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TAX LAW

I. TEST ADOPTED FOR EXEMPTING FRATERNAL ORGANIZATIONS FROM AD VALOREM TAXATION

In *Hibernian Society v. Thomas*[1] the South Carolina Court of Appeals held that the Society's meeting hall was exempt from *ad valorem* taxation under section 12-37-220B(12)[2] of the South Carolina Code. The case is significant for the following two reasons: (1) the court articulated a test to determine when a fraternal organization's property is tax exempt; and (2) the case notifies practitioners of the possible sources of interest payments on refunds of *ad valorem* taxes.

In 1979 and 1980 the Society paid, under protest, *ad valorem* taxes on Hibernian Hall to both the city and the county of Charleston.[3] The Society then sued the city and county for refunds of the taxes plus interest from the city. The trial court held that Hibernian Hall was exempt from *ad valorem* taxation under section 12-37-220B(12),[4] but did not require that the city pay interest under section 12-47-230[5] of the South Carolina

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1. 282 S.C. 465, 319 S.E.2d 339 (Ct. App. 1984).

2. S.C. CODE ANN. § 12-37-220B(12)(Supp. 1984).

3. Record at 1. In 1979 the Society paid *ad valorem* taxes of $2,971.92 to the city and $3,673.91 to the county; in 1980 the Society paid $3,176.88 to the city and $3,830.19 to the county.

4. The statute provides in pertinent part:

> B. In addition to the exemptions provided in subsection A the following classes of property shall be exempt from ad valorem taxation subject to the provisions of § 12-3-145:
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> (12) The property of any fraternal society, corporation or association, when the property is used primarily for the holding of its meetings and the conduct of its business and no profit or benefit therefrom shall inure to the benefit of any private stockholders or individuals.

S.C. CODE ANN. § 12-37-220B(12)(Supp. 1984).

5. The statute provides in pertinent part:

> The remedies and rights . . . for the payment of taxes under protest and the recovery thereof shall apply equally to incorporated municipalities, with respect to city or town taxes, . . . [and] if judgment be for the plaintiff . . . the amount of taxes, with interest at six per cent from the date of payment, shall be refunded to the plaintiff.

S.C. CODE ANN. § 12-47-230 (1976).

Code.

The Society appealed the denial of interest, and the city and county appealed the award of the refunds, arguing that the Society had failed to meet the criteria for tax exemption under section 12-37-220B(12). The court of appeals affirmed the trial court's decision on the refunds, but reversed the decision not to require the city to pay interest. The Hibernian Society did not argue on appeal that interest should also have been paid by the county.[6]

In holding that Hibernian Hall was exempt from *ad valorem* taxes, the court of appeals found that the criteria in section 12-37-220B(12) had been satisfied: (1) the Society was a fraternal organization; (2) Hibernian Hall was used primarily for holding society meetings and conducting its business; and (3) the members did not profit or benefit individually from the Society's business.[7]

In holding that the Hibernian Society was a fraternal organization within the meaning of section 12-37-220B(12), the court stated: "It was formed with the purpose . . . of engaging in charitable work which purpose presently exists."[8] Noting that the hall was open 364 days a year for conducting the Society's business and only intermittently rented out to nonmembers, the court also found that the hall's primary purpose was its availability for Society meetings and the conduct of its business.[9] Finally, the court, applying logic rather than case law,[10] determined that the Society's business neither profited nor benefited the individual members. The court stated:

> There is bound to be some incidental, non-financial benefit resulting from membership in any type organization. In enacting this particular condition, the legislature intended, we believe, to stop the flow of any direct or indirect commercial benefits to the *individual members* of the Society, . . . as opposed to the benefits which inherently and customarily flow to the members

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6. The argument does not appear in the Hibernian Society's appellate brief or in the trial transcript.

7. 282 S.C. at 469, 319 S.E.2d at 342. *See supra* note 4.

8. *Id.* at 470, 319 S.E.2d at 342.

9. *Id.* at 471, 319 S.E.2d at 343.

10. In its discussion of inured benefits, the court of appeals cited only one case, Harding Hosp. v. United States, 505 F.2d 1068 (6th Cir. 1974), and distinguished it from the instant case.

of a fraternal organization as a *group*.[11]

Since the court found that the Society met all three conditions imposed by section 12-37-220B(12), the meeting hall was exempt from *ad valorem* taxation, and the Society was entitled to refunds of the taxes paid under protest.

