STATE OF SOUTH CAROLINA
In The South Carolina Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable John D. McLeod
Administrative Law Judge

Case No. 09-ALJ-17-0532-CC
Case Tracking No. 2011196887

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

v.

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

RESPONDENT'S REPLY TO PETITIONER'S MOTION FOR REHEARING

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INTRODUCTION

Pursuant to Rules 221(a) and 240 of the South Carolina Appellate Court Rules (SCACR), the South Carolina Department of Revenue (Department) would respond to the Appellant's petition for rehearing as follows. The Department respectfully requests that this Court deny this petition on two specific grounds: (1) that it establishes nothing more than opposing viewpoints instead of misapprehensions or overlooked law and (2) Petitioner's motion raises several new arguments not properly presented for review.

STATEMENT OF THE CASE

This matter came before the Administrative Law Court (ALC) pursuant to S.C. Code Ann. §§ 12-60-460 and 12-60-470 (Supp. 2010). This action began when Centex International, Inc. & Affiliates (Appellant or taxpayer) filed amended returns in 2007 adjusting the apportionment ratio for its income from the sale of bundled mortgages for the 2002-2005 tax years. The amended returns also claimed infrastructure tax credits based upon the expenditures made by subsidiaries of the Appellant, operating in South Carolina as a general partnership. The South Carolina Department of Revenue (Respondent or Department) determined the taxpayer was not entitled to the apportionment adjustments, or the claim for infrastructure tax credits made therein, on the basis that the infrastructure expenses were incurred by an unqualified subsidiary of the taxpayer, a general partnership, rather than the taxpayer directly. On July 25, 2007, the Department disallowed the adjustments made on the Appellant's amended returns for the 2002-2005 tax years, issued a notice of proposed assessment, and denied the claim for credits. On October 23, 2007, the Appellant wrote the Department appealing the denial of the credits and the notice of proposed assessment. The Department issued its

Department Determination on December 4, 2009, setting forth the legal basis for its adjustments and denial of the claim for credits. On December 7, 2009, the Appellant requested a contested case hearing before the ALC to dispute the Department Determination. Prior to a hearing on the merits, the Department filed a Motion for Partial Summary Judgment on the infrastructure credit question, to which the Appellant responded with a Cross-Motion for Summary Judgment on the same issue. A hearing was held before The Honorable John D. McLeod on March 31, 2011, and the Department's motion was subsequently granted. Appellant timely filed a Motion for Reconsideration pursuant to Rule 59(e), SCRCP, on June 13, 2011. The Department filed a Reply in Opposition on June 16, 2011, and a hearing on that motion was held at the offices of the ALC on July 7, 2011. The Appellant's motion was subsequently denied, and an appeal followed. The appeal was heard before this Honorable Court on April 17, 2013 and a decision was filed on July 24, 2013, ruling in favor of the Department. Petitioner filed its motion for rehearing on August 7, 2013.

STATEMENT OF THE FACTS

This action was brought by the Appellant to challenge the Department's denial of its request for a refund for approximately $5,100,000,[1] based upon a disallowed infrastructure tax credit for the 2002-2005 income tax years. The infrastructure tax credit claimed by the taxpayer is based on an attempted flow-through of the expenses incurred by Centex Homes, a general partnership that is wholly owned by three corporate affiliates

[1]In the event that the ALC's decision is overturned, determining the actual amount of the refund due will require a further audit of the infrastructure projects and the taxpayer's tax returns, as the amount was never fully ascertained since it was denied on legal grounds.

of Centex International. It purchases, develops, sells land or lots, and constructs and sells single family homes in South Carolina and many other states. As part of its business in this State, the partnership incurred expenses from constructing or improving the infrastructure within certain developments, more specifically roads, sewers, and water lines.

For tax years 2002-2005, the parent company (Centex International & Affiliates) filed amended corporate income tax returns, which included amended partnership returns for Centex Homes, claiming tax credits pursuant to S.C. Code Ann. § 12-6-3420 (Supp. 2010) for expenses that the partnership, Centex Homes, incurred in constructing or improving infrastructure in those areas that the partnership developed. Upon audit, these credits were denied by the Department.

