

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Administrative Law Judge

Case No. 10-ALJ-17-0270-CC

Duke Energy Corporation 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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TABLE OF CONTENTS

	Page
I. STATEMENTS OF IDENTITY AND INTEREST OF AMICUS CURIAE.....	1
II. INTRODUCTION & FACTUAL BACKGROUND.....	1
A. The Determination Letter.....	1
B. The Department's Conduct: The Waivers	2
C. The Department's Defense: The Waivers Do Not Mean What They Say	2
D. The Department's Actions: Effects and Consequences	3
III. DISCUSSION & ANALYSIS	4
A. Extensions of Time to Assess Tax or Claim a Refund	4
B. Statute of Limitations.....	5
C. The Department Has Validly Waived the Statute of Limitations and Extended the Time to Claim a Refund.....	10
D. The Department is Equitably Estopped From Raising the Statute of Limitations Defense	16
E. The Statute of Limitations has been Equitably Tolloed by the Department's Conduct.....	18
IV. CONCLUSION.....	19

TABLE OF AUTHORITIES

Page

CASES

<i>Am. Legion Post 15 v. Horry County</i> , 381 S.C. 576, 584, 674 S.E. 2d 181, 185 (Ct. App. 2009)	17, 18
<i>Angle v. United States</i> , 996 F.2d 252 (10th Cir. 1993)	13
<i>Anonymous Taxpayer v. S.C. Dep't of Revenue</i> , 377 S.C. 425, 439–40, 661 S.E. 2d 73, 80–81 (2008)	7, 12
<i>Argent Lumber Co. v. Query</i> , 178 S.C. 1, 182 S.E. 93, 95 (1935)	13, 14
<i>Brandt v. Hickel</i> , 427 F.2d 53, 57 (9th Cir. 1970)	17
<i>Case v. Hermitage Cotton Mills</i> , 236 S.C. 285, 287, 113 S.E. 2d 794, 795 (1960)	7
<i>Commissioner v. Lester</i> , 366 U.S. 299, 306 (1961)	11
<i>Finn v. United States</i> , 123 U.S. 227, 232–33, 8 S. Ct. 82, 85 (1887)	13
<i>Goff v. Mills</i> , 279 S.C. 382, 388, 308 S.E.2d, 778, 781 (1983)	12
<i>Grunwald v. Comm'r</i> , 86 T.C. 85, 89 (1986)	8, 11
<i>Heckler v. Community Health Servs. Of Crawford County, Inc.</i> , 462 U.S. 51, 60– 61, 104 S. Ct. 2218, 2224 (1984)	17
<i>Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.</i> , 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009)	18, 19
<i>Langley v. Pierce</i> , 313 S.C. 401, 403–04, 438 S.E. 2d 242, 243 (1993)	7
<i>Mathis v. Brown & Brown of S.C., Inc.</i> , 389 S.C. 299, 309, 698 S.E.2d 773, 778	10
<i>McCall v. Batson</i> , 285 S.C. 243, 329 S.E. 2d 741 (1985)	12, 14, 15
<i>McGill v. Moore</i> , 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2003)	8
<i>McLendon v. S.C. Dep't of Highways & Pub. Transp.</i> , 313 S.C. 525, 525–26, 443 S.E. 2d 539, 540 (1994)	7
<i>Mende v. Conway Hosp., Inc.</i> , 304 S.C. 313, 315, 404 S.E. 2d 33, 34 (1991)	7, 12
<i>Menges v. Dentler</i> , 33 Pa. 495, 500 (1859)	17
<i>Mid-Continent Refrigerator Co. v. Way</i> , 263 S.C. 101, 105, 208 S.E.2d 31, 33 (1974)	9
<i>Monarch Mills v. S.C. Tax Comm'n</i> , 149 S.C. 219, 146 S.E. 870, 872 (1929)	13
<i>Myrtle Beach Lumber Co. v. Willoughby</i> , 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981)	9
<i>Newman v. Comm'r</i> , T.C. Memo. 1974-45	11
<i>Plantation A.D., LLC v. Gerald Builders of Conway, Inc.</i> , 386 S.C. 198, 205, 687 S.E. 2d 714, 718 (Ct. App. 2009)	9
<i>Quail Hill v. County of Richland</i> , 387 S.C. 223, 236, 692 S.E. 2d 499, 506	17

TABLE OF AUTHORITIES (continued)

