
State of South Carolina
Department of Revenue
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SC PRIVATE LETTER RULING #11-1

SUBJECT: Waterworks Utility Located in a Federal Enclave
(License Fee)

REFERENCES: S.C. Code Ann. Section 12-20-100 (2000)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2000)
S. C. Code Ann. Section 1-23-10(4) (2005)
SC Revenue Procedure #09-3

SCOPE: A Private Letter Ruling is an advisory opinion issued to a specific taxpayer by the Department to apply principles of law to a specific set of facts or a particular tax situation. It is the Department's opinion limited to the specific facts set forth, and is binding on agency personnel only with respect to the person to whom it was issued and only until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion, providing the representations made in the request reflect an accurate statement of the material facts and the transaction was carried out as proposed.

Question:

Is XYZ Services ("Taxpayer"), which is conducting business as described in the facts, subject to the corporate license fee imposed under Code Section 12-20-100?

Conclusion:

Taxpayer is subject to the corporate license fee imposed under Code Section 12-20-100. For that portion of its business conducted within a federal enclave¹ (presently its entire business), Taxpayer is subject only to that portion of the license fee based on gross receipts under Code Section 12-20-100(A)(2). For that portion of Taxpayer's business conducted within a federal enclave (presently its entire business), Taxpayer is not subject to that portion of the license fee based on the fair market value of the property owned and used by it.

¹ A "federal enclave" is territory that the United States has acquired pursuant to the Jurisdiction Clause of the United States Constitution and to which the state has ceded jurisdiction over such property. See, Hellerstein & Hellerstein, State Taxation, 3d ed. (2000). Most federal property is not located within a federal enclave and therefore, the special rules relating to federal enclaves do not apply to such property.

Facts:

Taxpayer, a privately owned company, has contracted with the United States Department of Defense to assume operation of existing water and wastewater utility systems at a federal enclave located in South Carolina. The systems provide services only to persons located on the federal enclave. The systems were previously maintained and operated by the United States government. Taxpayer purchased the systems, but not the underlying land, from the United States government. Taxpayer maintains and operates the systems and charges the Department of Defense for its services. Presently, the entirety of Taxpayer's operations is conducted on the federal enclave. All of Taxpayer's business is regulated by the South Carolina Public Service Commission.

Discussion:

Code Section 12-20-100 provides in relevant part:

(A) In the place of the license fee imposed by Section 12-20-50, every... waterworks company ... shall file an annual report with the department and pay a license fee as follows:

(1) one dollar for each thousand dollars, or fraction of a thousand dollars, of fair market value of property owned and used within this State in the conduct of business as determined by the department for property tax purposes for the preceding taxable year; and

(2) (a) three dollars for each thousand dollars, or fraction of a thousand dollars, of gross receipts derived from services rendered from a regulated business within this State during the preceding taxable year, except that with regard to electric cooperatives, only distribution electric cooperatives are subject to the gross receipts portion of the license fee under this subitem (2)(a).

(b) When a consolidated return is filed pursuant to Section 12-6-5020, the phrase "the gross receipts derived from services rendered from a regulated business" does not include gross receipts arising from transactions between the separate members of the return group;

(B) The minimum license fee under this section is the same as provided in Section 12-20-50(A). When a combined return is filed, the minimum license fee applies to each corporation in the combined group.

As a general rule, state taxes may not be imposed on persons and property located within a federal enclave. However, the federal government has allowed states to impose some state taxes on persons and businesses located within a federal enclave.²

² SC Code Section 3-1-120 provides: "Exclusive jurisdiction in and over any land so acquired by the United States pursuant to the consent given by §3-1-110 [which allows the purchase or acquisition of land for sites or buildings for federal purposes] shall be, and the same is hereby, ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this State. The jurisdiction so ceded shall continue no longer than the United States shall own such lands." This provision has been determined as to not allow state tax laws to be applied to anyone (public or private) operating or employed on these lands unless a statutory exception has been made. See, *Reynolds v. South Carolina Tax Commission*. 162 S.E. 2d 259 (1968).

The Buck Act, 4 U.S.C. §§104-111, 106 provides:

“No person shall be relieved from liability for any income tax levied by any State or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and any such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in the Federal area within such State to the same extent and with the same effect as though such area were not a Federal area.”

Section 110 of the Buck Act provides in relevant part:

“As used in sections 105-109 of this title --...

The term “income tax” means any tax levied on, with respect to, or measured by net income, gross income or gross receipts. ...[emphasis added]

The term “Federal area” means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State.

When a statute is clear and unambiguous, there is no room for construction and the terms of the statute must be given their literal meaning. *Duke Power Co. v. South Carolina Tax Commission*, 354 S.E. 2d 902, 903 (1987). See also, *SCANA Corporation v. South Carolina Department of Revenue*, 683 S.E. 2d 468, 469 (2009). The Buck Act includes an income tax as being a tax levied on or measured by gross receipts. The tax contained in Code Section 12-20-100 is measured in part based on gross receipts.