ARGUMENTS

In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument. Rule 221(a), SCACR. "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Jean H. Toal, Shahin Vafai & Robert Muckenfuss, Appellate Practice in South Carolina 309 (1999) (citing Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933)). As Chief Judge Alex Sanders so aptly stated, "[A]ppellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." Kennedy v. S. Carolina Ret. Sys., 349 S.C. 531, 533 (2001) (citing State v. Austin, 306 S.C. 9, 19 (Ct. App. 1991)).

With respect to brevity, this return shall address each of Appellant's arguments and illuminate the following immutable conclusions: that this Court has not overlooked or misapprehended the law, that the vast majority of Appellant's petition for rehearing is an attempt to reargue the case using new arguments that were not raised at trial or on appeal, and the Appellant even presents some of its own complete misstatements of law.

I. The Majority was Correct in Distinguishing "A Taxpayer" versus "The Taxpayer" under the Infrastructure Tax Credit Statute.

A. People v. Enlow

The primary basis to disregard the Appellant's revisit of the "A versus The" argument is that it presupposes that this Court misapprehends the English language. However, there are other legal shortcomings worth noting as well, as this Court's plain language interpretation held no misapprehensions of law.

The Appellant claims that the majority mistakenly relied upon a Colorado case, People v. Enlow, 310 P.2d 539 (Colo. 1957), to evaluate the language of the infrastructure credit statute. While the majority certainly used the linguistic analysis contained therein, the underlying holding of Enlow was immaterial to this Court's reading of the plain language § 12-6-3420. The Enlow case was relied upon merely as an example of judicial recognition that word choice by the Legislature must be read plainly when unambiguous, and that the word "a" is general, while "the" is specific. The remainder of this Court's interpretation of § 12-6-3420 is based purely upon the general rules of statutory construction and the corporate context found within the credit statute itself. As such, no misapprehension of law has occurred here.

The Appellant then attempts to use "simple English" to further illustrate its flawed logic with the sentence:

"I'm not buying another watch until I sell ***the*** gold Rolex I own."

While the Appellant properly diagrams this sentence structure and identifies that "the" modifies "gold Rolex" instead of "watch," it overlooks the simple fact that a Rolex is still a watch. Moreover, unlike the credit statute, this rudimentary example places the broad term (watch) first and the specific term (Rolex) last, rendering it obvious to which word "the" contextually refers. Juxtaposing the infrastructure credit as a sentence:

"[a] corporation may claim a credit . . . for expenses incurred by the taxpayer"

it is apparent that without referring back to the specific term (corporation), "the taxpayer" would be contextually ambiguous. Furthermore, unlike a Rolex still being a watch, a general partnership is not a corporation. Consequently, this example misses the entire point of why the Legislature's choice to use "the taxpayer" must be read as an object of specificity. Reading it in any other fashion renders the statute ambiguous and unclear and the plain language must be respected.

The remainder of Appellant's Enlow analysis should be disregarded by this Court as nothing more than semantics not previously discussed on appeal and which further ignores the fact that the context of the infrastructure credit statute as a ***corporate*** credit must be read into the plain language contained therein.

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

The Appellant's argument regarding the general rule of tax credits is based entirely upon a misleading analysis by shepardizing case not cited by the majority's

opinion. In recognizing the general rule that "tax credits should be claimed by the entity that earns or generates the credit," this Court cited to Berks County Tax Collection Comm. v. Penn. Dep't of Cmty. & Econ. Dev., 60 A.3d 589, 592 (Pa. Commw. Ct. 2013). The court in Berks County simply recognized the underlying nature of credits and deductions, as they are generally reductions in tax liability of the entity that earned those credits and deductions. However, case law analysis is not required to arrive at that conclusion, for if it were not the general rule, the pass-thru statute of S.C. Code Ann. § 12-6-3310 would not be required at all. It should be unequivocally evident that entities being able to claim credits and deductions they did not generate are exceptions to the general rule and without express statutory permission such entities cannot do so. As the Department noted in its Brief:

> While entertaining, the Appellant's assertion that the Department promulgated this general premise as a "secret" interagency rule is specious at best. (Appellant's Initial Br. 24.) It logically follows that the general rule is that the entity generating the credit must be the entity that claims it; for if it was not, exceptions written directly into individual credit statutes (i.e., the consolidated return portion of the credit at issue in subsection (H)) and the pass-through provisions of § 12-6-3310 would have been completely unnecessary. Our Legislature included the "qualified claimant prerequisite" in the flow-through provisions of § 12-6-3310(B)(1), on the basis of this general rule.