	Page
<i>Ripley v. Commissioner of Internal Revenue</i> , 103 F.3d 332 (4th Cir. 1996).....	8
<i>Rock Island, A. & L.R. Co. v. United States</i> , 254 U.S. 141, 143	11
<i>S. Atl. Fin. Serv., Inc. v. Middleton</i> , 356 S.C. 444, 447, 590 S.E. 2d 27, 29 (2003).....	7, 9, 10
<i>Simpson v. MSA of Myrtle Beach, Inc.</i> , 373 S.C. 14, 26–27, 644 S.E.2d 663, 669 (2007).....	10
<i>Springs & Davenport, Inc. v. AAG, Inc.</i> , 385 S.C. 320, 326, 683 S.E.2d 814, 817 (Ct. App. 2009).....	9
<i>United States v. Dalm</i> , 494 U.S. 596, 608, 110 S. Ct. 1361, 1368 (1990).....	12, 13
<i>United States v. Ganz</i> , 806 F. Supp. 1567, 1575 (1992).....	17
<i>United States v. Hodgekins</i> , 28 F.3d 610, 614 (7th Cir. 1994).....	10
<i>Williams v. Teran, Inc.</i> , 266 S.C. 55, 60, 221 S.E.2d 526, 529 (1976).....	9
<i>Zabinski v. Bright Acres Assocs.</i> , 346 S.C. 580, 589, 553 S.E. 2d 110, 114 (2001).....	16

STATUTES

S.C. Code Ann. § 12-47-210.....	6
S.C. Code Ann. § 12-47-220.....	6
S.C. Code Ann. § 12-54-30.....	6, 14
S.C. Code Ann. § 12-54-80.....	5, 6
S.C. Code Ann. § 12-54-85(A)	4
S.C. Code Ann. § 12-54-85(C)(4).....	5, 16
S.C. Code Ann. § 12-54-85(C)(5).....	5
S.C. Code Ann. § 12-54-85(F)(1)	5, 16
S.C. Code Ann. § 12-60-40.....	5, 12, 15, 16
S.C. Code Ann. § 12-60-470(G)	14

OTHER AUTHORITIES

S.C. Dep’t of Rev. Annual Accountability Report 2008-2009, at 2 (Sept. 15, 2009).....	3
South Carolina Revenue Procedural Bulletin #00-3	11

I. STATEMENTS OF IDENTITY AND INTEREST OF AMICUS CURIAE

The South Carolina State 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 businesses. 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 nonprofit, nonpartisan 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. INTRODUCTION & FACTUAL BACKGROUND

A. The Determination Letter

The genesis of this contested case proceeding is a Department Determination letter dated February 4, 2010 issued by the Department to the Appellant, Duke Energy Corporation (“Duke”), relating to Duke’s request for a refund for Tax Years 1978 through 2001. The Chamber of Commerce is not a party to this action. The sole participation herein of *amicus curiae* is for the limited purpose of providing information and analysis for the Court of one of the

defenses raised by the Department in its Determination Letter, specifically that Duke's request for a refund was not "timely." The Department's position on this issue and assertion of the statute of limitations as a defense is entirely contradictory to the practices and procedures implemented by the Department and its predecessors for decades.

B. The Department's Conduct: The Waivers

As acknowledged by the Department in its Determination Letter, Duke and the Department entered into numerous written agreements furnished by the Department entitled "Consent to Extend the Time to Assess Tax" during the time periods at issue in this proceeding – viz. 1978-2001 (the "Waivers"). These agreements specifically set out the years and tax return types subject to the agreement and further specifically state that the agreement "extends the time for mailing a notice of assessment **or refund**" during the stated time period. The Waivers are issued on the Department's letterhead, with information pre-filled in by the Department, and signed by the Department prior to delivery to Duke.

C. The Department's Defense: The Waivers Do Not Mean What They Say

According to the Department's Determination Letter, despite the clear written language of the Waivers executed between the Department and Duke, the agreements do not operate to extend the time to file a refund claim but rather only benefit the Department by extending the time to assess taxes. The Determination Letter notes that each of the several agreements executed between Duke and the Department provide, in relevant part, that the written agreement "extends the time for mailing the notice of assessment **or refund of the above tax** pursuant to the provisions of [the South Carolina Code]." Determination Letter at 9 (emphasis added).

In the Determination Letter, the Department first argues – incredibly – that the Code provisions cited to in the Waivers only allow the extension of time to assess taxes and do not allow the extension of time to file a refund claim. *Id.* The Department additionally argues –

even more incredibly – that prior to the passage of the Revenue Procedures Act in 1995, the Department had no authority to extend time to file a refund, only for the assessment of taxes, thus regardless of either party’s intention or belief, the agreements cannot operate to alter the period in which the taxpayer can file a claim for refund. *Id.* The Department’s arguments are without merit.

