THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable John D. McLeod
Administrative Law Judge

Opinion No. 27288 (Filed July 24, 2013)

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

v.

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

AMICUS CURIAE BRIEF ON BEHALF OF THE SOUTH CAROLINA STATE CHAMBER OF COMMERCE

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I. INTEREST OF THE AMICUS

The South Carolina Chamber of Commerce (the "Chamber") is a tax-exempt organization under Section 501(c)(6) of the Internal Revenue Code organized to further the common interests of South Carolina business. The Chamber is a leading advocacy organization for business in the state, including the advocacy of a balanced and predictable tax and spending system. The Chamber strives to create prosperity for the state's citizens through increased economic productivity and competition and to promote the positive impact of a successful business community, in both the private and public sectors, on citizens of this state.

The Chamber is a non-profit, non-partisan organization which represents businesses, industries, professions, and associations throughout the State. The Chamber aims to serve South Carolina's broad based business interests using a unified voice. Specifically, the Chamber protects South Carolina's businesses by identifying and addressing issues facing businesses, lobbying at both the state and federal level, providing management training and program development, offering employer benefits programs, seeking a balance between environmental responsibility and economic success, addressing education policy to ensure a work force for the future, and tendering meaningful business communications.

II. STATEMENT OF ISSUES UNDER APPEAL

A. Does the Majority Opinion Fail to Apply the Proper Standard of Review for Economic Development Incentives?

B. Does the Majority Opinion improperly disregard the Legislature's

Definition of Taxpayer?

C. Does the Majority Opinion read the Pass-Through Provisions too Narrowly?

III. ARGUMENT

A. General

The Infrastructure Tax Credit statute is an economic development incentive statute. The ALC Order so describes it. The obvious purpose is to promote the development of housing and commercial development by authorizing real estate developers to provide the necessary public infrastructure at their cost and expense. Such infrastructure includes public water, sewer and road construction – all of which are critical to real estate development.

The benefit to local government is also obvious. The tax base is expanded – sometimes greatly so. Jobs are provided during the construction phase and housing and/or commercial office space when the project is complete.

And the General Assembly recognized that no matter how much real estate development may benefit the economy and the tax base, in many cases state and local government simply does not have the funds to build the required public road, water and sewer infrastructure. So the General Assembly accordingly enacted the Infrastructure Tax Credit statute.

The tax credit statute is relatively straight forward. It states in relevant part:

> "(A) A corporation may claim a credit for the construction or improvement of an infrastructure project..... for (1) expenses paid or accrued by the taxpayer."

It is fair to say that prior to the majority opinion in *Centex*, the word "taxpayer,"

when used in Title 12, has always been assumed to mean the statutory definition contained in section 12-6-30, which includes partnerships.

The majority opinion disregards the General Assembly's definition of "taxpayer" and substitutes "corporation." This is a matter of utmost concern to the State Chamber as the words "the taxpayer" appears in the great majority of state tax credit provisions.

In addition, the Court's hyper-technical reading of an economic development incentive may chill investments under a host of incentive statutes. Lastly, the Court's strict (and unique) reading of the pass through statute causes great concern in a variety of tax areas (and not just incentives).

B. The Majority Opinion Fails to apply the Proper Standard For Review for Economic Development Incentives

1. "A Taxpayer" vs. "The Taxpayer"

The majority opinion is premised upon the fact that "the legislature used the phrase '*the* taxpayer' rather than '*a* taxpayer.' " Of significant interest the Infrastructure Tax Credit Act actually uses three phrases: "corporation;" "taxpayer;" and "qualifying private entity." The Act uses "corporation" 12 times; "taxpayer" eight times; and "qualifying private entity" six times.

Seven of the 12 references to "corporation" are found in subsection (I) which deals with the disposition of the credit in the event of a merger, consolidation or reorganization of the corporation which originally claimed the credit. Excluding subsection (I), the breakdown is as follows:

"Corporation"	"Taxpayer"	"Qualifying Private Entity"
5	8	6

The majority opinion holds that based upon the use of the words "the taxpayer," only a corporation could make the qualifying expenditures. If only corporations could make the qualifying expenditures, why would the General Assembly have used the term "taxpayer" eight times and "qualifying private entity" six times? Wouldn't it have simply used "corporation"?