(Respondent's Reply Br. at 16). Despite the seemingly undeniable logic of the general rule that claiming and earning the credit is normally performed by the same entity, the Appellant attempts to undermine its existence by distinguishing the holding of a case that the Berks County Court relied upon – Dunmire v. Applied Business Controls, Inc., 63 Pa. Commw. 479, 440 A.2d 638 (1981). Regardless of whether or not the Pennsylvania court

in Dunmire supports the application of this general rule, the ALC here properly ruled upon this issue without any reliance upon that case in its Order Granting Respondent's Motion for Partial Summary Judgment. In that order, the ALC recognized the administrative practice in South Carolina: "[that] the long standing policy of the Department in interpreting tax credit statutes, has been that "[e]xcept as otherwise provided, a credit must be used by the taxpayer that earns it."" (R. on Appeal at 11) (citing Pet'r Ex. G at 21; (Summ. J. Hr'g Tr. 60:5-7)). Based upon the basic underlying logic of the general rule and the long standing administrative practice of the Department, and the lack of any precedential value, the Appellant's attempted attack through Dunmire case should be disregarded. Therefore, there is no misapprehension of law here.

C. Media General Commc'ns, Inc. v. South Carolina Dep't of Revenue is Inapplicable.

The Appellant briefly looks to Media General Commc'ns, Inc. v. South Carolina Dep't of Revenue, 388 S.C. 138, 694 S.E.2d (2010) as some basis to disregard the majority's strict construction of the plain language of the infrastructure credit. As will be discussed in more detail regarding Appellant's subsection F below, the primary basis of inapplicability between Media General and Centex is that the former is based upon a tax imposition statute and the latter upon a tax credit statute. One is construed in favor of the taxpayer and the other strictly construed against the taxpayer, thus making the differences of these cases entirely distinguishable. Beyond that distinction, to even discuss Media General (which construed an alternative apportionment method statute for corporate income tax and the implications of reading the term "taxpayer" as singular or plural) is nothing more than a red herring that draws attention from the context and plain language

of § 12-6-3420. The alternative apportionment statute in Media General allowed for "any other method," to compute tax liability which the taxpayer then petitioned the ALC to allow the filing of a combined reporting methodology. Since combined reporting would include multiple taxpayers filing on the same return and South Carolina is considered a "single entity" state in regards to income tax filings, the Department read the word "taxpayer" as only allowing singular entities to file and therefore "any other method" did not include combined returns. Unlike the apportionment method statute (in which any ambiguity should be resolved in favor of the taxpayer) the corporate infrastructure credit statute does not have a congruent "any other entity" phrase related to what type of taxpayer qualifies. Its plain language is limited, quite specifically, to corporations. Therefore, the Appellant's claim that this Court overlooked Media General as a source of guidance is mistaken.

D. The Majority Evaluated Subsections (G), (H) and (I) of S.C. Code Ann. § 12-6-3420 Properly.

The Appellant then claims that the majority misapprehended subsections (G), (H) and (I) of the credit statute by interpreting them as further support of the corporate limitation for claiming the credit. All three of these subsections clearly discuss corporations and various aspects of the process of claiming this credit, and support this Court's interpretation of the plain language. As such, no misapprehension of law can be found here.

E. The Appellant Again Raises the "Qualifying Private Entity" Argument to No Avail.

This section of the Appellant's Motion for Rehearing does contain an actual example of misapprehended law. Unfortunately for the Appellant, the mistake is its own

and not the Court's. The General Assembly's inclusion of the phrase "qualifying private entity" in subsections (A)(3), (C)(2), (E), and (F), all refer to a type of non-governmental entity to which the corporation has deeded the infrastructure. None of these references are related to electric co-ops or any other entity that could make the qualifying expenditures. There are some areas of South Carolina that are maintained by private water and sewer companies which are subsidized for their management and operation of publicly used infrastructure. Section 12-6-3420 simply allows a corporate taxpayer to build roads and sewers in these areas, deed the improvements to those private entities (which ultimately benefit the general public), and still receive a tax credit. Nothing concerning discussions of "qualified private entities" relates to an expansion of what types of entities can make qualifying expenditures to generate the credit itself, and the Appellant's discussion of this language is unfounded.

