

Foreword

This handbook is a tool to help business license officials interpret and administer the business license ordinance. It is used as the textbook for license officials participating in the SC Business Licensing Officials Association's certification program. Additionally, municipal elected officials will find it helpful as a training guide.

The handbook does not address every business licensing issue, but it does offer guidance in how to deal with those most frequently encountered. Officials should consult an attorney for specific advice when faced with unusual situations.

The procedures suggested in this publication may require occasional revision to adapt to changes in state law, industrial classifications, IRS statistics and field experience. This handbook replaces all earlier versions.

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Part 1 – Business License Concept

Definition of Business License

Licensing of a trade may be referable to the police power of a local governing body when done to regulate avocations that disturb public order, health or morality. However, a business license ordinance enacted to raise revenue is an ordinance levying a tax. *State v. Columbia*, 6 S. C. 1 (1874).

A business license tax is not a property tax. It is a method of requiring a business or occupation to contribute its share in support of the government “as it regards the profits or advantages of such occupations.” *State v. Hayne*, 4 SC 403 (1873). It is not a sales or income tax, although it is measured by gross income.

A business license fee is an excise tax levied on the privilege of doing business, and the value of the privilege extended is measured by the business’s gross receipts. It does not apply to those who work for wages or salary. It applies only to those in business for themselves. *Hay v. Leonard*, 212 SC 81, 46 S.E. 2d 653 (1948); *Carter v. Linder*, 303 SC 119, 399 S.E.2d 423 (1990).

State Laws Authorizing Business License Taxes

Municipalities

- (a) **Gross Income.** Each municipality can levy a business license tax measured by gross income. *SC Code Sec. 5-7-30* No other basis is authorized, except for certain businesses. Railroads, telecommunications and insurance companies are subject to special statutes. See Part 2 for a discussion of what constitutes gross income.
- (b) **Surtax For Parking.** A municipality can levy a surtax on a business license in a designated area to provide and maintain parking for a downtown commercial area. *Sec. 5-7-30* A petition by two-thirds of the affected licensed taxpayers is required.
- (c) **Wholesalers and Lenders.** Wholesalers and real estate lenders pay business license taxes to municipalities in which they maintain a warehouse or place of business. *Sec. 5-7-30*
- (d) **Annexed Business.** The license tax for a business annexed into a municipality must be prorated to reflect the number of months it is located in the municipality. *SC Code Sec. 5-21-60*

Counties

SC Code Sec. 4-9-30(12) authorizes a county to levy uniform license taxes on businesses in the unincorporated area of the county. The statute exempts teachers, ministers, rabbis, telephone, telegraph, gas and electric utilities, or other utilities regulated by the Public Service Commission, insurance companies, entities exempt under another law, and a business making loans secured by

real estate unless it has a premises located in the unincorporated area of the county. Gross income must be reduced by the amount of income upon which a license for another county or municipality is computed and paid.

Constitution

The SC Constitution contains no direct reference to business license taxes. Because the license tax is not a property tax, it is not subject to the provisions of Article X, Sec. 6 of the SC Constitution regarding uniformity. See *Hay v. Leonard*, 212 S. C. 81, 46 S.E. 2d 653 (1948).

Franchise Distinguished

Municipalities and counties may grant franchises and charge for the use of public streets. *SC Code Sec. 5-7-30* and *Sec. 4-9-30(11)* It is important not to confuse a franchise with a business license.

A franchise is the extension of a privilege to use the streets for a purpose for which the franchisee does not have a legal right to do without permission of the governing body in control of the streets. Franchises are customarily granted for an annual fee to place telephone, electric, gas and cable television lines in streets or on public property. The fee is not a tax. The franchise holder is not exempt from a business license tax unless specifically provided by the franchise agreement.

The franchise agreement is a contract and may be enforced as such by either party. A business license is not a contract. Because a franchise is not exclusive unless approved by the voters in a referendum, more than one franchise could be granted for the same purpose.

In *City of Cayce v. AT&T*, 326 SC 237, 486 S.E.2d 92 (1997), the Supreme Court ruled that the franchise power granted by SC Code Sec. 5-7-30 could be used only when the lines served customers within the municipality. Consent of the governing body to place lines in the streets not serving municipal customers may be required pursuant to SC Constitution Art. VIII, Sec. 15, and a fee may be charged for that consent.

The public has a legal right to use the street for ordinary pedestrian and vehicular travel purposes and for transporting goods in commercial transactions. Such activities are not subject to franchise powers.

Counties may exercise the same franchise powers as municipalities, except counties may not franchise telephone, telegraph, gas and electric utilities or utilities owned and operated by a municipality.

Nontaxable Businesses and Limitations

The following businesses are exempt from business license taxes or have limitations on the amount or method of computing the tax pursuant to the cited sections of the SC Code or US Code.

1. Air express and passenger interstate transportation are exempt. *49 USC Sec. 40116(b), Sec. 40102.*
2. Alcoholic liquors are exempt. *SC Const. Art. 8-A, Sec. 12-33-20*
3. Banks and building loan companies are exempt. *Sec. 12-11-30, Sec. 12-13-50*
4. Billiard tables must have state licenses and are subject to special rules. *Sec. 12-21-2730 through 2746*
5. Buses, both intrastate and interstate, are exempt. *Sec. 58-23-620, Sec. 12-23-220*
6. Carriers – common motor carriers, taxicabs, intrastate passenger and baggage companies holding PSC certificates A and B – are exempt. Others may be licensed only where principal offices are located. *Sec. 58-23-620, Sec. 12-23-220*
7. Coin-operated machines must have state licenses and are subject to special rules. *Sec. 12-21-2720 - 2728*
8. Credit unions, state and federal, are exempt. *Sec. 34-27-300; 12 USC Sec. 1768*
9. Fire insurance premiums are limited to 2 percent. *Sec. 38-7-160*
10. Lenders on loans secured by real estate are limited to location of office. *Sec. 4-9-30(12); Sec. 5-7-30*
11. Marketing cooperative associations are exempt. *Sec. 33-47-120*
12. Mutual benevolent aid associations are exempt. *Sec. 38-35-60*
13. Railroads are limited to a maximum fee determined by population. *Sec. 12-23-210*
14. Telecommunications providers are subject to limited license rates. *Sec. 58-9-2220*
15. Wholesalers not having places of business within a municipality are exempt. *Sec. 5-7-30*
16. Workers' compensation insurance premiums are exempt. *Sec. 38-7-50*
17. Satellite television service programming transmitted by satellite directly to a subscriber's premises is exempt. Local activities subject to a business license tax include sale, installation and service equipment used for reception and viewing of satellite signals by a subscriber, and distribution of satellite programming from a master antenna by cable to subscribers.

Regulation

Although business licenses primarily are used as a revenue source, they also may be used to regulate businesses. The business license ordinance may impose health requirements, bonds, regulation of operating hours, etc. Most business license ordinances require a statement that personal property taxes have been paid as a condition for the license. This requirement is considered appropriate under the power to regulate by license ordinance.

A legal business is entitled to be licensed; an illegal operation is not. Revocation of the license of a newsstand dealer for selling obscene literature was upheld in *City of Greenville v. Bryant*, 257 SC 448, 186 S.E. 2d 236 (1972). The Greenville ordinance and the SC Code of Laws prohibit selling obscene magazines. The U.S. Supreme Court has ruled consistently that obscene material is not protected under the U.S. Constitution's First Amendment.

The State Supreme Court, in *City of Columbia v. Abbott*, 269 SC 504, 238 S.E. 2d 177 (1977), upheld the license revocation for a bookstore selling obscene material declared by city council to be a nuisance.

Denying or revoking a business license must be based on a legally sufficient reason, preferably according to reasonable standards disclosed in the ordinance. Denying or revoking a license does not allow summary closing of the business by enforcement officers. However, it does subject the operator to prosecution for violating the license ordinance. If immediate closure of the business is sought, it should be accomplished through criminal prosecution or action for injunction.

Reasonableness

Federal nor state law provide any guidelines for determining when a license tax is reasonable. Yet, the council is clearly required to enact reasonable ordinances.

Discretion of Council

In *US Fidelity and Guaranty Co. v. City of Newberry*, 253 SC 197, 169 S.E. 2d 599 (1969), the court declared that although a license tax must be reasonable, there is no doubt the specified rates charged may be different. The court held:

If different rates are to be charged for different classifications, it necessarily follows that the city council must use its judgment and set the different rates to be collected. In deciding whether the tax is reasonable, it has been held that the reasonableness is largely within the discretion of the city council.

The 1974 case of *US Fidelity and Guaranty Co. v. City of Spartanburg*, 263 SC 169, 209 S.E. 2d 36, dealt more definitively with reasonableness than prior cases and is discussed later in connection with insurance companies. The 1983 decision in *Southern Bell v. Aiken*, 279 SC 269, 306 S.E. 2d 220, raises some questions about the court's willingness to substitute its judgment for that of an elected council and about who has the burden of proof of reasonableness. However, this case is not considered a precedent because it has not been followed in later decisions of the court.

Comparison of Rates

The court in the *Newberry* case, *supra*, went on to add:

One can only speculate on the question of reasonableness by comparison. Reasonableness must be determined by the factual situation involved. It will be assumed, the contrary not being shown, that the council had all facts relative to each classification, including problems and municipal expenses brought about by the business in the various classifications.

The mere fact that the rate charged a company is several times that of businesses in other classifications does not entitle the company to relief.

Loss of Profits

The tax is not considered unreasonable merely because the business is losing money. The council cannot set aside a license simply because a business claims a loss. The court in the *Newberry* case held:

Many things bring about a loss or a profit, and neither city council nor this court should be called upon to determine whether a loss is caused by poor business management or payment of a license tax or some other cause.

The tax, levied on the privilege of doing business, is not based on profits, net income or taxable income for state and federal income tax purposes. It is based on the total income from the business activity without deductions for expenses. The fact that expenses exceeded income in a particular year does not provide an exemption.

Study Questions for Part 1

1. What is taxed by a business license tax?
2. Who is subject to a business license tax?
3. What income is used to calculate a business license tax?
4. When must a license tax be prorated?
5. What are the differences between a franchise fee and a business license tax?
6. What are some non-taxable businesses?
7. Is the business license ordinance a good regulatory tool?
8. Can a business be closed by revocation of a business license?
9. Can different classes of businesses be charged different rates?
10. Who has the authority to set license rates?
11. Must a business that loses money pay a business license tax?

Notes

Part 2 – Interpretation

The license ordinance does not cover every situation. License officials must interpret and apply ordinance provisions in accordance with accepted principles of statutory construction and administration. Based on the ordinance, along with state and federal laws, the license official must decide if a business is subject to the tax, if a business needs more than one license, what classification applies to a business and whether the amount reported is correct. Although the license official has the right to interpret the license ordinance, the official cannot make rulings contrary to express provisions of the ordinance or make decisions that add to or take away words from the ordinance.

Doing Business

Municipalities and counties may charge business license taxes only for the privilege of doing business within their jurisdictions. What level of activity constitutes “doing business” within the scope of business licensing? The question of whether business is being done is often related to nonresident’s business operations. Does occasional activity by a nonresident within a city or county constitute “doing business” within the meaning of the law? These questions are addressed briefly in the following sections. The interstate commerce aspect of business licensing is addressed in Part 3.

Place of Business

A license may be charged for the privilege of doing business within the city or county regardless of whether there is an established place of business therein, except for businesses given special treatment by statute. See Atty. Gen. Op. No. 1262, January 12, 1962; and *Crosswell & Co., Inc. v. Town of Bishopville*, 172 SC 26, 172 S.E. 698 (1933). SC Code Sec. 5-7-30 contains no general prerequisite that there be a place of business in the taxing municipality. However, wholesalers and real estate lenders must have an establishment within the taxing municipality. *Sec. 5-7-30*. See *Sec. 4-9-30(12)* for similar lender provisions for counties. Motor carriers and taxicab owners with specified Public Service Commission certificates are taxable only where principal offices are located, *Sec. 58-23-620 and Sec. 12-23-220*

Limited Activities

Some limited activities by nonresidents do not constitute “doing business.” See *Pee Dee Chair Co. v. City of Camden*, 165 SC 86, 162 S.E. 771 (1931) and *Wrenn Bail Bond Service, Inc. v. City of Hanahan*, 335 SC 26, 515 S.E.2d 521 (1999), for examples.

In *Pee Dee Chair Co. v. City of Camden*, the court held that for licensing purposes, a single delivery of merchandise within a municipality does not constitute doing business therein. The Pee Dee Chair Company had its principal place of business in the City of Darlington, where it manufactured and sold in wholesale quantities chairs and other furniture. The court noted that although a single delivery might constitute doing business under certain conditions, the case before it was not such an instance. The company delivered only one load of chairs, and there was no indication it planned to make any subsequent deliveries. There was nothing to indicate the delivery

was anything other than an isolated, incidental or casual one. There was no indication the plaintiff planned to engage in the business of hauling merchandise by trucks in Camden.

The 1999 *Hanahan* case involved a bail bondsman who performed a service in the city in a single instance. The court held that state law did not preempt municipal authority to levy a business license tax on bail bondsmen, but that the single isolated activity did not constitute “doing business,” citing *Pee Dee Chair Co. v. City of Camden*.

Although a single delivery does not constitute doing business, the courts have held that repeated deliveries can be considered doing business. In *Crosswell & Co., Inc. v. Town of Bishopville*, 172 SC 26, 172 S.E. 698 (1933), the court ruled that a company with its principal place of business in the City of Sumter that had been delivering wholesale groceries to Bishopville once or twice a week for more than two years was doing business in Bishopville and could be required to obtain a business license. Under Sec. 5-7-30 as amended, this principle now would apply only to retail deliveries by nonresidents.

