THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Case No. 09-ALJ-17-0532-CC

Centex International, Inc. & Affiliates. . . . . Appellant,

v.

South Carolina Department of Revenue . . . . . .Respondent.

APPELLANT'S PETITION FOR REHEARING

Burnet R. Maybank, III
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202-2426
PHONE: 803.771.8900
FACSIMILE: 803.253.8277

Attorney for Appellant Centex International, Inc. & Affiliates

August 7, 2013
Columbia, South Carolina

Pursuant to Rules 221(a) and 240 of the South Carolina Appellate Court Rules, Appellant Centex International, Inc. and Affiliates, ("Centex") respectfully petitions this Court for a rehearing of Opinion No. 27288, which was filed July 24, 2013 ("Opinion"). The basis for this petition is that the Opinion overlooks and misapprehends key points of law.

I. "A Taxpayer" versus "The Taxpayer" under the Infrastructure Tax Credit Statute

A. *People v. Enlow*

The Court erred in holding that the General Assembly's use of the words "the" taxpayer (versus "a" taxpayer) meant that "the taxpayer" which incurred qualifying expenses must be the corporation claiming the credit. The majority mistakenly relies upon a Colorado case, *People v. Enlow*, 310 P.2d 539 (Colo. 1957). At issue in that case was whether conviction in another state or in the federal system was a disqualifying factor for a variety of purposes. (The Court discussed removal from office, divorce and disbarment.) The Colorado Court held that the constitutional definition of felony vs. misdemeanor turned on whether the act was punishable by imprisonment in *the* penitentiary or in the county jail. The Colorado Court noted the various cases that held that "the penitentiary" meant that state's penitentiary – and not the penitentiary of some other state or criminal justice system (e.g., federal). Accordingly, "the penitentiary" was limited to the state penitentiary of Colorado, and not, e.g., the penitentiary in South Carolina.

The use of the term "the" therefore defined exactly what penitentiary serving time in disqualified someone from holding public office or would give rise to divorce or disbarment.

It should first be noted that South Carolina would hardly follow the *Enlow* decision. The conviction and serving a criminal sentence in a Colorado prison by a South Carolina lawyer would likely serve as the basis for disbarment or divorce in South Carolina.

More importantly, use of the term "the" taxpayer hardly limits the definition as "the taxpayer" is a term of art in South Carolina, having been defined by the General Assembly in S.C. Code Ann. § 12-6-30 to include partnerships.

Enlow is inapplicable. The Court simply held "the penitentiary" meant that state's penitentiary. This hardly supports the notion that the term "the taxpayer" is limited to the corporation filing the corporate income tax return. Using simple English, if I said, "I'm not buying another watch until I sell the gold Rolex I own," "the" modifies or limits Rolex (and maybe which Rolex if I own several) – not watch.

In addition, as is clear from other lines of cases, the meaning of the word "the" depends on the context and purpose of the statute in which it is found, and should not be so limited. *Craig v. Boyes*, 11 P.2d 673, 674 (Cal. Ct. App. 1932). Although "the" is sometimes used before nouns to have a particularizing effect, *Enlow*, 310 P.2d at 546, there are various other special uses that are equally as common. *See Howell v. State*, 138 S.E. 206, 210 (Ga. 1927).

For instance, "the" can be placed before a generic noun to indicate something that is understood. *Id.* For example, "we speak of the Mississippi, to denote that that river is well known." *Id.* In addition, "the" is also used in statutes in the sense of any. *Id.* In *Noyes v. Children's Aid Society of New York*, New York court of appeals first proclaimed the now familiar principle that the article "the" does not always mean but one. 70 N.Y.

481, 483 (N.Y. 1877). "Take the well-worn and well-wearing quotation: 'The man that hath not music in himself is fit for treason, stratagem, and spoils.' The meaning of the article is not exhausted, when one man is found with no music in himself. 'The man,' means there, 'any man.'" *Id.* (holding that a statute using the words "the party" should be construed to mean "any party"). *See also Bishop v. United Railways Co. of St. Louis*, 147 S.W. 170, 172 (Mo. Ct. App. 1912) (holding that the plain and obvious meaning of the statute granting a lien to "the attorney who appears" may be properly read as "*any* attorney who appears"); *Craig v. Boyes*, 11 P.2d at 674 (holding that the *Noyes* rule was applicable in construing a statute referring to "the proximate cause" as not being exclusive to the sole proximate cause and encompassing "any proximate cause").