D. The Department’s Actions: Effects and Consequences

The Department’s position that the Waivers were merely a one-sided agreement to extend the time to assess the tax, and not intended to extend the time for a taxpayer to claim a refund, is a novel argument. The entire taxpaying community has proceeded with the understanding that these form waivers drafted and issued solely at the Department’s behest applied equally to extend the time to assess the tax, as well as to claim a refund. This understanding clearly reflects the language of the waivers, which on their face provide that the waivers extend the time for refunds. By claiming that the statute of limitations bars Duke’s claims for refund in this contested case, the Department has revoked its promises to the taxpayers and has jeopardized its working relationship with the state’s business communities.

The Department proclaims that it is “instrumental in bringing new businesses and encouraging existing businesses to expand within South Carolina.” S.C. Dep’t of Rev. Annual Accountability Report 2008-2009 at 2 (Sept. 15, 2009). The Department acknowledges that by administering most of the tax credit programs in this state, the Department is closely involved in enhancing economic development in this state. *Id.*

The Department’s primary purpose, of course, is to collect state tax revenues, which account for approximately 91% of the state’s total revenues. *Id.* at 1. As part of its ongoing process to improve organizational information and efficiency, the Department highlights the key partners and suppliers of information regarding tax revenues and information, the citizens of

South Carolina, and specifically the Chamber. *Id.* at 13.

The Department's laudable involvement with business development in this state, however, will be severely affected by the Department's decision to fleece the state's taxpayers of the right to a closed, legislatively determined period of time for the assessment of taxes. Relying on the Department's promises that the statute of limitations will be equally regarded as extended for both assessments and refunds, taxpayers have been willing to extend the state's power to assess taxes and increase its tax collections. The Department's newly-professed position that the waivers only operate in its favor, and not the taxpayer's, belies the long-standing cooperation with the business community necessary to foster fair, efficient, and enhanced tax and business operations alike. The Department's position is not only incorrect at law, as discussed below, but also extinguishes any expectation by the business community that taxpayers will receive fair and impartial tax administration in the state of South Carolina.

III. DISCUSSION & ANALYSIS

The Department alleges that Duke is not entitled to any refund on several of its claims because the statute of limitations has expired as to a number of years that are in fact explicitly included in the Waivers. By executing the Waivers, however, the Department has waived its right to assert the defense of statute of limitations as to the refund claims subject to the written Waivers and is barred from asserting that Duke's refund claims are untimely.

A. Extensions of Time to Assess Tax or Claim a Refund

The three-year statute of limitations applies to the assessment of taxes, and the Department is precluded from assessing taxes after that time. S.C. Code Ann. § 12-54-85(A) (Supp. 2012). However, the Department may assess taxes after that time if the taxpayer consents to an extension prior to the time that the original assessment period has passed. § 12-54-85(C)(4).

A taxpayer generally may file a claim for a tax refund within the later of three years from the time a tax return was filed, or two years after the time the tax was paid. § 12-54-85(F)(1). However, the Department may extend the time to file a claim for tax refund. *See* § 12-60-40 (authorizing extension of time limitations under Title 12 of the South Carolina Code).

B. Statute of Limitations

1. *The Department's Authority Regarding FS-43*

Both the ALC (by Order dated Aug. 9, 2012) and the Department agree that the DOR Form FS-43 executed on Dec. 19, 1997 for the tax year ending 1994 “effectively extended the period for filing a refund claim.” ALC Order at p. 4.

The ALC Order agreed that the current version of the FS-43 – which the DOR now agrees extends the time to filing a refund claim – is virtually identical to the prior version which Duke repeatedly signed. *Id.* at p. 12. (The *only* difference is that instead of reference to “Section 12-54-80” the form now refers to “Section 12-54-85(C)(5).”)

Indeed the ALC Order is largely premised on the General Assembly’s adoption of the Revenue Procedure Act, specifically section 12-60-40 “which allows the Department to grant extensions of *any* tax-related limitations.” *Id.* (Emphasis added)

The ALC Order concurred: “Thus, even if Form FS-43 inferred that a taxpayer has the right to extend the time frame to request for refund, the Department cannot exceed its statutory authority based upon that form.” *Id.*

This, of course, begs the question of what statutory authority did the Department possess to promulgate and request the execution of the Form FS-43 prior to the Revenue Procedures Act?

The Form FS-43 answers that in part. It references Section 12-54-80 which explicitly allows the DOR and the taxpayer to extend the time for the mailing of a notice of assessment. The ALC places great significance on the failure of Section 12-54-80 to include the word

“refund.” The prior form FS-43 explicitly includes the word “refund.” And the ALC Order “nevertheless recognizes the **application** of section 12-54-80 could result in a refund of taxes paid by the taxpayer....” *Id.* at 7 (emphasis in original).

What other powers did the former Tax Commission possess? As the ALC Order notes, “section 12-54-30 provided in relevant part that: ‘If the commission discovers on examination of a return *or otherwise* that the tax penalty or interest paid by a person is in excess of the amount legally due, the commission may order a refund or give credit for the overpayment.’” ALC Order at p. 9 (emphasis added).