Collection of Money/Mail Order

A municipality or county can collect a business license from a person who has a place of business as a collector in the municipality or county. The collector would not be subject to a license if he had a place of business elsewhere, engaged in no business activities within the boundaries of the taxing jurisdiction and simply had creditors living in a town or county. Money collection by mail for goods sold by a nonresident by mail, telephone or electronic means and delivered by mail or common carrier does not provide a sufficient nexus for a business license tax. See *Quill Corporation v. North Dakota*, 112 S.Ct. 1904 (1992).

Sales

Test driving automobiles or other vehicles into a municipality by salesmen and customers in isolated instances does not allow the municipality to impose a business license tax on a nonresident dealer. The nonresident must conduct some part of his business within the municipality before the municipality may tax him. The direct sale of merchandise by peddlers is subject to a business license tax. Although a nonresident supplier may not be “doing business,” an independent agent or salesperson may be subject to a license tax on the agent’s commissions for taking orders for the supplier. The sale and delivery of building materials to a construction site is a retail sale subject to a license tax.

Regular Conduct

The *Bishopville* and *Hanahan* cases cited above make it plain that some course of regular conduct is necessary to constitute “doing business,” but there are no fixed rules to apply. The court said in the *Hanahan* case: “Generally, the determination whether a party is ‘doing business’ in a certain jurisdiction is dependent upon the facts of each case.”

The attorney general said that a municipality may lawfully impose a business license tax on a land surveyor who regularly conducts business within the municipality, even though the surveyor may have already paid a business license fee in another municipality. However, the court said in *Pee Dee Chair Co. v. City of Camden* that sometimes the performance of a number of isolated acts

pertaining to a particular business does not constitute doing business within the meaning of the license tax law, unless an intent to engage in the business is clearly apparent. The court stated that, although under some circumstances a single act may be sufficient, as a general rule only repeated and continuous acts constitute doing business. An example of a single act uniformly considered to be “doing business” is a construction or repair activity for which a building permit is required.

Tests for Doing Business

To determine if an operation is “doing business” within the meaning of the statutes, the license inspector must consider the nature of the business being done by the nonresident. There is no serious problem when the business or agent is a resident of the city or county imposing the license. Some pertinent questions to ask about nonresident activities are:

How frequently is the business operation carried out?

Does the business maintain an agent, office or vehicles within the city or county?

Does the activity place a burden on the municipal or county services?
[The license tax is not a tax on benefits.]

Does the business deal with people or property in a city or county on a regular or continuing basis?

Is the activity subject to regulation by the city or county? [For example, building codes]

Is the business listed in local directories as serving the city or county?

Does it advertise regularly in the city or county? [Newspapers, radio, TV, signs, etc.]

Does the business derive a substantial portion of its income from activity within the city or county?

Although these questions do not conclusively determine whether the activity constitutes “doing business” for business license purposes, they can help the license inspector make a reasonable decision.

State License Exemption

Contractors, subcontractors, bail bondsmen, elevator inspectors and others have claimed an exemption from business license taxes on income from activities requiring a state license. State contractor licensing statutes do not preempt local business license taxes. Bail bondsmen are not exempt by virtue of regulatory license requirements of SC Code Sec. 38-53-10, et seq. *Wrenn Bail Bond Service, Inc. v. City of Hanahan*, 335 SC 26, 515 S.E.2d 521 (1999). An elevator inspector subject to qualification licensing requirements of SC Code Sec. 41-16-10, et seq. is subject to a local business license tax that does not regulate. *City of Myrtle Beach v. Taylor Technologies Group, Inc.* (SC Circuit Court, May 20, 1999).

The Supreme Court in the *Hanahan* case held “in order to preempt an entire field, a state law must manifest a legislative intent that no other enactment may touch upon the subject in any way.” Where the legislature preempts only regulation of qualifications or professional licensing, there is no conflict between the state law and a business license ordinance not attempting to regulate qualifications or professional conduct. The ordinance may simply require payment of a fee for the privilege of doing business in the city. Some businesses for which the state has preempted local business license taxes are listed in Part 1, Nontaxable Businesses and Limitations.

Classification

License inspectors must find out sufficient details about a business to place it into the appropriate rate class. The application form provides this information in most cases, but the inspector should ask additional questions when there is doubt. Most license ordinances require an applicant to provide all information deemed appropriate for the license inspector to carry out the purpose of the license ordinance.

Industrial Classification System

Any method of classification with a rational basis that is reasonably related to the purpose of licensing may be used. The Municipal Association’s original Model Business License Ordinance used the Standard Industrial Classification Manual for placing businesses into the proper classification derived from indexes of ability to make a profit as determined from national IRS statistics.

In 1997, the North American Industry Classification System Manual replaced the SIC Manual for federal statistical purposes. The Association revised the model ordinance to use the NAICS Manual as the basis for business classifications. The most recent model ordinance uses the 2012 NAICS Codes and rate classes based on 2009 IRS statistics. Officials should use the updated NAICS Codes and IRS statistics to ensure the most rational basis for classifying businesses.

The official 2012 NAICS Manual is available in print and on CD-ROM from the National Technical Information Service by calling 800.553.6847 or 703.605.6000 or visiting www.ntis.gov/products/naics.aspx. Previous versions of the NAICS Manual are available as well.

For more information and downloadable conversion tables, visit www.census.gov/epcd/www/naics.html or www.ntis.gov/products

The license inspector’s task regarding classification is different from that of council. The license inspector is concerned with making a proper classification of a particular business within the framework of an ordinance. Through the ordinance, the council has established the broad categories of business types that fall within a given rate class.

Equal Protection

The city or county has the right to classify businesses for license purposes and to impose different rates on different classes. Compliance with the equal protection clauses of the state and federal

constitutions requires that any classification not be arbitrary and bear a reasonable relation to the legislative purpose sought to be affected. Officials must treat alike all members of each class under similar circumstances. The tax must be fair and nondiscriminatory. *US Fidelity & Guaranty Co. v. Newberry*, 257 SC 433, 186 S.E. 2d 239 (1972).

The legislative purpose of the license tax is simply to raise revenue for operation of the city or county. Uniformity between classes is not required. *Carter v. Linder*, 303 SC 119, 399 S.E.2d 423 (1991).

State courts have recognized municipalities' right to establish different classes within the same broad category of businesses for setting business license rates. This type of classification may be done only when there is some reasonable basis for making a distinction. Insight into the classification of retail merchants may be gained by examining the City of Spartanburg's ordinance that was tested in the State Supreme Court. *Great Atlantic and Pacific Tea Co. v. Spartanburg*, 170 SC 262, 170 S.E. 273 (1933).

See *Hill v. City Council*, 59 SC 396, 38 S.E. 11 (1901) for illustrations of classifications held constitutional by the state Supreme Court. However, the Supreme Court has confused the issue in three decisions: *US Fidelity & Guaranty Co. v. Newberry*, 257 SC 433, 186 S.E. 2d 239 (1972); *US Fidelity & Guaranty Co. v. Spartanburg*, 263 SC 169, 209 S.E. 2d 36 (1974); and *Southern Bell v. Aiken*, 279 SC 269, 306 S.E. 2d 220 (1983). It appears the court may require a showing of a rational basis for a wide disparity in rates between classes, overlooking the general rule that equal protection applies only within a classification and not between classes. The settled rules regarding the burden upon the taxpayer to prove unconstitutionality beyond a reasonable doubt were recited in *Thompson Newspapers, Inc. v. City of Florence*, 287 SC 305, 338 S.E. 2d 324 (1985).

Nonresidents

Many license ordinances provide that rates for nonresident businesses are classified higher than for residents, usually double the resident rates. The Supreme Court has upheld a differential rate classification between residents and nonresidents as fully justified, if the circumstances and conditions were different and if the imposition of a higher license on residents was not unreasonable, capricious or confiscatory. *American Bakeries Co. v. Sumter*, 173 S. C. 94, 174 S.E. 919 (1934); and *Crosswell & Co., Inc. v. Town of Bishopville*, 172 S. C. 26, 172 S.E. 698 (1933)

Ability to Pay

Since 1975, many municipalities have adopted ordinances with the ability to pay as determined from national statistics on income and profit as the principal basis for classification. A similar system was upheld by the Georgia Supreme Court in *Pharr Road Investment Co. v. City of Atlanta*, 224 Ga. 752, 164 S.E. 2d 803 (1968), and was ruled constitutional in principle by the SC Supreme Court in *Southern Bell v. Aiken* (1983). In *North Carolina Land Corp. v. City of North Charleston*, 281 S. C. 470, 316 S.E. 2d 137 (1984), the court upheld the classification system's constitutionality based upon ability to pay. The court first recognized the profit concept in 1873 in *State v. Hayne*, 4 S. C. 403. The NAICS classification ordinance discussed above is based on ability to pay as determined by an index of ability to make a profit calculated from nationwide IRS statistics.

Gross Income

Basis for Tax

The general statutory basis for levying a business license tax requires it to be measured by gross income. *SC Code Sections 4-9-30(12) and 5-7-30* The number of employees, capital invested, net income or losses, and taxable income may not be used to calculate the business license tax. As noted in Part 1 (page 4), certain businesses are subject to state statutory provisions requiring business license taxes be levied on population, gross premiums or with limitations as to what revenue is included in gross income and limitations on rates.

Gross Income Defined

Gross income may be defined by the license ordinance. Generally, it means all revenue received from the business operation without any deductions for such things as cost of goods, overhead, salaries or costs of sale. The amount should conform to the gross figure reported on the business' federal income tax return. Section 61(a) of the Internal Revenue Code defines gross income as "all income from whatever source derived." Although there are no allowable deductions from gross income for business license purposes, there are certain receipts customarily included on the income tax return in gross income and later deducted that are not really business income. These receipts are considered exempt income for business license purposes because the funds are not retained by the business and do not constitute actual income.

Exempt Income

Most early license ordinances exempted income from interstate commerce under U.S. Supreme Court decisions prior to 1977. Since the decision in *Complete Auto Transit, Inc. v. Brady*, 430 US 274 (1977) allowing taxation of interstate commerce activities meeting four tests laid down by the Court, most ordinances have been amended to delete the interstate commerce exemption. Taxation of interstate commerce is discussed in more detail in Part 3.

Counties must exempt income received from activities in another county or a municipality to which a license tax is paid. *SC Code Sec. 4-9-30(12)*. **Municipalities must do the same.** *SC Code Sec. 5-7-30* This treatment was approved in *Eli Witt Co. v. City of West Columbia*, 309 SC 555, 425 S.E.2d 16 (1992).

Taxes, such as gasoline and sales taxes, collected by businesses are not income and should not be included in reported gross income. The same is true for the portions of fees and commissions divided with others. Such funds reported as income would result in a higher license fee because no deductions are permitted in the manner for which income tax deductions may be taken. Only income to the business should be reported in the gross figure for business license tax purposes.

The tax on cigarettes is part of the wholesale price of the cigarettes and is not collected and remitted by the retailer. The cigarette tax is **not** exempt income.

Many license ordinances provide for using federal and state income tax returns to verify gross income reported for license purposes. This sometimes leads to discussion of whether the amount reported on Schedule C, Line 1 is the proper amount to be used when a business reports returns and

allowances resulting in a reduced gross income. The amount of gross receipts on which a business license tax may be levied is the amount of actual gross income to the owner. It does not include funds collected for others as noted. It does not include funds returned to customers in the tax year, although the books of the business may show the funds as receipts which are later reduced by deductions for income tax purposes. The actual business gross income does not include funds collected but not retained as income. The fact that business bookkeeping practices are driven by income tax considerations does not change this.

There are no exemptions for cost of goods sold or business expenses. These are deductions for income taxes levied on taxable income calculated under rules that are quite different from business license rules. Returns are not business expenses.

The burden is on the taxpayer to demonstrate exemption entitlement. There are no deductions for business license calculations. The licensing official should examine records considered relevant to determine what is actual gross income.

Income from Government Projects

Income from contracts or activities performed for the state or its political subdivisions and agencies is not exempt from business license taxes. There is no statutory exemption. Courts have ruled that although license fees may cause a higher contract price, this does not amount to a tax on another governmental unit. *North Myrtle Beach v. SC Public Service Authority (Santee Cooper)* [SC Circuit Court, 1991].

Income from a federal project is not exempt unless the work is performed on territory over which jurisdiction has been ceded by state statute to the federal government (for example, military bases and post offices; see SC Code Sec. 3-1-10, et seq.). If the tax is not laid on the federal government, even though the economic burden falls on the government, there is no immunity from the tax. *US v. County of Fresno*, 429 US 452; *US v. New Mexico*, 455 US 720; and *Washington v. US*, 103 S.Ct. 1344.

State or federal immunity from taxation cannot be transferred to a third party.

Outside Income Included

A business located in a municipality or county that does business beyond the boundaries of the taxing entity may be subject to a business license tax computed on total income on which a tax has not been paid to another municipality or county. The state Supreme Court confirmed the right to base the license fee on total receipts in *Triplett v. City of Chester*, 209 SC 455, 40 S.E. 2d 684 (1946); and *Eli Witt Co. v. City of West Columbia*, 309 SC 555, 425 S.E.2d 16 (1992).

In the *Triplett* case, the court said that a municipal corporation's right to impose a business license tax on a corporation for business conducted within the city limits, although part of the business was carried on outside the municipality, was generally recognized. The controversy arose over levying a license upon a general contractor whose business was constructing highway and railroad bridges in various parts of South Carolina and in other states. He had never done any actual construction work in the City of Chester. He established a central office in a building owned by him in the city. The Court said:

The administrative and executive work, an indispensable phase of respondent's business, was conducted in the office established, maintained and operated in the City. This portion of his business enjoyed all the advantages afforded by the municipal government of Chester to any other business conducted within its corporate limits. We cannot dissociate the managerial features of the business which were conducted within the City, along with the storing of equipment, from the manual execution of the work which was done without the City. All are essential functions of the general contracting business in which respondent is engaged.

