

Business License Handbook

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 South Carolina Business Licensing Officials Association's certification program. Municipal elected officials will also 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 that are 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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Unless the context clearly indicates otherwise, wherever a masculine pronoun is used in this publication, the same is intended, and shall be understood and interpreted to include all individuals, of any gender, or those who do not identify with any gender.

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The model business license ordinance and class schedule are available at www.masc.sc (keyword: business license tax).

Part 1 – Business License Concept

Definition of Business License

A business license tax is an excise tax levied on the privilege of doing business within a municipality or a county. The value of the privilege extended is measured by the business gross revenue or receipts of the licensee. 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).

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); *Town of Hilton Head v. Kigre, Inc.*, 408 SC 647, 760 S.E.2d 103 (2014); *Olds v. City of Goose Creek*, 424 SC 240, 818 S.E.2d 5 (2018). It is not a sales or income tax, although it is measured by gross income.

State Laws Authorizing Business License Taxes

The Home Rule Act for municipalities (*SC Code Sec. 5-7-30*) and for counties (*SC Code Sec. 4-9-30*) both authorize the levying of a business license tax. Act 176 of 2020 (now codified at *SC Code Secs. 6-1-400 to -420*) substantially revised and standardized the laws applicable to business licenses. This section summarizes the original Home Rule authorizations and the main provisions of Act 176 of 2020; the following sections of this handbook provide more detail on specific applications under Act 176 of 2020 and applicable case law.

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).

Municipal Home Rule Act

- 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 as referenced in state law. Gross income must be reduced by the amount of income upon which a business license for another county or municipality is computed and paid. Railroads, telecommunications, insurance companies, real estate businesses, transportation network companies, and certain other businesses are subject to special statutes. See **Part 2** for a discussion of determining 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. *SC Code 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. *SC Code Secs. 5-7-30 and 6-1-400(C)*.
- d) **Annexed business:** The business license tax for a business annexed into a municipality must be prorated to reflect the number of months during the year of annexation for which the business is within the municipality. *SC Code Sec. 5-21-60*.

County Home Rule Act

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 and rabbis; telephone, telegraph, gas, and electric utilities, and other utilities regulated by the Public Service Commission; insurance companies; entities exempt under another law; and professional sports teams. A business making loans secured by real estate is also exempt unless it has premises located in the unincorporated area of the county. Gross income must be reduced by the amount of income upon which a business license for another county or municipality is computed and paid.

Counties with a Business License Tax

- Beaufort County
- Charleston County
- Dorchester County
- Horry County
- Jasper County
- Marion County
- Orangeburg County
- Richland County
- Sumter County

Act 176 of 2020

Act 176 of 2020 standardized many aspects of business licensing. This Handbook describes the specifics in the more detailed sections below, but the main provisions of Act 176 of 2020 are these:

- Establishes a standard due date of April 30, with May 1 as the start of the license year; penalties may be imposed beginning May 1. *SC Code Sec. 6-1-400(B)(1)*.
- Requires that the business license tax be computed on gross income for the calendar year preceding the due date, for the business's 12-month fiscal year preceding the due date, or on a 12-month projected income based on the monthly average for a business in operation for less than one year. *SC Code Sec. 6-1-400(B)(2)*.
- Provides that refunds for overpayment must be requested by the taxpayer by June 1 and paid within 30 days of the request. *SC Code Sec. 6-1-400(B)(3)*.
- Includes a standard definition of gross income. *SC Code Sec. 6-1-400(E)*.
- Defines gross income on which non-resident businesses pay the tax. *SC Code Sec. 6-1-400(E)(1)(a)*.
- Clarifies that gross income for agents, such as real estate agents, receiving commissions that are split among multiple agents is only the income that each agent retains. *SC Code Sec. 6-1-400(E)(1)(b)*.
- Allows manufacturers to calculate the business license tax for municipal locations on the lesser of gross income collected from business done at the location, the amount of income allocated or apportioned to a location for purposes of state income taxes, or expenses of the location as a cost center. *SC Code Sec. 6-1-400(E)(1)(d)*.
- Requires that municipalities accept a standard business license application distributed by the SC Revenue and Fiscal Affairs Office. *SC Code Sec. 6-1-400(F)*.
- Provides for the creation and use of a standard class schedule. By December 31 of every odd year, jurisdictions must adopt the updated class schedule recommended by the Municipal Association of SC and certified by the SC Revenue and Fiscal Affairs Office. *SC Code Sec. 6-1-400(G)*.
- Requires that taxing jurisdictions allow reporting, calculation, and payment of business license taxes through a business license tax portal hosted and managed by the SC Revenue and Fiscal Affairs Office. *SC Code Sec. 6-1-400(J)*.
- Standardizes the appeals process for assessments in all jurisdictions. *SC Code Sec. 6-1-410*.
- Regulates the use of third parties that assist in the collection of business license taxes. *SC Code Sec. 6-1-420*.

Franchise Distinguished

Municipalities and counties may grant franchises and charge for the use of public streets. *SC Code Secs. 5-7-30 and 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 franchise holder 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, fiber optic 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 the franchise

agreement or state law specifically provides an exemption or limitation. *See, for example, SC Code Sec. 58-9-2220 (Municipal Charges to Telecommunications Providers).*

The franchise agreement is a contract and either party may enforce it as such. 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 SC Supreme Court ruled that the franchise power granted by *SC Code Sec. 5-7-30* applies only when the infrastructure within the right-of-way serves customers within the municipality. In this case, the relationship between the municipality's residents and an interstate telephone cable was "simply too attenuated to be characterized as a 'franchise.'" On the other hand, *SC Constitution Art. VIII, Sec. 15* provides that construction and operation of utility infrastructure in a public street requires the consent of the governing body of the municipality, which consent may require payment of a fee.

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. However, certain commercial activities involving vehicles, such as haulers and taxicabs, are subject to state regulation.

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

These 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 U.S. Code.

- Air express and passenger interstate transportation are exempt. *49 U.S.C. Secs. 40102 and 40116(b).*
- Alcoholic liquors are exempt. *SC Const. Art. 8-A, SC Code Sec. 12-33-20.*
- Banks and building loan companies are exempt. *SC Code Secs. 12-11-30 and 12-13-50.*
- Billiard tables must have state licenses and are subject to special rules. *SC Code Secs. 12-21-2730 through -2746.*
- Buses, both intrastate and interstate, are exempt. *SC Code Secs. 58-23-620 and 12-23-220.*
- Certain carriers (common motor carriers, taxicabs and intrastate passenger and baggage companies holding PSC certificates A and B) are exempt. Others may be licensed only where principal offices are located. *SC Code Secs. 58-23-620 and 12-23-220.*
- Coin-operated machines must have state licenses and are subject to special rules. *SC Code Secs. 12-21-2720 through -2728.*
- Credit unions — state and federal — are exempt. *SC Code Sec. 34-26-390; 12 U.S.C. Sec. 1768.*

- Fire insurance premiums are limited to 2%. *SC Code Sec. 38-7-160.*
- Lenders on loans secured by real estate are limited to location of office. *SC Code Secs. 4-9-30(12) and 5-7-30.*
- Marketing cooperative associations are exempt. *SC Code Sec. 33-47-120.*
- Mutual benevolent aid associations are exempt. *SC Code Sec. 38-35-60.*
- Railroads are limited to a maximum fee determined by population. *SC Code Sec. 12-23-210.*
- Telecommunications providers are subject to limited license rates. *SC Code Sec. 58-9-2220.*
- Wholesalers not having places of business within a municipality are exempt. *SC Code Secs. 5-7-30 and 6-1-400(C).*
- Workers' compensation insurance premiums are exempt. *SC Code Sec. 38-7-50.*
- Satellite television service programming transmitted by satellite directly to a subscriber's premises is exempt. *7 U.S.C. Sec. 152 (notes).* 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.

