



ALAN WILSON
ATTORNEY GENERAL

November 19, 2018

The Honorable Nancy Mace
Member
South Carolina House of Representatives
District No. 99
308A Blatt Bldg.
Columbia, SC 29201

Dear Representative Mace:

Attorney General Alan Wilson has referred your letter to the Opinions section. The request letter reads as follows:

A residential home builder who does business located within my district (hereinafter referred to as the "Company") provides an invaluable service to numerous homeowners located in my district and throughout the State of South Carolina. ...

The issue is whether permit fees paid by the Company to Berkeley County constitute a license tax or similar tax for purposes of determining gross income pursuant to the business license ordinance enacted by the Town of Mount Pleasant (the "Town").

...

The Town of Mount Pleasant Business License Ordinance (the "Ordinance") requires businesses within the Town to obtain a business license and to pay an annual license fee based upon the business's classification and gross income. Specifically, the Ordinance states that "[e]very person engaged or intending to engage in any calling, business, occupation or profession ... in whole or in part, within the limits of the Town ... is required to pay an annual license tax and obtain a business license as herein provided." See Town of Mount Pleasant Ordinance No. 14015 § 1 (March 12, 2014)(emphasis added). The Ordinance defines gross income as the "gross receipts which consist of the total revenue of a business, received or accrued, for one calendar year collected or to be collected

from business done within the Town, excepting therefrom income from business done wholly outside of the Town on which a license tax is paid to some other City or a county and fully reported to the Town." Id. § 2. The Ordinance further provides a deduction from gross income for "'business done wholly outside of the [Town] on which a license tax is paid to some other municipality or a county, taxes collected for a governmental entity, or income which cannot be taxed pursuant to State or federal law." Id. § 6. The stated purpose of the Ordinance is to provide "such regulation as may be required by the businesses subject thereto and [to raise] revenue for the general fund through a privilege tax." Id. § 3.

Here, the principal place of business of the Company is located within the Town. The Company is now, and has been for a number of years, engaged in business as a general contractor, building and constructing residential homes throughout Charleston County, Berkeley County, Dorchester County, the City of North Charleston, and the Town of Summerville. However, the Company has never performed any construction work within the Town.

All of the counties and municipalities for which the Company performs its business activities, except Berkeley County, require the Company to obtain a separate business license for the privilege of doing business within the respective jurisdiction. Specifically, Berkeley County does not issue or require a separate general business license. Rather, Berkeley County requires that a contractor apply for a separate permit for each building or structure being constructed within the county (the "Permit Fee"). See Berkeley County, S.C., Code of Ordinances § 11-67 (Sept. 22, 2017) (the "Berkeley County Ordinance"). The Berkeley County Ordinance further states that

[t]he permit applicant, prior to the issuance of said permits, shall pay all fees and/or any inspection services, which are prescribed under the applicable codes, attached hereto. Such fees shall be based on the most recent valuation tables as recommended by the International Code Council (I.C.C.). These valuation tables will be updated annually on July 1, the beginning of Berkeley County's fiscal year. The chief building official shall set the final building permit valuation.

The fees suggested by the building valuation data table are for the "total cost of construction." Per section 40-11-20 of the General and Mechanical Contracting Act, #23, "total cost of construction" means the actual cost incurred by the owner, all contractors,

subcontractors, and other parties for labor, material, equipment, profit and incidental expenses for the entire project. This does not include the cost of design services unless those services are included in a construction contract. Section 40-11-300 (A) of the General and Mechanical Contracting Act states that "the total cost of construction must be used to determine the appropriate license group for a project.

Id. § 11-68 (emphasis added). The fee schedule for the building permit fees, which are based on the cost of construction as described in § 11-68, are set forth in the Berkeley County Ordinance. See id. § 11-85.

Despite the 2016 gross income of the Company being derived from business done wholly outside of the Town, for which a license tax or similar tax was paid to another municipality or county, the Town did not exempt from the gross income of the Company the business done wholly within Berkeley County. It is our understanding the Town believes that the other municipality or county for which the business is performed must require the Company to obtain a business license in order for such business income of the Company to be exempted from gross income under the Ordinance. ...