In *Howell v. State*, 164 Ga. 204 (1927), the Supreme Court of Georgia relied on *Noyes* in support of its decision dismissing a defendant's appeal and upholding the death penalty. In that case, the law required that "*the* warden of the penitentiary" be present for and serve as defendant's executioner. The defendant argued that because there was no warden of the penitentiary at that time, the execution could not proceed because "the warden" could not be present. In essence, the defendant argued that because the word "the" was a word of limitation, it could only refer to one warden.

The Georgia Supreme Court rejected this semantic argument, and instead relied on the application of "common sense." In addition to relying on *Noyes* for the proposition that "the" can mean "any", the court noted:

> By section 4905 of the Civil Code of 1910 sheriffs are required, before entering on the duties of their office, to take and subscribe "before the judge of the superior court, or ordinary," the oath embraced in said section. Here the article "the" is used before the noun "judge." It would not be a proper construction of the language, "the judge of the superior court," to hold that in a county, such as Fulton, where there are five

> superior court judges, this oath could not be administered to the sheriff by any one of these judges, for the reason that the statute requires this oath to be administered by "the judge," when in fact there was no such judge in Fulton county. This is a familiar illustration of the fact that the article the, as used in statutes, is often used in the sense of any. We agree with the statement made by Chief Justice Tilghman, in *Sharff v. Commonwealth,* 2 Bin. (Pa.) 516, that "grammatical niceties should not be resorted to without necessity," and that *in some cases "it would be extending liberality to an unwarrantable length, to confound the articles 'a' and 'the.'"* While this is true, it would be carrying grammatical niceties to an extreme to hold that a statute using the article the before a noun denoting an official at the penitentiary should be stricken down because there are several officials of the same denomination, no one of whom falls within the particularization indicated by this article when confined to its general use, although it may come within one of its special uses.

Id. at 210-11 (emphasis added).

In *Howell*, the court held that the more expansive interpretation of "the" was more in line with the purpose of the statute and the intention of the legislature.

B. The Majority Misstates the "General Rule" with Respect to Tax Credits

The majority further notes that the limiting nature of the word "the" is "consistent with the general rule that tax credits should be claimed by the entity that earns or generates the credit," and cites *Berks County Tax Collection Commission v. Pennsylvania Department of Community and Economic Development*, 60 A.3d 589, 592 (Pa. Commonw. Ct. 2013). *Berks County*, in turn, relies on *Dunmire v. Applied Business Controls, Inc.*, 63 Pa.Cmwlth. 479, 440 A.2d 638 (1981), for the quotation cited by the majority. However, contrary to the majority's assertion, the entity who "earned or generated" the tax credit in *Dunmire* is not the entity that actually claimed the credit. Instead, the partners claimed the benefit of the tax credit earned when the partnership paid its tax liability.

Dunmire involved a tax credit for taxes paid to another taxing entity. In that case, two partners sought a tax credit for their share of city net profits tax *which was paid by their law partnership.* While the partners reduced their tax owed by the amount of the credit, the taxing authority reduced the partners' tax base by the amount of city tax paid. Thus, the case merely revolved around whether the tax benefit was a "credit" or a "deduction," and does not focus on determining the proper recipient of tax credit.

However, more importantly, while the majority relies on *Dunmire* for the proposition that "tax credits should be claimed by the entity that earns or generates the credit," *that very case* allows the partners to take the credit that was paid, earned, and generated by the law partnership. According to the case, "[o]n every return, the Petitioners claimed a credit for their respective shares of the City of Philadelphia's net profit tax paid by the law firm of which both Petitioners are partners."

C. *Media General Communications, Inc. v. SCDOR*

Just three years ago, this Court unanimously rejected virtually the identical argument advanced by the DOR in this case in *Media General Communications, Inc. v. SCDOR*, 388 S.C. 138, 694 SE2d 525 (2010). The DOR argued that the equitable apportionment statute was limited to a single "taxpayer" and thus did not apply to the Media General Group. For example, pg. 23 of the DOR's brief stated: "Rather, the legislative intent is meant to provide relief to an individual taxpayer.... This is clearly found in subparagraph (A)(4) of §12-6-2320 by its use of the singular term "taxpayer's" when it 'allows for any other method.' "

D. Subsections (G), (H) and (I) of S.C. Code Ann. § 12-36-3420

The majority opinion states that "subsections (G), (H), and (I) [of the Infrastructure Tax Credit Statute] specifically define a "corporation" as the entity that may claim the credit. The majority states that this reveals the legislature's intent that a corporation must be the entity that incurs the expenses to generate the credit. Everyone in this case – Appellant, Respondent, and Supreme Court – agrees that only a corporation may claim the credit. Appellant claimed the credit on its consolidated corporate income tax return.