Section 12-54-30 has no statute of limitations whatsoever (unlike the former pay the taxes under protest and file a law suit within 30 days statutes, Sections 12-47-210 and 12-47-220). The ALC Order concedes as much: “Thus, Section 12-54-30 allowed the Department to grant relief to a taxpayer if discovered as overpayment on examination of a return or otherwise, even if a claim for refund would be untimely.” *Id.* at 10.

Both the statute and the ALC Order reference a refund based upon an examination of a return “*or otherwise*.” What is “or otherwise?” Would it not include the filing of an amended return?

And wouldn’t an “examination of a return” possibly include an amended return?

The ALC Order accordingly finds that the Tax Commission had the authority to issue an actual refund on (1) an untimely filed return (2) where no return was even filed, or (3) “otherwise” – but had no authority to extend the deadline for filing an amended return?

It seems incredible – even nonsensical – that the Tax Commission had the power to grant a tax refund for a late filed return but didn’t have the power to waive the statute of limitations for when the amended return should be filed.

And this was the exact position of the two former Chief Auditors for the Department of Revenue (Marvin Davant and Robbie Anderson) who testified (via affidavit) that the Department has taken the position since the 1960's that the FS-43 worked both ways. Specifically both testified that prior to the Revenue Procedures Act the execution of the FS-43 extended the time for a taxpayer to file an amended return.

2. Waiver of Statute of Limitations

The statute of limitations is a procedural device that, unlike a jurisdictional limitation, may be waived by the parties. *See Langley v. Pierce*, 313 S.C. 401, 403–04, 438 S.E. 2d 242, 243 (1993); *Case v. Hermitage Cotton Mills*, 236 S.C. 285, 287, 113 S.E. 2d 794, 795 (1960). The statute of limitations defense can be waived by parties to a tax refund claim. *See Anonymous Taxpayer v. S.C. Dep't of Revenue*, 377 S.C. 425, 439–40, 661 S.E. 2d 73, 80–81 (2008). A party who waives the statute of limitations is barred from raising the statute as a defense. *McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 525–26, 443 S.E. 2d 539, 540 (1994). Waiver may be shown by words or conduct and may result from an express agreement, from failure to claim the defense, or by any action or inaction manifestly inconsistent with an intention to insist on the statute. *Mende v. Conway Hosp., Inc.*, 304 S.C. 313, 315, 404 S.E. 2d 33, 34 (1991). Under the rules of construction applicable to contracts, a written agreement to waive the statute of limitations must be “construed liberally and interpreted strongly in favor of the non-drafting party.” *S. Atl. Fin. Serv., Inc. v. Middleton*, 356 S.C. 444, 447, 590 S.E. 2d 27, 29 (2003).

3. Construction and Interpretation of Waivers

The Consent Agreements executed between the Department and Duke are express agreements subject to review and enforcement by the Court. In *Ripley v. Commissioner of Internal Revenue*, 103 F.3d 332 (4th Cir. 1996), the Fourth Circuit Court of Appeals specifically

addressed the principles of law applicable to the interpretation of Internal Revenue Service (“IRS”) Form 872, a form waiver that, similar to the Department’s form waiver, FS-43, extends the time to assess additional tax. At issue in *Ripley* was whether the IRS timely had assessed gift taxes against donees of property where the donor had executed a Form 872, described by the Fourth Circuit as “a document developed by the IRS to solicit a taxpayer’s agreement to extend the time in which the Service may assess a tax.” *Id.* at 334. In determining how to construe or interpret the IRS’s form waiver, the Fourth Circuit noted that a Form 872 is not a contract, but rather a waiver of a limitations period. *Id.* at 337 (internal citations omitted). If the taxpayer, however, qualifies the waiver of the statutory limitations period on specified conditions, the conditions must be satisfied for the waiver to be upheld. *See id.*

The Fourth Circuit further stated as follows:

[T]hough a Form 872 is a waiver of the applicable limitations period, not a contract, many courts have recognized that principles of contractual interpretation must be utilized in construing them. Consequently, because the IRS drafted the Form 872, including the language specifying the date of termination of the extension agreement, to the extent that the language is ambiguous it is construed against the IRS.

Id. at 337 (internal citations omitted).

The principles of contractual interpretation, therefore, should be applied when construing or interpreting the Department’s form waiver, FS-43. Contract principles are significant because by statute the parties must agree to an extension of time to assess a tax in writing. *Grunwald v. Comm’r*, 86 T.C. 85, 89 (1986).

The cardinal rule of contract interpretation is to ascertain and give legal effect to the intentions of the parties as determined by the contract language. *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2003). If the terms of a contract are clear and unambiguous, a court

must enforce the contract according to its terms regardless of its wisdom or folly. *S. Atl. Fin. Srvs., Inc. v. Middleton*, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003).