In addition to the request letter, this Office was provided with information concerning the Berkeley County's building permit program and lack of a business license tax. The Berkeley County Government's website confirms that it "does not issue and or require a business license." Business Licenses, BERKELEY CNTY GOV'T, <https://www.berkeleycountysc.gov/drupal/dept/permitting/license> (last visited November 2, 2018). However, in a letter dated August 28, 2017, Berkeley County Permitting Manager, Yolanda Ellis, stated that Berkeley County's building permit fee serves, in part, as a license fee as follows:

Please accept this letter as our acknowledgement that permit fees for every house built in Berkeley County do, in fact, contain a component for the privilege of doing business in Berkeley County, which serves as a license fee. A permit Authorization is required for all contractors requesting to do work within the unincorporated portions of Berkeley County including, but not limited to; licensed general and mechanical contractors; licensed residential home builders and/or registered residential specialty contractors, sign contractors, etc.

Finally, this Office was provided with pages 18-19 of a General Ledger for Berkeley County dated May 25, 2017. The ledger shows that Berkeley County's annual budget anticipated

\$4,000,000 to be generated from permitting fees. Meanwhile, the ledger also shows the annual budget anticipated \$1,015,000 in expenses related to “Building & Code Enforcement” and \$328,000 in expenses related to “Permitting.” The revenue generated by the permitting fees exceed both of these expenses categories by roughly \$2,657,000.

While this Office assumes the facts provided in the request letter and those which were subsequently provided are accurate, this Office does not make factual determinations in an opinion. See Op. S.C. Atty. Gen., 2015 WL 4497734 (July 2, 2015) (“[A]s we have cautioned in numerous opinions, this Office does not have the jurisdiction of a court to investigate and determine facts.”). With this caveat in mind, this opinion will analyze whether a court would likely find that Berkeley County building permit fees paid by a general contractor could be considered a de facto business license tax?

Law/Analysis

Based upon the information provided in the request letter and subsequently, it is this Office’s opinion that a court may well find that Berkeley County’s building permit fee constitutes, in part, a de facto business license tax. Such a finding would require a reduction of the calculated gross income for a business license tax in other municipalities and counties. See S.C. Code Ann. § 5-7-30 (“[T]he gross income for the purpose of computing the tax must be reduced by the amount of gross income taxed in the other county or municipality.”); S.C. Code Ann. § 4-9-30(12) (authorizing counties to implement a business license tax). It continues to be this Office’s opinion that building permits fees should not, in most circumstances, be considered business license taxes or equivalent thereto. Rather, this opinion is limited to the situation described to this Office where an official charged with overseeing permitting states that the building permit fee “contain[s] a component for the privilege of doing business.” Ellis letter, supra.

The South Carolina Supreme Court describes a business license tax as follows:

A business license fee is an excise tax—not an income or sales tax. Town of Hilton Head Island v. Kigre, Inc., 408 S.C. 647, 649, 760 S.E.2d 103, 103 (2014). Specifically, a business license fee is a tax on the privilege of doing business within a county or municipality.

Olds v. City of Goose Creek, 424 S.C. 240, 246, 818 S.E.2d 5, 9 (2018); see also Triplett v. City of Chester, 209 S.C. 455, 459, 40 S.E.2d 684, 685 (1946) (“It is the privilege of doing business within the municipality that is sought to be taxed.”); Wingfield v. S.C. Tax Comm’n, 147 S.C. 116, 144 S.E. 846 (1928) (“The phrase ‘license tax’ implies a burden on that which is not

property, but results from its enjoyment or the conduct of the business or calling, or on a civil right and privilege.”). The General Assembly has authorized municipalities to impose such a business license tax according to the following parameters:

Each municipality of the State, in addition to the powers conferred to its specific form of government, may ... levy a business license tax on gross income, ... If the person or business taxed pays a business license tax to a county or to another municipality where the income is earned, the gross income for the purpose of computing the tax must be reduced by the amount of gross income taxed in the other county or municipality.