Act 176 of 2020 provides additional exemptions and limitations, which are listed separately below to highlight recent changes in law.

- "Charitable organizations" (a defined term in *SC Code Sec. 6-1-400(D)(1)*) are exempt from the business license tax, except that charitable organizations that report income from for-profit activities, or unrelated business income, are subject to a business license tax on the part of their gross income from such for-profit activities or unrelated business income. *SC Code Sec. 6-1-400(D)(2).*
- Wholesalers are exempt from business license taxes unless they maintain warehouses or distribution establishments within the taxing jurisdiction. *SC Code Sec. 6-1-400(C).* This exemption, although included in Act 176, seems repetitive of the exemption in *SC Code Sec. 5-7-30* listed above.
- For taxing jurisdictions in which the person or business does not have a domicile, business subject to the license tax within that taxing jurisdiction includes only gross income received within such taxing jurisdiction. *SC Code Sec. 6-1-400(E)(1)(a).*
- For agents, such as real estate agents, who divide commissions with other brokers or agents, only the amount retained by the broker or agent is considered gross income. *SC Code Sec. 6-1-400(E)(1)(b).*
- Manufacturers may report as gross income the lesser of gross income collected from business done at the location, the amount of income allocated and apportioned to that location for purposes of state income taxes, or the amount of expenses attributable to the location as a cost center of the business. *SC Code Sec. 6-1-400(E)(1)(d).*
- Gross income does not include taxes collected for a governmental entity, escrow funds, or funds that are the property of a third party. *SC Code Sec. 6-1-400(E)(2).*

Regulation

Although local governments use business licensing primarily as a revenue source, they may also use licensing to regulate businesses. The business license ordinance may impose health requirements, bonding requirements, regulation of operating hours or other conditions of licensing. 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. The South Carolina Supreme Court upheld revocation of the business license of a newsstand dealer for selling obscene literature in *City of Greenville v. Bryant*, 257 SC 448, 186 S.E.2d 236 (1972). The Greenville Code of Ordinances and the SC Code of Laws both prohibited 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. Later, the South Carolina Supreme Court again upheld revocation of a license for a bookstore selling obscene material declared by city council to be a nuisance. See *City of Columbia v. Abbott*, 269 SC 504, 238 S.E.2d 177 (1977).

A municipality may deny or revoke a business license only for a legally sufficient reason, preferably according to objective and reasonable standards disclosed in the ordinance. Denial or revocation of a license does not allow summary closing of the business by enforcement officers. It does, however, subject the operator to prosecution for violating the license ordinance. If a municipality seeks immediate closure of a business, it should do so through criminal prosecution or action for injunction.

Reasonableness

Neither federal nor state laws provide any specific guidelines to determine whether a license tax is reasonable. However, the council is clearly required to enact reasonable ordinances. Act 176, although requiring standardization of the class schedule, does not directly regulate business license tax rates.

Discretion of Council

In *U.S. Fidelity and Guaranty Co. v. City of Newberry*, 253 SC 197, 169 S.E.2d 599 (1969), the court held that although business license taxes must be reasonable, the rates charged to businesses in different classes may be different. The court explained:

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.

Later, *U.S. Fidelity and Guaranty Co. v. City of Spartanburg*, 263 SC 169, 209 S.E.2d 36 (1974), dealt more definitively with reasonableness than prior cases and is discussed later in connection with insurance companies.

Comparison of Rates

The mere fact that the rate charged a business in one classification is several times that of businesses in other classifications does not entitle a business to relief. The court in the *Newberry* case, cited above, explained:

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.

On the other hand, in *Southern Bell Tel. & Tel. Co. v. City of Aiken*, 279 SC 269, 306 S.E.2d 220 (1983), the court found unreasonable a rate structure that taxed the licensee in question at 24 times the average rate imposed upon other businesses. Likewise, in *U.S. Fidelity and Guaranty Co. v. City of Newberry*, cited above, the court found “grossly disproportionate” a rate of taxation where certain insurers paid taxes at a rate twenty times that paid by other enterprises.

Loss of Profits

A business license tax is not considered unreasonable merely because a given business may be losing money. The council cannot set aside the business license tax simply because a business claims a loss. The fact that expenses exceeded income in a yearly tax period does not provide an exemption. The court in the *Newberry* case also stated:

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.

A business license tax is an excise tax levied on the privilege of doing business. As such, the business license tax does not depend on profits, net income, or taxable income for state and federal income tax purposes. Instead, the business license tax applies to the total gross income from a business’s activity, without deductions for expenses.

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. May municipalities use the business license ordinance as a 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?

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, as well as 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 of gross income 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 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 often arises with respect to nonresidents. Does occasional activity by a nonresident within a city or county constitute “doing business” within the meaning of the law? If so, to what gross income does the business license tax apply? 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 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. *SC Code Secs. 5-7-30 and 6-1-400(C)*. For counties, *SC Code Sec. 4-9-30(12)* provides a similar provision applicable to real estate lenders. Motor carriers and taxicab owners with specified Public Service Commission certificates are taxable for their certificated business activities only where principal offices are located. *SC Code Secs. 58-23-620 and 12-23-220*.

Nonresident Business

Act 176 of 2020 specifically addresses nonresident businesses in *SC Code Sec. 6-1-400(E)(1)(a)*:

- If the licensee has a domicile in the taxing jurisdiction, gross income includes all gross receipts or gross revenue received or accrued by the licensee. The licensee may deduct income earned outside of the taxing jurisdiction if the licensee fully reports such income and pays a license fee thereon to some other taxing jurisdiction.

- If the licensee does not have a domicile in the taxing jurisdiction, gross income includes only gross receipts or gross revenue received or accrued within such taxing jurisdiction.

The Municipal Association’s model business license ordinance provides that a licensee may have more than one domicile for purposes of this section.

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.*, 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 chairs and other furniture in wholesale quantities. 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 transaction. 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.*

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), a company with a principal place of business in the City of Sumter had been delivering wholesale groceries to Bishopville once or twice a week for more than two years. The court held that the company was doing business in Bishopville and could be required to obtain a business license. Although the court in *Crosswell & Co.* concluded that a municipality could apply the business license tax to wholesale deliveries, the current versions of *SC Code Secs. 5-7-30 and 6-1-400(C)* both provide that wholesalers are exempt from business license taxation in municipalities in which they do not maintain warehouses or distribution establishments. The *Crosswell & Co.* principle now therefore applies only to retail deliveries by nonresidents.

Collection of Money/Mail Order

A municipality or county can require that a person who has a place of business as a collector in the municipality or county obtain a business license. 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 has historically been considered insufficient to provide a nexus for a business license tax. See *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992). The federal case of *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), has eased the requirement of physical presence of internet sellers within a state for the imposition of state sales tax. However, *Wayfair* has not yet been extended to municipal business license tax.

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 the nonresident. 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. As explained by the court 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 has opined 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 tax in another municipality. However, the court stated in *Pee Dee Chair* that the performance of even multiple isolated acts does not necessarily constitute doing business within the meaning of the license tax law unless an intent to engage in a business is clearly apparent. The court observed that, although under some circumstances a single act may be enough, generally 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” subject to business licensing, 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? In considering this question, remember that business licensing 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 (for example, building codes) by the city or county?
- Is the business listed in local directories as serving the city or county?
- Does it advertise regularly in the city or county?
- 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.