Exclusion of gross receipts on which a license is paid to some other municipality or county avoids multiple taxation. The state Supreme Court deemed the exclusion to be reasonable in *Eli Witt Co. v. City of West Columbia, supra*. The case involved wholesale distribution of goods from a warehouse in the city to stores outside the city. Allowing credits for taxes paid elsewhere does not violate the constitutional requirement for equal protection.

Some ordinances provide for different rates on income produced from out-of-city activities and collected through an in-city office. In the absence of such a provision, the license inspector cannot give different treatment.

Rates and Fees

License inspectors are not concerned with rate setting, which is the function of council. Problems can arise regarding fees charged a new or successor business or the operation of more than one type of business at the same location under one ownership.

Flat Fees

Because flat or fixed fees are not based on gross income, they do not comply with the state law authorization and would be discriminatory. However, it is generally accepted practice to charge a minimum base rate sufficient to cover administrative costs. A base rate charged on the first level of gross income (for example, the first \$2,000) is customary.

New Owner

When a new owner takes over an existing business, the license fee for the new owner may be based on the volume of business done by the old business during the preceding year. See *City of Columbia v. Niagara Fire Ins. Co.*, 249 SC 388, 154 S.E. 2d 674 (1967).

Proration

Proration for a new business is considered appropriate to meet the test of reasonableness. SC Code Sec. 5-21-60 provides that a business license shall be prorated for the year in which a business is annexed to the municipality. A reasonable method of proration for a new business is as follows:

(a) To test the estimate of the gross income for the remainder of the initial year of operation of a new business, compare the estimate submitted by the applicant to gross incomes reported by similar businesses for prior years (classification analysis). If the estimate appears reasonable, it

should be accepted. If there is a question, request additional information to make a reasonable estimate. The estimated gross income should equal or exceed the basic fixed expenses of the business.

Example:

Employee salaries	\$2,000
Utilities	300
Other Expenses (supplies, etc.)	200
Cost of goods sold	<u>2,500</u>
Estimated Monthly Total	5,000

This total multiplied by the number of months remaining in the license year gives a reasonable minimum estimate.

(b) To determine the gross income for the next full license year of a new business, take the **actual** income for the portion of the first year in business and divide it by the number of months in business. Multiply that figure by 12 for a full year estimate.

Example:

$\frac{(\text{actual income}) \$40,000}{(\text{months in business}) 4} = \$10,000$ (average monthly gross)
 $(\text{average monthly gross}) \$10,000 \times 12 = \$120,000$ (estimated gross for full year)

Nonresident Rates

Where circumstances warrant, an out-of-city agent or business may be charged a different rate than a similar business within the municipality. However, the charge cannot be unreasonable, capricious or confiscatory. *American Bakeries Co. v. Sumter*, 173 SC 94, 174 S.E. 919 (1934). Many ordinances double the rates for nonresidents.

Multiple Operations

Multiple business operations under one ownership may need to obtain more than one business license. *Wood-Mendenhall Co. v. Greer*, 88 SC 249, 70 S.E. 724 (1911). Some ordinances permit an owner to obtain one license for all operations at one location based on the highest rate applicable to any operation. A separate license for each business location is usually required, although some ordinances allow one license for a chain of businesses under one ownership. Council should address this in the ordinance. If one license is permitted for multiple locations, the city should issue duplicate licenses because there is usually a requirement to post the license at the place of business.

The license official determines if a given operation is distinct or separable from the general business. Some discretion is involved, and a NAICS manual can help. Business operations' descriptions in these manuals usually indicate subsidiary activities included in the general business category. For example, an automobile dealership (NAICS 4411) would include retailing new and used vehicles, repair services, and sale of tires, batteries, parts and accessories. One license would cover all included operations.

Calculation of Fees

Calculating the correct fee is sometimes left to the taxpayer, particularly for renewals. However, it is the license official’s responsibility to make sure the correct fee is paid.

License ordinances include varied fee schedules. Some older ordinances contain rates that vary from one business classification to another on the amount of gross income covered by the base fee but have only minor variations in the rate per \$1,000 above the base. This treatment produces a large number of rates and makes administration more difficult.

The NAICS-based ordinance provides classifications with a rational basis and a simplified rate structure. License tax calculation under these ordinances is straightforward, as shown in the following example:

A food or grocery store (NAICS 44511) is in Rate Class 1.

Assume that Class 1 Rates are:

Rate Class	<u>Income: 0 - \$2000</u> Minimum Fee	<u>All Over \$2000</u> Rate per Thousand or fraction thereof
1	\$25	\$1.00

and

Declining rates apply in all classes for gross income in excess of \$1,000,000	
Gross Income in \$ Millions	Percent of Class Rate for each additional \$1,000
0 – 1	100%
1 – 2	90%
2 – 3	80%
3 – 4	70%
Over 4	60%

Assume a grocery store has \$4,575,000 in gross income for the prior year.

The license tax would be calculated as follows:

On first \$ 2,000	minimum -	\$ 25.00
On next 998,000 at 100% of \$1.00 per thousand	-	998.00
On next 1,000,000 at 90% of \$1.00 per thousand	-	900.00
On next 1,000,000 at 80% of \$1.00 per thousand	-	800.00
On next 1,000,000 at 70% of \$1.00 per thousand	-	700.00
On next <u>575,000</u> at 60% of \$1.00 per thousand	-	<u>345.00</u>
Gross Income 4,575,000		License Tax 3,768.00

Study Questions for Part 2

1. What level of activity constitutes “doing business?”
2. Must there be an established place of business in the taxing jurisdiction for the business license ordinance to be applicable?
3. What are examples of activities that do not amount to “doing business”?
4. What are some tests for determining whether an operation is “doing business”?
5. When is the holder of a state license exempt from a local business license?
6. What is required for classifying businesses in different rate classes?
7. Must every business in the same classification be treated in the same manner?
8. May higher rates be charged to nonresidents than to resident businesses?
9. Does a classification system based on ability to pay have a rational basis?
10. What is gross income for business license tax purposes?
11. What deductions from gross income are allowed for business license purposes?
12. What types of income are exempt from business license tax calculation?
13. Is income from government projects exempt?
14. How is income from outside activities treated?
15. Are flat fees authorized?
16. When should license taxes be prorated?
17. How are multiple operations at one location under one ownership licensed?
18. How is a license tax calculated for a high-income business under a declining rate schedule?

Part 3 – Difficult Applications

Some business types often request clear explanations from the license inspector on the inability to allow deductions and exemptions or the correct application of federal law concerning interstate commerce. The more common difficult applications are discussed with the warning that an attorney should always be consulted when unusual or complicated cases arise.

Agricultural Products

Agricultural products are exempt from county vendor licenses. *SC Code Sec. 40-41-90* There is no state law exemption from municipal business licenses. A municipal ordinance may allow an exemption or omit sale of agricultural products as a class from licensing if desired. The exempt class is usually limited to products grown by the seller.

Air Express and Transportation

Air express of parcels and passenger transportation, if any part of the activity is conducted across a state line, are exempt from licensing by federal statute *49 USC Sec. 40116(b) and Sec. 40102* These activities may not be taxed locally except by ad valorem, income and sales taxes. The exemption applies to the entire operation, including ground delivery by truck.

Alcoholic Beverages

Counties and municipalities cannot impose license taxes for the privilege of engaging in the business of manufacturing and selling “alcoholic liquors.” *SC Code Sec. 12-33-20* The definition of “alcoholic liquors” in *Sec. 61-6-20* applies. That definition excludes “a beverage declared by statute to be nonalcoholic or nonintoxicating.” “Nonalcoholic or nonintoxicating beverages” are defined as all beer or fermented beverages not exceeding 5 percent alcohol by weight and all wines not exceeding 21 percent alcohol by weight. *Sec. 61-4-10*. A previous statute (*Sec. 12-21-1080*) which preempted a license tax on beer and wine was repealed effective July 2001.

Amusement Machines - See Coin-operated Machines

Auctioneers

Notwithstanding any other provision of law, *SC Code Sec. 40-6-320* provides municipalities may enact ordinances to license auctioneers based on qualifications. The Supreme Court decision in *Wrenn Bail Bond Service, Inc. v. City of Hanahan*, 335 SC 26, 515 S.E.2d 521 (1999), allowed a nonregulatory, local privilege tax to be imposed on auctioneers. However, legislation has restricted this authority.

“Notwithstanding any other provision of law, the governing body of a county or municipality may not impose a license, occupation, or professional tax or fee upon the gross proceeds of an auctioneer licensed under Chapter 6 of Title 40 for the first three auctions conducted by the auctioneer in the county or municipality, unless the auctioneer maintains a principal or branch office in the county or municipality.” *Section 6-1-315 (3)*

Automobile Dealers

Some license ordinances allow automobile dealers to deduct the value of trade-in vehicles from gross income. There is no statutory provision for such a deduction. The gross income from a transaction is the full sale price, whether paid in cash or something of agreed value. There is no deduction allowed for the cost of vehicles sold, so the sale price of a new or used vehicle would be included in gross income. The result may be taxation on the value of the trade-in twice. This problem may be addressed in the rate-setting process as an unusual operational characteristic that justifies an adjusted rate if the governing body so decides. Motor vehicle, boat and farm machinery dealers are included in Rate Class 8 of the model NAICS-based ordinance for this reason.

Bail Bondsmen

Bail bondsmen are not exempt from business license taxes under the regulatory license requirements of SC Code Sec. 38-53-10, et seq. *Wrenn Bail Bond Service, Inc. v. City of Hanahan*, 335 SC 26, 515 S.E.2d 521 (1999). There is nothing in the statutes indicating preemption by the state or prohibiting local license taxes on the privilege of doing business.

Bingo

The state regulates bingo under the Bingo Tax Act, SC Code Title 12, Chapter 21, Article 24, Sec. 12-21-3910, et seq. Bingo operators must obtain a license from the SC Department of Revenue. *SC Code Sec. 12-21-3940* Only nonprofit organizations exempt from federal income taxes under IRS Code Sec.501(c)(3), (4), (8), (10), or (19) may be licensed. Bingo must be conducted by a licensed promoter who must pay an annual state privilege tax of \$1,000. *SC Code Sec.12-21-3950* The state licenses and taxes bingo in six categories. *SC Code Sec. 12-21-4020* There is no language in the statutes prohibiting a municipal or county business license tax on the organization or a paid promoter. See *AmVets Post 100 v. Richland County*, 280 SC 317, 313 S.E.2d 293 (1984). Exemption from income taxes does not automatically exempt a business from business license taxes. A charitable exemption depends on language in the business license ordinance.

Canvassers - See Peddlers and Solicitors

Carriers, Buses and Taxicabs

A city or county cannot levy a license tax on holders of Public Service Commission A and B certificates. *SC Code Sec. 58-23-620* Holders of an E or F certificate, Certificate of Compliance, or a common or contract motor carrier of property may be taxed only at their place of residence

or location of principal place of business. Holders of C certificates are subject to business license taxes.

A taxicab usually has a C certificate. However, a taxi license issued in the municipality or county “*in which his principal place of business is situated*” is good in every municipality or county in the state. *SC Code Sec. 12-23-220* The exemption provided by this section applies only to interurban business. “*The governing body of a county or city may license taxis only in the county or city where the taxi principally is operated at the time of application for a license.*” *SC Code Sec. 58-23-1210*

Recommendation: Charge a business license at the operator’s residence or location of the principal place of business – where the vehicles are registered. If a taxi licensed elsewhere is operated principally for intra-urban transportation between points within the municipality or county, it may be subject to a local license tax. A taxi properly licensed elsewhere and delivering passengers from or picking up passengers destined for another jurisdiction is exempt.

Charitable and Religious Activities

Charitable Activities

State law regulates charitable solicitations. It requires individuals have a municipal or county permit to solicit funds from motorists on streets. *SC Code Sec. 5-27-910*

The Solicitation of Charitable Funds Act requires charitable organizations to annually register with the secretary of state, pay a \$50 fee, and submit annual reports. The attorney general enforces these provisions. *SC Code Sec. 33-56-10, et seq* “A charitable organization” includes tax-exempt organizations under state and federal income tax laws.

The exempt purposes set forth in IRS Code Sec. 501(c) (3) are charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and preventing cruelty to children or animals. The term charitable is used in its generally accepted legal sense and includes relief of the poor, the distressed, or the underprivileged; advancement of religion; advancement of education or science; erecting or maintaining public buildings, monuments, or works; lessening the burdens of government; lessening neighborhood tensions; eliminating prejudice and discrimination; defending human and civil rights secured by law; and combating community deterioration and juvenile delinquency. This Act does not preempt local regulation and does not exempt an organization from a business license.

Exemption from state or federal income taxes does not automatically entitle the activity to exemption from a business license. An exemption depends on the language in the business license ordinance. The ordinance may define charitable in more stringent terms than the income tax laws. However exemption under IRS Code Sec. 501(c) is sometimes considered as a factor in determining whether an organization is charitable.

The 2012 Model Business License Ordinance defines a “charitable organization” as an organization that is determined by the Internal Revenue Service to be exempt from federal income taxes under 26 U.S.C. section 501 (c)(3), (4), (6), (7), (8), (10) or (19). The Model Ordinance further provides that a “charitable organization” or any for-profit affiliate of a “charitable organization,” that reports income from for-profit activities or unrelated business income for federal income tax purposes to the Internal

Revenue Service, shall be deemed a business subject to a business license tax on the part of its gross income from such for-profit activities or unrelated business income.

Most business license ordinances, as well as the 2012 Model Ordinance, provide that the charitable organization will be considered a business subject to the license tax unless the entire proceeds of a charitable organization are used for charitable (eleemosynary) purposes.

Religious Activities

Promulgation of religious beliefs is a freedom protected by the First Amendment to the U.S. Constitution. Evangelism, preaching, house-to-house distribution of religious literature and the solicitation of contributions for religious purposes are not subject to business licensing.