Also of significance are the three subsections of section 12-6-3420 directly relating to the making of the expenditures (as opposed to claiming the credit.) These are subsections (B), (D) and (F). Subsection (B) relates to "*expenses paid or accrued by the taxpayer* in building [an].....infrastructure project." Subsection (D) provides that if infrastructure benefits more than the taxpayer "the *expenses of the taxpayer* must be allocated to the various beneficiaries...." (Emp. added). And (F) states that "A *qualifying private entity is not allowed a credit.....for expenses it incurs.....*" (Emp. added). None of these subsections uses the word "corporation!"

The Majority Opinion states that "[r]eading section 12-6-3420 in its entirety,...reveals the legislatures intent that a corporation must be the entity that incurs the expenses to generate the tax credit." Yet in the only specific references to expenses in the Act the General Assembly used "taxpayer" (or qualifying private entity).

And why would the General Assembly have used the term "qualifying private entity" at all if only corporations could incur the expenses? Subsection (F) plainly states "A qualifying private entity is not allowed the credit.....for expenses it incurs in building or improving facilities it owns, manages or operates." Why wouldn't it have simply said, "A corporation is not allowed the credit....."

Hundreds of statutes in Title 12 use the term "taxpayer." The majority of tax credits have the words "the taxpayer" contained therein. Few, if any, sections in Title 12

contain the phrase "taxpayer as defined in section 12-6-30,...."

Are taxpayers now going to have to analyze every code section to determine if "taxpayer" is defined by section 12-6-30 – or something else? After *Centex*, taxpayers know one thing: the use of the term "taxpayer" *eight* times in a statute is not sufficient in itself to invoke the statutory definition contained in section 12-6-30!

Perhaps most egregious in the majority opinion is its reliance on *Bell Atlantic Nynex Mobile, Inc. v. CIR Services*, 869 A.2d 611 (Conn. 2005) and *L&W Construction Co. v. Wisconsin Dept. of Revenue*, 439 N.W.2d 619 (Wis. Ct. App. 1989). The tax credit statutes in both cases very explicitly limited the credit to the "corporation" which paid certain expenditures. By contrast, the South Carolina Infrastructure Tax Act limits the credit to expenditures made by the taxpayer – a statutory term of Art. The cases could hardly be more distinguishable!

2. The Majority Opinion's Hyper-technical reading of the Act fails to conform with the spirit of Economic Development Incentives

The South Carolina Appellate Courts have long recognized the importance of state economic development incentives. See *Southeastern-Kuson, Inc. v. S.C. Tax Commission*, 276 S.C. 487, 490, 280 S.E.2d 57, 59 (1981), *Hercules Contractors & Engineers v. S.C. Tax Commission*, 280 S.C. 426, 435, 313 S.E.2d 300, 306 (Ct. App. 1984), *Duke Power v. Bell,* 156 S.C. 299, 301, 152 S.E. 865, 868 (1930).

Courts in other jurisdictions have recognized that construing tax incentive statutes to narrowly could defeat the legislative purpose. Such statutes, while granting tax credits, should not be so strictly construed against the taxpayer as to defeat or destroy the legislative intent and should further, not frustrate, the policy of rewarding investment and spurring economic development. See *State of Arizona v. Capital Castings*, 207 Ariz. 445,

