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 REPLY TO RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING

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Briefly responding to Respondent Department of Revenue's (the "Department" or "DOR") Reply to Appellant Centex International, Inc. & Affiliates' ("Centex") Petition for Rehearing:

I. B. The "General Rule" with respect to Tax Credits

Page 7 of Respondent's Reply repeats the truism that except as otherwise provided, a credit must be used by the taxpayer that earns it.

It bears repeating that in its ALC brief, ALC Proposed Order, Respondent's Brief before the Supreme Court, and Respondent's Reply to Appellant's Petition for Rehearing, the Department has not cited a single:

(1) Statute;

(2) Regulation;

(3) DOR Policy Document (Revenue Ruling, PLR, etc.); or

(4) South Carolina Appellate Court case

which supports this statement.

Not one! And no one from the DOR testified to this purported long standing agency interpretation at the ALC hearing!

Indeed, in what is apparently the only written DOR pronouncement on the subject, the *South Carolina Tax Incentives for Economic Development: Winter Edition 2009*, the rule is just the opposite. The publication states:

> Except as otherwise provided, a credit must be used by the taxpayer who earns it. *Exception to these rules exist* for the following: (1) taxpayers [like Centex] participating in a consolidated corporate income tax return [and] (2) pass through entities [like Centex Homes] eligible to earn and use a credit...

Id. at 21.

I. E. Qualifying Private Entity

Faced with the simple fact that the Infrastructure Tax Credit statute uses the term "qualifying private entity" (in addition to "corporation" and "taxpayer"), Respondent argues that the various statutory references to qualifying private entity "all refer to a type of non-governmental entity to which the corporation has deeded the infrastructure." (Id. at pg 9).

For example, Page 9 of Respondent's Reply states:

> "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.*" (emphasis added)

Page 9 also states:

> "Nothing concerning discussions of "qualified private entities" [in the Act] relates to an expansion of what types *can make qualifying expenditures* to generate the credit itself..." (emphasis added)

Is this what the Infrastructure Tax Credit statute says? No!

Subsection (F) of Section 12-6-3420 states: "A qualifying private entity is not allowed the credit provided by this section *for expenses it incurs in building or improving facilities it owns, manages, or operates.*" (Emp added). Obviously (F) deals with building – not receiving – the infrastructure.

II. A. PLR #11-6

Respondent attempts to limit PLR #11-6, which allowed an LLC taxed as a partnership to make the requisite eligible expenditures and pass through the corporate income tax credit to its S Corporation member.

The Respondent first states that LLC's were granted seemingly unfettered access to tax credits with the addition of an amendment to the pass-through statute in 2008. Perhaps true, but that's not what the PLR relies on.

Section 12-6-3310 contains three subsections (A), (B), and (C). Subsection (C) contains the LLC provisions. Subsection (B) contains the general pass-through provisions applicable to partnerships and all other pass-through entities.

As stated above, all the eligible expenditures in PLR #11-6 were made by the LLC – not the S Corporation member.

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 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...

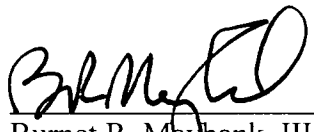
Code Section 12-6-3620 does not address the pass through of credits by flow through entities. *However, Code Section 12-6-3310(B) provides general rules* relating to the pass through of credits by flow through entities. *Under Code Section 12-6-3310(B)(1)* "Unless specifically prohibited, an "S" corporation, 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 added)

In summary, using the general pass through provision, subsection (B) (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.

Respondent also notes that "no express limitation exists in its language as to what type of entity may claim it." There may not be an "express limitation" but the section states "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...." Section 12-6-530 is the corporate income tax section and Section 12-20-50 is the corporate license tax section.

In summary, PLR #11-6 deals with virtually identical facts and a very similar statute. The expenditures were made, i.e. the checks were cut, by the LLC, and not the corporation. And the statutes are similar in that they are corporate income tax credits without an explicit pass-through provision.

Respectfully submitted,



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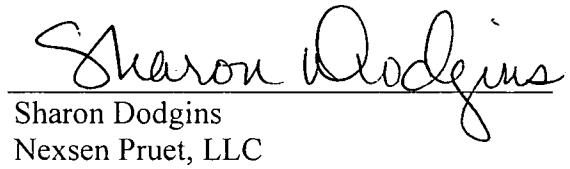
PROOF OF SERVICE

I certify that I have served the **Appellant's Reply to Respondent's Return to Appellant's Petition for Rehearing** on the South Carolina Department of Revenue by mailing a copy of it, to their attorney of record, Adam Marinelli, South Carolina Department of Revenue, P.O. Box 12265, Columbia, SC 29211.

August 22, 2013



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