In *Follett v. Town of McCormick*, 321 U.S. 573 (1944), the U.S. Supreme Court held that a municipality could not require a business license for a minister who went from house to house distributing religious literature, even though his activities were confined to his hometown and he depended for his livelihood on contributions requested in return for the literature.

Bookstores selling books not solely for the purposes of spreading religious beliefs may be licensed even if they are owned and operated by religious denominations.

Kindergartens and schools operated by churches as extensions of religious outreach may not be licensed. If they are operated for profit as secular activities, they may be licensed.

Coin-operated Amusement Machines and Billiard Tables

State, municipal and county licensing of amusement machines and billiard tables is prescribed in SC Code Title 12, Chapter 21.

Amusement Machines

(a) Video Poker

State law prohibits video poker machines with a free play feature or cash payout. *SC Code Sec. 12-21-2710* and *Sec. 12-21-2720* as construed by the Supreme Court in *Joytime Distributors and Amusement Co., Inc. v. The State of South Carolina*, 338 SC 634, 528 S.E.2d 647 (1999)

(b) Nonpay Amusement

A municipality may not limit the number of machines licensed. Pursuant to *SC Code Sec. 12-21-2720 (A)(3)* It may impose a license fee on those machines not to exceed \$360 for a two-year period. A machine that may be licensed by the SC Department of Revenue under subsection (A)(3) is “a machine of the **nonpayout** type, or in-line pin game, operated by a slot in which is deposited a coin or thing of value except machines of the nonpayout pin table type with levers or flippers operated by the player by which the course of the balls may be altered or changed.” Each of these machines would continue to be subject to a \$180-per-year municipal license fee, plus a \$12.50 business license tax for operating all machines at one location.

(c) Music, Rides, Pinball

State law imposes limits of \$12.50 per year per machine plus \$12.50 for a municipal business license tax for operation of all machines at one location licensed under SC Code Sec. 12-21-2720(A)(1) and (A)(2). Under those subsections, the state requires a license for each machine for playing of music, kiddy rides, juke boxes, amusements, video games without free play feature, crane type machines and nonpayout pinball tables operated by any coin or thing of value.

The maximum municipal business license of \$12.50 on the business operating machines at one location is set by Code Sec. 12-21-2746, limiting all licenses by municipalities and counties to one-half of the amount charged by the state before March 28, 1956 (which was \$25). *Crenco v. City of Lancaster*, 318 SC 278, 457 S.E.2d 338 (1995).

The state requires a machine owner to purchase an operator's license for the business in addition to the license for each machine. *SC Code Sec. 12-21-2728*

The bottom line for municipal amusement machine license taxes

Operator of machines licensed under Sec. 12-21-2720(A)(1) and (A)(2) - \$12.50 per machine plus \$12.50 business license tax for operation of all machines at one location.

Operator of nonpayout machines licensed under Sec. 12-21-2720(A)(3) - \$180 per machine plus \$12.50 business license tax for operation of all machines at one location.

Distributor who does not own and operate the machines nor is licensed as an operator under Sec. 12-21-2728 but **sells or leases** the machines, a gross receipts business license tax may apply.

Vending Machines

Vending machines not listed (i.e., cigarettes, candy, food machines) are not subject to local licenses on each machine by a state statute. A business license may be charged on gross income from operating vending machines.

Billiard Tables

The state requires a license for each billiard or pocket billiard table, football table, bowling lane table and skeeball table (*SC Code Sec. 12-21-2730*) and a license for the privilege of engaging in the business (*Sec. 12-21-2734*).

Municipalities and counties can levy a license tax on the business not to exceed one-half of the amount levied by the state before March 28, 1956. *SC Code Sec. 12-21-2746* The maximum municipal license is \$5 per table measuring less than 3½ feet wide and 7 feet long and \$12.50 per table longer than that.

Some municipalities charge a business license fee on the gross receipts from the whole business in addition to the fee authorized by statute for each table.

Contractors and Subcontractors

No State Exemption

Contractors and subcontractors have no basis under state law to claim an exemption from the business license tax. A contractor who claims the license fee charged for being certified by the state exempts him from municipal license fees may be charged without regard to other forms of taxation. Each municipality in which he takes a contract may collect a license fee. *1950-51 Op. Attorney General pg. 198*

Outside Income Included

Contractors may object to the license being based on total gross receipts, especially on funds not earned within the municipality or county. The state Supreme Court confirmed the right to base the license fee on total receipts in *Triplett v. City of Chester*, 209 SC 455, 40 S.E. 2d 684 (1946); and *Eli Witt Co. v. City of West Columbia*, 309 SC 555, 425 S.E.2d 16 (1992). See the discussion in Part 2, Gross Income.

As noted in Part 2, some ordinances provide for different rates on income produced from out-of-city activities and collected through an in-city office. In the absence of such a provision, the license inspector cannot give different administrative treatment.

Subcontractors Taxable

Subcontractors are not exempt from a business license tax even though the general contractor may pay a tax on the full contract price of a project. A general contractor cannot deduct the amount paid to a subcontractor from the gross income upon which he computes his license tax.

The contractor and subcontractor are two different people or entities engaged in two different business activities. Each is subject to a license tax based upon the gross income received. The tax is levied upon the privilege of doing business not on the income. Therefore, there is no double taxation, as is frequently argued.

If an owner pays a general contractor to supervise the work but pays the tradesmen or subcontractors directly, the amounts paid subcontractors would not be included in the contractor's gross income.

If a subcontractor claims to be an employee of the contractor, he should be required to produce payroll records or W-2 withholding records to substantiate employee status. Otherwise, he is subject to a license tax as an independent contractor.

Government Contracts

Contractors with state agencies or subdivisions are not exempt from business license taxes. The tax is based on the contractor's privilege of doing business not on the governmental entity. The fact that license fees may cause a higher contract price does not affect this principle. *North*

Myrtle Beach v. SC Public Service Authority (Santee Cooper) [Circuit Court, 1991]. See the discussion on income from government projects in Part 2, Gross Income.

A contractor on a federal project is not exempt from a license tax unless the work is performed on territory over which jurisdiction has been ceded by state statute to the federal government such as military bases. *SC Code Sec. 3-1-10 through 3-3-340*

The U.S. Supreme Court has upheld taxes on contractors dealing with the federal government if the tax is not laid on the federal government. The federal immunity from taxation may not be conferred on a third party even though the entire economic burden falls on the federal government. See *US v. County of Fresno*, 429 US 452; *US v. New Mexico*, 455 US 720; and *Washington v. US*, 103 S. Ct. 1344.

Credit Unions

Federal and state credit unions are exempt from local business license taxes. *12 USC Sec. 1768; SC Code Sec. 34-27-300*

Door-to-door Sales - See Peddlers and Solicitors

Fireworks

The state has preempted the regulation of the sale of fireworks and requires an annual retail license fee for a state permit. This permit is treated as a regulatory fee in addition to a normal business license fee on gross income required by local ordinance. Because the state specifically permits sale of fireworks, retail sale cannot be prohibited outright by municipalities and counties. *SC Code Sec. 23-35-10 through 23-35-80*

The location of sale of fireworks is subject to zoning laws and requires approval of the municipal fire chief or county sheriff as meeting safety standards of the State Board of Pyrotechnic Safety. Licenses and permits must be issued on forms prescribed by the State Board of Pyrotechnic Safety. *SC Code Sec. 23-35-70* A fireworks display is subject to a permit approved by the municipal or county governing body. *SC Code Sec. 23-35-60*

Fortunetelling

Fortunetelling, palmistry, phrenology, clairvoyance or prediction of future events by cards, etc. are illegal as an inducement to promote some other business. *SC Code Sec. 16-17-690* Many municipalities prohibit such activities for any purpose by ordinance. The prohibition may be made in the business license ordinance.

Fortunetellers in any county must obtain a license from the county clerk of court. *SC Code Sec. 40-41-310*

Fuel Dealers

Heating-fuel dealers making retail deliveries from out-of-town locations to customers in town are subject to a license tax. The absence of an office or facility in the town makes no difference. However, wholesale fuel deliveries are exempt unless the wholesaler has an establishment in town. *SC Code Sec. 5-7-30* Separate reporting of gross income by dealers making both retail and wholesale deliveries may be necessary since the NAICS-based model license ordinance places retail fuel oil sales and wholesale deliveries into different rate classes.

Health Maintenance Organization

NAICS Code 621491 specifically include HMOs, which are associations or groups primarily engaged in providing medical or health services to members **through their own facilities or employed physicians** for a fixed prepaid fee. An HMO cannot refer to itself as an insurer, even though the state Department of Insurance regulates HMOs. *SC Code Sec. 38-33-140(D)* A medical service plan providing health services by **contract through private physicians or facilities owned by others** in accordance with a prearranged schedule of specified charges is classified as insurance under NAICS 52411.

Home Occupations

Home occupations such as teaching music, hairstyling, bookkeeping and tailoring are subject to a business license tax unless the business classification is entirely exempt from licensing regardless of location. An exemption for “all home occupations” would be invalid as a denial of equal protection. The location alone cannot be the basis for exemption.

There may be a rational basis for classifying businesses by the number of participants (for example, teaching fewer than four music students) and allowing an exemption for a level of activity too small to really be considered a business. Take care to identify a rational basis for the classification.

A home occupation must be a permitted use under local zoning regulations to be licensed. It must be licensed according to the nature of the business operation in the same manner as any other business. There is no “home occupation” business license classification.

Insurance Companies and Agents

Municipal Taxation

Insurance companies operating within a municipality are subject to business license taxes measured by the gross premiums collected. Generally speaking, the municipality may levy the license tax measured by the premiums collected by the insurance company through an office in the municipality or on risks located in the municipality, regardless of whether an office or an agent is maintained therein. Payment of state taxes through the Department of Insurance does not exempt insurance companies from municipal taxes. Nothing in the insurance laws prevents municipal business license fees. *SC Code Sec. 38-7-160* The Municipal Association Insurance Tax Collection Program collects for participants’ current and delinquent license taxes on gross

premiums from domestic and foreign insurance companies. (See Insurance Agents on page 30 and Brokers on page 31.)

The Association also serves as the municipal agent to receive and distribute to South Carolina municipalities the municipal portion of the broker’s premium tax for nonadmitted insurers collected by the South Carolina Department of Insurance. Agents for insurers licensed to do business in this state are subject to a local business license tax on gross commissions if the ordinance so provides.

(a) Doing Business

Out-of-state insurance companies that have no agents or offices within the city are not exempt from the license tax on the basis that they are either not “doing business” or are engaged in interstate commerce. The insuring of a risk located within the city, the collection of premiums on that risk in any manner and the adjustment of claims on policies constitutes “doing business.” Collecting premiums exclusively by mail would make no difference.

Support for this position may be found in the U.S. Supreme Court case of *Equitable Life Society v. Pennsylvania*, 238 US 143 (1915); *City of New Orleans v. Kansas City Life Ins. Co.*, 22 So. 2d 51 (1945). South Carolina insurance statutes require that insurance business be conducted in this state through licensed agents, managers and adjusters. *SC Code Sec. 38-43-60*

(b) Interstate Commerce Not Exempt

Prudential Ins. Co. v. Benjamin, 328 US 408 (1946), held that Congress expressly left to the states the regulation and taxation of insurance companies by the McCarran-Ferguson Act, 15 USC Sec. 1011. Insurers in interstate commerce could be taxed. *North Myrtle Beach v. GEICO* (DCSC 1991), held that a mail-order insurer in interstate commerce could be taxed, but an interstate commerce exemption in the ordinance prevented taxation. All participants in the Municipal Association of SC insurance collection program have removed exemptions for interstate commerce from their ordinances. Under the decision in *City of Charleston v. Government Employees Insurance Company*, 334 SC 67, 512 S.E.2d 504 (1999), mail-order insurance companies with no offices in the state are subject to municipal business license taxes on gross premiums collected in the municipality or realized from risks located in the municipality as authorized by *SC Code Sec. 38-7-160*.

(c) Fire Insurance

Fire insurers are placed in a separate licensing category. Municipalities may base the license of fire insurers or their agents only on premiums from risks located within the municipal limits or premiums collected within the municipality on risks located outside the limits of the municipality. *SC Code Sec. 38-7-160*. When a risk is determined to be located within a municipality, the fire insurer should pay business license taxes on those premiums to that municipality. When a risk is determined to be located outside a municipality, the fire insurer should determine where the premiums for those risks were collected. If the premiums were collected within a municipality, then the business license tax is due to that municipality.

For most municipalities, the business license on fire insurance premiums cannot exceed 2 percent. Cities with a population of 50,000 or more cannot exceed 5 percent.

Nothing in the state insurance laws may be “construed as preventing any municipality from levying and collecting license fees or taxes in accordance with its ordinances.” *SC Code Sec. 38-7-160*

(d) Classification

Casualty companies and life insurance companies may be placed into different rate categories. The Supreme Court has consistently upheld reasonable classifications so long as all companies of the same general type are treated alike. In *City of Columbia v. Putnam*, 241 SC 195, 199, 127 S.E. 2d 631, 633 (1962), the Court held:

(A)n ordinance setting the amount of license fees on a percentage of gross premiums as provided for in the present ordinance in respect to casualty companies is not invalid in that (the) . . . Casualty Insurance Company is treated equally with other casualty companies in the same class. The fact that one class may pay more proportionately than other classes does not of itself make the license fee unreasonable or arbitrary since this is largely within the discretion of City Council.

(e) Reasonableness of Rates

In *US Fidelity and Guaranty Co. v. City of Spartanburg*, 263 SC 169, 209 S.E. 2d 36 (1974), US Fidelity and Guaranty paid 2 percent of gross receipts while other businesses paid much less. The Court stated that a gross disparity between license taxes laid on different classifications of business is constitutionally impermissible unless there is a rational basis.