No General Exemption for Businesses Subject to State Licensing

Contractors, subcontractors, bail bondsmen, elevator inspectors, and others have claimed an exemption from business license taxes on income from activities requiring a state license. The courts have uniformly held that state licensing itself, absent a specific statutory exemption from local business licensing, does not preempt the local business license tax. For example, the state’s contractor licensing statutes do not preempt local business license taxes on contractors. Likewise, an elevator inspector subject to qualification licensing requirements under *SC Code Secs. 41-16-10 et seq.* is subject to a local business license tax. Bail bondsmen are not exempt merely because state law provides regulatory licensing requirements in *SC Code Secs. 38-53-10 et seq.*, see *Wrenn Bail Bond Service, Inc. v. City of Hanahan*, 335 SC 26, 515 S.E.2d 521 (1999).

The question is ultimately one of preemption; does the state licensing scheme preempt local business licensing? The SC Supreme Court in the *Hanahan* case held “in order to preempt an entire field, a state law must make 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 tax 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 learn adequate 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.

Method of Classification; Standardized Business License Class Schedule

Before Act 176, any method of classification with a rational basis that was reasonably related to the purpose of licensing could be used. The Municipal Association's original model business license ordinance used the Standard Industrial Classification, or SIC, 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, or NAICS, Manual replaced the SIC Manual for federal statistical purposes.

Act 176 requires that all taxing jurisdictions use a standardized business license class schedule recommended by the Municipal Association and adopted by the Director of the SC Revenue and Fiscal Affairs Office. *SC Code Sec. 6-1-400(G)(1)*. The Municipal Association must update the standardized class schedule every even-numbered year, using the latest available NAICS Manual. Each taxing jurisdiction must adopt the updated class schedule, as approved by the SC Revenue and Fiscal Affairs Office, no later than December 31 of each odd year.

Taxing jurisdictions may, however, provide for additional reasonable subclassifications, described by NAICS codes, based upon particularized considerations as needed for economic stimulus or disproportionate demands by specific business subclassifications on the taxing jurisdiction. To provide for additional subclassifications, the taxing jurisdiction must make a finding of a rational basis as explained in an ordinance approved by a positive majority of council.

The Municipal Association's model ordinance reflects the changes made by Act 176 and includes the current approved standardized class schedule.

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 specific 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. The equal protection clauses of the state and federal constitutions require that the classifications not be arbitrary and bear a reasonable relation to the legislative purpose sought to be achieved. Officials must treat alike all members of each class under similar circumstances. The tax must be fair and nondiscriminatory. *U.S. Fidelity & Guaranty Co. v. Newberry*, 257 SC 433, 186 S.E.2d 239 (1972).

The legislative purpose of the license tax is primarily to raise revenue for operation of the city or county. In general, then, uniformity between classes is not required. *Carter v. Linder*, 303 SC 119, 399 S.E.2d 423 (1991). On the other hand, as noted above, business licensing may serve a secondary purpose of regulating certain businesses. In such cases, the taxing jurisdiction should carefully consider the reasonableness and rationality of the distinction between businesses that are subject to regulation through business licensing and those that are not.

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 of Abbeville*, 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: *U.S. Fidelity & Guaranty Co. v. Newberry*, 257 SC 433, 186 S.E.2d 239 (1972); *U.S. 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 establish higher rates for nonresident than for resident licensees, usually double the resident rates. The state Supreme Court has upheld a differential rate classification between residents and nonresidents, if the circumstances and conditions are different and if the imposition of a higher license on nonresidents is 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

As noted below, the business license tax applies to gross income. Nonetheless, since 1975 many municipalities have adopted ordinances that determine the applicable rate by considering ability to pay based on national profitability statistics. The Georgia Supreme Court upheld a similar system in *Pharr Road Investment Co. v. City of Atlanta*, 164 S.E.2d 803 (1968), and was ruled constitutional in principle by the South Carolina Supreme Court in *Southern Bell Tel. & Tel. Co. v. City of Aiken*, 279 SC 269, 306 S.E.2d 220 (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 NAICS classification schedule discussed above is based on ability to pay as determined by an index of ability to make a profit calculated from nationwide IRS statistics. Given that Act 176 requires that taxing jurisdictions adopt a standardized business license class schedule based on the NAICS manual, this method is clearly legal in South Carolina.

Gross Income

Basis for Tax

The general statutory authorization to levy 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 or adjust the business license tax. As noted in **Part 1**, certain businesses are subject to state statutory provisions that limit or specify the rate of business license taxes.

Gross Income Defined

Before Act 176, local ordinances could define gross income for business license purposes, subject to some isolated limitations. This situation resulted in some local variation. Act 176 standardizes the definition of gross income as “gross receipts or gross revenue of a business, received or accrued, for one calendar or fiscal year collected or to be collected from business done within a taxing jurisdiction.” *SC Code Sec. 6-1-400(E)(1)(a)*. The amount should conform to the gross receipts or sales figure reported on the business’ federal income tax return. In addition, Act 176 provides that gross income may be verified by inspection of returns and reports filed with the Internal Revenue Service, the SC Department of Revenue, the SC Department of Insurance or other governmental agencies. *SC Code Sec. 6-1-400(E)(3)*.

Act 176 contains special rules for determining gross income of agents, insurance companies, manufacturers, and telecommunication companies, *see SC Code Sec. 6-1-400(E)(1)(b) – (e)*, as follows:

- Gross income for agents means gross commissions received or retained by the licensee; for divided commissions, only the amount retained by each broker or agent is considered gross income.
- Gross income for insurance companies means gross premiums written.
- Gross income for manufacturers with a location in the taxing jurisdiction is the lesser of gross income collected from business done at the location, the amount of income allocated and apportioned to that location by the business for purposes of the business's state income tax return, or the amount of expenses attributable to the location as a cost center of the business.
- Gross income for telecommunications providers is determined as set forth in Article 20, Chapter 9, Title 58.

In addition, Act 176 excludes from gross income taxes collected for a governmental entity, escrow funds or funds that are the property of a third party.

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 U.S. 274 (1977), which allows taxation of interstate commerce subject to four tests, most ordinances have been amended to delete the interstate commerce exemption. Taxation of interstate commerce is discussed in more detail in **Part 3**. The Municipal Association's Model Ordinance explicitly does not exempt interstate commerce.

All taxing jurisdictions, both counties and municipalities, must exempt income received from activities in another county or a municipality to which a license tax is paid. See *SC Code Sec. 6-1-400(E)(1)(a)*; see also *SC Code Sec. 4-9-30(12) (counties) and SC Code Sec. 5-7-30 (municipalities)*. This treatment was approved in *Eli Witt Co. v. City of West Columbia*, 309 SC 555, 425 S.E.2d 16 (1992).

The Municipal Association has historically advised that third-party taxes, such as gasoline and sales taxes collected by businesses, are not income and should not be included in reported gross income. This concept was included in Act 176 and applies to taxes collected for a governmental entity, escrow funds, or funds that are the property of a third party. *SC Code Sec. 6-1-400(E)(2)*. The same is true for the portions of fees and commissions divided with others. *SC Code Sec. 6-1-400(E)(1)(b)*. Such funds, if included in gross income, would result in a higher license tax because deductions from gross income are not permitted for business license taxes as they are for income taxes. To address this issue, only income to the business should be reported in gross income 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 therefore not exempted from gross income of the retailer.

Many license ordinances provide for using federal and state income tax returns to verify or cross reference gross receipts, sales, and other income information. Act 176 specifically allows such verification. *SC Code Sec. 6-1-400(E)(3)*. However, these income tax returns may show a “gross income” line entry different from the figure for “gross receipts” that is used for business license tax purposes. Gross income for business license purposes, unlike gross income for income tax purposes, does not provide for deductions for cost of goods sold or other business expenses. These are deductions for income tax purposes used to arrive at a taxable income figure that is calculated under rules that are quite different from business license tax rules.