S.C. Code Ann. § 5-7-30 (emphasis added); see also S.C. Code Ann. § 4-9-30(12) (authorizing counties to implement a business license tax). The Town of Mount Pleasant has adopted a business license tax by ordinance (the “Ordinance”) which became effective on July 1, 2014. Town of Mount Pleasant Ord. No. 14015. The Ordinance states a license is required in the following circumstances:

Every person engaged or intending to engage in any calling, business, occupation or profession listed in the rate classification index portion of this ordinance, in whole or in part, within the limits of the Town of Mount Pleasant, South Carolina, is required to pay an annual license tax and obtain a business license as herein provided.

Town of Mount Pleasant Ord. No. 14015, § 1. The Ordinance explains how gross income should be calculated to determine the amount due:

A license tax based on gross income shall be computed on the gross income for the preceding calendar or fiscal year, and on a twelve-month projected income based on the monthly average for a business in operation for less than one year. The tax for a new business shall be computed on the estimated probable gross income stated in the license application of the balance of the license year.

Town of Mount Pleasant Ord. No. 14015, § 4(B). The Ordinance defines “gross income” to mean:

[G]ross receipts which consist of the total revenue of a business, received or accrued, for one calendar year collected or to be collected from business done within the Town, excepting therefrom income from business done wholly outside of the Town on which a license tax is paid to some other City or a county and fully reported to the Town. The gross receipts for business license purposes may be verified by inspection of returns and reports filed with the Internal Revenue

Service, the South Carolina Department of Revenue, the South Carolina Department of Insurance, or other government agency. ... Gross income for business license tax purposes shall not include taxes collected for a government entity, escrow funds, or funds which are the property of a third party. ...

Town of Mount Pleasant Ord. No. 14015, § 2. In relevant part, the Ordinance allows deductions from gross income as follows:

- A. No deductions from gross income shall be made except income from business done wholly outside of the Municipality on which a license tax is paid to some other municipality or a county, taxes collected for a governmental entity, or income which cannot be taxed pursuant to State or federal law. The applicant shall have the burden to establish the right to deduction by satisfactory records and proof.
- B. ... No person shall be exempt from this ordinance by reason of the payment of any other tax, unless exempted by State law, and no person shall be relieved of the liability for the payment of any other tax by reason of the application of this ordinance.

Town of Mount Pleasant Ord. No. 14015, § 6. The question presented to this Office is, thus, whether an applicant can establish that gross income earned from construction projects which are regulated by a Berkeley County building permit qualifies for a deduction from gross income under the Ordinance.

This Office has consistently opined that building permit fees are distinct from business license taxes. This Office's June 5, 1975 opinion to General Counsel of South Carolina Public Service Authority, Wallace S. Murphy, clarified why a building permit would not, in most circumstances, be considered a tax, as follows:

[A] building permit does not constitute a tax or assessment even though it involves the payment of a fee. A governmental charge for raising revenue is a 'tax'. Columbia Gaslight Co. v. Mobley, 139 S.C. 107, 137 S.E. 211 (1927). On the other hand, a permit is a privilege granted by 'competent authority' to do an act which without the permit would be illegal. Heslep v. State Highway Department of South Carolina, 171 S.C. 186, 171 S.E. 913 (1932). 53 C.J.S. Licenses § 1. Thus the Authority cannot claim exemption from the building regulation as part of the exemption from taxation, since the building regulation requires permits without which construction is unlawful under § 10 of Act No. 1857. Then also, even though the building permit requirement resembles a 'tax or

assessment' in that it raises money to be used for a public purpose, it cannot be deemed one because it does not charge the fee as a condition precedent to doing business as would a tax. Rather, the aim of the permit requirement is to ... regulate the construction—not to raise revenue. This is evidenced by the fact that the buildings plans are perused and sites visited for inspection. Thus it is exactly opposite the situation which was Western Union Tel. Co. v. Town of Winnsboro, 71 S.C. 231, 50 S.E. 870 (1904), where the provision in question was held to be a tax, rather than a permit or license, because the payment of a sum was a condition precedent to doing busi[ness] and gave thereafter the right to carry on the business without any further regulation.