F. Statutory Construction of Tax Imposition Statutes vs. Tax Credits.

The majority was correct in its reliance upon CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 716 S.E.2d 877 (2011), which recognized the long standing rule that exemptions, credits, and deductions are matters of legislative grace and are strictly construed against the taxpayer. While an ambiguity in a tax imposition statute may be construed against the government, the Appellant stretches this proposition such that ambiguities in tax credits should be liberally construed in favor of the taxpayer. This contention is without merit. In support of its tenuous claim, the Appellant looks to Alltel Commc'ns, Inc. v. South Carolina Dep't of Revenue, 399 S.C. 313, 731 S.E.2d 869 (2012). At issue in Alltel was the construction of a statute that imposes a license tax – not a credit. It is well settled law that taxing statutes are treated wholly different than

exemption, deduction, or credit statutes. Compare M. Lowenstein & Sons, Inc. v. S.C. Tax Comm'n, 277 S.C. 561, 290 S.E.2d 812 (1982); Davis Mech. Contractors, Inc. v. Wasson, 268 S.C. 26, 231 S.E.2d 300 (1977); C.W. Matthews Contracting Co. v. S.C. Tax Comm'n, 267 S.C. 548, 230 S.E.2d 223 (1976); and S. Soya Corp. v. Wasson, 252 S.C. 484, 167 S.E.2d 311 (1969), with Cooper River Bridge v. S. Carolina Tax Comm'n, 182 S.C. 72, 188 S.E. 508 (1936). The Appellant's claim that this Court misapprehended this long standing rule of law is simply unsupported.

The Appellant then reintroduces Technical Advice Memorandum (T.A.M.) #89-14 to this appeal, which, as stated on the first page 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.

Regardless of the lack of any evidentiary weight to this document, its contents are simply inapplicable to this case. The Appellant quotes a portion involving the tax cap placed on any one infrastructure project as follows:

> 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.

A cursory review of the cases cited by the T.A.M. reveals the Commissioner's error in arriving at this conclusion. Southeastern Fire involved an action to recover taxes paid on reinsurance premiums, not a credit. H.D. & J.K. Crosswell involved an action to recover excess profits tax assessed and collected by the Internal Revenue Service, not a credit. And finally, Deering Milliden was a case involving corporate license tax paid under protest, also not a credit. The Appellant is absolutely correct in its contention that tax imposition statutes are construed against the government. Tax credits, deductions, and exemptions however are not. This Court applied these longstanding principles of law correctly, and thus no ground for rehearing exists here.

II. The Pass-Through Provisions of § 12-6-3310 were applied correctly.

A. The Express Corporate Limitation and Private Letter Ruling (PLR) #11-6.

The Appellant then claims that this Court mistakenly interpreted the express corporate limitation of the infrastructure credit as a specific prohibition against pass-through from a general partnership. The Appellant is merely repeating an argument raised and ruled upon, and no misapprehension or overlooking of law has occurred here. As the Department stated during oral argument, general partnerships do in fact file a return upon which eligible credits for the group are claimed. In order to pass any credit through to the partners, the partnership as a whole must be entitled to claim it first. Because the infrastructure credit is expressly limited to corporations claiming it, such eligibility can never exist in the first place – and thus, no pass-through can occur.

In a second attempt to prove that the Department's interpretation is contradictory of past administration of credits, the Appellant then cites to Private Letter Ruling #11-6,

which involved the biomass credit pursuant to § 12-6-3620. Once again, the Appellant is mistaken. The infrastructure credit statute and the biomass credit statute are not analagous, and this Court properly ruled upon this issue in the first instance.

First and foremost, PLR #11-6 involves an LLC taxed as a partnership. As was noted in the Department's Brief at pages 29-30, LLC's were granted seemingly unfettered access to tax credits with the addition of an amendment to the pass-through statute in 2008 (after the tax years at issue in this case). While that fact alone (which was raised on appeal and properly ruled upon on by the majority) shows the Appellant's use of the PLR is unfounded, other notable differences exist with the biomass credit. First, no express limitation exists in its language as to what type of entity may claim it. Second, the biomass credit uses the non-specific "**a** taxpayer" as opposed to "the." As such, PLR #11-6 properly interpreted the much broader biomass credit and appropriately granted it to an LLC that was expressly allowed to do so under the pass-through provisions of § 12-6-3310.

