely an assurance of, or inducement to perform that principal obligation. United States v. Ryder, 110 U.S. 729, 734, 4 S.Ct. 196, 28 L.Ed. 308 (1884). Allied's contract thus resembles more a contract to perform services than a contract of insurance. The forfeiture of the surety's bond, if the accused fails to appear, is not to reimburse the state for an economic loss but serves more as a penalty for the surety's own failure to perform. . . .
>
> A contract of bail requires the payment of a fee in exchange for the promise of the surety that the accused will appear. It also provides an amount to be forfeited upon the failure of that duty. It may, in fact, be more in the nature of a service agreement or a loan, but we are convinced that the tax court was correct in its determination that the writing of bail bond contracts, for federal income tax purposes, are not contracts of insurance. We are mindful of the fact that Allied remains subjected to state insurance laws and that its name and charter powers indicate its intention to operate as an insurance company. But the test established by Treas.Regs. s 1.801-l(b) makes it clear that "the character |of the business actually done" will determine whether an entity is taxable as an insurance company. For the reasons stated above, we conclude today that for the taxable years in question Allied did not qualify as an insurance company for purposes of ss 831 and 832 of the Code and that, accordingly, the tax court's determination that Allied's accounting treatment of certain income and deduction terns was improper is affirmed.

Both Wilson and Allied's reasoning is critical in any analysis of how the statutes in question are construed.

Accordingly, it is clear that the bondsman-defendant relationship is not one of "insurance" in the usual sense of the word. In that regard, your letter states that, regardless of the fact that "different defendants may pay . . . different premiums to the bail bondsman, . . . the bail bondsman sends a percentage of the face amount to the bail bond insurance company." You further note that even though currently the bail bond surety company "pays taxes upon the total amount collected by the bail bondsman (i.e. written premium) . . . the industry argues that the money paid to the bondsman over and above what the bondsman remits to the bail bond surety company is not for an insurance premium, but is instead for the services the bondsman provides such as monitoring the defendant, making sure the defendant shows up for court appearances, or finding the defendant if he absconds, etc." Because of the unique nature of the bail bond industry, and for other reasons as well, we agree with these arguments: the portion retained by the bondsman "is not for an insurance premium. . . ."

Several commentators have described the role which bail bondsmen play in our criminal justice system. One commentator has noted that

> [b]ail bondsmen play an important role in maintaining social control over bailed defendants. The bondsman and the defendant form a contract in which the bail

> bondsman agrees, for a fee . . . to act as the defendant's surety. . . . In addition to paying the fee, the defendant agrees to appear in court for all scheduled appearances. The bondsman only makes a profit when he is able to collect fees from the defendant and avoid paying the amount of the bond to the court.

Joiner, "Private Police: Defending the Power of the Professional Bail Bondsman," 32 Ind. L.Rev. 1413, 1422 (1999). Another commentator has described the role of the bail bondsman as follows:

> [b]ail bondsman face substantial risks, both financially and physically, necessitating their substantial fees as insurance. "Most people bailed out of jail by bondsman return to court without incident, but a few that put up a fight can present a very real danger to the men and women hired to bring fugitives back to justice." . . . Bondsmen are tasked with ensuring that dangerous individuals remain accountable to the justice system while out of custody. . . . In addition to the physical dangers, bondsmen face financial forfeiture if they fail to deliver defendants to trial. . . . "If bailees fail to appear for their hearings, the bondsman owes the entire bail amount to the court." . . . . Under the professional bondsman system, the only one who loses money for nonappearance is the professional bondsmen" because the defendant loses the money . . . he paid to obtain the bond whether he attends the scheduled hearing [or not].

Causey, "Reviving the Carefully Limited Exception: From Jail to GPS Bail," 5 Faulkner L.Rev. 59, 88-89 (2013). Thus, the authorities, including that of our own Supreme Court, are clear that the primary function of the bail bondsman is to "secure the appearance of the principal to answer the call of the court in accordance with the requirements of the bond. . . ." Wilson, 274 S.C. at 527-28, 265 S.E.2d at 678-79.

We now turn to the statutes at issue, given this unique role of the bail bondsman, as described above. Section 38-7-20 provides in pertinent part that "there is levied upon each insurance company . . . an insurance premium tax based upon total premiums . . . written by the company in the State during each calendar year ending on the thirty-first day of December." (emphasis added). Subsection (A) goes on to specify the difference between the premium tax levied for life insurance and "[a]ll other types of insurance. . . ." (§ 38-7-20(A)). Section 38-7-60(1) states that:

> (1) [n]o later than March first of each year, every insurer licensed by the director or his designee shall file with him a return of premiums collected by the insurer in the State during the immediately preceding calendar year ending on December thirty-first.