Subsection (G) provides a clawback of the corporate income tax credit if an expenditure by the taxpayer is later ruled non-qualifying; (H) allows the credit in a consolidated corporate income tax return (such as Appellant's) and (I) provides the survival of the credit in the case of the merger of the original corporation.

None of these subsections deal whatsoever with expenditures made by the taxpayer. The fact that these subsections use the term "corporation" rather than "taxpayer" supports Appellant's position. The General Assembly used "corporation" where appropriate and "taxpayer" where appropriate.

E. Qualifying Private Entity

The majority held that the General Assembly's use of "qualifying private entity" in the statute is not dispositive. The statute uses three terms: (1) corporation; (2) taxpayer; and (3) qualifying private entity.

As noted in the cross-reference in section 12-6-3420, a qualifying private entity includes an electric co-op.

The majority opinion notes that appellant argued that a non-corporate entity may claim the infrastructure tax credit. To the contrary, the appellant argues that this section simply means that an electric co-op could make the qualifying expenditures.

The cross-reference is a standard anti-double dip provision. It states that an electric co-op could not claim the infrastructure tax credit as well as the utility tax credit under section 12-6-3420 for the same expenditure.

While co-ops pay utility taxes, they do not pay corporate income taxes. The reason for the anti-double dip limitation is to prevent a co-op (which was a subsidiary of a corporation which pays corporate income taxes) from making an expenditure (and claiming the utility tax credit) and then having the corporation claim the infrastructure tax credit on its consolidated income tax return based upon the same expenditure. The anti-double dip language is necessary as subsection (H) explicitly allows a consolidated return to claim the credit whether or not the corporation entitled to the credit contributed to the tax liability of the consolidated group. (A co-op would not, by definition, contribute to the tax liability of the consolidated group.)

A parent corporation could claim the credit for expenditures made by the co-op, however, if the co-op did not claim the utility tax credit.

Appellant's point is that this clearly illustrates the General Assembly's understanding that the corporation claiming the credit and the taxpayer making the expenditures would not necessarily be the same entity.

F. Ambiguity in Tax Statutes is Resolved Against the Government

Tax exemption statutes are strictly construed against the taxpayer, e.g., *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 716 S.E.2d 877 (2011).

On the other hand, ambiguity in tax exemption statutes is resolved against the government. The Supreme Court most recently reiterated this rule in *Alltel Communications, Inc. v. S.C. Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012) in quoting *SCANA Corp. v. S.C. Department of Revenue*, 384 S.C. 388, 683 S.E.2d 468 (2009) (Beatty, J., dissenting.) *SCANA* involved whether the SCANA corporation qualified for the Investment Tax Credit.

The Court in *Alltel* quoted as follows:

> see also SCANA Corp. v. S.C. Dep't of Revenue, 384 S.C. 388, 394 n. 3, 683 S.E.2d 468, 471 (2009) (Beatty, J., dissenting) (noting general rule that *where substantial doubt exists as to the construction of tax statutes, the doubt must be resolved against the government*). (Emphasis added)

Indeed, the Department of Revenue quoted this some rule regarding the subject Infrastructure Tax Credit in SC Technical Advice Memorandum ("TAM") #89-14. (Ex. A) At issue in the TAM was the meaning of the tax cap which applied to "any one infrastructure project." The DOR stated:

> It is ambiguous whether the language "any one infrastructure project" means that only one project may qualify for the credit per year or whether the credit is merely limited to 50% or $10,000 of expenses paid. Many South Carolina cases have held that tax statutes are not to be extended beyond the clear import of their language, and *any substantial doubt as to its meaning is to be resolved in favor of the taxpayer. (Southeastern Fire Ins. Co. v. South Carolina Tax Commission*, 253 S.C. 407, 171 S.E.2d 355 (1969); *H.D. & J.K. Crosswell, Inc. v. Jones*, 60 F.2d 827 (1972); *Deering Milliden, Inc. v. South Carolina Tax Commission*, 257 S.C. 185, 184 S.E.2d 711 (1971).
>
> *It therefore appears that the appropriate interpretation of this statute should be the one most favorable to the taxpayer*. (Emphasis added).