The key factor in the court's decision was its determination that no member benefited individually from the projects or benefits of the Society. The court of appeals based this finding on two grounds. First, the court stated that any benefits resulting from membership in the Society inured to the benefit of the members as a group. Second, the court noted that although some financial benefits inured to the group members, these financial benefits simply were not substantial enough to violate the no-profit condition of section 12-37-220B(12).[12] It thus appears that the court of appeals devised a two-part test for determining if any profit or benefit has inured to any individual member. First, all the benefits must inure to the group, and second, any *financial* benefits the membership may receive must be insubstantial.

In ruling that the city was required to pay six percent interest per annum on the tax refund, the court of appeals held that the city lacked standing to challenge the constitutionality of the statute requiring the payment of interest.[13] Section 12-47-230 requires that a city, but not a county, pay six percent interest when ordered by a court to refund *ad valorem* taxes. The city challenged the statute on equal protection grounds, but the court decided that the city lacked standing to raise the equal protection issue.[14] The court also determined that the city was barred from contesting the constitutionality of section 12-47-230 since a city is a political subdivision of the state and, for purposes of equal protection, could not challenge the constitutionality of a statute effectively enacted by itself.

Counsel for the Hibernian Society failed to argue, and perhaps for this reason the court of appeals failed to recognize, that

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11. 282 S.C. at 471, 319 S.E.2d at 343 (emphasis in original).

12. *Id.* at 471-72, 319 S.E.2d at 343.

13. *Id.* at 473, 319 S.E.2d at 344.

14. The court determined that the city was not a "person" within the meaning of S.C. CONST. art. I, § 3, which provides in pertinent part: "nor shall any person be denied the equal protection of the laws." 282 S.C. at 472, 319 S.E.2d at 343-44.

section 12-47-60[15] of the South Carolina Code sometimes requires a county to pay interest on *ad valorem* taxes refunded as a result of litigation.[16]

In *Bowaters Carolina Corp. v. Smith*[17] the South Carolina Supreme Court held:

> The general supervisory powers conferred by the statutes upon the Tax Commission with respect to assessment of property taxation bring such taxes within the classification of those administered by the Commission, within the meaning of Section 65-2656 . . . and renders the county liable for interest on the amount of the taxes recovered in this action."[18]

Thus, the court ruled that *ad valorem* taxes are administered by the South Carolina Tax Commission. While there are subtle differences in the fact situations of *Bowaters* and *Hibernian Society*, the language quoted above suggests that the Society could have recovered interest from the county as well as the city. Counsel's failure to argue for interest from the county under section 12-47-60 may have cost the Society a substantial amount in interest.[19]

Hibernian Society v. Thomas sets forth a test to determine when the property of fraternal organizations is exempt from *ad valorem* taxation. Under this opinion, an insubstantial amount of financial benefit may inure to the benefit of all the members of a fraternal organization without threatening the tax exempt status. Perhaps most importantly, this decision should alert attorneys that interest on *ad valorem* tax refunds may be obtained

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15. S.C. CODE ANN. § 12-47-60 (1976).

16. That statute provides in pertinent part:

> With respect to taxes . . . administered by the South Carolina Tax Commission, whenever any amount of taxes . . . are recovered by successful litigation in the courts of this State, such amounts recovered shall bear interest at the rate of one half of one per cent per month from the date such taxes . . . were paid . . . .

S.C. Code Ann. 12-47-60 (1976).

17. 257 S.C. 563, 186 S.E.2d 761 (1972).

18. 257 S.C. at 574, 186 S.E.2d at 765. S.C. CODE ANN. § 65-2656 (1962) is currently S.C. CODE ANN. § 12-46-60 (1976).

19. The amount would have been six percent per annum of the taxes paid in 1979 and 1980, calculated from the last day of the tax year until the date of this decision. The taxes paid were $3,673.91 for 1979 and $3,830.19 for 1980. Record at 1.

from both the city and the county under the South Carolina Code.

Michael G. Wimer

II. COMPUTER SOFTWARE SUBJECT TO STATE SALES AND USE TAX

In *Citizens and Southern Systems v. South Carolina Tax Commission*[20] the South Carolina Supreme Court held that the sale of magnetic tape computer software was a transfer of tangible personal property[21] and, thus, subject to the state sales and use tax.[22] This decision aligns South Carolina with the minority of states taxing computer software as tangible personal property[23] and solidifies the state Tax Commission's position that the sale of such software is taxable.[24]

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20. 280 S.C. 138, 311 S.E.2d 717 (1984).