The City defended the disparity on two grounds: (1) fire and casualty insurers receive more benefit than other businesses from two of the City’s most expensive and efficient services, fire and police protection, and (2) such insurers pay little, if any, ad valorem property tax so should contribute substantially to the cost of city government by the business license tax. The Supreme Court concluded that the reasons given by the city were not irrational nor was the resulting rate palpably unreasonable.

The burden is on the challenger to prove a lack of a rational basis. However, a municipality should be able to show why it charges one business class more than another. In doing so, the municipality should consider factors such as the net profit index of one business class as compared to another, the amount of other taxes paid, if any, and the service and protection given by the city to one business class as compared with other categories of business.

County Taxation Prohibited

Counties are prohibited from levying a business license tax on insurance companies. *SC Code Sec. 4-9-30(12)*

Insurance Agents

Payment of license fees by insurance companies does not exempt independent agents or brokers from license fees. Employees of insurance companies who sell insurance are exempt. *Hay v. Leonard, 212 SC 81, 46 S.E.2d 653 (1948)*

The tax on the insurance companies is on the privilege of insuring risks in the municipality. The tax on the independent agents is on the privilege of selling insurance and handling claims. These are two different business activities conducted by two different entities. Whether the agent sells for one or a number of companies does not determine whether he is subject to the tax. The test is whether he is an employee or an independent agent. An employee's paycheck would include payroll deductions for income taxes and social security. The independent agent or broker would receive a commission that would be his gross income for business license purposes.

Independent insurance agents sometimes argue that they should not pay a business license tax because the company pays a tax on the gross premiums. They contend this would be double taxation because their commissions are paid from gross premiums. This is a misconception.

Some points to consider in support of taxation of agents.

- Agents are in business just like other people who contract to perform a service. They contract with insurance companies to sell policies.
- It is unfair to tax other businesses and exempt agents. Other businesses must carry a heavier burden to support the city budget when a class of business is exempt from the tax. Other types of agents and brokers are taxed.
- Tax payments by insurance companies do not come from the commission income received by agents for the sale of policies. The companies do not pay license fees for agents.
- There is no double taxation. The taxes are levied on two different businesses. For example: manufacturers, wholesalers and retailers may be subject to license taxes on gross income from the sales of the same goods because each activity is a separate business. Neither the goods nor the sales transactions are the subjects of the tax.
- The tax is due for the privilege of doing business. While it is measured by gross income, it is not an income tax or a premium tax.

Insurance Brokers

The South Carolina General Assembly, to ensure consistency with the federal Non-admitted and Reinsurance Reform Act of 2010, ratified Act 283 on June 28, 2012, amending S.C. Code §§ 38-7-16 and 38-45-10 through 38-45-195. The Act establishes a blended broker's premium tax rate of 6 percent, comprised of a 4 percent state broker's premium tax and a 2 percent municipal broker's premium tax. A municipality may not impose on brokers of nonadmitted insurance in South Carolina an additional license fee or tax based upon a percentage of premiums as was the practice prior to the passage of these federal and state laws.

Pursuant to S.C. Code Ann. §§ 38-45-10 and 38-45-60, the Municipal Association of South Carolina may, by agreement with a municipality, be designated the municipal agent for purposes of administration of the municipal broker's premium tax. The South Carolina Department of Insurance is required to collect the broker's premium tax and distribute to municipalities the municipal portion of the tax. As the municipal agent, the Association distributes the funds to the municipalities.

Interstate Commerce

Interstate Commerce Defined

“Interstate commerce” is the trading in commodities between individuals of different states.

“Interstate commerce” is not a technical, legal conception but a practical matter to be determined upon a broad consideration of the substance of the whole transaction. It means not merely interstate movement but interstate business. It includes trade resulting in the passage of property, people or messages from within one state to within another state.

Articles are considered interstate commerce when they commence their final movement for transportation from the state of their origin to the state of their destination. Interstate commerce includes buying and selling goods for shipment from one state to another and all component parts of the transaction are included (i.e., taking orders, shipping, unloading, storage, delivery to purchaser, collection of sales price). However, goods may come out of interstate commerce at some stage and become a part of an activity that is intrastate in nature and subject to a license tax, as the following examples indicate.

Taxable Interstate Commerce

Prior to 1977, a business license tax could not be levied on the privilege of carrying on a business exclusively interstate in character according to the U.S. Supreme Court ruling in *Spector Motor Service, Inc. v. O'Connor*, 340 US 602 (1951). However, the Supreme Court overruled the *Spector* case in *Complete Auto Transit, Inc. v. Brady*, 430 US 274 (1977), and established a four-pronged test for validity of state or local taxes on interstate commerce.

Under that test, a local tax on interstate commerce is valid if:

- (1) the tax is applied to an activity with a substantial nexus (connection) with the taxing state (local government);
- (2) the tax is fairly apportioned;
- (3) the tax does not discriminate against interstate commerce; and
- (4) the tax is fairly related to the service provided by the state (local government).

Many business license ordinances in this state contained an express exemption for interstate commerce in keeping with the law prior to 1977. Where there is such a provision, interstate commerce is not subject to the business license tax. See *Carolina Manufacturing Co. v. City of Greenville*, 260 SC 580, 197 S.E. 2d 665 (1973); *North Myrtle Beach v. GEICO*, (DCSC 1991). However, most ordinances have been amended to delete the interstate commerce exemption.

Therefore, the first inquiry is whether the license ordinance contains an exemption. If it does, no tax is levied. If it does not, the tax may be levied only if all four tests in the *Complete Auto Transit* case are met. In either event, it is necessary to determine whether the activity in question is interstate commerce.

The intrastate activity of a business also engaged in interstate commerce is subject to the tax where the intrastate activity is separable, even if the ordinance exempts interstate commerce.

Examples of Interstate Commerce

These examples are taken from actual court decisions from across the nation and should be considered only as guidelines in making local decisions. The courts do not always agree on similar facts, and a single factual difference or the purpose for the determination can produce varied results. License inspectors should consult the city or county attorney in difficult cases.

(a) Advertising. Although a local newspaper, magazine, radio station or television station may be engaged in interstate commerce to some degree by distributing or broadcasting across state lines, advertisements sold or contracted for within this state are not in interstate commerce. Such activity would be subject to a business license.

(b) Insurance. Insurance transacted across state lines may be interstate commerce. If the ordinance does not exempt interstate commerce, mail order insurance companies may be taxed on premiums from risks in this state. *Prudential Ins. Co. v. Benjamin*, 328 US 408 (1946), *City of Charleston v. Government Employees Insurance Company*, 334 SC 67, 512 S.E.2d 504 (1999).

(c) Manufacturing. Manufacturing of goods intended to be shipped across state lines is not interstate commerce. Interstate commerce does not commence until the goods are shipped. However, the activity of manufacturing produces no gross income as a general rule. A business license must be computed on gross income from an activity subject to the privilege tax. A sale in interstate commerce may be a separate activity from the manufacture of the goods. Therefore, there must be an apportionment of the sales price to the manufacturing process conducted within the taxing jurisdiction. A tax on the capital invested in a business is no longer authorized by state law.

(d) Motion Pictures. Motion picture films manufactured out of state and leased to exhibitors in this state are in interstate commerce until delivered. The showing of films by local theaters is not interstate commerce.

(e) Newspapers. Publication of a local newspaper is not interstate commerce, even if a small portion of its circulation is located across a state line and it carries some advertising from out of state. The sale of advertisements is not interstate commerce.

Distribution by a local distributor within the state of an out-of-state newspaper to vending machines and dealers for local sale in this state is not interstate commerce. The local distributor would be subject to a license tax based on his gross income.

(f) Office. An out-of-state business maintaining only a local office through which it keeps records, holds meetings, distributes dividends and executes documents is not engaged in

interstate commerce. However, where no gross income is collected by that office, it may be subject to only a base minimum fee if the license ordinance so provides.

(g) Peddlers and Solicitors. Peddlers who obtain goods from out of state and sell them on their own terms, even if they remit a portion of the proceeds to the out-of-state supplier, are not in interstate commerce and are subject to a license tax.

Solicitors or traveling salesmen who take orders for goods from out of state, even though samples are displayed and a portion of the purchase price is collected with the order, are in interstate commerce.

A local commission agent of an out-of-state company to whom goods are shipped for sale in the original packages is involved in interstate commerce.

(h) Professional Services. Professional services rendered locally by an out-of-state consultant, engineer, architect, contractor, advisor, etc., are not interstate commerce.

(i) Radio and Television Broadcasting. Radio and television broadcasting constitutes interstate commerce whether programs originate locally or out of state where they are broadcast to listeners and viewers out of state. The sale of advertisements is not interstate commerce.

(j) Repairs. Local repairs or work performed on an article that reaches the local shop by a shipment in interstate commerce is not interstate commerce. The mere fact that an anticipated local transaction causes movement in interstate commerce is not sufficient to constitute the local transaction a part of interstate commerce.

(k) Securities. Transactions on national security exchanges are interstate in nature. The sales of securities are subjects of interstate commerce. However, some security transactions may be intrastate, and the broker may be subject to a license tax.

(l) Small Loans. A small loan transaction completed by the borrower when he signs documents and receives money in this state does not involve interstate commerce even if the funding source was a main office out of state.

(m) Sports Exhibitions. The business of giving sports exhibitions does not involve interstate commerce just because the participants are transported across state lines.

(n) Stevedoring. A stevedoring company that loads and unloads out-of-state or foreign cargo is involved in interstate commerce. However, if the company merely supplies longshoremen to the ship owner without controlling the loading or unloading, that is not an activity in interstate commerce.

(o) Warehousing. Warehousemen who are employed by a company that owns or has contracted to deliver goods shipped from out of state and which are stored as a part of the process of delivery to the purchaser are engaged in interstate commerce. Examples are freight carriers, parcel delivery services, mail order firms, chain store warehouses, and storage by the purchaser for use by the purchaser.

Local distribution of goods owned by a wholesaler from a wholesaler’s warehouse to retailers is not interstate commerce.

Goods shipped to a warehouse to meet anticipated needs without specific orders from customers to whom they are to be delivered are not in interstate commerce after they reach the warehouse. However, some transaction-generating revenue must occur thereafter to subject the activity to a business license. The independent operation of a warehouse for a fee to any user would be subject to a business license based on gross fees collected, regardless of the source or destination of the goods stored. It would be a separate transaction from sale or delivery of the goods.

Lenders

A business making loans secured by real estate is not subject to a business license tax unless it has premises located within the municipality or county levying the tax. *SC Code Sec. 5-7-30; Sec. 4-9-30(12)*

Lottery Ticket Sales

Retailers receive a commission from the sale of lottery tickets. That commission should be included in the gross income reported by the retailer for business license tax purposes. The sale price of the lottery ticket is not income to the business. There is no business license tax exemption for commission income from sale of lottery tickets.

Newspapers

Local newspaper publishers are subject to business license taxes. They must be classified appropriately (NAICS 51111). Newspaper publication is not required to be classified with general manufacturing. See *Thomson Newspaper, Inc. v. City of Florence*, 287 SC 305, 338 S.E. 2d 324 (1985).

Pawnbrokers

Pawnbrokers in cities and counties must be licensed pursuant to SC Code Sec. 40-39-20, and the business must be conducted only at the location designated in the license.

Pawnbrokers may be required to meet other regulatory conditions set by local ordinance, including the business license ordinance.

Peddlers, Hawkers and Itinerants

Door-to-door Sales

Although the U.S. Supreme Court has upheld “Green River” ordinances (see *Green River v. Fuller Brush Co.*, 10 Cir., 65 F.2d 112) that prohibit uninvited door-to-door sales or solicitations (see *Breard v. City of Alexandria*, 341 US 622), the state Supreme Court has held such ordinances to be unreasonable and void.

In *City of Orangeburg v. Farmer*, 181 SC 143, 186 S.E. 783 (1936), the Court held that the occupation of soliciting orders from house to house is lawful when conducted in a proper manner. The ordinance declaring a lawful occupation to be a nuisance was held to be unconstitutional. The Court noted that the ordinance was passed at the request of the Retail Merchants Association and that there was no logical or valid public health or safety reason for it.

Peddlers selling goods at retail for immediate delivery are subject to a business license tax. Solicitors of orders for goods to be delivered in the future, not in interstate commerce, are subject to a business license tax, unless an interstate commerce exemption applies.

Street Sales

Vendors do not have the right to sell their goods in the public streets without express permission of the governing body in control of the streets. *Huffman v. City of Columbia*, 146 SC 436, 144 S.E.2d 157 (1928); *City of Charleston v. Roberson*, 275 SC 285, 269 S.E.2d 772 (1980). This does not restrict the right to travel on the streets for purposes of making deliveries.

Sales may be made from vehicles parked on private property if the activity complies with zoning, safety and health regulations. A business license must be issued for a lawful activity.

Transient merchants may be charged higher license fees than resident merchants. They may not be denied licenses to restrain trade for protection of local merchants. See McQuillin, MUNICIPAL CORPORATIONS, Sec. 26.144, *et seq.*

County Licenses

In addition to the Home Rule licensing provisions in *SC Code Sec. 4-9-30*, there are specific state statutes authorizing counties to license peddlers and hawkers in Title 40, Chapter 41 of the Code. Section 40-41-90 exempts vendors of newspapers, magazines, vegetables, tobacco and agricultural products, and sales by sample for established commercial houses from county licenses.

Precious Metal Dealers

A precious metal dealer must obtain a permit from the local law enforcement agency to engage in the business of purchasing precious metals before he can obtain a business license. *SC Code Sec. 40-54-20* State law also requires the dealer operate only from a permanent place of business. Dealers cannot operate on public property nor from a vehicle, flea market, hotel room or similar temporary location.

Real Estate

Leasing

Gross rents from the leasing of real estate, commercial or residential, constitute business income for computing a license tax. The type of tenant is immaterial. There is no interstate commerce involved in local leasing to an out-of-state firm. Some municipalities classify and exempt owners of less than a certain number of leased units from the tax. Others exempt owners with less than a threshold amount of rental income. This is done to avoid a tax on people who are

not really in the business but have a small personal investment. Such an exemption is not required by law. It must have a rational basis if granted by ordinance.