The pass-through statute does not grant general partnerships free access to all tax credits. On the contrary, it quite clearly states that before a pass-through can take place, the entity must first qualify for the credit it seeks. Partnerships must first file a return and claim the credits it has generated, and because the infrastructure credit expressly limits the type of entity that can claim it to corporations, no pass-through can ever take place. The majority did not misapprehend, nor overlook, this clear aspect of the law and rehearing on this ground should be disregarded.

B. The Lack of a Pass-Through Provision in the Infrastructure Credit is Immaterial.

The Appellant's discussion of the dearth of language in § 12-6-3420 regarding pass-through provisions is without merit. First, the lack of such language in the credit is fact – not misapprehended law – and thus this should not be considered grounds for rehearing. Furthermore, the Appellant's statement that all of the examples of other credits that incorporate pass-through provisions were enacted prior to § 12-6-3310 is entirely incorrect. The pass-through statute was enacted in June of 2003. Section 12-6-3560, the motion picture credit, was enacted a year after the pass-through statute in July of 2004. Regardless of this error, this section of Appellant's motion is a mere diversion and should be discarded by this Court. The infrastructure credit does not incorporate pass-through provisions because it is expressly limited to corporations by its plain language, and thus speculation as Legislature's rationale in choosing to omit such provisions is a pointless and fruitless endeavor.

C. The Appellant Misinterprets the Case Law from Other Jurisdictions.

The Appellant's attempt to reargue the two cases of Bell Atlantic Nynex Mobile, Inc. v. CIR Services, 869 A.2d 611 (Conn. 2005), and L&W Constr. Co. v. Wisconsin Dep't of Revenue, 439 N.W.2d 619 (Wis. Ct. App. 1989), presents no misapprehensions or overlooked law, and therefore should also be disregarded as a basis for rehearing.

The majority properly cited these cases as perfect examples from other jurisdictions where any perceived inequity of disallowing a partnership the ability to pass through credits for which it did not qualify was not enough to disregard the plain language of the statutes at issue. Much like the case presented here, where there is no doubt that if the individual partners had made the qualifying expenditures the credit would have been granted, the choice to operate as a general partnership is a sophisticated

business decision and choice of entity carries with it serious implications, including taxation. Attempting to distinguish these cases on the basis of differently worded statutes or presenting new case law never before presented before the ALC or this Court is not only improper, but misses the rationale behind the majority's reliance upon them. The denial of the infrastructure credit is certainly a possible example of legislative inequity, and the majority relied upon Bell Atlantic and L&W as further support for the proposition that equitable considerations have no room in the strict construction of a tax statute. See also United States v. Brockamp, 519 U.S. 347 (1997). Furthermore, the principle that equity follows the law is well established. See Smith v. Barr, 375 S.C. 157, 164, 650 S.E.2d 486, 490 (Ct. App. 2007) (citing C&S Nat'l Bank v. Modern Homes Constr. Co., 248 S.C. 130, 133, 149 S.E.2d, 327 (1966)). As such, the infrastructure credit's limitation to corporate expenditures does not allow for equitable considerations regarding the Appellant's choice of entity. The choice of the Legislature to limit credits for specific types of entities is a policy question not fit for judicial review, and although seemingly arbitrary, such choices are outside of the purview of the issues presented to this Court.

III. "Entity" and "Aggregate" Partnership Theories were properly ruled upon by this Court.

Finally, the Appellant challenges this Court's determination that S.C. Code Ann. 12-6-600, Dalton v. South Carolina Tax Comm'n, 295 S.C. 174, 367 S.E.2d 459 (Ct. App. 1988), and Ellis v. South Carolina Tax Comm'n, 280 S.C. 65, 309 S.E.2d 761 (1983) did not support the claim that the expenditures made by the partnership should be treated as if the corporate partners made them directly. This argument, too, is without

merit, as this Court properly determined that a partnership is not some ethereal entity that carries no true implications within the realm of taxation.