88 P.3d 159, 161 (2004) ("In the tax field, we liberally construe statutes imposing taxes in favor of taxpayers....but strictly construe tax exemptions.....Nevertheless, an exemption should 'not be so strictly construed as to defeat of destroy the [legislative] intent and purpose.'....Our interpretation of the statute therefore should further, not frustrate, the policy of encouraging investment and spurring economic development"); *Idaho State Tax Commission v. Haener Bros., Inc.*, 121 Idaho 741, 828 P.2d 304, 307 (1992) ("Although construction of exemption statutes is generally to be construed against the taxpayer, the overall scheme and intent of the legislation must not be overlooked"); *Sharpe v. Tyler Pipe Indus., Inc.*, 919 S.W.2d 157, 161 (1996) (the concept that a tax exemption must be "strictly" construed "cannot be used as an excuse to stray from reasonableness;") *Texas Citrus Exchange v. Sharp*, 955 S.W.2d 164, 179 (Tex. 1997) ("By construing the tax exemption for electricity to narrowly, the Comptroller defeats the legislative purposes underlying the exemption"); *Amoena Corp. v. Strickland*, 248 Ga. 496, 283 S.E.2d 894, 897 (1981) ("It is true that tax exemptions are to be strictly construed against the taxpayer.....However, this should not impinge on the other rule that a statute is to be construed in accordance with its real intent and meaning and not so strictly as to defeat the legislative purposes;") *Elmer W. Davis, Inc. v. Comm. Of Taxation,* 957 N.Y. S.2d 427, 433, 104 A. D3d 30 (2012) (" 'while it is certainly true that an exemption statute is to be construed strictly against those arguing for non-taxability, a tax exemption statute's interpretation should not be so narrow and literal as to defeat its settled purpose'. .....Inasmuch as the Tribunal's interpretation of General Municipal Law §854 (4) is so narrow and literal as to hamper the statutory goal of fostering economic development, ...it must be annulled; ") *City of Pinson v. Utilities Board*, 96 So. 2d 367, 370 (2007) ("although tax exemption clauses are to be construed most strongly against

the party or person paying the tax, they are not to be so strictly construed as to defeat or destroy the intent and purpose of the statute containing the exemption clause, and no statutory construction should be accepted that would have that effect;") *Commissioner of Revenue v. Gillette Co.*, 454 Mass. 72, 907 N.E.2d 629, 632 (2009) ("We have said with respect to other tax incentive statutes, however, that they 'must be fairly construed and reasonably applied in order to effectuate the legislative intent and purpose to promote the general welfare of the Commonwealth'.")

Referring to federal tax incentives, the authors of *Interpreting Tax Statutes: When are Statutory Presumptions Justified*, Houston Business and Tax Law Journal 389, 400-01 (2004) state:

> Third, there are instances *where application of a presumption is useful to ensure that a clear legislative agenda is not frustrated by an unduly narrow or broad interpretation.* For example, where Congress has created an exemption from tax for charitable gifts in order to encourage such philanthropy, the exemption provision should be construed liberally to advance the presumed policy and legislative goal behind the statute. *This would also be the case for incentive tax credits, where a narrow construction could frustrate a legislative agenda.* Liberally construing such credits is often necessary to give full force to Congress' intent to encourage certain activities.
>
> Take the enhanced oil recovery credit found at section 43, for example....Congress wants taxpayers to rely on these credits when they weigh their investment options, and without a liberal construction of the credits, taxpayers will be hesitant to do so. (emp added)

The DOR has previously recognized that economic development tax statutes should be construed in a way to benefit the obvious legislative purpose, regardless of possible legal ambiguities. *See* SCDOR PLR #95-3 (S Corp eligible for Job Tax Credit, which statute required an entity to be "subject to" South Carolina taxes, even though S Corps rarely are); and SC PLR 96-11 ("and" means "or" making it easier for entities to

qualify for utility tax credit.)

The DOR took this position with regard to the Infrastructure Tax Credit statute! In its Technical Advice Memorandum (TAM) 89-14, the SCDOR stated this rule of statutory construction with regards to the Infrastructure Tax Credit:

> 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); *Deering Milliken, 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. (emphasis added)

As stated above, the legislative intent for the Infrastructure Tax Credit statute is to incentivize the private sector to pay for and provide public road, water and sewer. By rewriting the statute to insert "corporation" in lieu of the legislature's definition of "taxpayer," the majority hampers the statutory goal of fostering economic development. Instead, "the appropriate interpretation of this statute should be the one most favorable to the taxpayer." (TAM 89-14).

C. The Majority Opinion improperly disregards the Legislature's Definition of Taxpayer

Arguably the words "the taxpayer" in the Infrastructure Tax Credit statute can be read in one of two ways: (1) it can be rewritten to mean "corporation;" or (2) the General

Assembly's definition of "taxpayer."

The majority opinion rewrites the statute to read "corporation." While the wording of Infrastructure Tax Credit statute is fairly unique, as stated above, the words "the taxpayer" are found in the great majority of tax credit provisions.