Operation

Operating buildings, developments, projects, complexes, malls, etc., is a business. The gross receipts of the operator (who may also be the owner) is used to compute the tax. If the operator is also the owner, rents plus any other charges collected from tenants should be included.

Sales

Sales may be made by owners, brokers or salesmen.

(a) Owner Sales.

Sales by owners are subject to license taxes if the owners are in the business of selling real estate. A single or occasional sale by an owner as a personal investment transaction would not be a business. It may be necessary to get information on the frequency of sales and how the owner reports proceeds on income tax returns to determine whether he is in the business of selling real estate.

The full sale price with no deductions for mortgages, commissions, closing costs or purchase cost to the owner is the amount used to compute the license tax.

(b) Broker Sales.

Commissions received by real estate brokers constitute gross income for license purposes. If commissions are divided with other brokers or salesmen, as frequently occurs, only the amount retained by a broker is considered income to him.

Business license must be charged to broker-in-charge.

Notwithstanding any other provision of law, the governing body of a county or municipality may not impose a license, occupation, or professional tax or fee upon real estate licensees, except upon the broker-in-charge at the place where the real estate licensee shall maintain a principal or branch office. The license, occupation, or professional tax or fee shall permit the broker-in-charge and the broker's affiliated associate brokers, salespersons, and property managers to engage in all of the brokerage activities described in Chapter 57 of Title 40 without further licensing or taxing, other than the state licenses issued pursuant to Chapter 57 of Title 40 or pursuant to other provisions of law. No license, occupation, or professional tax or fee shall be required of the affiliated associate brokers, salespersons or property managers of a broker-in-charge for such gross receipts upon which a license, occupation or professional tax or fee has already been paid. *Section 6-1-315*

Brokered transactions of real property in counties or municipalities, other than those in which the broker-in-charge maintains a principal or branch office, create a nexus for imposition of a license, occupation, or professional tax or fee only with respect to gross receipts derived from transactions of property located in that county or municipality. *Section 6-1-315*

Reduction of amount of gross income taxed under certain conditions.

If the person or business taxed pays a business license tax to another entity 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 entity. *Section 5-7-30*

Telephone Companies and Service

Because court-ordered divestiture broke up the telephone monopoly, it is necessary to get a detailed description of the company's operation to determine how to classify the company. To be classified as a telephone company, the operation must involve the communication of information in some manner (i.e., wire, microwave, fiber optic cable, radio wave).

Counties may not license or franchise telephone companies. *SC Code Sec. 4-9-30*

If the company sells or leases communication equipment or installs and services equipment but transmits no information, it is not classified as a telephone company for business license purposes. One of the following classifications may apply.

- Installation of equipment (NAICS 23531)
- Leasing and rental of equipment (NAICS 53249)
- Retail sales (NAICS 443112)
- Service of equipment (NAICS 811213)

Franchise or Consent

In *City of Cayce v. AT&T*, 326 SC 237, 486 S.E.2d 92 (1997), the Supreme Court limited the power to franchise granted by SC Code Sec. 5-7-30 to those businesses using public streets for lines to serve customers within the municipality. Municipalities have the authority to grant a franchise for the use of public streets and to charge for that use. *SC Code Sec. 5-7-30* The court also held that consent of the governing body to place lines in the streets that do not serve municipal customers may be required pursuant to SC Constitution Art. VIII, Sec. 15. A fee may be charge for that consent.

For many years, municipalities routinely charged telephone companies with lines in public streets a franchise fee of 3 percent of recurring local service charges. In some instances, long distance tolls were included in the gross revenue on which the franchise fee was based after the decision of the US Supreme Court in *Goldberg v. Sweet*, 488 US 252 (1989). The 5 percent franchise fee imposed by the City of Orangeburg on gross income from all sources was upheld in *BellSouth Telecommunications, Inc. v. City of Orangeburg*, 337 SC 35, 522 S.E.2d 804 (1999). However, the whole picture was changed by Act 112 of 1999, as discussed below.

State Telecommunications Act of 1999

Act 112 of 1999, SC Code Sec. 58-9-2200, *et seq.*, changed the emphasis from franchise fees to business license taxes on telecommunications services and placed statutory limitations on municipal franchise fees, consent fees and business license taxes. The legislation is complicated

because of efforts to address existing unexpired franchises and ordinances adopted prior to December 31, 1997. All municipalities are subject to the Act.

(a) Franchise or Consent Fees

Under Act 112, municipal franchise or consent fees are limited by population ranges according to the following schedule.

<u>Population</u>	<u>Maximum Fee</u>
1 - 1,000	\$ 100
1,001 - 3,000	\$ 200
3,001 - 5,000	\$ 300
5,001 - 10,000	\$ 500
10,001 - 25,000	\$ 750
Over 25,000	\$ 1,000

(b) Business License Taxes

For a greater understanding of the Act’s effect on business license taxes, review the Municipal Association of SC’s model ordinance adopted by participants in the Association’s Telecommunications Tax Collection Program on the next page.

Wholesalers

Wholesalers are exempt from municipal license taxes unless they maintain warehouses or distribution establishments within the municipality. *SC Code Sec. 5-7-30* A wholesale transaction involves a sale to someone who will resell the property. It does not include a sale to a user or consumer. *SC Code Sec. 12-36-120*

MASC Sample Ordinance No. 99-001
Amending The Business License Ordinance
Levying A Business License Tax On Telecommunications

WHEREAS, the South Carolina General Assembly has adopted Act No. 112 of 1999 which provides for municipalities to charge business license taxes and fees for the use of public rights of way to telecommunications companies; and

WHEREAS, it is necessary to amend the business license ordinance to conform to State law;

NOW THEREFORE, BE IT ORDAINED by the Mayor and Council of the City/Town of _____, that the Business License Ordinance is amended as follows:

Section 1.

a. Notwithstanding any other provisions of the Business License Ordinance, business license taxes for retail telecommunications service as defined in SC Code Sec. 58-9-2200, including but not limited to those services described in Standard Industrial Classification (SIC) 481 and North American Industry Classification System (NAICS) 5133, shall pay an annual business license fee based on gross income.

b. Pursuant to SC Code Sec. 58-9-2220, the following business license tax schedule shall apply to the gross income from retail telecommunications services for the preceding calendar or fiscal year which either originate or terminate in the municipality and which are charged to a service address within the municipality regardless of where these amounts are billed or paid and on which a business license tax has not been paid to another municipality. The measurement of the amounts derived from the retail of mobile telecommunications services shall include only revenues from the fixed monthly recurring charge of customers whose service address is within the boundaries of the municipality.

Rate for license taxes due in the years 1999 through 2003:

three tenths of one percent (0.3 %) of gross income for the preceding year;

Rate for license taxes due in the year 2004 and each year thereafter:

seventy-five hundredths of one percent (0.75 %) of gross income for the preceding year.

For a business in operation for less than one year, the amount of business license tax authorized by this section shall be computed on a twelve-month projected income.

Section 2.

a. The rate for business licenses for retail telecommunications service for 1999 shall be 0.3% of 1998 gross income, due on October 1, 1999, and payable by January 31, 2000, without penalty.

b. The telecommunications business license tax shall be due on January 1 in each year, beginning in the year 2000. Declining rates shall not apply. Taxes are payable without penalty by

January 31 following the due date. After January 31, the delinquent penalty shall be five percent (5 %) of the tax due for each month, or portion thereof, after the due date until paid.

Section 3.

Exemptions in the business license ordinance for income from business in interstate commerce are hereby repealed. Properly apportioned gross income from interstate commerce shall be included in the gross income for every business subject to a business license tax.

Section 4.

a. Nothing in this ordinance shall be interpreted to interfere with a franchise agreement or contractual agreement entered into with a telecommunications provider prior to December 31, 1997.

b. Fees imposed by a franchise or contractual agreement with a telecommunications provider which expires prior to December 31, 2003, shall continue in effect until December 31, 2003.

c. All fees collected under such franchise agreement or contractual agreement shall be in lieu of fees or taxes which might otherwise be authorized by this ordinance.

d. A business license tax ordinance, adopted prior to December 31, 1997, which levied a business license tax paid by a telecommunications company higher than that levied under this ordinance, shall remain in effect through December 31, 2003.

Section 5.

As authorized by SC Code Sec. 5-7-300, the Agreement with the Municipal Association of South Carolina for collection of current and delinquent license taxes from telecommunications companies pursuant to SC Code Sec. 58-9-2200 in the form attached hereto is approved, and the Mayor is authorized to execute it.

Section 6.

All ordinances in conflict with this ordinance are hereby repealed.

Study Questions for Part 3

1. Is a vendor of agricultural products grown by the vendor exempt from a license tax?
2. Is ground delivery by truck of a parcel transported from another state by air exempt?
3. Are retail liquor stores subject to a local business license tax?
4. Are auctioneers subject to a license tax?
5. How are trade-in motor vehicles treated for license tax calculation?
6. Is a licensed bingo promoter for a charitable sponsor exempt?
7. When can taxicabs be charged a license tax?
8. Is a 501(c)(3) charitable organization automatically exempt from a business license tax?
9. When is a church kindergarten subject to a license tax?
10. What is the maximum business license tax allowed by statute for operation of all coin-operated amusement machines at one location?
11. Are cigarette vending machines subject to a tax per machine?
12. Are independent subcontractors subject to a license tax when the contractor pays a license tax on the full contract price?
13. When are contractors on government projects exempt?
14. When are nonresident fuel dealers subject to a license tax?
15. How are home occupations licensed?
16. Are mail order insurance companies in interstate commerce subject to a license tax?
17. Why should independent insurance agents pay a license tax when the company pays a tax on gross premiums that include agent commissions?
18. What are the four tests for taxing interstate commerce?
19. What are some examples of interstate commerce that are subject to license taxes?
20. May peddlers be denied licenses to protect local businesses?
21. Is the owner of an apartment building claiming it as a personal investment exempt?
22. Are real estate salesmen working for a broker exempt?

23. What telephone related activities are not classified as a “telephone company”?
24. What are the limitations on franchise and consent fees and business license taxes under the 1999 Act on telecommunications fees?
25. When is a mortgage lender or wholesaler exempt from a municipal license tax?

Part 4 – Administration

In addition to making each license conform to constitutional and statutory regulations, there are several administrative issues that must be addressed to ensure a successful licensing program. The license ordinance must be administered according to law and enforced in a reasonable and nonarbitrary manner. An effort should be made to collect from all businesses and individuals subject to the license. Each business or group within a license category must be treated equally with all other members of that same group or class.

A license ordinance cannot cover every situation that arises or every detail of administration. Those responsible for administering the ordinance must have the authority to make decisions and administrative interpretations or regulations not inconsistent with the ordinance or state law. Any such regulations or interpretations should be put in writing and made available to applicants. The courts recognize that administrative interpretations of ordinances need to be considered.

Office Procedures

Freedom of Information

Business license applications should be treated as confidential. Licensees generally object to public disclosure of such information. Upon proper inquiry, the disclosure that a particular person has complied with the ordinance, paid the proper license fee and obtained a license is sufficient to satisfy the public's need to know and the Freedom of Information Act. The Act specifically provides that income reported on business license applications is not public information. *SC Code Sec. 30-4-40(a)(2)*

SC Code Sec. 6-1-120, as originally adopted in 1999, caused mass confusion by prohibiting release of any information provided by a business license taxpayer. This statute was amended in 2000 to provide for release of information in accordance with the Freedom of Information Act and specifically authorizes sharing of data between public officials or employees in the performance of their duties.

Any information requested for person-to-person commercial solicitation of handicapped people is exempt from disclosure under the FOI Act. *SC Code Sec. 30-4-40(a)(2)*

The FOI Act does not provide a penalty for disclosing exempt records. However, many license ordinances contain a confidentiality provision that removes discretion from the license official and limits release of information to those items required to be released by law. The governing body has ultimate responsibility for complying with the FOI Act. A request for information that is not clearly required to be released should be referred to council.

SC Code Sec. 6-1-120 prohibits disclosure to the public of financial information provided by a taxpayer. Publication of statistics classified to prevent the identification of particular reports, returns or applications and the information on them is not prohibited. For a knowing violation, Sec. 6-1-120 provides severe penalties of up to \$1,000 or imprisonment for up to one year, or

both. In addition, a municipal or county officer or employee must be dismissed from office or position and is disqualified from holding a public office in this state for five years following conviction.

It is considered incorrect to disclose the amount of license tax paid by a business because gross income could be calculated using the license rate schedule. This position may have little meaning in view of the requirement in most license ordinances that the business license be posted in the place of business and the amount of tax paid is routinely entered on the license.

Under the statutes effective on the publication date of this handbook, the following information is subject to disclosure:

1. Any data may be shared with other public officials or employees in the performance of their duties, when those duties relate to enforcement of the license ordinance.
2. The public is entitled to obtain any information on license records except gross income, financial data provided by the taxpayer and information used for commercial solicitation of handicapped persons.
3. Statistics classified to prevent identification of particular license records are public records.

Advice to Taxpayers

Many taxpayers do not understand that the business license is an excise tax on the privilege of doing business in a municipality or county and not a sales, income or property tax. The license must be computed on gross income pursuant to state law without deductions. Frequently, explanations must be given to avoid misunderstanding and improper reporting.

“Part 3 - Difficult Applications” contains information on many problem areas that arise in administration. Sharing this information could help applicants better understand licensing requirements.

Taxpayers are not exempt from a license tax simply because no notice or application was mailed to them. Every business operator is presumed to have knowledge of the law applicable to the business.

Double taxation is a common objection raised by contractors and subcontractors. See the discussion in Part 3 for responses to this objection.