Where a language in a contract is ambiguous, it is well settled that any ambiguity must be construed liberally and interpreted strongly against the drafting party and in favor of the non-drafting party. *Id.*; see also *Mid-Continent Refrigerator Co. v. Way*, 263 S.C. 101, 105, 208 S.E.2d 31, 33 (1974) (stating that it is elementary that any ambiguities or conflicts in a contract prepared by and printed on the forms of the drafting party must be construed favorably to the non-drafting party); *Springs & Davenport, Inc. v. AAG, Inc.*, 385 S.C. 320, 326, 683 S.E.2d 814, 817 (Ct. App. 2009) (noting that any doubt about the construction of a written instrument must be resolved against the drafter and in favor of the party to whom it was delivered). A contract is ambiguous if it can be understood in more than one way or is unclear because it expresses its purpose in an indefinite matter. *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 205, 687 S.E. 2d 714, 718 (Ct. App. 2009).

The reason for this rule of strict construction against the drafting party is that the party who prepared the contract or is responsible for its language is in the stronger position to avoid confusion in meaning, and thus must bear responsibility for any ambiguity and suffer from its shortcomings. *Myrtle Beach Lumber Co. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981); see also *Williams v. Teran, Inc.*, 266 S.C. 55, 60, 221 S.E.2d 526, 529 (1976) (“The rule of law is that where the contract is susceptible of more than one interpretation, a doubt shall be resolved against the party whose business it was to speak without ambiguity”).

Moreover, this rule of strict construction against the drafting party applies with particular force in cases involving a contract of adhesion. *S. Atl. Fin. Srvs., Inc. v. Middleton*, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (Ct. App. 2002), *aff’d as modified*, 356 S.C. 444, 590 S.E.2d 27

(2003). A contract of adhesion is a standard form contract offered on a “take-it-or-leave-it” basis with terms that are not subject to negotiation. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26–27, 644 S.E.2d 663, 669 (2007).

Under these well-settled rules of contractual interpretation and construction, the plain language of the Consent Agreements should control, and, even if the language is reasonably susceptible to more than one interpretation, any ambiguity should be liberally and strongly construed against the Department as the drafting party. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778; *S. Atl. Fin. Servs.*, 356 S.C. at 447, 590 S.E.2d at 29 (2003); *see also Ripley*, 103 F.3d at 337 (holding that ambiguous language in a form waiver should be construed in favor of the taxpayer and against the government as the drafting party).

C. The Department Has Validly Waived the Statute of Limitations and Extended the Time to Claim a Refund.

In denying Duke’s refund claims, the Department claims that the Waivers were not “intended” to extend the time to file refund claims. The Waivers are official documents, FS-43, drafted solely by the Department and issued to taxpayers in an attempt to obtain consent to extend the time to assess additional taxes. The Waivers clearly provide that the agreements extend the time for assessment *or* refund. Furthermore, the Waivers should be strongly construed against the Department as the drafting party and in favor of Duke to equally apply to extend the time to assess a tax and claim a refund. *See, e.g., United States v. Hodgekins*, 28 F.3d 610, 614 (7th Cir. 1994) (“The IRS is an arm of government with authority to subject citizens to the burdens of litigation. With this authority comes a responsibility to be careful. The IRS cannot – as it did with [the taxpayer] – compel a party to give up the protection afforded by the statute of limitations, based on a representation that it would only seek to reopen a claim under a limited condition, and then try to ignore the condition, or substitute a different condition.”); *Grunwald v.*

Comm'r, 86 T.C. 85, 89 (1986) (“A deal is after all a deal, and fairness dictates that both parties adhere to the provisions of the [Waiver] document they both voluntarily signed.”). To hold otherwise would put Duke, and countless other taxpayers, at an unfair advantage from cooperating with the Department and agreeing to a waiver that the Department subsequently can claim operates only in its favor.

The Tax Court has eloquently stated the importance of equitable application of the income tax laws to both the government and the taxpayer, which reasoning applies equally here:

The nature of our income tax system is one of self assessment. Its very foundations rest upon the continued goodwill and cooperation of our citizens in voluntarily disclosing their taxable income. Such cooperation will not long be forthcoming if the tax laws are not administered in an equitable and evenhanded manner. . . . As Justice Douglas said in his Concurring Opinion in *Commissioner v. Lester*, 366 U.S. 299, 306 (1961):

* * * In an early income tax case, Mr. Justice Holmes said ‘Men must turn square corners when they deal with the Government.’ *Rock Island, A. & L.R. Co. v. United States*, 254 U.S. 141, 143. The revenue laws have become so complicated and intricate that I think the Government in moving against the citizen should also turn square corners.