Further, the terms “with respect to, or measured by” as those terms are contained in the Buck Act have generally been interpreted broadly by the courts, allowing privilege taxes (such as Code Section 12-20-100) to qualify as a tax measured with respect to income or gross receipts when the tax was based on salary, profits of a business, or gross receipts even though the tax is entitled a license tax or is designated as being a tax for the privilege of doing business in the jurisdiction. See, *Howard v. Commission of Sinking Fund of City of Louisville*, 344 U.S. 624 (1953), *United States v. Lewisburg Area School District*, 539 F. 2d 301 (3rd Cir. 1976), *City of Portsmouth v. Fred C. Gardner Company, Inc.*, 211 S.E. 2d 259 (Va. 1975). See also, *General Dynamics Corporation v. Bullock*, 547 S.W. 2d 255 (Tx. 1977), where a franchise tax that was based primarily on stated capital, surplus and undivided profits but which was apportioned by a formula consisting of gross receipts in Texas to gross receipts everywhere was considered a tax measured by gross receipts.

Therefore, Code Section 12-20-100 is at least in part, an income tax under the Buck Act.

While the taxpayer is subject to that portion of the tax that consists of a tax based upon its gross receipts, a separate portion of the tax imposes a tax based on the taxpayer's property located within a federal enclave. The Buck Act does not extend to allowing states and local jurisdictions to impose taxes on, or based on, property located at a federal enclave. In *Humble Pipe Line Co. v. Waggoner*, 376 U.S. 369 (1964), the United States Supreme Court considered whether Louisiana had the right to impose an ad valorem property tax on privately owned pipelines and equipment located at an Air Force base in Louisiana. The court rejected the claim of the state that by leasing property to a private oil and gas pipeline the United States had lost the exclusive jurisdiction over the territory. The Court went on to note that "when Congress has wished to allow a state to exercise jurisdiction to levy certain taxes within a federal enclave, it specifically so states, as in the Buck Act." This decision has been interpreted as not allowing even personal property of a private entity to be taxed by the state when that personal property is located within the federal enclave. See, *Mississippi River Fuel Corp. v. Cochreham*, 382 F. 2d 929 (5th Cir. 1967, on reh'g, 390 F. 2d 34 (5th Cir. 1968), cert denied, 390 US 1015 (1968).

Based on the *Humble Pipe* decision, that portion of the tax under Code Section 12-20-100 that is levied with respect to the property of the Taxpayer is not allowed even though it is not an ad valorem property tax, since the federal government has not specifically allowed property based state taxes to be imposed within a federal enclave.

This does not mean that state taxes cannot be imposed on federal property or transactions that affect the federal government, however, when property is located in a federal enclave and the state has ceded all jurisdiction over the federal enclave, the ability to impose taxes within the federal enclave is restricted unless the United States Government allows for such tax by statute or otherwise. The Buck Act is such a statute in that it allows a state to impose its state sales and use tax or income tax on persons and transactions within a federal enclave.

The question then becomes whether the state, pursuant to Code Section 12-20-100, can impose the income portion of the tax, but not impose the property based portion of the tax. In this instance, the statute is not unconstitutional on its face, rather a portion of the statute cannot be enforced as to this particular taxpayer based on federal law.

"The rule is that where part of a statute is unconstitutional, if such part is so connected with the other parts as that they mutually depend upon each other as conditions and considerations for each other, so as to warrant the belief that the Legislature intended them as a whole, and if they cannot be carried into effect, the legislature would not have passed the residue independently of that which is void, the whole act is void. On the other hand, where a part of the statute is unconstitutional, and that which remains is complete in itself, capable of being executed, wholly independent of that which is rejected, and is of such character as that it may fairly be presumed that the Legislature would have passed it independently of that which is in conflict with the Constitution, then the courts will reject that which is void and enforce the remainder." *Fairway Ford, Inc. v. Timmons*, 314 S.E. 2d 322 (1984) citing *Townsend v. Richland County*, 2 S.E. 2d 777, 781 (1939); *Aiken County Board of Education v. Knotts*, 262 S.E. 2d 14, 18 (1980) (quoting *Townsend*).

Under Code Section 12-20-100, the tax in question is composed of two separate measures of tax – the first being based on property value, and the second being based on gross receipts. That portion of the tax that is based on gross receipts can be administered and imposed even if that portion of the tax based on property value cannot be imposed. Accordingly, the state may tax the taxpayer under Code Section 12-20-100 based on its gross receipts without taxing the taxpayer on its property values.

CAVEAT: This advisory opinion is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances, as stated, are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting the advisory opinion may not rely on it. If the taxpayer relies on this advisory opinion, and the Department discovers, upon examination, that the facts and circumstances are different in any material respect from the facts and circumstances given in this advisory opinion, then the advisory opinion will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this advisory opinion, changes in a statute, a regulation, or case law could void the advisory opinion.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/James F. Etter

James F. Etter, Director

April 20, 2011
Columbia, South Carolina