Gross income for business license tax purposes, as also illustrated above, does not include funds collected but not retained by the business as income. These include monies that are collected by the business but are required to be paid or passed through to others, such as taxes or commissions. Gross income also does not include refunds (funds returned to customers) during the tax year.

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 should be considered 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 taxes may cause a higher contract price, this does not amount to a tax on another governmental unit.

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 Secs. 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. *United States v. County of Fresno*, 429 U.S. 452 (1977); *United States v. New Mexico*, 455 U.S. 720 (1982); and *Washington v. United States*, 460 U.S. 536 (1983).

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 all 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 tax on total income 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 tax 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 he owned within 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 income 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*, cited above. 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 Taxes

Flat Taxes

Because flat or fixed taxes are not based on gross income, they do not comply with the state law authorization and would be discriminatory. Flat taxes are different, however, from a flat rate applicable to two or more classes. There is nothing in state law that explicitly requires that rates be graduated based on classification; although graduation of rates by class is by far the most common practice, some taxing jurisdictions apply the same rates to more than one class.

It is generally accepted practice to charge a minimum base rate sufficient to cover administrative costs. A base rate that includes the tax for the first tier of gross income (for example, the first \$2,000) is customary, but some taxing jurisdictions apply a base rate that does not include an allowance for any gross income. Municipalities that do not provide an allowance for gross income in the base rate should consult with their municipal attorney to confirm that the base rate is fairly calculated and applied.

New Owner

When a new owner takes over an existing business, the license tax 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 or annexed business is considered appropriate to meet the test of reasonableness. With annexation, *SC Code Sec. 5-21-60* provides that a business license shall be prorated for the year when the business is annexed to the municipality. Act 176 provides that gross income for a business in operation for less than one year must be on a 12-month projected income based on the monthly average. *SC Code Sec. 6-1-400(B)(2)*. The provision suggests a two-part analysis for a new business. First, the taxing jurisdiction would determine the projected annual gross income for the business based on gross income to date. Then, that amount would be prorated to account for the number of months covered by the license.

A reasonable method of proration for a new or annexed 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. For 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. For example:

Actual income	\$40,000
Months in business	<u>÷ 4</u>
Average monthly gross	\$10,000
\$10,000 x 12 = an estimated gross of \$120,000 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. Councils should address this in their ordinances. 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. The descriptions of business operations 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, as well as the sale of tires, batteries, parts, and accessories. One license would cover all included operations.

Calculation of Taxes

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

The NAICS-based standardized business license class schedule, required by Act 176, 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 business with a NAICS code of 44511 is in Rate Class 1. Assume that Class 1 Rates are:

Rate Class	Base Rate for Income of 0 – \$2,000	Rate Per Thousand or Fraction Thereof for All Amounts Over \$2000
1	\$25	\$1.00

Also assume that declining rates apply in all classes for gross income in excess of \$1,000,000, as shown in this chart:

Gross Income	Percent of Class Rate for Each Additional \$1,000	Amount of Class Rate for Each Additional \$1,000
0 – \$1 million	100%	\$1.00
\$1 – 2 million	90%	\$0.90
\$2 – 3 million	80%	\$0.80
\$3 – 4 million	70%	\$0.70
Over \$4 million	60%	\$0.60

Assume a business inside city limits has \$4,575,020 in gross income for the prior year. License taxes are calculated based on a rate per thousand. All portions per thousand are rounded to the nearest thousand. The license tax would be calculated as follows:

The first million always includes the base.

On first \$2,000, base rate applies:	\$ 25.00
On next \$998,000 at 100% of \$1.00 per thousand:	998 x \$1.00 = \$998.00
On next \$1,000,000, at 90% of \$1.00 per thousand:	1,000 x \$0.90 = \$900.00
On next \$1,000,000 at 80% of \$1.00 per thousand:	1,000 x \$0.80 = \$800.00
On next \$1,000,000 at 70% of \$1.00 per thousand:	1,000 x \$0.70 = \$700.00
On next \$576,000 at 60% of \$1.00 per thousand:	576 x \$0.60 = \$345.60
 Gross income: \$4,575,020	 License tax: \$3,768.60

Now assume this business is located outside city limits but did \$1,575,020 in gross income inside your city the prior year. License taxes are calculated based on a rate per thousand. All portions per thousand are rounded to the nearest thousand. Since the business is located outside your city, the base and rate per thousand are doubled. The license tax would be calculated as follows:

The first million always includes the base.

On first \$2,000, the base rate applies:	\$50.00
On next \$998,000 at 100% of \$2.00 per thousand:	998 x \$2.00 = \$1,996.00
On next \$576,000, at 90% of \$2.00 per thousand:	576 x \$1.80 = \$1,036.80
 Gross income: \$1,575,020	 License tax: \$3,082.80

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 into 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 the general definition of gross income for business license tax purposes? Are there certain businesses for which calculation of gross income is subject to special rules?
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 taxes 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 below, 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 activities is conducted across a state line, are exempt from licensing by federal statute, *see 49 U.S.C. Secs. 40116(b) and 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 *SC Code 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% alcohol by weight. *SC Code Sec. 61-4-10*. Some preemptions of business license taxes apply for beer and wine sales, as described in Article 7, Chapter 21 of Title 12. *SC Code Section 12-21-1085*.

Amusement Machines — See Coin-Operated Machines

Auctioneers

SC Code Sec. 40-6-320 provides that municipalities may not enact ordinances to license auctioneers based on qualifications. The state 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. *SC Code Sec. 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. The Municipal Association's model ordinance allows inclusion of such dealers in Class 9, optional subclasses; previous model ordinances included automotive dealers in Class 8.

Bail Bondsmen

Bail bondsmen are not exempt from business license taxes under the regulatory license requirements of *SC Code Secs. 38-53-10 et seq.* See *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, *SC Code Secs. 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), (7), (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 Office of Regulatory Staff A and B certificates. *SC Code Sec. 58-23-620*. Holders of an E or F certificate or Certificate of Compliance, as well as a common or contract motor carrier of property, may be taxed for their certificated business activity 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, i.e. 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.

Internet-enabled transportation networks such as Uber — which provide prearranged rides and their network drivers — are not subject to a business license tax. *SC Code Sec. 58-23-1710(B)*. Transportation network companies and TNC drivers are subject to regulation by the state ORS under the Transportation Network Company Act (*SC Code Secs. 58-23-1610 et seq.*).

Charitable and Religious Activities

Charitable Activities

State law regulates charitable solicitations. It requires individuals to 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 Secs. 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 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. Act 176, however, provides specific rules applicable to charitable organizations. *SC Code Sec. 6-1-400(D)*. The Act defines a “charitable organization” as an organization that is determined by the IRS to be exempt from federal income taxes under 26 U.S.C. Section 501 (c)(3), (4), (6), (7), (8), (10) or (19). The Act 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 IRS, is a business subject to a business license tax on the part of its gross income from such for-profit activities or unrelated business income. Finally, the Act provides that a charitable organization is considered a business subject to a business license tax on its total gross income if (a) any net proceeds of operation, after necessary expenses of operation, inure to the benefit of any individual or any entity that is not itself a charitable organization as defined in the Act; or (b) any net proceeds of operation, after necessary expenses of operation, are used for a purpose other than a charitable purpose as defined in the Act. Excess benefits or compensation to a sponsor, organizer, officer, director, trustee, or person with ultimate control of a charitable organization is not be deemed a necessary expense of operation.

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 licensing, as well as municipal and county licensing, of amusement machines and billiard tables are 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. *See SC Code Secs. 12-21-2710 and 12-21-2720*, as construed by the state Supreme Court in *Joytime Distributors and Amusement Co., Inc. v. 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 tax 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 tax, 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, jukeboxes, amusements, video games without a free-play feature, crane-type machines, and nonpayout pinball tables operated by any coin or thing of value.