License ordinances do not provide for penalty waivers by either the license official or the council. This is sometimes difficult to explain to a taxpayer. The explanation could refer to penalties for other delinquent taxes that are not waived. A waiver provision without standards would violate equal protection rights. No standards have been devised that would meet a constitutional test.

Deal courteously and consistently with taxpayers. Providing information and assistance with forms can reduce problems in administration.

Administration Checklist

- (a) Be thoroughly familiar with the license ordinance and forms.
- (b) Assist applicants in completing forms correctly.
- (c) Explain the classification and tax rate.
- (d) Stress the necessity for reporting gross income accurately. Inform the applicant that the reported figure is subject to verification by examination of other tax records or audit.
- (e) Require name, address and Federal I.D. or Social Security number to be the same as those used by applicant on income and sales tax returns.
- (f) Courteously challenge information suspected to be incorrect.
- (g) Require sufficient information to determine whether the applicant is entitled to a license for a lawful business and to determine the proper rate class.
- (h) Require production of applicable state licenses.
- (i) Coordinate licensing with other municipal or county departments such as zoning, building inspection, health, fire and law enforcement.
- (j) Keep accurate records systematically filed.
- (k) Investigate and deal with violations promptly.

Forms and Records**Notice**

State law does not require issuing a notice that a business license is due. However, it is advisable to mail a renewal application to existing businesses each year, run a newspaper notice or both. Mailing renewal applications should be done well in advance of the due date to avoid concerns about when penalties for late payment are imposed. Some ordinances prescribe notice procedures. Failure to receive a notice does not excuse a business' liability for the tax or penalties.

Forms List

Forms are necessary for administration. The following list of forms and records are adequate in most cases.

- (a) A single page license application form used for all businesses. **Sample Form 1**
- (b) A code clearance form to confirm the proposed business and premises complies with applicable zoning, building, fire and health regulations. **Sample Form 2**

Part 4 – Administration

- (c) A supplementary information sheet for businesses requiring special attention or regulation (such as bars, massage parlors, bookstores, ambulance services, taxi cabs, contractors, fireworks, utilities, etc.).
- (d) A short license form in duplicate, serially numbered. The license numbers should be entered on the applications which should be filed alphabetically. Duplicate licenses should be filed numerically for accountability.
- (e) An inquiry form for checking law enforcement records for regulated business applicants.
Sample Form 3
- (f) A license fee assessment form to be sent by certified mail, receipt requested. **Sample Form 4**
- (g) Form letters for notice of audits, and denial or revocation of a license to be sent by certified mail, receipt requested.
- (h) A form letter for making inquiry to the SC Department of Revenue for verification of gross income.
- (i) Warrant forms approved by the attorney general for prosecution in court.
- (j) Sales tax return printout from SC Department of Revenue.
- (k) Current list of all known businesses operating in the taxing jurisdiction.
- (l) Annual delinquent list showing collection action taken.
- (m) Records of random and special audits.

Public Records Act

The South Carolina Public Records Act, SC Code Sec. 30-1-10, et seq., requires a public body to retain and preserve all records defined as “public records” in the Freedom of Information Act, SC Code Sec. 30-4-20(c). Records must be maintained according to regulations and the records management program of the SC Department of Archives and History. No records may be destroyed except in accordance with records schedules and procedures approved by the Department.

Regulations of the Department of Archives and History, R-12-603.1 and 12-603.2, contain general schedules applicable to business license records. Applications and records documenting authorization for a business to operate must be retained for three years (microfilm optional). After that time, the records may be destroyed.

**Sample Form 1
License Application**

Instructions For Filing License Application

1. Persons Required To File Application:

Every person engaged or intending to engage in any calling, business, occupation or profession listed in the rate classification index portion of the business license ordinance, in whole or in part, within the limits of the city/county is required to pay an annual license fee and obtain a business license fee as herein provided.

All applications must be filed on this standard application form.
Verify accuracy of information and make corrections in red ink where necessary.

2. Computation Of License Fees:

- A. Enter gross income for preceding calendar or fiscal year (12 months).
Gross income does not include taxes collected for a government agency.
- B. Deduct income on which a license tax was paid to another municipality or county.
- C. Enter balance of gross income subject to license tax.
- D. Use rate schedule provided to compute license fee due.
Apply declining schedule, if applicable.
- E. Add penalty for late payment, if applicable.
- F. For businesses operating less than a full year, divide gross income by the number of months in business then multiply by 12 for an annualized figure.
- G. Business licenses will not be issued until payment has been made in full.
- H. Make checks payable to the City/County of _____.

3. Penalties: Payments postmarked after **April 15** must include a penalty of **5 percent** per month.

All businesses are subject to audit and verification of gross receipts by examination of income tax returns and documents filed with state and federal government agencies.

4. Master License Number must be furnished when applicable.

	Mechanical	Electric	Gas	Exterminator
Card No.	_____	_____	_____	_____
Name	_____, Address _____			Expiration Date _____

5. Declining Rate Schedule for Gross income over \$1,000,000:

		Minimum \$ _____
1st	Million - Rate indicated in applicable rate class	\$ _____
2nd	Million - 90% of class rate per \$1,000	\$ _____
3rd	Million - 80%	\$ _____
4th	Million - 70%	\$ _____
over 4	Million - 60%	\$ _____
	Total License Fee: \$ _____	

Original application must be signed and returned with remittance.

**Sample Form 1
License Application**

City/County Of _____ Account No. _____ Start Date _____

Business Name _____ Address (location of business) _____

Tax Map _____ Block _____ Lot _____ Zoning District _____

Federal ID/SS Number _____ SC retail tax number _____

Type of business _____ SIC/NAICS Code _____ Rate Class _____

Application for: ___ New ___ Renewal ___ Going out of business [date _____]

Ownership: ___ Corporation ___ Partnership ___ Individual - No. Employees _____

Name of owner, partner or principal _____

Telephone no. Local _____ Home _____ Emergency _____

Fax No. _____ Email _____

Is hazardous waste involved in operation? ___ No ___ Yes (attach details)

Code Clearance: ___ Zoning ___ Inspection ___ Fire ___ Health ___ Law Enforcement

Computation of License Tax

Compute your tax according to the following schedule and make check payable to:

_____ Deliver By Due Date _____.

Gross income for preceding calendar or fiscal year \$ _____

Less income on which a license tax was paid to another city or county for operations outside city/county \$ _____

Balance of gross income subject to license tax \$ _____

Tax: Rate class minimum on first \$2,000 _____ plus

\$ _____ Per \$1,000 for income over \$2,000 _____

[See declining rate schedule for over \$1 million]

[-Office Use Only-]

Total License Tax \$ _____ [Payment Record:]

Penalty after due date ___ % Per month \$ _____ [Check No. _____]

Total License Tax and Penalty \$ _____ [Date Received _____]

Certification

I (We) do hereby certify that the above information and amount returned as gross income from my business is true and correct, and that I have made no deductions except income on which I have paid a business license tax to another city or county, for which I have proof of payment. I am familiar with the penalty provisions of the ordinance and the grounds for revocation of the license, including making false or fraudulent statements in this application. I certify that all business personal property taxes due and payable to the City/County have been paid, and that the above business name is the same as reported on documents filed with the state and federal governments. I understand that my business income tax returns and other documents may be inspected to verify gross income or other business data.

Signature _____ Title _____ Date _____

**Sample Form 2
Code Clearance Form**

This form is required for all businesses located in the city/county.

We have received your application for a business license. Before we can issue a license, you must get the necessary approvals for code compliance applicable to the location and nature of your business.

A check mark indicates which approvals are required. Upon completion of this clearance sheet you may mail or bring it with the required license fee to this office. You may not lawfully conduct business until this office issues a license.

Date: _____ Name of Business: _____
Name of Owner(s): _____
Street Address: _____
Telephone: _____ Zip Code: _____
Type of Business: _____
Type of Building: () Residence () Store () Office Building () Warehouse

[] Zoning Division: Compliance with Zoning Ordinance
() Approved
() Disapproved

Signature Date

[] Inspection Division: Compliance with Building Code
() Approved
() Disapproved

Signature Date

[] Fire Department: Compliance with Fire Code
() Approved
() Disapproved

Signature Date

[] Health Department: Compliance with Health Regulation
() Approved
() Disapproved

Signature Date

In the event of a change of location or ownership of a business, the same procedure shall be followed within ten days of change. If you have a problem, please call this office at _____ (Tel. No.).

Deliver or mail to: _____

**Sample Form 3
Law Enforcement Inquiry
For Business License Application**

To: Chief of Police/Sheriff

From: License Inspector

Date: _____

_____ of _____
(Name) (Home Address)

has applied for a business license at _____
(Address)

to operate a _____
(Nature of business)

Please provide any relevant information you have.

Business License Inspector

To: License Inspector

From: Chief of Police/Sheriff

I have no information regarding this license applicant.

I report the following:

Applicant has a criminal record.

The nature of the business is unlawful.

The location of the business has a past history of law enforcement problems.

Applicant has managed or operated other businesses in the city/county and has encountered difficulties with law enforcement as follows: _____

Other: _____

Additional Information: _____

Date: _____

Chief Of Police/Sheriff

Sample Form 4

STATE OF SOUTH CAROLINA)
 COUNTY OF)
 CITY OF)

**NOTICE OF ASSESSMENT
 OF BUSINESS LICENSE FEE**

Date Of _____
 Notice: _____ Business Code _____ SIC _____ NAICS _____

Name & Mailing Address of Business _____

S.S./Fed. ID No.: _____

Last License No.: _____ Year: _____

The city/county code provides that the license inspector shall make an assessment of business license tax when no license is obtained or when insufficient information has been furnished. The assessment is made upon the best information available to the License Inspector, which may include statistical sampling. **This assessment becomes final unless application for adjustment is made to the license division within five days after receipt of this notice.** An evidentiary hearing will be held upon application for adjustment and a notice of final assessment issued. Final assessment may be appealed to city/county council only upon payment in full of the assessment under protest within five days and the filing of written notice of appeal within ten days thereafter.

The business named above is hereby assessed the following business license tax and penalties for the license year indicated.

<u>Year</u>	<u>Gross Income</u>	<u>Tax Rate</u>	<u>License Tax</u>	<u>Penalties</u>
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
		Totals	_____	_____

Certified Mail
 Receipt Requested

[Penalties accrue at the rate of 5 percent per month until payment is made in full.]

Date: _____

 License Inspector

Study Questions for Part 4

1. What information in business license records is subject to disclosure to the public?
2. Who is ultimately responsible for compliance with the Freedom of Information Act?
3. Are taxpayers who do not receive notice exempt from a license tax?
4. Does the license official have authority to waive penalties? Does council?
5. May Federal I.D. or Social Security numbers be required on license applications?
6. What information may be required on a business license application?
7. May production of state licenses for an operation be required before issuing a business license?
8. Is it permissible to require information from other departments and agencies to determine whether the business can be lawfully operated? Give examples.
9. What are some useful forms for licensing administration?
10. How long must business license records be kept by the public body?

Part 5 – Enforcement

Income Verification

The city or county may levy a license tax based on total gross income without regard to other forms of taxation and without regard to where the income is earned when the business is based within the city or county. *Triplett v. City of Chester*, 209 SC 455, 40 S.E. 2d 684 (1946); *Eli Witt Co. v. City of West Columbia*, 309 SC 555, 425 S.E.2d 16 (1992). The exemption for income on which a license fee is paid to another municipality or county is considered appropriate to meet the test of reasonableness.

SC Code Sec. 4-9-30 authorizing counties to levy business license taxes provides for reduction of gross income reported to counties by income taxed in another county or municipality.

State Tax Records

The SC Department of Revenue is authorized by SC Code Sec. 12-4-310 to make available to a municipality or county sales tax records and records indicating gross receipts upon request of the appropriate official. The Department can only release income tax records if the gross receipts reported to the local government were less than gross receipts reported to the Department.

(a) Sales Tax List

The Department of Revenue is authorized to allow municipalities to check the gross receipts reported to them by various businesses for sales tax purposes. To obtain a listing, a city official must send a letter to the Department requesting such information. Once such a request is made, the Department will send the information every year. If there is a difference between the amount reported to the city and the amount reported to the Department, the local official should notify the Department of the discrepancy.

(b) State Income Tax Records

The Department of Revenue will make income tax records available if it is satisfied that the gross receipts reported to the municipality were less than the gross receipts reported to the Department. If information is desired concerning an individual, the Department requires the individual's name, address and social security number be sent to the Department along with the amount reported to the city. If information is desired concerning a partnership or a corporation, the Department requires the name and address of the partnership or corporation and the federal identification number. For administrative purposes, the Department of Revenue requests the business be identified as either a partnership or a corporation.

It is important to require a license applicant to use the same name and social security or federal I.D. number for the business license as used for state tax reporting. Inquiries should state the specific year(s) requested.

City and county officials will have to determine which businesses on the sales tax list are located within their boundaries. Some companies, instead of sending in individual reports for each place of business, report on a company-wide basis. This type of reporting is permitted by law. The Department will not be able to furnish gross receipts for a particular business location when this procedure is followed.

Requests for information should be addressed to:

Research and Public Affairs
SC Department of Revenue
PO Box 125
Columbia, SC 29214

Applicants should be advised that sales taxes, gasoline taxes and funds collected for others or held in escrow should not be included in gross income. If those funds are included in the gross income reported for income tax purposes, they should be excluded when computing the business license tax.

Federal Tax Returns

According to a 1987 opinion of an Internal Revenue Service disclosure officer, a local taxing authority may require disclosure of federal tax return information in connection with a business license application. There is no federal prohibition against such a requirement. However, a city or county using such a requirement should include in the license ordinance a prohibition against unauthorized disclosure of the information to protect the confidentiality of the tax information that is not public information under federal or state law.

Field Inspections

Field inspections can be a useful way to obtain first-hand information and to verify license records. Using a location report, street index, property tax records or city directory as a guide, an inspector can make a physical check of each street. State retail license information can be obtained and compared with business license information (such as name, address and identification number).