Op. S.C. Atty. Gen., 1975 WL 28886 (June 5, 1975). Similarly, in a December 2, 1961 opinion, this Office responded to a request concerning the maximum license fee that a municipal corporation may charge a general contractor to build new homes. Op. S.C. Atty. Gen., 1961 WL 11726 (December 2, 1961). Therein, we explained that business licensing “constitutes a revenue, rather than a regulatory, measure.” Id. at *1. In contrast, the opinion explained that building permits “are related generally to local building codes and fire precaution regulations.” Id. at *2. In fact, the General Assembly has provided for the regulation of construction by local governments through building permits.¹ While it continues to be this Office’s opinion that, generally, building permits fees are intended to serve a separate purpose from business license taxes, we will consider below whether the building permit ordinance employed by Berkeley County can be found to operate as a de facto business license.

Berkeley County has adopted building permit requirements by ordinance. Berkeley County, S.C., Code of Ordinances §§ 11-64, et seq. Section 11-64 states that “[n]o work ... shall commence until a valid permit for such work has been issued by the permitting department.” If work is begun before obtaining permits “all administrative and permit fees are doubled.” Id. at § 11-65. As described from the request letter above, the amount of each building permit fee is based on a valuation table set by the chief building official. Id. at § 11-67. The fees suggested in the valuation data table are based on the “total cost of construction.” The “total cost of construction” is defined as “the actual cost incurred by the owner, all contractors, subcontractors, and other parties for labor, material, equipment, profit and incidental expenses for the entire project. This does not include the cost of design services unless those services are included in a

¹See S.C. Code § 4-25-10 (county government directed to regulate “construction, alteration or repair of all buildings and structures of every kind.”); S.C. Code § 4-25-210 (requiring building permit granted by county auditor); S.C. Code § 6-9-30 (requiring appointment of building official in each county and municipality); S.C. Code § 6-9-50 (adoption by reference to nationally recognized codes and standards for regulation of construction); S.C. Code § 12-43-240 (mandating counties require building permits and that such permits be furnished to county assessor); S.C. Code § 40-3-320 (requiring authority charged with the responsibility of issuing building permits be in possession of plans sealed by an architect registered in South Carolina before issuing the permit).

construction contract.” Id. The building permit fee schedule employs a fee schedule based on cost of construction as well as square footage for foundations, decks, porches, and accessory structures. Id. at § 11-85. While some of the building permit fee is based on square footage, a significant portion of the fee is based on the total cost of construction estimated prior to the start of construction. Again, as defined, this total cost includes both the actual cost of construction and profits for contractors and subcontractors.

Assuming the general contractor pays the building permit fee, the total cost of construction by which the Berkeley County fee is calculated would be similar to the gross income earned by the general contractor. See Town of Mount Pleasant Ord. No. 14015, § 2. It is this Office’s understanding that the general contractor described in the request letter would not be considered a new business nor a business in operation for less than one year. The license tax which the general contractor pays to the Town of Mount Pleasant for a given year would then be computed according to “the gross income for the preceding calendar or fiscal year.” While the Berkeley County building permit fee ordinance uses the term “total cost of construction” which is an estimate before work begins rather than as “total revenue of a business, received or accrued, for one calendar year collected or to be collected,” the estimated total costs of construction will accrue and become collectable as work begins on a project. When the estimated costs used to compute the building permit fee become gross receipts received or accrued after construction work begins, the estimated costs would then become gross income and be used to compute the following year’s business license tax in the Town of Mount Pleasant. Id. at § 4(B). Thus, the manner by which Berkeley County computes the amount owed for a building permit fee and the manner by which the Town of Mount Pleasant calculates the amount owed for a business license tax have significant commonality in that they are both based in part on a general contractor’s costs and profits or gross income. See Carter v. Linder, 303 S.C. 119, 123, 399 S.E.2d 423, 425 (1990) (“A business license fee ... is based upon classification and gross income, not upon the level of governmental services provided.”).