SC Code Sec. 12-21-2746 establishes the maximum municipal business license of \$12.50 on the business operating machines at one location, limiting all licenses by municipalities and counties to one-half of the amount charged by the state before March 28, 1956, which was \$25. *Crengo 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:

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

- **The operator** of nonpayout machines licensed under *SC Code Sec. 12-21-2720(A)(3)* pays \$180 per machine plus \$12.50 business license tax for operation of all machines at one location.
- **The distributor** who does not own and operate the machines nor is licensed as an operator under *SC Code Sec. 12-21-2728*, but sells or leases the machines, may be subject to a business license tax based on gross income.

Vending Machines

Vending machines not listed — such as cigarettes, candy or 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 skee-ball table (*SC Code Sec. 12-21-2730*) and a license for the privilege of engaging in the business (*SC Code 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 tax 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 tax on the gross income from the whole business in addition to the tax 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. The Attorney General has opined that local business licensing of contractors “constitutes a revenue, rather than a regulatory, measure,” *SC Op. Attorney General December 2, 1961*, and therefore does not conflict with state licensing of contractors. As such, contractors cannot claim that the license tax charged by the state exempts them from municipal business license taxes. Each municipality in which the contractor takes a contract may collect a license tax.

Duration of License

Act 176 provides that business licenses for construction contracts may, at the option of the contractor, be issued on a per project basis. *SC Code Sec. 6-1-400(B)(2)*. Although ordinary business licenses must be issued for a 12-month period beginning May 1 and ending April 30, business

licenses for construction contracts issued on a per-project basis expire at the completion of the construction project. *SC Code Sec. 6-1-400(B)(1)*. Section 3 of the Municipal Association’s model ordinance provides that business licenses issued on a per project basis may require that the licensee file, by each April 30 during the continuation of the construction project, a statement of compliance, including but not limited to a revised estimate of the value of the contract.

Outside Income Included

Contractors may object to the license being based on total gross income, especially on funds not earned within the municipality or county. However, the state Supreme Court confirmed the right to base the license tax on total income 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 the contractor computes the 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 license tax is levied upon the privilege of doing business, and contractors and subcontractors are engaging in different businesses. 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, the subcontractor should be required to produce payroll records or W-2 withholding records to substantiate employee status. Otherwise, the subcontractor 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 taxes may cause a higher contract price does not affect this principle. 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 Secs. 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 United States v. County of Fresno, 429 U.S. 452 (1977); United States v. New Mexico, 455 U.S. 720 (1982); and Washington v. United States, 460 U.S. 536 (1983).*

Credit Unions

Federal and state credit unions are exempt from local business license taxes. *12 U.S.C. Sec. 1768; SC Code Sec. 34-26-390.*

Door-to-Door Sales — See Peddlers and Solicitors

Fortunetelling

Fortunetelling, palmistry, phrenology, clairvoyance or prediction of future events by cards or other means are illegal if used as an inducement to promote some other business. *SC Code Sec. 16-17-690.*

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 who make 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, because the standardized business license class schedule may classify retail fuel oil sales and wholesale deliveries into different rate classes.

Health Maintenance Organizations

NAICS Code 621491 specifically includes 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 SC 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 (for example, 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 constitute “doing business.” Taxing jurisdictions, however, should be sure to identify a rational basis for the classification.

A home occupation may not be issued a business license unless the occupation is classified as a permitted or allowed use under the local zoning ordinance. 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

The Municipal Association’s Local Revenue Services program collects participants’ current and delinquent license taxes on gross premiums from domestic and foreign insurance companies. The Municipal Association also serves as the municipal agent to receive and distribute to South Carolina municipalities the municipal portion of the brokers’ premium tax for nonadmitted insurers collected by the SC Department of Insurance. As such, taxing jurisdictions that participate in the Local Revenue Services program do not directly administer or collect the business license tax on insurers.

On the other hand, taxing jurisdictions may administer and collect business license taxes on agents for insurers licensed to do business in the state, if the local ordinance so provides. The Municipal Association’s model ordinance provides, in the text for Class 8.4 in Appendix A, that independent agents, brokers, and their employees are subject to a business license tax based on their natural class.

Although Local Revenues Services administers and collects the business license tax on insurers, for information, this handbook includes the rules followed by Local Revenue Services with respect to insurers. Insurance companies operating within a municipality are subject to business license taxes measured by the gross premiums collected, except that bail bond insurers may deduct amounts

retained by a licensed bail bondsman for authorized commissions, fees and expenses. *SC Code Sec. 38-7-20(A)(2)(b)*. 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 to the Department of Insurance does not exempt insurance companies from municipal taxes. Nothing in the insurance laws prevents municipal business license taxes. *SC Code Sec. 38-7-160*.

- 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 U.S. 143 (1915), and in *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 U.S. 408 (1946), held that Congress expressly left to the states the regulation and taxation of insurance companies by the McCarran-Ferguson Act, *15 U.S.C. Sec. 1011*. Insurers in interstate commerce may be taxed. A 1991 unreported decision in the federal District Court for South Carolina 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 Local Revenue Services 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 are 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%. Cities with a population of 50,000 or more cannot exceed 5%.

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, provided that 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 taxes 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 tax unreasonable or arbitrary since this is largely within the discretion of City Council.

- e) **Reasonableness of rates:** In *U.S. Fidelity and Guaranty Co. v. City of Spartanburg*, 263 SC 169, 209 S.E.2d 36 (1974), U.S. Fidelity and Guaranty paid 2% of gross income 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: first, that 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 second, such insurers pay little, if any, *ad valorem* property tax, so they 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

For business licensing purposes, municipalities must distinguish between licensing of insurers and licensing independent agents who sell or broker insurance products. As noted above, business licensing of insurance companies is regulated by state law, and the business license tax on insurance companies is administered and collected by the Municipal Association's Local Revenue Services program. The business licensing of insurance companies extends to direct employees of such companies who sell insurance; these employees are exempt from additional business license taxes. *Hay v. Leonard*, 212 SC 81, 46 S.E.2d 653 (1948). Payment of license taxes by insurance companies, however, does not exempt independent agents or brokers from license taxes.

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 many companies does not determine whether he is subject to the tax. The test is whether the agent 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 the agent's or broker's gross income for business license purposes.

In short, municipalities that participate in the Local Revenue Services program should directly license and charge only independent insurance agents and brokers. Local Revenue Services will license and charge insurance companies and their employees, and remit the proceeds to the municipal participants on a periodic basis.

Independent insurance agents sometimes argue that they should not pay a business license tax because the insurance 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 taxes 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. Although 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 Nonadmitted and Reinsurance Reform Act of 2010, ratified Act 283 on June 28, 2012, amending *SC Code Secs. 38-7-16 and 38-45-10 through 38-45-195*. The Act establishes a blended broker's premium tax rate of 6%, comprising a 4% state broker's premium tax and a 2% municipal broker's premium tax. A municipality may not impose on brokers of nonadmitted insurance in South Carolina an additional license tax based upon a percentage of premiums, as was the practice prior to the passage of these federal and state laws.

Pursuant to *SC Code Secs. 38-45-10 and 38-45-60*, the Municipal Association of SC may, by agreement with a municipality, be designated the municipal agent for purposes of administration of the municipal broker's premium tax. The Municipal Association's Local Revenue Services program provides this service to its participants. The SC 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, Local Revenue Services receives the entire amount from the SC Department of Insurance and then distributes the funds to the municipalities.

Interstate Commerce

Interstate Commerce Defined

"Interstate commerce" is the trading in commodities between individuals of different states. It is not a technical or legal conception, but is a practical matter to be determined based on a broad consideration of the substance of the whole transaction. It means not merely interstate movement, but instead 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 to be in 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 includes all component parts of the transaction (i.e., taking orders, shipping, unloading, storage, delivery to purchaser, or collection of sales price).