It is well recognized that "[i]n construing statutory language, the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction." Tillotson v. Keith Smith Builders, 357 S.C. 554, 558, 593 S.E.2d 621, 624 (Ct. App. 2004) (quoting Higgins v.

State, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992)). Moreover, as indicated, the intention of the Legislature is paramount. In this instance, § 38-7-20(A) generally establishes an insurance premium tax. Section 38-7-60(1) sets forth how that premium tax must be returned by the taxpayer. Reading these two general provisions together, and in harmony with each other, it is our view that, in this unique circumstance, § 38-7-60(1) is determinative. We do not see how the Legislature, cognizant of the unique nature of the bail and industry, intended to deem the money retained by the bondsman as an insurance "premium."

A decision of the Administrative Law Court ("ALC") confirms the importance of § 38-7-60(1). In S.C. Dept. of Insurance v. NLC Mutual Insurance Co., 1998 WL 546490 (August 12, 1998), the ALC concluded that the insurance company had not failed to timely file its premium return which would have resulted in a revocation of its authority to transact business in South Carolina. In its ruling, the ALC quoted § 38-7-60(1) as controlling as to whether the company was "required to file a premium return on September 1, 1997. . . ." According to the ALC, ". . . under S.C. Code Ann. § 38-7-60, NLC was not required to file a premium return until March 1 of the following year." While certainly this ALC decision is not dispositive of the question at hand, it is worthy of note that the ALC looked only to § 38-7-60(1) regarding the filing of a return on premium taxes.

Moreover, as discussed extensively above, our Supreme Court, in Wilson v. McLeod, supra, has emphasized that the relationship of bondsman to defendant is not one of ordinary insurance. As the Court stated, the "bail bonding business does not meet the definition" of "insurance." According to the Court, "[t]he business of bail bonding involves a principal charged with some crime being released from government custody into the custody of his bailor. Should he fear that he may lose custody of the principal he is entitled, '. . . as a matter of right, at any time during the return term of the writ against them to surrender their principal, in discharge of their liability. . . .'" 274 S.C. at 527-28, 265 S.E.2d at 678-79. Allied Fidelity Corp. further explores the role of the bail bondsman, concluding that a business primarily engaged as a bail surety is not an "insurance company" and that the bail contract is not an "insurance contract."

Applying the reasoning of these decisions, we need not resolve this matter based upon any perceived conflict between §§ 38-7-20 or -60. Both statutes are general in nature and apply generally to all insurance. Under either, we believe the proper construction, based upon Wilson v. McLeod and Allied Fidelity, as well as the overarching uniqueness of the bonding industry, is that premium taxes should be paid only on the amount sent by the bondsman to the surety company. It is our view that the General Assembly was cognizant of the relationship between the bail bondsman and a criminal defendant and could not have intended that the portion of the fee retained by the bondsman and not remitted to his surety company should be subject to the premium tax paid by the surety company. In the words of your letter, ". . . the money paid over and above what the bondsman remits to the bail bond surety company is not for an insurance premium, but is instead for the services the bondsman provides such as monitoring the defendant. . . ." The fees retained by the bondsman are retained in order to ensure that the defendant appears before the court to satisfy the obligations which the defendant must meet, such

as good behavior. Only that portion of the fees remitted to the surety company may be deemed as insuring the bondsman. In our view, only those monies may be considered to be "premiums . . . written by the company. . . ." in accordance with § 38-7-20(A). As Wilson v. McLeod recognized, insurance laws do not neatly apply to the bail bondsman and his surety, but must be interpreted in recognition of the unique relationship which the bail bondsman has to a criminal defendant.

Further, in our judgment, even if there is a conflict between §§ 38-7-20 and 38-7-60, the result would be the same. The law would instruct that all doubt must be resolved in favor of the taxpayer. Accordingly, the premium tax would be paid only on the amount "collected" by the surety company, as remitted by the bondsman to his surety. The money which the bondsman retains, however, is not for "insurance" purposes, but is part of the tripartite agreement between bondsman, criminal defendant and the State to insure that the defendant meets his or her obligations to the court.