When the terms of a statute are clear and unambiguous, a court must apply them according to their literal meaning. *Duke Power Co. v. S.C. Tax Commission,* 292 S.C. 64, 354 S.E.2d 902 (1987); *Garris v. Cincinnati Ins. Co.,* 280 S.C. 149, 311 S.E.2d 723 (1984).

And where the General Assembly has prescribed legal definitions for the terms employed in a statute, such definitions are generally binding upon the courts and should prevail. In *Brown v. Martin,* 203 S.C. 84, 26 S.E.2d 317, 318 (1943) the Court stated:

> The General Assembly has power to prescribe legal definitions of its own language, and such definitions are generally binding upon the Courts, and should prevail. *Windham v. Pace*, 192 S.C. 271, 6 S.E.2d 270.
>
> While the Workmen's Compensation Act is to be liberally construed to the end that the benefits thereof may not be denied upon technical, narrow and strict interpretation, words should be given their established legal meaning or the meaning which the Legislature intended. *Coakley v. Tidewater Const. Corporation,* 194 S.C. 284, 9 S.E.2d 724; nor is the Court justified in so construing it as to do violence to a specific requirement of the Act. *Wallace v. Campbell Limestone Co.*, 198 S.C. 196, 17 S.E.2d 309.

See also Weston v. Caroline Research and Development Foundation, 303 S.C. 398, 401 S.E.2d 161 (1991) ("It is well settled that legislative body has the power within reasonable limits to prescribe legal definitions of its own language, and when an Act passed by it embodies the definition, it is generally binding upon the Courts"); *Bell Finance v. South Carolina Dept. of Consumer Affairs,* 297 S.C. 111, 374 S.E.2d 918, 920

(Ct. App. 1988) "In construing a statute, the words used should be given their ordinary meaning, nothing else appearing... Where the statute, however, contains words that are statutorily defined, the statutory definitions should generally be followed in interpreting the statute."); *Fruehauf Trailer Co. v. South Carolina Electric Gas Co.*, 223 S.C. 320, 75 S.E.2d 688 (1953); *Purvis v. State Farm Mut. Auto Ins. Co.*, 304 S.C. 283, 403 S.E.2d 662, 665 (1991) ("The General Assembly has the power to prescribe legal definitions by statute, and such definitions are binding upon courts and should prevail.")

In addition, if a statute is unambiguous, then the plain meaning of the statute's words should apply without regard to statutory interpretation principals, e.g. *Kennedy v. South Carolina Retirement System*, 345 S.C. 339, 346-48, 549 S.E.2d 243, 246-7. *See also Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16, at § 6 (1998) ("Pacesetter contends the remedies of section 37-10-105 are penal in nature such that the statute should be strictly construed against the purchasers. As Judge Floyd noted, however, strict construction of penal statutes may be modified by affirmative legislative action. 2B Singer, *Sutherland Statutory Construction, section 59.06.* Further, this Court has held that recognized rules of statutory construction must give way to the cardinal rule of legislative intent."); *Gardner v. Biggart*, 308 S.C. 331, 417 S.E.2d 858, 859 (1992) ("Department correctly observes that §15-78-20(f) requires the Act be liberally construed in favor of limiting the State's liability. *However, the cardinal rule of statutory construction is that the legislative intent must prevail*.....This Court will not construe a statute in derogation of sovereign immunity liberally in favor of the State when, to do so, negates the legislative intent.")

This Court should therefore read the Infrastructure Tax Credit statute literally, i.e. the Appellant "corporation may claim a credit....for (1) expenses paid or accrued by the

taxpayer." "Taxpayer" is defined by the General Assembly to include partnerships. Three corporate subsidiaries of the Appellant paid $68 million in qualifying expenses from a joint (general partnership) checking account. The Appellant claimed the credit in its consolidated state corporate income tax return. Read literally the Appellant has satisfied all the credit requirements.