Where reasonable people can disagree whether "the taxpayer" is (1) the corporation; or (2) another entity, the doubt is resolved against the government.

II. Partnership that Qualifies for a Credit under the Pass-Through Statute

A. The Infrastructure Credit May Be Only Claimed by a Corporation

The majority opinion states that the infrastructure credit may be claimed only by a corporation and such an express limitation constitutes a specific prohibition against pass-through from a partnership to a corporation.

The majority cites no authority for this broad statement and no South Carolina case has ever held to this effect. Indeed the DOR has never held to this effect in any Regulation or Policy Document.

In fact, the DOR very recently ruled to the exact opposite in PLR #11-6, which deals with the biomass credit statute, section 12-6-3620. The biomass credit is a corporate income tax statute and is drafted very similarly to the Infrastructure tax credit statute. *The expenditures in the PLR were made by a LLC* taxed as a partnership. The relevant member of the LLC was a S corporation that had four South Carolina resident shareholders.

Utilizing the definition of "taxpayer" found in section 12-6-30 and the pass-through provision, section 12-6-3310(B)(1), the DOR opined that the LLC (which as stated above, made the qualifying expenditures) could pass through the credit to its corporate members. The PLR plainly states:

> 1. May ABC [LLC] passthrough the biomass credit to Member A [the corporation] ...
>
> Answer: The biomass credit statute provides in relevant part:
>
> > ...There is allowed a credit against the income tax imposed pursuant to Section 12-6-530 or license fees imposed pursuant to Section 12-20-50, or both, for twenty-five

> percent of the costs incurred by a taxpayer for the purchase and installation of equipment used to create heat, power, steam, electricity, or another form of energy for commercial use from a fuel consisting of not less than ninety percent biomass resource. ...
>
> Code Section 12-6-3620 does not address the pass through of credits by flow through entities. However, Code Section 12-6-3310(B) provides general rules relating to the pass through of credits by flow through entities. Under Code Section 12-6-3310(B)(1) "Unless specifically prohibited, an "S" corporation, limited liability company taxed as a partnership, or partnership that qualifies for a credit pursuant to this article may pass the credit earned to each shareholder of the "S" corporation, member of the limited liability company, or partner of the partnership. Under (B)(2), for an "S" corporation owing corporate level tax, a credit must first be used at the entity level with only the remaining credit passing through to the shareholders of the "S" corporation. This provision allows the pass through of the credit by ABC to Member A.... (Emphasis in original)

In summary, using the general pass through provision (and not subsection (C), the LLC provision) the DOR held that the LLC could pass through the expenditures it made to the corporate member as a credit on the corporation's tax return.

The statute and the facts in PLR #11-6 are almost identical to this appeal!

B. Unlike Several Other Tax Credit Statutes, the ITC Does Not Incorporate a Pass-Through Provision

The majority notes that unlike several other tax credits, the Infrastructure Credit Statute does not contain language incorporating the pass through provisions of section 12-6-3310.

The biomass corporate tax credit statute similarly does not contain such language but the DOR held that this did not prevent pass through of the credit.

The majority cites as examples sections 12-6-3340, 12-6-3370, and 12-6-3560. As pointed out in Appellant's Brief, (pg. 28), all of these code sections were passed before the General Assembly enacted the general pass-through statute. Presumably, the

General Assembly felt upon passage of 12-6-3310, it would serve no purpose to add pass-through language in the numerous other tax credit statutes.

In addition, the pass-through language in 12-6-3340 and -3370 is used to limit the credit. Both credits contain a tax cap of $2500. In the case of pass-through entities, statutes with tax caps always provoke the question: is the cap determined at the entity level – or at the partnership level. For example, in a partnership with five partners, is there one $2500 credit or five $2500 credits? The purpose of pass-through provisions is to make clear there is one $2500 credit.

C. Case Law from Other Jurisdictions

The majority cites as instructive two cases from other jurisdictions, specifically *Bell Atlantic Nynex Mobile, Inc. v. CIR Services*, 869 A.2d 611 (Conn. 2005), and *L&W Constr. Co. v. Wisconsin Department of Revenue*, 439 N.W.2d 619 (Wisc. Ct. App. 1989).