21. S.C. CODE ANN. § 12-35-140 (1976) defines "tangible personal property" as "personal property which may be seen, weighed, measured, felt or touched or which is in any other manner perceptible to the senses . . . ."

22. *See* S.C. CODE ANN. §§ 12-35-510 through -810 (1976). Section 12-35-510 imposes "upon every person engaged or continuing within this state in the business of selling at retail any tangible personal property whatsoever" a sales tax equal to a percentage of the gross proceeds of the sales of the business. Section 12-35-810 provides for the imposition of a tax on the "storage, use or other consumption in this State of tangible personal property purchased at retail for storage, use or other consumption in this State . . . ."

23. *See, e.g.*, District of Columbia v. Universal Computer Assocs., 465 F.2d 615 (D.C. Cir. 1972); Honeywell Information Sys. v. Maricopa County, 118 Ariz. 171, 575 P.2d 801 (1977); First Nat'l Bank of Springfield v. Dep't of Revenue, 85 Ill. 2d 84, 421 N.E.2d 175 (1981). *But see* Comptroller of the Treasury v. Equitable Trust Co., 296 Md. 459, 464 A.2d 248 (1983); Greyhound Computer Corp. v. State Dep't of Assessments and Taxation, 271 Md. 674, 320 A.2d 52 (1974); Maccabees Mutual Life Ins. Co. v. State Dep't of Treasury, 122 Mich. App. 660, 332 N.W.2d 561 (1983); University Microfilms v. Scio Township, 76 Mich. App. 616, 257 N.W.2d 265 (1977); Commerce Union Bank v. Tidwell, 538 S.W.2d 405 (Tenn. 1976); Bullock v. Statistical Tabulating Corp., 549 S.W.2d 166 (Tex. 1977); Statistical Tabulating Corp. v. Bullock, 538 S.W.2d 259 (Tex. 1976); First Nat'l Bank of Fort Worth v. Bullock, 584 S.W.2d 548 (Tex. Civ. App. 1979); Janesville Data Center v. Wis. Dep't of Revenue, 84 Wis. 2d 341, 267 N.W.2d 656 (1978).

24. S.C. Tax Comm'n R., S.C. CODE ANN. (R. & REG.) 117-174.262 (1976) states in part:

> The [sales and use] tax applies to total charges for coding, punching or otherwise reproducing prewritten programs including charges for the tapes or other properties when furnished by the seller or reproducer.
>
> The temporary transfer of possession of a program for a consideration for the purpose of direct use by the customer or to be reproduced by the customer on or into tapes or other properties is a lease of tangible personal property

In 1978 Citizens and Southern Systems (C & S Systems) purchased a computer software program on magnetic tape. C & S Systems then transferred the program from the magnetic tape into its computer memory and returned the tape to the manufacturer. When the State Tax Commission assessed a sales and use tax on the purchase, C & S Systems paid it under protest and brought this action to recover the taxes plus interest. C & S Systems argued that the sale was one of either intangible personal property or services, neither of which is subject to the sales and use tax.[25] The Tax Commission countered that the sale of the magnetic tape software was subject to taxation because the software met the statutory definition of tangible personal property.[26] The trial court ruled in favor of the Tax Commission.[27]

The South Carolina Supreme Court affirmed the trial court's decision and found that the magnetic tape computer software was tangible personal property subject to the state's sales and use tax.[28] The court rejected the theory that the tax status of a computer program should be based on its ability to be separated from the tape itself. Citing *Comptroller of the Treasury v. Equitable Trust*,[29] the court agreed that the " '[t]he taxability of a sale of a canned program copy should not turn on whether the buyer stores the program in memory.' "[30] Thus, it was of no consequence that C & S Systems transferred the program into its computer and returned the magnetic tape to the seller; the transaction was still one of tangible personal property.

C & S Systems also contended that the sale should not be subject to taxation because the program could have been introduced into its computer through a number of other, less tangible means. The court, however, citing *Chittenden Trust Co. v. King*,[31] stated that the buyer is forced to "accept the consequences of its choice to purchase the program in the form of a magnetic tape . . . ."[32] To hold otherwise would be to effect a

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subject to the tax . . . .