Newman v. Comm'r, T.C. Memo. 1974-45.

The Department’s longstanding position is to treat the Waivers as extending both the time for assessment and for the taxpayer to file a refund. In South Carolina Revenue Procedural Bulletin #00-3, the Department of Revenue explicitly states that “[c]onsistent with its longstanding administrative position,” if a taxpayer agrees to the Department’s request to extend the time limitations on assessments, the Department will consider the time for a taxpayer to file a refund claim to be similarly extended. It is clear that the Department intended, and has always intended, for the Waivers to extend the time for Duke to claim a tax refund. The Department is therefore bound to allow Duke to file a claim for refund within the period of time

stated in the Waivers.

1. Waiver of Statute of Limitations

Contrary to the Department's assertions, the Department was also authorized to waive the statute of limitations for filing a refund claim prior to enactment of S.C. Code Ann. § 12-60-40 in 1995. The South Carolina Supreme Court has abolished the doctrine of sovereign immunity, and thus the Department at all times has been authorized to waive the statute of limitations defense, even without explicit legislative authority to do so. *See McCall v. Batson*, 285 S.C. 243, 329 S.E. 2d 741 (1985). The Waivers, therefore, are a valid waiver of the statute of limitations defense to Duke's refund claims, and the Department is barred from raising the defense that the claims are untimely.

As discussed above, the statute of limitations is a procedural defense that may be waived by any party, including the Department, by express or implied agreement. *See, e.g., Anonymous Taxpayer v. S.C. Dep't of Revenue*, 377 S.C. 425, 440, 661 S.E.2d 73, 80 (2008) (discussing waiver of statute of limitations with respect to tax refund claim); *Mende v. Conway Hosp., Inc.*, 304 S.C. 313, 315, 404 S.E.2d 33, 34 (1991) (stating that waiver of statute of limitations defense may be express or implied). Under South Carolina law, the statute of limitations is not a jurisdictional requirement for Duke to bring a tax refund claim, but rather is a procedural limitation that may be waived by the Department. *See Goff v. Mills*, 279 S.C. 382, 388, 308 S.E.2d, 778, 781 (1983) (noting that the imposition of a statute of limitations is not a jurisdictional question).

In contrast, under federal law a statute of limitations for suits against the state is considered to be jurisdictional in nature, and therefore may not be waived by officers or agents of the state without express legislative authority to do so. *See United States v. Dalm*, 494 U.S. 596, 608, 110 S. Ct. 1361, 1368 (1990) (noting that the state is immune from suit except to the

extent to it has consented to be sued, and the terms of its consent define the court's jurisdiction to entertain the suit). The United States Supreme Court has stated this antiquated rule of sovereign immunity as follows:

The general rule that limitation does not operate by its own force as a bar, but is a defense, and that the party making such a defense must plead the statute if he wishes the benefit of its provisions has no application to suits in the court of claims against the United States. An individual may waive such a defense, either expressly or by failing to plead the statute, but the government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the court of claims. Since the government is not liable to be sued, as of right, by any claimant, and since it has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period after the cause of action accrued, a judgment in the court of claims for the amount of a claim which the record or evidence shows to be barred by the statute would be erroneous.

Finn v. United States, 123 U.S. 227, 232–33, 8 S. Ct. 82, 85 (1887).

Federal courts have extended the principles of sovereign immunity to tax refund claims and held that filing a timely refund claim with the Internal Revenue Service is a jurisdictional prerequisite to maintaining a tax refund suit. *Angle v. United States*, 996 F.2d 252 (10th Cir. 1993) (citing *United States v. Dalm*, 494 U.S. 596, 601–02, 110 S. Ct. 1361, 1364–65 (1990)). As a result, the Internal Revenue Service may not waive the statute of limitations applicable to tax refund claims except as authorized by statute. *See id.*

Early case law in South Carolina similarly applied the principles of sovereign immunity to tax refund claims. In *Argent Lumber*, the South Carolina Supreme Court held that in the absence of express statutory authority to waive the statute of limitations, an agent of the tax commission could not alter, amend, or change the statutory limitations period applicable to tax refund claims. *Argent Lumber Co. v. Query*, 178 S.C. 1, 182 S.E. 93, 95 (1935); see also *Monarch Mills v. S.C. Tax Comm'n*, 149 S.C. 219, 146 S.E. 870, 872 (1929) (holding that even if

a state permits itself to be sued for a tax refund, it is not liable for interest unless a statute specifically so provides). The inability of the tax commission's agent to waive the statute of limitations was based on sovereign immunity protecting the state from suit in the absence of a statute waiving immunity.