First and foremost it should be made incontrovertibly clear that § 12-6-600, Dalton, and Ellis all deal with taxable income and deductions for expenses incurred – not credits. To that extent, it should be resoundingly repeated, as Justice Beatty did at the outset for the majority, that the Department did not disallow the $68,000,000 deduction for expenses for the partners' taxable income, rather, only the additional credit requested under § 12-6-3420.

Review of the cases should quickly dispel the notion that this Court misapprehended the law in arriving at that conclusion. Ellis v. S.C. Tax Commission, 280 S.C. 65, 309 S.E.2d 761 (1983) dealt with the disallowance of individual income deductions for expenses incurred on out-of-state real estate purchases by a partnership the individuals had invested in. The Appellant argues vigorously that Ellis supports its position for a complete disregard of the partnership entity and for each individual partner to realize every item of income, loss, deduction, and credit as if acting independently. (Appellant's Initial Br. 33-34.) This is simply incorrect. It is important to first note that the United States Supreme Court has weighed in on the legal recognition of partnerships when it held:

> Thus, while the partnership itself pays no taxes, 26 U.S.C. § 701, it must report the income it generates and such income must be calculated in largely the same manner as an individual computes his personal income. For this purpose, then, the partnership is regarded as an independently recognizable entity apart from the aggregate of its partners.

United States v. Basye, 410 U.S. 441, 448 (1973). While the aggregate theory is applied in Ellis, the deductions for out-of-state losses against in-state income were properly denied in Ellis because of the court's recognition of the "conduit theory" approach, which simply means that every item of income, loss, credit, or deduction **retains its character** before being passed through to the partners. The holding in Ellis affirms the Respondent's position that the character of the infrastructure credit should be retained before it can be passed through to Centex's partners. To that extent, the Appellant is mistaken in its application of aggregate theory, as it begs the question of whether or not the partnership earned the credit in the first place. Upon examination of the same quotation proffered by the Appellant with slightly different emphasis added, it becomes clear that the Ellis Court understood that premise:

> The "pass through" rule is equally applicable to limited partnerships. Section 12-7-300 makes no distinction between a general or limited partnership. 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.

Ellis, at 68, 309 S.E.2d at 762-63 (emphasis added). The Appellant's argument, as noted above, puts the proverbial cart before the horse in presupposing that the partnership ever actually realized the corporate infrastructure credit. Before the partnership entity is disregarded and an individual partner can realize a credit, take a deduction, or pay tax on

income that is part of its distributive share, the **partnership must have earned that credit, taken deductible losses, or made taxable gains in the first place**. The three corporate partners of Centex Homes are certainly entitled to their distributive shares of reportable income and the deductions for losses incurred through the operation of the partnership. They are not, however, entitled extraordinary reach to tax credits that were simply not accessible by a partnership before such distributive shares were calculated.

The same logic is easily applied to the nearly identical decision of Dalton, where the Court again recognized that character of every item of gain, loss, deduction, and credit is retained before the pass-through takes place. To condense this type of tax treatment down to its most elementary form, the square peg of the corporate infrastructure credit cannot be forced through the round hole of a partnership, simply because the corporate partners contributed to the partnership's bank account.

CONCLUSION

The Appellant's Motion for Rehearing has failed to present this Court with any real semblance of misapprehensions of or overlooked law. That is the high threshold required to be met before Opinion No. 27288 issued on July 24, 2013 will be withdrawn. Rather, the Appellant has reargued the case presented in the original appeal, incorporating with it new legal theory, new inapplicable case law, and strained legal representations. Because a motion for rehearing made upon this basis is inappropriate, the Department respectfully requests that this Motion be denied, as this Court ruled upon this case entirely and properly in the first instance.

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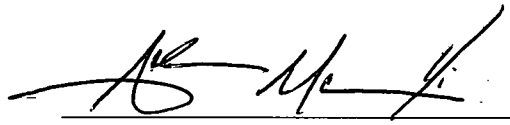
Respectfully submitted,



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PROOF OF SERVICE

I, Jena M. O'Connor, do hereby certify that I have caused to be mailed, postage prepaid, a copy of the Department of Revenue's Reply to Petition for Rehearing in the above referenced matter to Bernet R. Maybank, III, Esquire, PO Box 2426, Columbia, SC 29202, this 16th day of August 2013.

Jean M. O'Connor