25. Record at 17-19.
26. 280 S.C. at 140, 311 S.E.2d at 718.
27. Record at 59.
28. 280 S.C. at 141, 311 S.E.2d at 718.
29. 296 Md. 459, 464 A.2d 248 (1983).
30. 280 S.C. at 141, 311 S.E.2d at 718 (quoting 296 Md. at 472, 464 A.2d at 255).
31. 143 Vt. 271, 465 A.2d 1100 (1983).
32. 280 S.C. at 142, 311 S.E.2d at 719.

tax system based on what could have occurred rather than what actually took place.

The South Carolina Supreme Court modeled its decision and reasoning on *Chittenden*, which also concerned the purchase of a computer software program. Chittenden Trust Co. maintained that since the "focus of the transaction" was knowledge and information—an intangible—rather than the tape itself, the sales and use tax should not apply.[33] The *Chittenden* court indicated, however, that Vermont's statutory scheme did not anticipate that the "essence of the transaction" test should be applied in this context.[34] This "essence of the transaction" test has been used by several other courts in finding that the transfer of magnetic tape computer software is intangible personal property.[35] Although the South Carolina Supreme Court mentioned several of these cases, it did not apply the test.

In *Commerce Union Bank v. Tidwell*,[36] the Tennessee Supreme Court, construing a similar statute,[37] reached the opposite result and determined that magnetic tape computer software is intangible personal property. Noting that magnetic tapes are not a crucial element of software programs because computer programs can be transmitted by alternate means without any tangible manifestations, the court found that the transfer of magnetic tapes was only incidental to the actual purchase of intangible knowledge, which remained in the computer. The court distinguished magnetic tapes from phonographic records on the basis that a record is complete and ready to use when purchased,

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33. 143 Vt. at 274, 465 A.2d at 1101.

34. *Id.*, 465 A.2d at 1102. The *Chittenden* court rejected any distinction between the magnetic tape and such taxable personal property as books and records based on the inherent ability of the computer program to exist apart from the tangible tape. The court held that the value of both "lies in their respective abilities to store and later display or transmit their contents." *Id.*

35. *See, e.g.*, State v. Central Computer Servs., 346 So. 2d 1156 (Ala. 1977); First Nat'l Bank of Springfield v. Dep't of Revenue, 85 Ill. 2d 84, 421 N.E.2d 175 (1981); Commerce Union Bank v. Tidwell, 538 S.W.2d 405 (Tenn. 1976); Bullock v. Statistical Tabulating Corp., 549 S.W.2d 166 (Tex. 1977); Janesville Data Center v. Wis. Dep't of Revenue, 84 Wis. 2d 341, 267 N.W.2d 656 (1978).

36. 538 S.W.2d 405 (Tenn. 1976).

37. "Tangible personal property" is statutorily defined in South Carolina, Tennessee, and Vermont as "personal property which may be seen, weighed, measured, felt or touched, or is in any other manner perceptible to the senses." S.C. CODE ANN. § 12-35-140 (1976); TENN. CODE ANN. § 67-6-102(17)(1983); VT. STAT. ANN. tit. 32, § 9701(7)(1981).

while the magnetic tape computer program must be introduced into and then translated by the computer. It is the final intangible knowledge remaining in the computer that is the subject of the sale.[38]

Several courts have distinguished between canned computer programs, which are ready to use when purchased, and customized computer software, which, although standardized to some extent, requires more adaptation to suit the requirements of a particular purchaser.[39] When adaptations have been made to suit a specific installation, a strong argument can be made that the transaction is one of personalized services.[40] It can also be argued, however, that an adaptation made to personalize a program is not of sufficient magnitude to warrant classifying the transaction as one of services for tax purposes.[41]

Citizens and Southern Systems indicates to purchasers that magnetic tape computer software will be subject to the state sales and use tax. Those wishing to avoid the tax should purchase computer software in other, less tangible forms, such as via telephone transmission or manual loading into the computer. It also serves as a warning that the South Carolina Supreme Court will strictly and literally apply the statutory definition of "tangible personal property" for the purpose of determining tax status.

Judith L. McInnis

III. When Tax Refund Suit Is Permitted Without Prior Exhaustion of Administrative Remedies

In *Greenville Baptist Association v. Greenville County Treasurer*,[42] the South Carolina Court of Appeals held that a taxpayer whose property is denied tax exempt status by the

38. 538 S.W.2d at 408.