The South Carolina Supreme Court, however, subsequently abolished the doctrine of sovereign immunity and expressly overruled the principles stated in *Argent Lumber*. *McCall v. Batson*, 285 S.C. 243, 246–47, 250, 329 S.E.2d 741, 742–744 (1985). The South Carolina Supreme Court ruled that sovereign immunity does not apply to any case filed after July 1, 1986. *Id.*, 285 S.C. at 246, 329 S.E.2d at 743. After that time, therefore, the Department could waive the statute of limitations as a defense to an untimely filed claim.

The *McCall* decision, moreover, allows a taxpayer to enforce a waiver of the statute of limitations made by the Department. In *Argent Lumber*, the tax commission's agent orally agreed to wait a final determination by federal tax authorities, and that adjustments to the taxpayer's return would be made thereafter even though the limitations period on refunds would have passed. *Argent Lumber*, 178 S.C. 1, 182 S.E. at 95. The South Carolina Supreme Court stated that although the tax commission had the discretionary authority, by statute, to grant a refund even though the statute of limitations for filing a refund claim had passed, the taxpayer could not enforce the exercise of this discretion because of sovereign immunity prevented the state from being sued without its consent. *Id.* Because *McCall* expressly overruled *Argent Lumber* on these grounds, a taxpayer is entitled to enforce the Department's decision to exercise its discretion to issue a refund although the limitations period on filing refund claims has passed pursuant to S.C. Code Ann. § 12-54-30 (prior to repeal in 1995) and S.C. Code Ann. § 12-60-470(G) (after enactment of the Revenue Procedures Act in 1995). *McCall* would not permit a

taxpayer to sue the Department to exercise its discretion, e.g., to execute a Waiver and agree to consider an otherwise untimely refund claim, because the exercise of discretion includes the right to be wrong. *McCall*, 285 S.C. at 245, 329 S.E.2d at 742. However, after the Department has *actually exercised* this discretion by signing a Waiver and agreeing to extend the time for refund claims in exchange for consent to extend the time for assessment, sovereign immunity no longer protects the Department from a taxpayer's suit to enforce the terms of the Waiver.

Because sovereign immunity no longer applies to treat the statute of limitations as a jurisdictional bar to a tax refund claim, the Department, like any other party, has been fully capable of waiving the statute of limitations and its right to raise the statute as a defense to a tax refund claim. In addition, because sovereign immunity no longer bars a taxpayer from bringing suit to enforce the Department's proper exercise of its authority to grant untimely refund claims, the Department may be held to the terms of the Waiver. As of July 1, 1986, therefore, the Department has been authorized to waive its right to raise the statute of limitations defense to Duke's tax refund claims with respect to any and all tax years in question, and Duke is entitled to enforce this waiver by filing its refund claim.

Consistent with its right to waive the statute of limitations, prior to the enactment of § 12-60-40 the Department repeatedly induced Duke to consent to the extension of time to assess tax in an otherwise closed year in exchange for waiving the right to argue that a refund claim filed within the same time period was untimely. The Department's intention to waive the statute of limitations defense with respect to the years at issue is evident not only from the course of dealing between the Department and Duke, but also from the Department's repeated inclusion of the years in question in the Consent Agreements. The Department, therefore, has validly waived the right to raise the statute of limitations as a defense and is precluded from denying the refund

claims solely on the basis that Duke's claims for refund were not timely filed.

2. *Extension of Limitations Period*

In addition, Duke's refund claims are timely because they were filed within the time stated in the Waivers. Pursuant to S.C. Code Ann. § 12-60-40, the Department has actually extended the time for Duke to file the claims. Section 12-60-40 authorizes the Department to extend any time limitations provided under Title 12 of the South Carolina Code, including the time to file a claim for a tax refund. Unlike an extension of time to assess a tax, however, the extension of time to claim a tax refund is not required to be granted prior to expiration of the original filing period nor consented to in writing by the taxpayer to be valid. *Compare* S.C. Code Ann. § 12-54-85(C)(4) (Supp. 2012) *with* S.C. Code Ann. § 12-54-85(F)(1) (Supp. 2012).

Because no time limitations are placed on the Department's ability to extend the time to file refund claims, the Waivers were not required to be executed by the Department prior to the time that the original limitations period had run. Therefore, the Waivers validly extend the time to claim a refund, and Duke's claims were timely filed for all years in question.

D. The Department is Equitably Estopped From Raising the Statute of Limitations Defense.

The Department also should be barred from raising the statute of limitations as a defense to Duke's refund claims under the doctrine of equitable estoppel. The elements of equitable estoppel as to the party to be estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 589, 553 S.E. 2d 110, 114 (2001). A governmental entity is not shielded from the doctrine of equitable estoppel where its agents act within the property scope of their authority. *Quail Hill v. County of Richland*, 387 S.C. 223, 236,

692 S.E. 2d 499, 506. The party asserting estoppel against a governmental entity must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) justifiable reliance upon the government's conduct; and (3) prejudicial change in position. *Am. Legion Post 15 v. Horry County*, 381 S.C. 576, 584, 674 S.E. 2d 181, 185 (Ct. App. 2009).