As discussed above, normally, a building permit fee is not considered a business license tax because it is primarily used to regulate construction rather than as a device to raise revenue. However, where a building permit fee is described as “contain[ing] a component for the privilege of doing business,” requiring a rigid distinction between the two terms makes little sense. Because of the common purpose in the subject building permit fee and business license tax as well as the readily comparable methods of computation, a court may well find that the Berkeley County building permit fee operates as a de facto business license tax.

Assuming a court finds the building permit fee operates as a de facto business license tax, the fee may be susceptible to challenge as a violation of the Equal Protection Clause. S.C. CONST Art. I, § 3. In Eli Witt Co. v. City of W. Columbia, 309 S.C. 555, 558-559, 425 S.E.2d

16, 17-18 (1992), the South Carolina Supreme Court examined whether a business license tax violated the equal protection clause as follows:

Specifically, Eli Witt contends that the ordinance violates the equal protection and due process clauses because the ordinance is vague and arbitrary. ...

The equal protection clause is satisfied if the classification bears a reasonable relation to the legislative purpose, the members of the class are treated alike under similar circumstances and the classification rests on some reasonable basis. Medlock v. S.C. State Family Farm Dev. Auth., 279 S.C. 316, 306 S.E.2d 605 (1983). An ordinance violates the equal protection clause if it is arbitrary and there is no hypothesis to support the classification. Id.

The Court has explained that legislators are afforded a “very wide discretion” in determining which occupations “may be subjected to special forms of regulation or taxation through an excise or license tax.” Am. Bakeries Co. v. City of Sumter, 173 S.C. 94, 174 S.E. 919, 920 (1934). Where the classification of those occupations which are subject to license taxes “is not capricious and arbitrary; [and] where there exists a reasonable ground for difference or policy,” such classifications are generally upheld. Id. Further, licensing ordinances are “are presumed to be reasonable, and the courts will not interfere unless their unreasonableness and oppressiveness is clearly apparent.” Carter, 303 S.C. at 126, 399 S.E.2d at 426. A person who challenges such an ordinance would bear the burden of proving its unreasonableness. Id. This Office has previously opined that the unreasonableness of a business license tax could be demonstrated where there was no factual basis for the disparity in rates between different business classifications. See Ops. S.C. Atty. Gen., 1998 WL 993679 (December 21, 1998) (opining municipal ordinance which adopted model business license tax without justification for rate treatment between segregated industry classifications likely violated the equal protection clause); 1989 S.C. Op. Att’y Gen. 72 (March 3, 1989) (Jasper County business license ordinance set “substantial” rate disparity between classes with no factual justification.). Such business license taxes are “constitutionally suspect and would likely be declared unconstitutional by a court as violative of equal protection and due process.” Op. S.C. Atty. Gen., 1998 WL 993679 (December 21, 1998). Because the building permit fee only applies to the construction industry, if a court were to find it operates in part as a de facto business license tax, it could be found to violate the Equal Protection Clause as it does not apply to any other industry operating within the county.

Conclusion

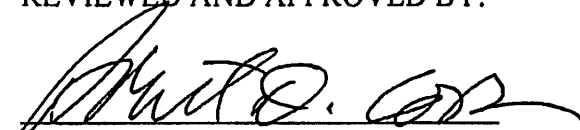
Based upon the information provided, it is this Office's opinion that a court may well find that Berkeley County's building permit fee constitutes, in part, a de facto business license tax. Such a finding would require a reduction of the calculated gross income for a business license tax in other municipalities and counties. See S.C. Code Ann. § 5-7-30 (“[T]he gross income for the purpose of computing the tax must be reduced by the amount of gross income taxed in the other county or municipality.”); S.C. Code Ann. § 4-9-30(12) (authorizing counties to implement a business license tax). It continues to be this Office's opinion that building permits fees should not, in most circumstances, be considered business license taxes or equivalent thereto. Rather, this opinion is limited to the situation described to this Office where an official charged with overseeing permitting states that the building permit fee “contain[s] a component for the privilege of doing business.” See Olds v. City of Goose Creek, 424 S.C. 240, 246, 818 S.E.2d 5, 9 (2018) (“[A] business license fee is a tax on the privilege of doing business within a county or municipality.”).

Sincerely,



Matthew Houck
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REVIEWED AND APPROVED BY:



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