Every retail business, including rooming houses and motels (except where such facilities consist of less than six sleeping rooms contained in a single building) used as the place of abode of the owner or operator of such facilities, must have a state retail license.

A field inspection also can determine whether more than one operation is conducted at a location, which would require more than one license; whether a business has moved or has a new owner; whether unlawful activities or public nuisances are present; or if a business is unlicensed.

The public relations aspect of the field inspection should not be overlooked. It can provide an opportunity to answer questions, give information and let the business community know that the license ordinance is uniformly applied and enforced.

Assessment

When no license is obtained, insufficient information is voluntarily given or records are not available locally for audit, the license inspector may make an assessment if authorized by ordinance. A sample assessment form is provided in Part 4.

The assessment must be based on the best information available to the license inspector and may involve statistical sampling, annualizing known figures for short periods, calculations of expenses and projected profit, or information from the Department of Revenue or Department of Insurance.

The license ordinance should provide for an appeal method for the assessment. Unless appealed, the assessment should become final after a fixed period and be collected in the same manner as any other license fee. Ordinance provisions for assessment that should meet constitutional requirements for due process may be found in the model business license ordinance.

Audits

License ordinances usually include a statement pointing out that the municipality may audit the accounts of businesses or individuals when the accuracy of the gross amount reported is in doubt. There are no specific statutes giving this authority, but it is generally agreed that the power to impose a license tax would include the right to check on the accuracy of the accounts. If the audit indicates falsely reported information, the company can be charged the cost of the audit in addition to all other charges due. The audit may be performed by city or county personnel or accountants employed for the specific purpose.

Auditing may be done to check on accounts expected to be fraudulent or as a routine check on the accuracy of all license reports. Making routine, spot audits of all types of businesses or certain types of businesses would require more staff than most municipalities have. However, a systematic random audit procedure for a limited number of businesses each year could work well.

When an audit is deemed appropriate, the following steps are suggested.

1. Notify the owner of the business and set a time.
2. Give an advance list of records to be inspected, such as sales tax returns, income tax returns and/or original business records.
3. Do not disrupt normal business activities.
4. Be firm but polite.
5. Explain the purpose of the audit and procedures to be followed.
6. Refusal to allow an audit constitutes grounds for prosecution.

7. Inspect only those records necessary to obtain needed information. Income tax returns may be sufficient.

Civil Suits

Applicable Circumstances

It is unusual for a municipality to bring a civil action against a taxpayer to collect a tax. However, this approach may be useful where circumstances make prosecution difficult or undesirable. For instance, an out-of-state business not easily reached for prosecution could be served with a civil action with less trouble and expense than a warrant involves. A nonresident would not be subject to service of an ordinance summons outside the municipal or county limits.

There is also a technical difference between a civil action and prosecution. Prosecution does not necessarily result in collection of the tax. It can produce a fine for each day of violation, but most courts are reluctant to impose large fines in such cases. The civil action permits collection of all fees and penalties without the stigma and unpleasantness attendant to prosecution initiated by an arrest warrant or ordinance summons.

The city or county attorney should handle those cases in which civil action seems appropriate.

Statute of Limitation

The Supreme Court in *State v. Life Ins. Co. of Ga.*, 254 SC 286, 175 S.E.2d 203 (1970), held that in the absence of a specific statute of limitation, the ordinary period of limitation applicable to an action upon a liability created by statute, applies to an action for collection of taxes.

SC Code Sec. 15-3-530, as amended in 1988, reduced the applicable six-year limitation to three years. Therefore, recovery of delinquent license taxes by civil action is limited to the taxes due for three years preceding the date of filing the action.

Warrants

Violating the license ordinance is a misdemeanor within the jurisdiction of municipal or magistrate's court. Prosecution is by a criminal proceeding instituted by an arrest warrant in the form approved by the state attorney general pursuant to statute. The following suggestions may be helpful.

1. Have the city or county attorney approve the warrant language.
2. The warrant is issued by a municipal judge, ministerial recorder or magistrate.
3. The warrant must be issued upon the affidavit of a person who has actual knowledge of the facts indicating the violation. Each day of known violation constitutes a separate offense.

4. Evidence of the violation should be carefully preserved for trial (i.e., notes of inspections, photographs, witnesses, notices, correspondence).
5. Payment of the license fee after service of a warrant does not dismiss the case. The case may be dismissed only by the prosecuting officer (license inspector or attorney) or the court for good reason, (i.e., lack of sufficient evidence).
6. A warrant cannot be served upon a nonresident unless countersigned by a magistrate having jurisdiction where the defendant resides.
7. An owner should not be prosecuted for doing business without a license pending a determination or an appeal from a denial or revocation of a license.

Ordinance Summons

A municipal or county can adopt an ordinance authorizing a law enforcement or code enforcement officer to issue a uniform ordinance summons for violating an ordinance. *SC Code Sec. 56-7-80* An officer who has personal knowledge of the violation must issue the summons. It is served without arrest of the offender. A bond is not set or collected by the issuing officer – the summons must set forth the procedure to post bond. The summons gives jurisdiction over disposition of the offense to a magistrate or municipal judge. The ordinance summons may not be used for violations of local ordinances regulating operation of motor vehicles.

The ordinance summons can be a very useful enforcement tool. It is particularly attractive because no arrest is involved.

Penalties

Civil Penalties

State law does not specifically mention civil penalties for unpaid license taxes, but it is generally accepted that penalties may be imposed. *Attorney General Op. 1949-50, p. 173* The state Constitution and statutes do not prohibit imposing penalties. Municipalities and counties have powers implied in the general grant of powers under Home Rule. Imposing penalties is a legislative function that must be done by ordinance.

Delinquent penalties are not limited by statute, and municipal ordinances vary widely in this regard. A 1995 survey by the Municipal Association showed penalties ranging from 0-15 percent monthly. The most common penalty was 5 percent per month from the due date until paid, without a limit.

The civil penalties that accrue monthly on unpaid license taxes provide a strong incentive for prompt payment. These penalties also apply to amounts by which taxes are underpaid, even though prompt payment of the insufficient amount was made. These penalties are added to the taxes due and are collected in the same manner as the taxes.

Criminal Penalties

The maximum penalties a court can impose for a business license ordinance violation is a fine of \$500, imprisonment for 30 days or both for each separate offense (each day of violation).

Lien

A right to place a lien on property for collecting a business license tax and penalties is not specifically granted by statute. This provision is sometimes included on the generally accepted theory that the power to levy a tax carries with it the power to collect in the normal manner, but enforcement by a court is doubtful. The Municipal Association of SC Model Business License Ordinance does not provide for a lien.

Denial or Revocation of License

Powers of License Inspector

Most license ordinances contain some provision for denying or revoking a license for cause. Because issuing a business license is generally regarded as a ministerial act, the license inspector cannot exercise discretion as to whether a license should be issued. He must follow the standards established by ordinance. In other words, a license inspector must issue a license to anyone who complies with the ordinance and pays the proper fee for operating a lawful business.

Whether the power to deny or revoke for cause is delegated to the license inspector or reserved to council, it must be exercised for legally sufficient, specified reasons. The procedure used should afford due process of law. The Supreme Court upheld one such procedure in the case of *City of Columbia v. Abbott*, 269 SC 504, 238 S.E. 2d 177 (1977). The model ordinance prescribes essentially the same procedure.

Courts will scrutinize a licensing provision that is regulatory and impacts First Amendment rights to ensure constitutional safeguards are afforded. First Amendment issues are usually encountered in connection with adult or sexually oriented businesses. See *Harkins v. Greenville County*, 340 SC 606, 533 S.E.2d 886 (2000), which invalidated a regulatory permit provision in the zoning ordinance.

Continuation of Business

Regulatory provisions should be set forth clearly and carefully followed. It is not legally permissible to close a business' doors simply by revoking the business license. The business owner that has no license, regardless of the reason, is subject to prosecution for a separate offense for each day of operation without a license. A different legal route, such as an injunction or public nuisance laws, must be used to prohibit continued operation. See the discussion of regulation in Part 1.

Abatement of Nuisances

Many business license ordinances authorize revoking a license for a business operated as a public nuisance. The Home Rule Act gives municipal and county councils authority to abate public nuisances. *SC Code Sec. 5-7-30; Sec. 4-9-30* However, revoking a license may not result in abatement of the nuisance. Other remedies are available.

Case law requires care in declaring an activity a public nuisance. Solicitors are given powers regarding nuisances, and an attorney should be consulted when it appears appropriate to request use of those powers. See *SC Code Sec. 15-43-20*.

Whenever a nuisance is kept, maintained or exists, as defined in this chapter, the Attorney General, the solicitor of the judicial district in which such nuisance is kept or any citizen of the State may maintain an action in equity in the name of the State, upon the relation of such Attorney General, solicitor or citizen, to enjoin perpetually such nuisance, the person conducting or maintaining the nuisance and the owner or agent of the building or ground upon which the nuisance exists.

Operating a business constituting a common law nuisance is a criminal offense that is indictable by a grand jury. A leading case in this state on the subject is *State v. Turner*, 198 SC 487, 18 S.E.2d 372 (1942).

If revocation of the business license to deal with a nuisance is requested, pursuit of either an injunction under *SC Code Sec. 15-43-20* or prosecution for operation of a common law nuisance is a better solution. Business license revocation may be appropriate as a part of the process, but it is a poor tool for nuisance abatement.

Unlawful Business

A business that is unlawful under provisions of the Constitution or statutes is not entitled to operate. A license should be denied upon application or revoked upon discovery of unlawfulness.

A business use that is prohibited in the location of the proposed business by health, safety, land use or zoning regulations, building codes or fire prevention codes would be unlawful and may not be licensed for that location. A home occupation not permitted by zoning regulations is unlawful.

Mistake or Misrepresentation

A license issued by mistake or upon misrepresentation that is material may be revoked. The public cannot be bound by an administrative error. A licensee obtains no superior rights in a license to which he is not entitled, even if he has expended funds in reliance thereon.

Payment Under Protest

Act 60 of 1995 repealed *SC Code Sec. 12-47-230* under which business license taxes were required to be paid under protest prior to a legal action contesting the validity of the tax. The

Revenue Procedures Act adopted by Act 60, SC Code Sec. 12-60-10, et seq., does not apply to municipal or county business license taxes.

Taxpayers may now bring a declaratory judgment action testing the validity of a business license tax without first paying the tax. Without a time limitation on the filing of an action, it appears that the three-year statute of limitation in SC Code Sec. 15-3-530 may be applicable, and a suit to recover taxes for three years could be brought.

Act 60 does not affect the assessment procedure and requirement for payment of the tax prior to appeal contained in many ordinances using the NAICS system of classification. Taxpayers should be advised that the only way to avoid a penalty in the event the tax is upheld is to pay under protest.

State License Regulations

Contractors

A state license issued by the SC State Licensing Board for Contractors does not exempt a contractor from local licensing requirements, regardless of the contract price or cost of construction. A business license should not be issued to a contractor who does not have the required state license. This helps enforce state laws and protects the public from unqualified contractors to the extent possible locally.

The statutes dealing with licensing contractors are complicated and are frequently amended. Therefore, the general information given here should be checked for possible amendments and new regulations.

SC Code Sec. 40-11-30 provides that practice as a contractor for work costing more than \$5,000 for general contracting or mechanical contracting requires a license from the SC State Licensing Board for Contractors.

The State licenses contractors in five major classifications containing numerous subclassifications based on the nature of the work performed. *SC Code Sec. 40-11-410* Financial statements required of general and mechanical contractors pursuant to *SC Code Sec. 40-11-260* are classified according to the total job cost. The five categories for general contractors have limits of \$30,000; \$100,000; \$350,000; \$750,000 and unlimited. The five groups for mechanical contractors have limits of \$17,500; \$30,000; \$50,000; \$125,000 and unlimited.

SC Code Sec. 40-59-5 through 40-59-130 provide for state licensing of a “residential builder,” which includes anyone who constructs at a cost exceeding \$5,000 a residential building for sale. An owner performing work on his own residence is not covered by this section.

Questions of compliance with state licensing requirements and requests for current regulations should be directed to the SC State Licensing Board for Contractors.

Fireworks Sales

As noted in Part 3, the State preempted the regulation of the sale of fireworks in 2010. The business must pay an annual retail license fee for the State to issue a permit.

The applicant must still receive a retail sales permit, but the permit is treated as a regulatory fee in addition to a normal business license fee on gross income required by local ordinance. The applicant must hold a state sales tax license issued by the Department of Revenue prior to issuance of the municipal or county license. Applicants no longer have to wait 60 days before they are allowed to open.

Tort Claims

The South Carolina Tort Claims Act exempts governmental entities from tort liability for exercising licensing powers, including issuance, denial, suspension, renewal, or revocation of or failure or refusal to so act, except when the function is exercised in a grossly negligent manner (usually, a jury question). *SC Code Sec. 15-78-60* The refusal to perform a purely ministerial duty (one in which no discretion is authorized) could result in a finding of gross negligence for which the individual employee would be liable. When in doubt, consult the city or county attorney for advice before taking action.

Study Questions for Part 5

1. What state records are available for gross income verification?
2. What tax returns are subject to inspection to verify gross income?
3. What are the benefits of field inspections?
4. When can an assessment of license taxes be made?
5. What are some steps that can be taken to audit business records?
6. When would a civil suit be appropriate to collect a business license tax?
7. What is the statute of limitation for collection of delinquent license taxes?
8. What factors should be considered before seeking a warrant to prosecute for violation?
9. When is an ordinance summons appropriate?
10. What civil penalties may be levied for delinquent license taxes?
11. What are the maximum criminal penalties that may be imposed for violations?
12. When can a license official revoke a business license?
13. How can a business be closed by revocation of the business license?
14. What methods are available to deal with a business operated as nuisance?
15. What actions may be taken by a taxpayer to recover contested license taxes?

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