In *Bell Atlantic*, a corporation could not claim a tax credit resulting from a partnership's payment of personal property taxes. The statute in that case specifically limited the credit to a taxpayer who paid the personal property taxes. In *L&W Constr. Co.*, the statute provided a credit for the "sales and use tax ... paid by the corporation."

Both statutes were very specific that the credit was allowed only to the entity that actually paid the taxes.

By contrast, the SC ITC statute provides a credit for "expenses paid or accrued by the taxpayer."

In 79 Conn. B.J. 67 (2005), the author summarizes *Bell Atlantic Nynex* as follows:

> The decision was based on the principle of statutory construction that exemptions from income are to be construed against the taxpayer and

> so has potential application to other types of expenditures incurred by passthrough entities that would qualify for tax credits if they had been incurred directly by partners. To the extent it is so applied, *the decision presents a trap for the taxpayer unaware that, with respect to credits, Connecticut does not follow the general rule that partnership expenditures are those of its partners*. (Emphasis added)

Of interest, the same court as in *L&W Constr. Co.*, the Wisconsin Court of Appeals, in *Wisconsin Dept. of Revenue v. Gordon*, 127 Wis. 2d 71, 377 N.W.2d 212 (1985) allowed an individual to take the exact same tax credit on his personal income tax return. The individual owned 100% of the stock of the corporation which paid the sales and use taxes. The Court rejected the DOR's contention "that the tax credit is available only to corporations." 377 N.W.2d at 213.

In the only published decision dealing with the South Carolina Infrastructure Tax credit, *Anonymous Corp. v. SCDOR*, 98-ALJ-17-0533 (1999), the taxpayer making the expenditures was a subsidiary – a different legal entity – than the corporation filing the return. The DOR did not challenge on this issue.

III. "Entity" and "Aggregate" Partnerships Theories

The majority opinion states that neither section 12-6-600, *Dalton v. South Carolina Tax Commission*, 295 S.C. 174, 367 S.E. 2d 459 (Ct. Apps. 1988) and *Ellis v. South Carolina Tax Commission*, 280 S.C. 65, 309 S.E. 2d 761 (1983) supports Appellant's position that the qualifying expenditures are treated as if they were made by the corporate-partners.

The three corporate partners of Centex Homes opened a general partnership bank account and paid for the $68 million in qualifying expenditures from this account.

It seems beyond a doubt that if the three corporations had paid the $68 million from their own bank accounts that the credit would be allowed.

If this is correct, what is the impact of paying from the general partnership bank account? For tax purposes are the expenditures deemed made by the general partnership? Or made by the corporations?

The rule, whether the item at issue is income, expense, deductions, or credits, is that the item is deemed made or realized by the partner – not the partnership.

In SCDOR Rev. Rul. 97-7, dealing with partnership income received from performing legal or accounting services the DOR stated "The law provides that each partner is directly taxable on his distributive share of partnership income. Items of income, such as personal service income received from a partnership performing legal or accounting services, are separately stated and passed through to the partners. *Such items retain their character at the partner level and are treated as if realized by the partner directly from the source from which realized by the partnership* [i.e., payments by clients]."

The *Ellis* and *Dalton* cases are directly on point.

By way of background, I own Wells Fargo stock. Wells Fargo is a corporation and consequently, I pay South Carolina state income taxes on my (tiny) quarterly dividend without regard to how or where Wells Fargo ginned up the income from which the dividend was paid. For example, if 100% of the income was from lease income from apartments in Colorado, I would pay state income taxes on my entire dividend in South Carolina.

By contrast, the result would be much different if Wells Fargo was a general partnership and I received a partnership distribution resulting from Colorado leases.[1] The income – or losses – would be taxable in Colorado. The Wells Fargo partnership would

[1] In 1995, the General Assembly changed this result for residents but the example is illustrative.

be disregarded and for tax purposes it would be exactly as if I (as a partner) personally received the lease payments in Colorado.

Not surprisingly, the DOR contests the issue when taxpayers report losses on their South Carolina returns. Most real estate developments produce losses in their early years. If I personally owned an apartment complex in Colorado which produced taxable losses (deductions), I could not use those deductions to offset my South Carolina taxable income as any income would not be taxable here. This is *Seward v. S.C. Tax Commission*, 269 S.C. 52, 236 S.E.2d 198 (1977) (which involved cattle ranching losses in other states.)