The Department's use of Waivers like those at issue in this case has been widespread for many years. The purpose of the extension of the statute of limitation by agreement has been as much for the convenience of the Department and its staff, as for the taxpaying entity. South Carolina is not alone in states employing these written agreements for both assessments and refunds. For the Department to now argue that those Waivers are not enforceable pursuant to their clear terms is fundamentally unfair to both Duke in this action and the countless other taxpayers and taxpaying entities who rightfully relied on the statements of Department staff in entering those agreements. *See Heckler v. Community Health Servs. Of Crawford County, Inc.*, 462 U.S. 51, 60–61, 104 S. Ct. 2218, 2224 (1984) (commenting on the possibility of “cases in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government”); *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970) (“To say to these appellants, ‘The joke is on you. You shouldn't have trusted us,’ is hardly worthy of our great government”); *Menges v. Dentler*, 33 Pa. 495, 500 (1859) (“Men naturally trust in their government, and ought to do so, and they ought not to suffer for it”); *see also United States v. Ganz*, 806 F. Supp. 1567, 1575 (1992) (“As the trustee of the people, the government is held to a higher standard in carrying out our common duties, including the prosecution of crimes. This higher standard requires the sovereign to perform its contractual duties with a sharpened sense of good faith and fair dealing.”).

Neither Duke nor any of the other taxpayers who have executed similar Waivers purporting to extend the time limitations for both tax assessments and refunds claims knew or could have known that the Department would refuse to honor the agreements as written and instead claim that only the Department benefitted from the agreements with the extension of time to assess taxes, and no such benefit would be recognized for the extension of time to file refund claims. Also evident is that Duke and other taxpayers would not have knowingly entered into these one-sided written agreements with no benefit to be conferred on the taxpayer in return. Where the very delay relied upon in asserting a statute of limitations defense was induced by the defending party, the defendant may be estopped from asserting the defense. *See Am. Legion Post 15 v. Horry County*, 381 S.C. 576, 584, 674 S.E.2d 181, 184 (Ct. App. 2009). The prejudice and fundamental unfairness to Duke and other similarly situated taxpayers is obvious from the nature and very fact of these proceedings.

E. The Statute of Limitations has been Equitably Tolloed by the Department's Conduct.

The statute of limitations for Duke to file the tax refund claims at issue should also be equitably tolled by the Department's conduct. "Equitable tolling is a judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). Tolling of a statute of limitations allows for courts of equity to "serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits." *Id.* In *Hooper*, the plaintiff was unable to effect service on the defendant prior to the expiration of the statute of limitations because the defendant corporation did not have a valid registered agent listed with the Secretary of State. *Id.*; *see also Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 377 S.C. 217, 659 S.E.2d 213 (Ct. App. 2008). The Court of Appeals had refused to equitably toll the statute

of limitations and dismissed the lawsuit, holding that equitable tolling was “reserved for extraordinary circumstances.” *Hooper*, 377 S.C. at 230, 659 S.E.2d at 219. The Supreme Court reversed the Court of Appeals, holding that equitable tolling did not require extraordinary circumstances to warrant application. *Hooper*, 386 S.C. at 114-120, 687 S.E.2d at 32-34. “Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental practicality and fairness.” *Id.* (internal quotations omitted).

In this case, justice and fundamental fairness demands that the Department be required to honor the Waivers of their own creation, which expressly allow the extension both of the time to assess taxes as well as the time to file a claim for refund. The Department has induced taxpayers to enter into agreements to extend the time to assess a tax – the relinquishment of a right that results in enormous benefit and revenue to the Department – by promising the taxpayer an equal opportunity to claim a refund during the extended time period. Justice demands that parties who voluntarily enter into written agreements to their own advantage be bound by the express terms of that agreement, even where one party is the State of South Carolina. To allow otherwise is to work a fundamental unfairness on every taxpaying entity who has been deceived by the actions of the Department.

IV. CONCLUSION

For the foregoing reasons, this Court should deny the Department’s defense that the refund claims are not ‘timely’ and find that the Consent to Extend Time to Assess Tax agreements were valid and enforceable as to the extension of time for the assessment of taxes as well as the claim for refund. The Department’s position is not only incorrect at law, but also jeopardizes the ongoing, working relationship with the business community and taxpayers of this state and the state’s ability to collect additional revenues through the taxpayer’s voluntary waiver

of the time to assess taxes.

RESPECTFULLY SUBMITTED,

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Columbia, South Carolina



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