39. *See, e.g.*, First Nat'l Bank of Springfield v. Dep't of Revenue, 85 Ill. 2d 84, 421 N.E.2d 175 (1981); Maccabees Mutual Life Ins. Co. v. State Dep't of Treasury, 122 Mich. App. 660, 332 N.W.2d 561 (1983).

40. Maccabees Mutual Life Ins. Co. v. State Dep't. of Treasury, 122 Mich. App. at 666, 332 N.W.2d at 563-64.

41. Comptroller of the Treasury v. Equitable Trust, 296 Md. 459, 464 A.2d 248 (1983).

42. 281 S.C. 325, 315 S.E.2d 163 (Ct. App. 1984).

South Carolina Tax Commission is not required to exhaust all administrative remedies, including appeal to the Tax Board of Review, before initiating an action in the court of common pleas to recover taxes paid under protest.[43] The court concluded that only taxpayers challenging overvaluation of property are required to exhaust administrative remedies before initiating an action to recover taxes paid under protest.[44]

The appellant, Greenville Baptist Association, claimed an exemption for two tracts of land pursuant to article X, section 3 of the South Carolina Constitution,[45] which exempts property owned by religious institutions from taxation. The South Carolina Tax Commission determined that the property was not tax-exempt.[46] The appellant paid the taxes under protest and instituted an action to recover the taxes and have the property declared tax-exempt. The respondent demurred on the ground that the court lacked jurisdiction because the appellant had not exhausted all its administrative remedies, including an appeal to the Tax Board of Review. The trial court granted the demurrer, but the court of appeals reversed and remanded.[47]

In reaching its decision, the court of appeals first examined section 12-3-145(D)[48] of the South Carolina Code to determine whether it is mandatory that a taxpayer appeal to the Tax Board of Review before initiating an action to recover taxes paid under protest. The court acknowledged the merit of respondent's argument that "sound judicial policy favors a preliminary sifting process . . . to prevent attempts to swamp the courts by resort to them in the first instance,"[49] but noted that "tax statutes cannot be extended by implication beyond clear import of

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43. *Id.* at 327, 315 S.E.2d at 164.

44. *Id.* at 329, 315 S.E.2d at 165.

45. S.C. CONST. art. X, § 3(c) provides that the property of a church will be exempt from *ad valorem* taxation.

46. The court noted that the South Carolina Tax Commission found that the property was not "'actually occupied'" as required by S.C. CODE ANN. § 12-37-220(A)(3)(1976). 281 S.C. at 327, 315 S.E.2d at 164.

47. 281 S.C. at 326-27, 315 S.E.2d at 164.

48. S.C. CODE ANN. § 12-3-145(D)(Supp. 1984) provides: "In addition to any right of appeal otherwise provided by law, any taxpayer may appeal from the decision of the Commission to the Tax Board of Review for an interpretation of the Constitution or state laws regarding his exemption status upon payment of his taxes under protest . . . ."

49. 281 S.C. at 328, 315 S.E.2d at 165.

the language used."[50] Since the language of section 12-3-145(D) clearly states that appeal to the Tax Board of Review is an "additional remedy rather than a mandatory step in the appeal process,"[51] the court was "constrained to hold . . . that the judicial policy of exhaustion of administrative remedies must give way in face of legislative intent to the contrary as revealed in the clear language of the statute."[52]

The court continued its analysis by examining the judicial interpretations of section 12-47-220, which permits a taxpayer to bring an action against the county treasurer or the Commission in the court of common pleas to recover taxes paid under protest.[53] In addition, the court reviewed cases which have held that the requirement of exhaustion of administrative remedies applied to section 12-47-220.[54] These cases all entailed overvaluation of property by assessing officers, which should be corrected at an administrative level. Errors regarding the tax-exempt status of property, however, constitute jurisdictional defects that render the assessments entirely void and should be remedied by bringing actions at law.[55] To support its position, the court

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50. *Id.* (citing Adams v. Burts, 245 S.C. 339, 140 S.E.2d 586 (1965)(court refused to expand the meaning of a tax statute to infer legislative intent to discriminate against an accrual basis taxpayer in favor of a cash basis taxpayer)).

51. 281 S.C. at 328, 315 S.E.2d at 165.