Could I get around *Seward* by putting my ownership interest into a limited or general partnership? This was the issue in *Ellis v. S.C. Tax Commission*, 280 S.C. 65, 309 S.E.2d 761 (1983) in which the taxpayers tried to claim losses from oil and gas exploration and real estate ventures in other states on their South Carolina income tax returns. The taxpayers argued that their interest in the out-of-state limited partnerships "are intangible personal property interests, something approaching ownership of corporate stock" and therefore the income (and losses) was properly taxable (deductible) in South Carolina.

The court rejected this argument, stating:

> By reason of the "pass through" rule, the character of any item of income, gain, loss deduction or credit included in a partner's distributive share of gains and losses shall be the same as if such item was realized directly from the source from which realized or incurred by the partnership. *In other words, each item of income, gain, loss, deduction or credit is treated as if it were realized or incurred by the partner directly from the source* without ever having passed through the partnership. If this were not the case, then partners in real estate or other business ventures could not take advantage of depreciation write-offs and other operating expenses or losses. (Emphasis added)

Consequently, for tax purposes, the limited partnership was completely disregarded and it was as if the taxpayers (as in *Seward*) had paid the oil and gas exploration expenses and received any income themselves.

The next case is *Dalton v. S.C. Tax Commission*. The individual taxpayers deducted their share of interest expenses on loans utilized by limited partnerships to purchase and operate real estate developments in other states. The Supreme Court, disallowing the loss under the pass-through (and other statutory) provisions, stated that:

> The evidence establishes that all interest expenses were incurred to produce rental income. The production of rental income by the partnerships is treated *as though it was derived by the taxpayer directly.* (emphasis added) 367 S.E.2d at 463.

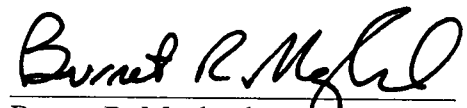
The preeminent state and local tax treatise, Hellerstein & Hellerstein, State Taxation §20.08, pg. 20-134 is to the same effect:

> Most states follow the basic federal tax structure governing income taxation of partners and partnerships. Under the federal rules, partnerships are treated as conduits and are not themselves subject to tax, but partners are directly taxable with respect to their distributive shares of partnership items of income, gain, loss, deduction, and credit. *As under federal law, partnership items normally retain their character when passed through to the person as though realized directly by the partners from their source.* (emphasis added)

In this case, for tax purposes the partnership checking account is disregarded. The DOR (Rev. Rul. 97-7), *Ellis*, *Dalton* and Hellerstein all agree: The $68 million in expenditures were made by the three corporations.

Centex hereby respectfully requests that this Court amend Opinion No. 27288 issued July 24, 2013, and re-issue an Opinion consistent with the requests set forth above.

Respectfully submitted,



Burnet R. Maybank, III
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
PHONE: 803.771.8900
FACSIMILE: 803.253.8277

Attorney for Appellant Centex International, Inc. & Affiliates

EXHIBIT A

1989 WL 1110652 (S.C.Tax.Com.)

Tax Commission
State of South Carolina

*1 SUBJECT:
INFRASTRUCTURE
CREDIT

SC Technical Advice Memorandum No.
89
-
14

DATE: May 17, 1989

TO: Mr. William F. Bray, Director

Office Services Division

FROM: John Swearingen, Manager

Tax Policy and Procedures Department

REFERENCE:

S.C. Code Ann. Section 12-7-1250 (Law. Co-Op. Supp. 1988)

AUTHORITY:

S.C. Code Ann. Section 12-3-170 (1976)

SC Revenue Procedure # 87-3

SCOPE:

A Technical Advice Memorandum is a temporary document issued to an individual within the Commission, upon request, and it applies only to the specific facts or circumstances related in the request. Technical Advice Memoranda have no precedential value and are not intended for general distribution.

Questions:
1. Is a corporate taxpayer limited to one $10,000 tax credit for one **infrastructure** project or is there a limitation of 50% not to exceed $10,000 per project with no limitation on the number of projects per year which may qualify for the credit?

2. If **infrastructure** project expenses were incurred prior to 1988 and the project is "deeded or dedicated"

(according to the statute) in 1988 or later, will the project qualify for the credit?

3. What constitutes dedication to public use as required by the statute?

4. Can the credit be claimed for a project that is deeded to a governmental entity?

5. In situations where the credit is claimed for a contribution of money to a governmental entity, will this have any effect of the corporation contribution deduction?