Taxable Interstate Commerce

Before 1977, municipalities could not levy a business license tax 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 U.S. 602 (1951). However, the Supreme Court overruled the

Spector case in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 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 or 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 or local government.

Previously, many business license ordinances 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). However, most ordinances have been amended to delete the interstate commerce exemption

Therefore, the first inquiry is whether the license ordinance contains an exemption for interstate commerce. The Municipal Association’s model ordinance explicitly does not exempt interstate commerce. If the local ordinance nonetheless continues to contain an exemption for interstate commerce, no tax is levied. Even absent an exemption for interstate commerce, however, a municipality may levy a business license tax only if all four tests in the *Complete Auto Transit* case are met. In any 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 U.S. 408

(1946); *City of Charleston v. Government Employees Ins. Co.*, 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 itself generally produces no gross income. 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.

Act 176 contains special rules for calculation of a manufacturer's gross income, discussed further above in **Part 2, Gross Income**.

- 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 rate charge 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 sale of securities is a subject of interstate commerce. However, some security transactions may be intrastate, and in such cases 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 merely 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:** Warehouse employees 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; SC Code 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 under the current NAICS Manual. 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 *Town of Green River v. Fuller Brush Co.*, 65 F.2d 112 (10 Cir. 1933)) that prohibit uninvited door-to-door sales or solicitations (see *Breard v. City of Alexandria*, 341 U.S. 622 (1951)), the South Carolina 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. 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 taxes than resident merchants. They may not be denied licenses to restrain trade for protection of local merchants. See 9 *McQuillin Mun. Corp.* § 26:62 (3d ed.).

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. *SC Code Sec. 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 obtaining a business license. *SC Code Sec. 40-54-20*. State law allows dealers to 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 or short-term location. Permits under this chapter of state law are in addition to a business license.

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

The operation of buildings, developments, projects, complexes, malls or other such facilities 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 of real property may be made by owners, brokers, or salesmen.

- a) **Owner Sales:** Sales of real estate 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 intended to be used to compute the license tax. Taxing jurisdictions should carefully review the language of their ordinances to avoid unintentional incorporation by reference of other state or federal income tax definitions of gross income. *Olds v. Goose Creek*, 424 SC 240, 818 S.E.2d 5 (2018).

- 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. *SC Code Sec. 6-1-400(E)(1)(b)*.

Brokers-In-Charge

Business licenses must be charged to the 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 the brokerage activities described in Title 40, Chapter 57 without further licensing or taxing, other than the state licenses issued

pursuant to such Chapter or 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. *SC Code Sec. 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.*

Possible Reductions

If the person or business taxed pays a business license tax to another county or municipality where the income is earned, the gross income for the purpose of computing the tax must be reduced by the amount of gross income taxed in the other county or municipality. *SC Code Sec. 6-1-400(E)(1)(a); see also SC Code Secs. 5-7-30 (for municipalities) and 4-9-30(12) (for counties).*

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, such as through wire, microwave, fiber optic cable or 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 state 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 charged for that consent.

For many years, municipalities routinely charged telephone companies with lines in public streets a franchise fee of 3% 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 U.S. Supreme Court in *Goldberg v. Sweet*, 488 U.S. 252 (1989). The 5% 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 State Telecommunications Act of 1999 (Act 112 of 1999) substantially revised the entire licensing and franchising of telecommunication providers, as discussed below.

State Telecommunications Act of 1999

Act 112 of 1999, codified at *SC Code Secs. 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 before 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.

Population	Maximum Fee
1 – 1,000	\$100
1,001 – 3,000	\$200
3,001 – 5,000	\$300
5,001 – 10,000	\$500
10,001 – 25,000	\$750
More than 25,000	\$1,000

- b) **Business License Taxes:** Act 112 of 1999 also substantially revised and limited the business licensing of telecommunication providers, with standard maximum rates to be applied statewide. The Municipal Association’s Local Revenue Services program administers and collects the business license tax for telecommunication providers and remits the amounts collected to the participating municipalities.

Wholesalers

Wholesalers are exempt from municipal license taxes unless they maintain warehouses or distribution establishments within the municipality. *SC Code Secs. 5-7-30 and 6-1-400(C)*; see also *SC Code Sec. 6-1-400(C)*. 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*.

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, local business license ordinances must address several administrative issues to ensure a successful licensing program. Each taxing jurisdiction must administer and enforce its business license ordinance according to law and in a reasonable and nonarbitrary manner. The taxing jurisdiction should make every effort to collect business licenses from all businesses and individuals subject to the license. In addition, the taxing jurisdiction must treat each business or group within a license class 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. The business licensing official should put any such regulations or interpretations in writing and should make them available to all applicants. The courts recognize that administrative interpretations of ordinances need to be considered.

Office Procedures

SC Freedom of Information Act

Business license applications should be treated as confidential. Licensees generally object to public disclosure of certain information contained in their applications. Upon proper inquiry, the disclosure that an identified person has complied with the ordinance, paid the proper license tax, and obtained a license is sufficient to satisfy the public's right to know under the SC Freedom of Information Act. The Act specifically provides that "information as to gross receipts contained in applications for business licenses" is considered "information of a personal nature" that may be exempted from disclosure. *SC Code Sec. 30-4-40(a)(2)*.

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

The Family Privacy Protection Act, codified at *SC Code Secs. 30-2-10 through -50*, limits the disclosure and use of defined "personal information," which includes (among other things) an individual's photograph or digitized image, Social Security number, date of birth, driver's identification number, name, home address, home telephone number, account or identification number issued or used by any governmental agency or private financial institution, and signature. *SC Code Sec. 30-2-30(1)*. The Act provides that no person shall knowingly obtain or use personal information obtained from a local government for commercial solicitation. *SC Code Sec. 30-2-50(A)*. In addition, each local government must provide a notice to requestors of public records that

Part 4 – Administration

obtaining or using personal information in public records for commercial solicitation is prohibited. *SC Code Sec. 30-2-50(B)*. Therefore, to the extent that a municipality includes defined personal information in its business license records, it must include the prohibition against use for commercial solicitation in responding to any request for such records.

FOIA 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 FOIA. A request for information that is not clearly required to be released should be referred to council.

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 FOIA and specifically authorizes sharing of data between public officials or employees in the performance of their duties.

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 specific reports, returns, or applications and the information on them is not prohibited. For a knowing violation, *SC Code 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 interpretation may have little meaning, however, in view of the requirement in most license ordinances that the business license be posted in the place of business. The business license routinely includes the amount of tax paid.

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. Taxing jurisdictions must compute the business license tax on gross income pursuant to state law without deductions. Frequently, local officials must provide detailed explanations to avoid misunderstanding and improper reporting.

Part 3, Difficult Applications, contains information on many problem areas that arise in administration. Sharing this information may 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.

Some license ordinances do not allow waivers of late fees or penalties 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, which are usually not waivable. In addition, a waiver provision without rigorously objective standards might violate equal protection rights.

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 ID 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) An application form. Note that under Act 176, taxing jurisdictions must accept a standard business license application as established and provided by the director of the SC Revenue and Fiscal Affairs Office. *SC Code Sec. 6-1-400(F)*. Taxing jurisdictions may, if they choose, have their own local forms as well, but they must also accept applications on the form approved by the SC Revenue and Fiscal Affairs Office. Previously, this handbook contained a model application form. Considering the requirement that taxing jurisdictions accept the standardized form, the Municipal Association recommends that you use that form as the baseline model.
- b) A code clearance form to confirm that the proposed business and premises complies with applicable zoning, building, fire and health regulations. See **Sample Form 1**.
- c) A supplementary information sheet for businesses requiring special attention or regulation, such as bars, massage parlors, bookstores, ambulance services, taxicabs, contractors, fireworks, utilities or other businesses. For businesses that are required to acquire a state professional license, such as contractors or bail bondsmen, the taxing jurisdiction may require the applicant to prove that is has been so licensed.
- 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. See **Sample Form 2**.
- f) A license tax assessment form to be sent by mail or personal service. See **Sample Form 3**.