We recognize the apparent longstanding interpretation by the Department of Insurance, which you discuss extensively in your letter. Typically, we would defer to that construction in cases of ambiguity. See Logan v. Leatherman, 290 S.C. 400, 403, 351 S.E.2d 146, 148 (1986) ["construction of a statute by the agency charged with executing it is entitled to most respectful consideration and should not be overruled without cogent reason."]. We note also that the Department affords considerable weight to the amendment in 2003 of § 38-7-20, removing the word "collected" and replacing it with the word "written." The Department believes that such a legislative amendment eliminates "any possibility that the Legislature intended that insurers and the Department calculate the premium tax on anything other than the premiums written without regard to whether they were 'collected.'" The problem is that Act 73 of 2003 concerns insurance generally and does not appear to address the bail bondsman or the bail relationship.

In this instance, we believe there are several "cogent reasons" to not follow the administrative interpretation of the Department of Insurance. We certainly respect that interpretation and recognize that is longstanding. Nevertheless, we do not think such construction considers two important criteria: the unique role of the bail bondsman, as recognized in Wilson v. McLeod, Allied Fidelity and other authorities, or the rule of construction that all doubt must be resolved in favor of the taxpayer. The word "premium" is defined in the Insurance Code as "payment given in consideration of a contract of insurance." See § 38-7-20(26) [definition of "premium"]. As Wilson v. McLeod makes clear, the money paid by a defendant to a bail bondsman is not a "contract of insurance." Nor is it an insurance "premium." Only that portion remitted to the bondsman's principal – the surety company – is supportable as a "contract of insurance." The consideration the surety company receives from this transaction is the amount remitted by the bondsman to his surety company. Given that all doubt is resolved in favor of the taxpayer, it is our view that, to apply the insurance statutes to a bondsman and his surety as if it were an ordinary insurance policy, is inconsistent with Wilson v. McLeod and is not in accord with legislative intent. We believe that such a delineation – counting only that

portion of the amount remitted to the bondman's surety as a "premium" – is in accordance with the legislative intent.

Conclusion

It is our opinion that the General Assembly did not intend that the bail bond surety company pay premium taxes "upon the total amount collected by the bail bondsman (i.e. written premium)." Instead, we believe that, based upon the unique status of the bail bondsman and his relationship as surety for criminal defendant, "the money paid to the bondsman over and above what the bondsman remits to the bail bond surety company is not for an insurance premium, but is instead for the services the bondsman provides such as monitoring the defendant, making sure the defendant shows up for court appearances, or finding the defendant if he absconds, etc." In our view, the statutes at issue were intended to be applicable to "insurance" generally, as opposed to the unique relationship of bail bondsman to a criminal defendant. The word "premium" is defined in these statutes as "payment given in consideration of a contract of insurance." Only the amount remitted by a bondsman to his bail bond surety company may be deemed to be part of an "insurance" relationship or an insurance "premium" as defined. Here, unlike the typical insurance agent, the bondsman does not merely "collect" the premium for his insurance agency, but instead seeks to ensure that the criminal defendant will meet his obligations to the court.

We appreciate the fact that § 38-7-20(A) taxes premiums "written by the company" and that the Department has consistently read this statute as meaning that the entire amount paid to the bondsman is included as an insurance "premium." The 2003 amendment of § 38-7-20, removing the word "collected" and replacing it with the word "written," did not, however, address bail bondsmen. Moreover, this position does not consider the ample authorities, including the Wilson decision of our own Supreme Court, concluding that the relationship of a bondsman to a criminal defendant is simply not one of "insurance." As Wilson stated, "[t]he inherent differences between the ordinary surety insurance company and the bail bondsman as surety cannot be ignored. The business of bail bonding involves a principal charged with some crime being released from government custody of his bailor. Should he fear that he may lose custody of the principal, he is entitled '. . . as a matter of right, at any time during the return term of the writ against them to surrender their principal, in discharge of their liability.'" We think that if the Legislature, certainly aware of the unique nature of the bondsman's business, had intended to include the entire bail bondsman's fee within the meaning of an insurance premium, it would not have done so not with the general language of § 38-7-20(A), but would have expressly so included this entire amount. Clearly, any ambiguity within the statute must be resolved in favor of the taxpayer. That being the case, we believe the bail bond surety company is not taxed for that entire amount.

Accordingly, it is our opinion that the Legislature did not intend that the portion of payment to the bondsman which is retained by him (and not remitted to his surety company) should be part of the premium tax imposed upon the bail bond surety company. Such amount is retained by the bondsman not as insurance, but to guarantee the defendant shows up for court and meets his other obligations established by the court.

Sincerely,

Robert D. Cook
Solicitor General