Discussion:

1. Section 12-7-1250(A) of the Code of Laws of South Carolina (Supp. 1988) states:

> A corporate taxpayer is allowed as a credit against taxes due pursuant to Section 12-7-230 an amount equal to fifty percent, not to exceed ten thousand dollars, of expenses paid or accrued by the taxpayer in building or improving any one **infrastructure** project.

It is ambiguous whether the language "any one **infrastructure** project" means that only one project may qualify for the credit per year or whether the credit is merely limited to 50% or $10,000 of expenses paid. Many South Carolina cases have held that tax statutes are not to be extended beyond the clear import of their language, and any substantial doubt as to its meaning is to be resolved in favor of the taxpayer. (Southeastern Fire Ins. Co. v. South Carolina Tax Commission, 253 S.C. 407, 171 S.E.2d 355 (1969); H.D. & J.K. Crosswell, Inc. v. Jones, 60 F.2d 827 (1972); Deering Milliden, Inc. v. South Carolina Tax Commission, 257 S.C. 185, 184 S.E.2d 711 (1971).

It therefore appears that the appropriate interpretation of this statute should be the one most favorable to the taxpayer. Section 12-7-1250(A) should thus be construed to mean that a taxpayer is not limited to the number of projects which will qualify for the credit.

2. In accordance with the plain wording of Section 12-7-1250, a project does not qualify for the **Infrastructure** Credit until it has met three criteria:

> ***2** (1) the project does not exclusively benefit the taxpayer
> (2) is built to applicable standards
> (3) it is dedicated to public use

There are exceptions to this listed in the statute however, it appears that the basic thrust of the statute is to require that the project be constructed and dedicated prior to the credit being available. The section was enacted by 1988 Act No. 488 effective for taxable years beginning after 1987. Therefore, a project dedicated in a taxable year beginning in 1988 but constructed in a prior year would qualify for the credit.

3. "Dedication" to public use rests on intention or clear assent of owner and must be under circumstances indicating abandonment to use of community.

> Peterson v. Borough of Marianna, 310 Pa. 524, 165 A. 838 ( )

In order to fully understand this phrase, one must also look to the meaning of "public use".

> Modern trend is to expand and liberally construe the term "public use" in considering state and municipal activities sought to be within its meaning; the test of "public use" is the right of the public to receive and enjoy its benefits.
>
> State ex rel. Taft v. Campanella, 50 Ohio St. 2d 242, 364 N.E.2d 21 ( )

It therefore appears that in order for dedication to public use to occur, (1) the owner of the land must manifest a clear assent to abandon the property to the use of the community and (2) the public must receive and enjoy the benefits of the property.

4. The credit may be claimed for a project deeded to a governmental entity. The credit is available as long as the 3 criteria described in # 2 are met. One of these criteria is that it be dedicated to public use. Public use has been defined in # 3 to mean the right of the public to receive and enjoy its benefits. Therefore, if the project is deeded to the governmental entity, the public must receive and enjoy the benefits in order to qualify for the credit.

5. The South Carolina corporate return is based on Federal taxable income. There is no provision in South Carolina law indicating that the use of the credit excludes a charitable deduction on the same return. Therefore, it appears that a charitable deduction and a credit is available.

Conclusion:

1. A corporate taxpayer may claim a credit of 50% of the expenses incurred not to exceed $10,000 per project with no limitation on the number of projects which may qualify for the credit.

2. **Infrastructure** project expenses incurred prior to 1988 and deeded or dedicated in a taxable year beginning in 1988 or later will qualify for the credit.

3. Dedication to public use will occur if (1) the owner of the land manifests a clear assent to abandon the property to the use of the community and (2) the public receives and enjoys the benefits of the property.

4. A project that is deeded to a governmental agency may qualify for the credit as long as the public receives and enjoys the benefits of the property.

*3 5. In situations where the credit is claimed for a contribution of money to a governmental unit, there is no effect on the corporation's charitable deduction.

1989 WL 1110652 (S.C.Tax.Com.)

END OF DOCUMENT

CERTIFICATE OF SERVICE

I certify that I have served the Petition for Rehearing, filed on August 7, 2013, upon all counsel of record, by directing that a copy of the Petition for Rehearing be hand delivered on August 7, 2013. Counsel of record is as follows:

Adam Nicholas Marinelli, Esquire
South Carolina Department of Revenue
P.O. Box 12265
Columbia, SC 29211

Respectfully submitted,

August 7, 2013

Sharon Dodgins
NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
(803) 771-8900