- g) Form letters for notice of audits as well as denial, suspension or revocation of a license to be sent as provided by the local ordinance.
- h) A form letter for making inquiry to the SC Department of Revenue for verification of gross receipts or gross revenue.
- i) Ordinance summons forms approved by the jurisdiction for prosecution in court.
- j) Sales tax return printout from the 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 audits.

Public Records Act

The SC Public Records Act, *SC Code Secs. 30-1-10 et seq.*, requires a public body to retain and preserve all records defined as “public records” in the SC 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.

The department’s regulations *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: 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 tax 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: _____
ZIP Code: _____ Phone: _____
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 Regulations

() 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 the following phone number: _____

Deliver or mail to: _____

Sample Form 2: 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 _____
(Business 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 3: Notice of Assessment

STATE OF SOUTH CAROLINA)
 COUNTY OF _____) **NOTICE OF ASSESSMENT**
 [CITY / TOWN] OF _____) **OF BUSINESS LICENSE TAX**

Date of Notice: _____ Business Code: _____ NAICS: _____

Name & Mailing Address of Business: _____

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

Last License No.: _____ Year: _____

South Carolina Code § 6-1-410(A) provides that if a taxpayer fails or refuses to pay a business license tax by May 1, the taxing jurisdiction may serve notice of assessment of the business license tax due on the taxpayer by mail or personal service. **This is your notice of assessment.** The assessment is made upon the best information available to us, which may include statistical sampling.

This assessment becomes final unless application for adjustment is made to the taxing jurisdiction within thirty days after the date of postmark or personal service. Within such 30 days, you may request, in writing with reasons stated, an adjustment of the assessment. If you timely request an adjustment, an informal conference between our business license official and you must be held within fifteen days of the receipt of the request, at which time you may present any information or documents in support of the requested adjustment. Within five days after the conference, our business license official shall issue a notice of final assessment and serve you by mail or personal service with the notice and provide a form for any further appeal of the assessment by the taxpayer.

Final assessment may be appealed within 30 days after the date of postmark or personal service of the final assessment by (a) filing the completed appeal form with our business license official, and (b) paying under protest of at least 80% of the business license tax based on the final assessment.

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:	_____	_____

[Penalties accrue at the rate of 5% 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 SC 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 ID 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 professional 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 if 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 tax is paid to another municipality or county is considered appropriate to meet the test of reasonableness.

SC Code Sec. 4-9-30, which authorizes counties to levy business license taxes, provides for reduction of gross income reported to counties by income taxed in another county or municipality. *SC Code Sec. 5-7-30*, which authorizes municipalities to levy business license taxes, contains a similar provision. Act 176 repeats this deduction for all taxing jurisdictions, see *SC Code Sec. 6-1-400(E)(1)(a)*: “In all cases, if the taxpayer pays a business license tax to another county or municipality, then the taxpayer's gross income for the purpose of computing the tax within the taxing jurisdiction must be reduced by the amount of gross income taxed in the other county or municipality.”

General Authorization

The Municipal Association has long advised taxing jurisdictions that they may verify reported gross income by comparison to state and federal tax records, and many local business license ordinances specifically provide for income verification. Act 176 codified this advice in *SC Code Sec. 6-1-400(E)(3)*, which provides that “[t]he gross receipts or gross revenues for business license purposes may be verified by inspection of returns and reports filed with the Internal Revenue Service, the South Carolina Department of Revenue, the South Carolina Department of Insurance, or other governmental agencies.”

State Tax Records

SC Code Sec. 12-4-310 authorizes the SC Department of Revenue, or DOR, to make available to municipalities and counties both sales tax records, *see subsection (5)*, and records indicating gross receipts, *see subsection (10)*, upon request of the appropriate official. DOR may release income tax records only if the gross receipts reported to the local government were less than gross receipts reported to DOR.

- a) **Sales Tax List:** State law authorizes DOR 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 DOR 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 DOR, the local official should notify the department of the discrepancy.

- b) **State Income Tax Records:** DOR 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 a taxing jurisdiction desires information concerning an individual, DOR requires that the taxing jurisdiction send the individual's name, address and Social Security to the department, along with the amount reported to the city. If a taxing jurisdiction desires information concerning a partnership or a corporation, DOR requires that the taxing jurisdiction send the name and address of the partnership or corporation and the federal identification number. For administrative purposes, DOR requests that the taxing jurisdiction identify the business as being either a partnership or a corporation.

It is important to require a license applicant to use the same name and Social Security or federal identification 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. DOR will not be able to furnish gross receipts for a particular business location when this procedure is followed.

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

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 firsthand 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. Inspectors may also obtain state retail

license information and compare it with business license information such as name, address and relevant 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.

Taxing jurisdictions should not overlook the public relations aspect of field inspections. They 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 and Appeal

When a taxpayer fails or refuses to obtain a license, provides insufficient information, or does not make income records available locally for audit, the taxing jurisdiction may make an assessment of the business license tax due. Previously, local ordinances established the process for assessments and appeals thereof. Act 176, however, provides a detailed, mandatory process for assessments and appeals in *SC Code Sec. 6-1-410*. This process is specifically referenced by and incorporated into the Municipal Association’s Model Ordinance.

Taxing jurisdictions should carefully review the law on assessments and should confirm that their local processes conform to Act 176. This handbook, however, offers a summary below as a guide. Note that the Act defines the term “business license official” as the officer, employee, or agent designated by the taxing jurisdiction as having primary responsibility for business licensing within the taxing jurisdiction. The Municipal Association’s model ordinance contains a mechanism to designate the business license official.

- If a taxpayer fails or refuses to pay a business license tax by the due date, the business license official may serve notice of assessment on the taxpayer by mail or personal service. The taxpayer may request an adjustment of the assessment within 30 days after the notice is mailed or personally served. If the taxpayer requests an adjustment, the business license official and the taxpayer must hold an informal conference within fifteen days of request. Within five days after the conference, the business license official must issue a notice of final assessment (including a form for any further appeal of the assessment by the taxpayer) and serve the taxpayer by mail or personal service.
- Within 30 days after the final assessment is mailed or personally served, the taxpayer may appeal the final assessment by filing the completed appeal form with the business

license official. As a condition of appeal, the taxpayer must pay under protest at least 80% of the business license tax based on the final assessment.

- If the taxpayer appeals the final assessment, the taxing jurisdiction’s council, or its designated appeals officer or appeals board (hereinafter the appeals board), must hear and determine the appeal. The appeals board must provide the taxpayer with written notice of the hearing and with any applicable rules of evidence or procedure. The appeals board must hold the hearing within thirty days after receipt of the appeal form, unless continued to another date by agreement. At the hearing, the taxpayer and the taxing jurisdiction have the right to be represented by counsel, to present testimony and evidence, and to cross-examine witnesses. The hearing must be recorded and must be transcribed at the expense of the party so requesting.
- After the hearing, the appeals board determines the assessment by majority vote. The appeals board then must issue a written decision, explaining the basis for the decision with findings of fact and conclusions of law. The appeals board must file the written decision with the business license official and serve it on the taxpayer by mail or personal service. The appeals board must also notify the taxpayer of the right to further appeals to the Administrative Law Court. The written decision is the final decision of the taxing jurisdiction on the assessment.
- Within 30 days after the date of postmark or personal service of written decision, the taxpayer may appeal the decision to the Administrative Law Court in accordance with the rules of the Administrative Law Court.