52. *Id.*

53. S.C. CODE ANN. § 12-47-210 (1976) provides: "When the State or any county charges or levies any tax whatsoever against any person . . ., the person . . . may, if he conceives such taxes to be unjust or illegal for any cause, pay such taxes . . . under protest . . . ." S.C. CODE ANN. § 12-47-220 (1976) provides: "Any person paying any taxes under protest may at any time within thirty days after making such payment, but not afterwards, bring an action against the county treasurer or the Commission . . . for the recovery thereof, . . . in the court of common pleas . . . ."

54. For cases holding that a taxpayer must exhaust all administrative remedies before instituting an action under S.C. CODE ANN. § 12-47-220 (1976), see Columbia Developers, Inc. v. Elliott, 269 S.C. 486, 238 S.E.2d 169 (1977); Newberry Mills, Inc. v. Dawkins, 259 S.C. 7, 190 S.E.2d 503 (1972); Meredith v. Elliott, 247 S.C. 335, 147 S.E.2d 244 (1966); Owen Steel Co. v. S.C. Tax Comm'n, 281 S.C. 80, 313 S.E.2d 636 (Ct. App. 1984).

55. The court adopted the position set forth in Meredith v. Elliott, 247 S.C. 335, 147 S.E.2d 244 (1966), in which the taxpayer alleged that the assessor's appraisal of the property was excessive. The South Carolina Supreme Court held that the taxpayer was required to exhaust the remedy of appeal to the Tax Commission before instituting an action to recover the taxes paid under protest. The *Meredith* court emphasized the difference between instances when a party is aggrieved by overvaluation and must "resort to the tribunal created by the State for the correction of errors in assessment" before maintaining an action at law and instances when a jurisdictional defect exists rendering

noted that prior to the enactment of section 12-3-145(D), appellate practice did not require a taxpayer whose property had been denied tax-exempt status to exhaust administrative remedies before bringing an action under section 12-47-220.[56]

Greenville Baptist Association v. Greenville County Treasurer permits a taxpayer whose property is denied exempt status by the South Carolina Tax Commission to bring an action in the court of common pleas without prior resort to the Tax Board of Review and without having exhausted available administrative remedies. Practitioners, however, should be aware that circumvention of administrative remedies is permissible only after denial of tax-exempt status, a jurisdictional defect, and not after a mere error of judgment, such as overvaluation of property.

Bonnie M. Weisman

IV. The "Public Purpose" Exemption for State Agencies Leasing Property to Private Individuals

In *South Carolina Public Service Authority v. Summers*[57] the South Carolina Supreme Court held that certain real property owned by the South Carolina Public Service Authority (the Authority) was exempt from *ad valorem* property taxation.[58] The court found that any private benefit conferred on the individual lessees of the property was merely incidental to the public purpose being served. In this decision the court continued its recent trend of expanding the scope of "exclusivity" in public purpose determinations.[59]

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an assessment "wholly void." *Id.* at 343-44, 147 S.E.2d at 248.

56. For cases illustrating this practice, see Bowaters Carolina Corp. v. Smith, 257 S.C. 563, 186 S.E.2d 761 (1972); Epworth Orphanage v. Wilson, 185 S.C. 243, 193 S.E. 644 (1937); Citadel Dev. Found. v. County of Greenville, 279 S.C. 443, 308 S.E.2d 797 (Ct. App. 1983).

57. 282 S.C. 148, 318 S.E.2d 113 (1984).

58. Much of the property in question was lakefront resort property surrounding Lakes Marion and Moultrie that was leased to private individuals for residential and commercial use. The remaining property was leased to the South Carolina Wildlife and Marine Resources Department and the United States Fish and Wildlife Bureau. Brief of Respondent at 8; 282 S.C. at 148, 318 S.E.2d at 113.

59. Other recent decisions holding that an exclusively public purpose existed, notwithstanding a lease that conferred a private benefit, include the following: Charleston County Aviation Auth. v. Wasson, 277 S.C. 480, 289 S.E.2d 416 (1982)(airport property

The South Carolina Constitution specifically exempts from *ad valorem* taxation any property owned by the state or its political subdivisions and used exclusively for public purposes.[60] This provision was made applicable to the South Carolina Public Service Authority through enabling legislation which specifically stated that the Authority serves a public purpose and, therefore, is not required to pay taxes on property it acquires to carry out its stated purpose.[61] Despite this provision, the tax assessors of several South Carolina counties assessed real property taxes on land leased by the Authority to private individuals. The Authority paid the taxes under protest and instituted this action to recover them.[62] The trial court found that the property was exempt from *ad valorem* taxation.