D. The Majority Opinion reads the Pass-Through Provisions too Narrowly

The Congressional Budget Office (CBO) issued a Report in December 2012[1]

The Summary states:

> Since the individual income tax was instituted in 1913, the profits of most businesses have been allocated, or "passed through," to their owners and subjected to that tax – rather than to the corporate income tax. However, most business activity has occurred at firms subject to the corporate income tax (C Corporations) because those firms tend to be larger than pass-through entities. Over the past few decades, the proportion of firms organized as pass-through entities and their share of the revenues that businesses receive from sales of goods and services – that is, business receipts – have increased substantially: In 1980, 83 percent of firms were organized as pass-through entities, and they accounted for 14 percent of business receipts; by 2007, those shares had increased to 94 percent and 38 percent, respectively. This report examines those shifts in organizational structure, the effect they have had on federal revenues, and the potential effects on revenues and investments of various alternative approaches to taxing businesses' profits.

The CBO Report shows the increase in entities organized as other than C Corporations over the past 20 years. As a result of these changes in choice of entity, the General Assembly adopted a broad pass-through provision, section 12-6-3310. This

[1] Congressional Budget Office, *Taxing Businesses through the Individual Income Tax* 1 (2012) (available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/43750-TaxingBusinesses2.pdf).

provision, prior to *Centex*, has been uniformly applied by the SCDOR to allow the pass-through of tax credits to partners, members, and S Corporation shareholders. Indeed, this pass-through statute was most recently cited by the DOR to allow expenditures made by an LLC to qualify for pass-through corporate tax credits, see SCDOR PLR 11-6.

The majority opinion states that "*Strictly construing* the Pass-Through statutes, we find that Centex Homes does not qualify for the credit." Why is the pass-through statute strictly construed? It is not itself a credit, deduction or exemption statute. It merely provides the statutory procedural mechanism for transferring credits and deductions to partners and members. And it contains the almost unique "unless *specifically* prohibited" statutory language. (emp. added)

The majority opinion also holds that "the condition precedent to pass through is that the credit is initially earned by the partnership." The partnership in this case was composed of three corporate partners. IRC § 702(b), section 12-6-600, *Dalton v. South Carolina Tax Commission*, 295 S.C. 174, 367 S.E.2d 459 (Ct. App. 1988) and *Ellis v. South Carolina Tax Commission*, 280 S.C. 65, 309 S.E.2d 761 (1983) all hold that the partnership is ignored for tax purposes. Instead, it is as if the partners – all corporations – had made the expenditures directly.

The majority opinion also relies on the fact that unlike several tax credit statutes the Infrastructure Tax Credit Act does not contain language incorporating the pass-through provisions of section 12-6-3310. Having enacted section 12-6-3310, why would the General Assembly ever incorporate such language in new Acts (other than to alter or amend them?) And what about the numerous tax credit provisions which have no pass-through provisions, e.g. sections 12-6-3375 (port cargo volumn increases), 12-6-3376 (plug-in hybrid vehicle), 12-6-3415 (R&D expenditures), 12-6-3470 (Employees Tax

Credit), 12-6-3477 (Apprentice Tax Credit), 12-6-3520 (habitat management), 12-6-3525 (vehicle or scrap recyclers), and section 12-6-3530 (community development tax credits). Is there a post-*Centex* cloud over these incentives?

IV. CONCLUSION

The Majority opinion states that "we question the wisdom of the statutory language as we believe an entity that legitimately expends funds for state infrastructure deserves to be rewarded with a tax incentive." The opinion also states "Even though we question the reasoning for restricting the infrastructure credit to corporate entities, we believe the statutory language is clear that the legislature intended this result."

The State Chamber urges the Court to not so strictly construe the Infrastructure Tax Credit against the taxpayer to defeat or destroy the legislative intent and further, not frustrate the policy of rewarding investment and spurring economic development. This is particularly true for a tax credit which provides critical public infrastructure such as road, water and sewer. And the court can accomplish this merely by adhering to the General Assembly's definition of "taxpayer."

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Amicus Curiae Brief filed by the South Carolina Chamber of Commerce complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I served the **Amicus Curiae Brief on Behalf of the South Carolina Chamber of Commerce** on the Appellant and Respondent by depositing copies of it in the United States Mail, postage prepaid, on September 9, 2013 addressed to their attorneys of record as follows:

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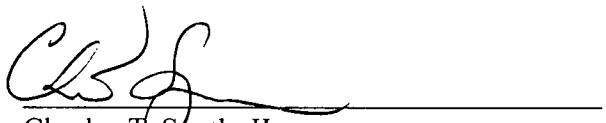

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