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 SC Department of Revenue or SC Department of Insurance.

Audits

License ordinances usually authorize the municipality to 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. In addition, Act 176 implies the right to audit by prohibiting any person other than the taxing jurisdiction from auditing a taxpayer’s records. *SC Code Sec. 6-1-400(J)(1)*. 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 that specific purpose.

Taxing jurisdictions may choose to audit only accounts expected to be fraudulent, or to use audits as a routine check on the accuracy of all license reports. Making routine spot audits of all types of businesses, or even 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 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. Refusal to allow an audit constitutes grounds for prosecution.
6. 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 taxes 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 Limitations

The state 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 limitations, the ordinary period of limitations applicable to an action upon a liability created by statute applies to an action for collection of taxes. *SC Code Sec. 15-3-530* provides that the applicable limitations period is 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. Changes in state law now require a law enforcement investigation prior to a court's issuance of an arrest warrant. A courtesy summons issued by the court is required if an arrest warrant is sought by someone other than a law enforcement officer. *SC Code Secs. 22-5-110 and 22-5-115*.

Ordinance Summons

A municipality or county may 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*. The authorized officer serves the summons without arresting the offender. The uniform ordinance summons does not set, and the issuing officer does not collect, any bond. Instead, the summons must set forth the procedure for posting bond. The summons gives jurisdiction over disposition of the offense to a magistrate or municipal judge. Note, however, that local governments must use uniform traffic tickets, rather than uniform ordinance summonses, 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.

Third-Party Collection Services

In recent years, local governments in South Carolina have increasingly turned to third-party collection services for assistance in applying and collecting business license taxes. Act 176 substantially limited this practice. *See SC Code Sec. 6-1-420*. First, the Act prohibits a private third-party entity from assessing business license taxes or requiring a licensee to remit confidential business license tax data to that private third party. Second, with respect to assisting in the collection of business license taxes, the Act provides that the third party service may **only** (a) through publicly available records, identify businesses that are operating within the contracting taxing jurisdiction without a business license; (b) provide that identification to a taxing jurisdiction; (c) communicate with the identified businesses to determine whether any

business license taxes are due and owing; and (d) assist those businesses with paying the relevant taxing jurisdiction. Third, if a business requests in writing that the third party cease communication with the business, then the third party is strictly prohibited from any further contact.

In addition, the Act allows a taxing jurisdiction to enter into a contract with a third-party collection service with a contingency fee, provided that the contingency fee may not be paid until the taxing jurisdiction issues a proposed assessment of business license taxes and the assessment has become final (either by failure to timely appeal or by final adjudication).

Act 176 contains further specific provision applicable to third-party collection services. Local governments considering a contract with a third party relating to business licenses should carefully review *SC Code Sec. 6-1-420*.

Penalties

Civil Penalties

State law does not specifically mention civil penalties for unpaid license taxes. However, the state Supreme Court has ruled that municipalities have the implied power to impose civil penalties by ordinance for late payment of business license taxes. In *Municipal Association of SC v. AT&T*, 361 SC 576, 606 S.E.2d 468 (2004), the court upheld a 5% per month penalty for late payment.

State law does not explicitly limit the amount of delinquent penalties, and municipal ordinances vary widely in this regard. The Municipal Association’s model ordinance provides for a penalty of five percent of the unpaid tax for each month or portion thereof after the due date until paid.

The civil penalties that accrue monthly on unpaid license taxes create 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 penalty a municipal court can impose for a business license ordinance violation is a fine of \$500, imprisonment for 30 days, or both for each separate offense, which is to say each day of violation.

Lien

State law does not specifically grant the right to place a lien on property for collecting a business license tax and penalties. Some local ordinances include this provision, on the theory that the power to levy a tax carries with it the power to collect in the normal manner. It is doubtful, however, that a court would enforce a lien for business license taxes, and the Municipal Association's model 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, or for suspending a license subject to a revocation hearing and determination. Because issuing a business license is generally regarded as a ministerial act, the business license official cannot exercise discretion as to whether a license should be issued. Instead, the business license official must follow the standards established by ordinance. In other words, a business license official must issue a license to anyone who complies with the ordinance and pays the proper tax for operating a lawful business.

Whether the power to deny, suspend, or revoke for cause is delegated to the business license official or is 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 Municipal Association's Model Ordinance prescribes essentially the same procedure.

Closing a business for noncompliance with the provisions of the business license ordinance implicates due process concerns. A licensee may be entitled to notice and an opportunity to be heard before the licensee's business is closed. The Municipal Association therefore recommends that the suspension of a business license ordinarily should not require closure of the business until the suspension is upheld after a properly noticed hearing. The Municipal Association's model ordinance provides that the licensee is entitled to be heard within 10 days after suspension. Some license ordinances provide for a longer delay between suspension and hearing (for example, 30 days). In such cases, the taxing jurisdiction should be careful to avoid unreasonably long business closures before allowing an opportunity for the licensee to be heard.

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.

Abatement of Nuisances

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

Taxing jurisdictions should exercise caution in declaring an activity a public nuisance. General law gives the circuit solicitors the legal right to regulate 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).

In addition to revoking the business license for operation of a nuisance, the jurisdiction may wish to consider pursuing either an injunction under *SC Code Sec. 15-43-20* or prosecution for operation of a common law nuisance.

Unlawful Business

A business that is unlawful under federal or state law is not entitled to operate. The local government should deny a business license upon application, or suspend and revoke a business license upon discovery, of a business that is unlawful under state law.

If health, safety, land use or zoning regulations, or building or fire prevention codes, prevent the operation of a business in a certain location, then that business is unlawful and may not be licensed for the affected location. A home occupation not permitted by zoning regulations is unlawful.

Mistake or Misrepresentation

A license issued by mistake or upon material misrepresentation may be revoked. An administrative error cannot bind the public. A licensee obtains no superior rights in a license to which he is not entitled, even if the licensee 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 Secs. 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 limitations in *SC Code Sec. 15-3-530* may be applicable, and a suit to recover taxes for up to three prior years could be brought. On the other hand, Act 60 does not affect the assessment procedures and requirement for payment under protest of at least 80% of the tax prior to appeal contained in *SC Code Sec. 6-1-410(B)*. Therefore, taxpayers may avoid a penalty in the event the tax is upheld by paying when due 80% of the tax under protest.

State Licensing of Contractors

A state license issued by the South Carolina Contractor’s Licensing Board does not exempt a contractor from local licensing requirements, regardless of the contract price or cost of construction. Local governments should not issue a business license to a contractor who does not have the required state license. This policy helps enforce state laws and protects the public from unqualified contractors to the extent possible locally.

Previous editions of this handbook provided a brief overview of the state licensing requirements applicable to contractors. Given the complexity and fluidity of these laws, this handbook deletes that overview. Instead, questions of compliance with state licensing requirements and requests for current regulations should be directed to the South Carolina Contractor’s Licensing Board.

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, which is 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. Employees also could be liable individually if they act outside the scope of official duty or with actual fraud, actual malice, or an intent to harm, or if they commit a crime involving moral turpitude. *SC Code Sec. 15-78-70(b)*. 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 are the advantages of using a uniform ordinance summons, as compared to other methods of enforcement?
9. What civil penalties may be levied for delinquent license taxes?
10. What are the maximum criminal penalties that may be imposed for violations?
11. When can a license official revoke a business license?
12. Should a business be closed for suspension of a business license, pending a hearing for permanent revocation?
13. What methods are available to deal with a business operated as nuisance?
14. What actions may be taken by a taxpayer to recover contested license taxes?



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