The appellants challenged this decision, arguing that because of the private benefit conferred upon the individual lessees, the property did not serve an exclusively public purpose; thus, the Authority was not entitled to tax-exempt status. The South Carolina Supreme Court disagreed and affirmed the trial court's decision.[63]

The supreme court, considering both the enabling legislation[64] and the South Carolina Constitution,[65] concluded that any private benefit to the lessees was only incidental to the attainment of the Authority's public purpose. Noting that "public purpose" is not easily defined, the court stated that each case must be decided on its own peculiar circumstances.[66] The court recog-

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leased to private concessionaires served an exclusively public purpose); S.C. Farm Bureau Mktg. Ass'n v. S.C. State Ports Auth., 278 S.C. 198, 293 S.E.2d 854 (1982)(grain elevator leased to a private entity for profit served a public purpose).

60. S.C. CONST. art. X, § 3 provides: "There shall be exempt from *ad valorem* taxation: (a) all property of the State, counties, municipalities, school districts and other political subdivisions, if the property is used exclusively for public purpose . . . ."

61. Under S.C. CODE ANN. § 58-31-80 (1976), the Authority was created "primarily for the purpose of developing the Cooper River, the Santee River, the Congaree River and their tributaries upstream . . . ." This enabling legislation was held constitutional in Clarke v. S.C. Pub. Serv. Auth., 177 S.C. 427, 181 S.E. 481 (1935).

62. The action was instituted pursuant to S.C. CODE ANN. § 12-47-220 (1976), which allows any person paying taxes under protest to bring an action against the county treasurer or the Commission.

63. 282 S.C. at 149-50, 318 S.E.2d at 113-114.

64. S.C. CODE ANN. § 58-31-80 (1976). *See supra* note 61.

65. S.C. CONST. art. X, § 3. *See supra* note 60.

66. 282 S.C. at 151, 318 S.E.2d at 114 (citing Byrd v. County of Florence, 281 S.C. 402, 315 S.E.2d 804 (1984)). In *Byrd* the court found a Florence County ordinance that

nized, however, that reference to prior decisions can be useful in deciding a particular case.[67] After reviewing a number of recent decisions that considered the relationship between leasing property and public purpose,[68] the court concluded that in all the cases holding that a particular lease transaction was tax exempt, "the governmental agency involved had as its purpose an objective designed to promote 'the public health, safety, morals, general welfare, security, prosperity [or] . . . contentment of all of the inhabitants or residents or at least a substantial part thereof.' "[69] The court found that there is a "critical distinction between the *purpose* for which the property [is] used and the method of accomplishing that purpose."[70] The Authority's purpose was "to increase access to the lakes by the public";[71] the method used to accomplish this purpose was to lease land to private individuals whose homes and commercial facilities would attract visitors to the lakes.[72]

It is well established that when property is owned by a municipal or quasi-municipal corporation, such as the Authority,

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authorized "the issuance of general obligation bonds for the acquisition and development of an industrial park" to be unconstitutional because "the primary beneficiaries of the proposed redevelopment would be private parties." *Id.* at 403-05, 315 S.E.2d at 805. For a discussion of *Byrd*, see *Constitutional Law, Annual Survey of South Carolina Law*, 37 S.C.L. REV. 47, 47-52 (1985). In Caldwell v. McMillan, 224 S.C. 150, 158, 77 S.E.2d 798, 801 (1953), the court observed that public purpose is a fluid concept that changes with time, place, economy, and countless other circumstances.

67. 282 S.C. at 151, 318 S.E.2d at 114-15.

68. State v. City of Columbia, 115 S.C. 168, 104 S.E. 337 (1920)(Columbia Opera House held to serve a public purpose); Charleston County Aviation Auth. v. Wasson, 277 S.C. 480, 289 S.E.2d 416 (1982); S.C. Farm Bureau Mktg. Ass'n v. S.C. State Ports Auth., 278 S.C. 198, 293 S.E.2d 854 (1982). In contrast to *Charleston County Aviation Authority*, see Clayton County Bd. of Tax Assessors v. City of Atlanta, 164 Ga. App. 864, 298 S.E.2d 544 (1983)(portion of airport property leased to an in-flight catering corp. was not in active use for airport purposes and was, therefore, subject to taxation).

69. 282 S.C. at 152, 318 S.E.2d at 115 (quoting Anderson v. Baehr, 265 S.C. 153, 162, 217 S.E.2d 43, 47 (1975)). The *Anderson* court applied this public purpose standard to determine whether the plaintiff's property was taken "without due process in violation of the Fourteenth Amendment of the United States Constitution." *Id.* at 158, 217 S.E.2d at 45.

70. 282 S.C. at 152, 318 S.E.2d at 115.

71. *Id.* at 153, 318 S.E.2d at 115.

72. *Id.* The court additionally found that the statutory language created a contract between the Authority and its bondholders and held that U.S. CONST. art. I, § 10 and S.C. CONST. art. I, § 4 protected such language against repeal by a subsequent constitutional amendment.

tax exemption is the rule and taxation the exception.[73] The court's decision in this case, however, appears to stretch the thin line that separates property serving a public purpose from property conferring a purely private benefit on individual citizens.[74] Unless a substantial part of the public is affected, the public benefit may be held negligible and speculative compared to the benefit to the private individual.[75] By leasing to private individuals who can afford to build vacation homes, the Authority may actually have been frustrating its stated purpose by limiting access to much of the lakefront property to the lessees and their invited guests.[76] As the appellants observed, "The public has no vested right to use the property and do so only upon compliance with conditions prescribed by the lessee."[77] On the other hand, those portions of the property leased to commercial establishments could possibly aid in the development of the property if the commercial establishments were of the type that would increase public access.[78]

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73. Charleston County Aviation Auth. v. Wasson, 277 S.C. 480, 289 S.E.2d 416 (1982); County of Hanover v. Trustees of Randolph Macon College, 203 Va. 613, 125 S.E.2d 812 (1962); S.C. CONST. art. X, § 3.

74. In Charleston County Aviation Auth. v. Wasson, 277 S.C. 480, 487, 289 S.E.2d 416, 420 (1982), the court set forth a two-part test for determining when property is used exclusively for a public purpose. The first step is to determine what the public purpose is, and the second step is to determine if the private benefits are of such magnitude that the public purpose served is merely incidental in comparison. The court recently added two additional steps to its test in Byrd v. County of Florence, 281 S.C. 402, 315 S.E.2d 804 (1984). The third step is to determine the speculative nature of the project; the fourth step is to "balance the probability that the public interest will be ultimately served and to what degree." *Id.* at 407, 315 S.E.2d at 806.

75. Anderson v. Baehr, 265 S.C. 153, 163, 217 S.E.2d 43, 48 (1975). Similarly, the North Carolina Supreme Court has held that property belonging to a redevelopment commission served a public purpose despite the fact that rent was being collected, because a *specific* plan existed for the future redevelopment of the property. Redevelopment Comm'n of High Point v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968).

76. The achievement of the public purpose appears to be only an incidental effect of the lease when compared with the direct impact of the lease of public property by airlines and rental car agencies in Charleston County Aviation Auth. v. Wasson, 277 S.C. 480, 289 S.E.2d 416 (1982).

77. Brief of Appellants at 10. The lessees have virtual control over the portion of property that they lease. The North Carolina Supreme Court found that the North Carolina Forestry Foundation's property was not exempt from *ad valorem* taxes when leased to a commercial paper company that had been contractually granted virtually complete operational control over the forest. Appeal of North Carolina Forestry Found., 296 N.C. 330, 250 S.E.2d 236 (1979).

78. It is well-settled in South Carolina and other jurisdictions that "the mere fact that benefits will accrue to private individuals or entities does not destroy public pur-

Because of the varied uses of the Authority's property, the public purpose question was an extremely close one. It appears, however, that the ultimate benefit to the public may be insignificant in comparison to the benefits accruing to the individual lessees. Although this case appears to grant wide latitude in public policy determinations, its holding should be narrowly interpreted and read in conjunction with the four-part test for public purpose established in *Byrd v. County of Florence*.[79] Because of the flexibility in construing public purpose, each case will continue to be decided on the basis of its own circumstances.

Deborah E. Casey

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pose." Bauer v. S.C. State Hous. Auth., 271 S.C. 219, 229, 246 S.E.2d 869, 874 (1978). *See also* Redevelopment Comm'n of High Point v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968).

79. 282 S.C. 148, 318 S.E.2d 113 (1984). *See supra* note 66.