

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph K. Anderson, III
Chief 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
MANUFACTURERS ALLIANCE (“SCMA”)

Lewis Gossett
Executive Director and Attorney for
The South Carolina Manufacturers Alliance
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Attorney for Amicus Curiae,
South Carolina Manufacturers Alliance

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I. STATEMENTS OF IDENTITY AND INTEREST OF AMICUS CURIAE

The South Carolina Manufacturers Alliance (the “Alliance”) is a tax-exempt organization under section 501(c)(6) of the Internal Revenue Code and is the manufacturing industry’s association in South Carolina, serving as its government liaison. The Alliance strives to preserve and promote the economic health of manufacturing industries in the state by seeking positive action in state government, as well as to educate public officials and the general public on issues of importance to manufacturing industries. The Alliance emphasizes that maintaining strong manufacturing industries in the state will foster and promote the strength of South Carolina’s economy. In 2009, the manufacturing sector accounted for approximately 12% of the state’s total employment.¹

The Alliance is a non-profit, bipartisan organization that has been in existence for 109 years. It serves as the manufacturing industry’s trade organization in South Carolina. The goal of the organization is to be the voice of manufacturers to the state’s legislative and regulatory branches of government, as well as preserving and promoting South Carolina’s widely respected business climate. It also provides a variety of educational forums.

Manufacturing employment (while down from historical figures) still constitutes 13% of total state employment in South Carolina,² and manufacturers pay 20.9% of all state wages. Manufacturers pay average annual wages of \$47,073 versus the South Carolina state average of \$37,752. Manufacturing wages range from \$135,148 in aircraft manufacturing, \$83,980 in nuclear power generation to \$37,336 in textiles.³ By contrast, retail trade pays an average wage

¹ S.C. Comptroller General’s Office, “Comprehensive Annual Financial Report for the Fiscal Year Ended June 30, 2009” at 8.

² Miley, Gallo & Associates, LLC, *The Economic Impact of Manufacturing in South Carolina* 3 (Dec. 2009), available at http://myscma.com/public_docs/ManufacturingReport_Final.pdf.

³ *Id.* at 9, tbl. 7.

of \$23,862, with food services paying \$14,357 and grocery stores \$21,001.⁴ Manufacturing directly creates and supports 256,000 jobs in South Carolina and indirectly another 328,000.⁵

Manufacturers also pay some 25% of all property taxes in South Carolina (including both traditional property taxes as well as fee-in-lieu).⁶ In some counties manufacturers constitute more than 50% of the property tax base.

A recent study indicates that South Carolina's economy ranks 11th in the nation in being dependent on the manufacturing sector.⁷ According to another study, since January 2010, manufacturers have invested more than \$7 billion in new projects in South Carolina and have created more than 21,000 jobs.⁸ This represents a greater than 10 percent employment gain — one of the best in the country.⁹ And in January 2013, South Carolina was recognized by IBM-Plant Location International as the top state for jobs linked to foreign investment.

II. INTRODUCTION & FACTUAL BACKGROUND

A. Department's Denial of Appellant's Refund Claims

This contested case follows the Department's denial of the refund requests of Appellant, Duke Energy Corporation (the "Appellant"), for 1978–2001 in a final determination letter (the "Determination Letter") issued on February 4, 2010. Although the Alliance is not a party to the action, it offers this brief as an *amicus curiae* for the limited purpose of providing the Court with information and analysis of the Department's assertion that the Appellant's claims for refund were untimely. The Department's equivocal position on the waiver and its decision to raise the

⁴ *Id.* at 9, tbl. 7.

⁵ *Id.* at 13.

⁶ *Id.* at 11, tbl. 8.

⁷ G. Scott Thomas, *Indiana Leans More on Manufacturing than any Other State*, Charlotte Business Journal (July 18, 2011, 1:00 AM), available at <http://www.bizjournals.com/bizjournals/on-numbers/scott-thomas/2011/07/indiana-leans-heavily-on-manufacturing.html>.

⁸ Mark Crawford, *The States Leading the U.S. Manufacturing Resurgence* (Winter 2013), available at <http://www.areadevelopment.com/regionalreports/q1-2013/states-leading-us-manufacturing-resurgence-2665542.shtml>.

⁹ *Id.*

statute of limitations as a defense is contrary to its long-standing position – and all taxpayers’ understanding – that the waiver operates not only as an extension of time for the Department to assess a tax, but also for the taxpayer to claim a tax refund.

The Administrative Law Court Order Granting Summary Judgment in Part and Denying Summary Judgment in Part dated August 9, 2012 (hereinafter “ALC Order”) found that “the Duke audit was extended a number of times, over a period of years, due to the pending results of an audit of Duke Energy by the Internal Revenue Service (IRS), and also due to health issues experienced by the Department’s auditor and changes in the Department’s personnel.” ALC Order at 2. The ALC Order found that the extensions were approved by the DOR through the executions of DOR Forms FS-43. *Id.* The first Form FS-43 was executed in August 1988 and additional FS-43 were periodically executed until June 2002. *Id.* The Department issued the waiver on its letterhead to the taxpayer, and asks that the taxpayer sign the FS-43 waiver to extend the time for assessment or refund of the taxes and for the years entered on the form by the Department. Each of the waivers executed by the Appellant and the Department provide that the form “extends the time for mailing the notice of assessment or refund of the above tax” to the time indicated in the agreement.

Note that this form FS-43 was drafted by the Department. In many cases the form is executed at the request of the Department. The DOR typically asks for the execution of the waiver to give it time to complete an audit before the statute of limitations runs on a period under audit. (Presumably thousands of waivers have been executed by taxpayers and the Department.)

Despite the clear language of the waivers and the Department’s longstanding position, in the Determination Letter the Department claims that the waivers only extend the time to assess a tax, not for a taxpayer to file a refund. The Department additionally argues – incredibly – that

even if the waiver was intended to equally apply to refunds, the Department did not have the authority to extend the period to file a refund claim until a legislative change which occurred in 1995, the adoption of the Revenue Procedures Act. The Department's arguments are contrary to the law, as well as to the longstanding position of the Department with respect to waivers.

To the SCMA's knowledge, prior to this action, the Department had never alerted taxpayers that the waiver did not go both ways, i.e., allow refund claims during the pendency of an audit. To the contrary, as seen below, the Department explicitly provided in Policy Documents that the execution of a waiver did allow for the filing of refund claims.

In addition, the Department had never alerted taxpayers prior to the instant action that it had no authority prior to 1995 to execute such waivers.

B. The Department's Mission & Taxpayers' Rights

The Department's stated mission is "to administer the revenue and regulatory laws of this state in a manner deserving the highest degree of public confidence in our integrity, effectiveness, and fairness." S.C. Dep't of Rev. Annual Accountability Report 2008-2009 at 1 (Sept. 15, 2009). To accomplish this mission, the Department declares it will "[a]dminister revenue and regulatory laws in a fair and impartial manner." *Id.* This reinforces the taxpayers' right to receive fair administration under the tax laws and reliance on its express, lawful agreements with the Department.

The South Carolina Taxpayers' Bill of Rights requires that the Department publish brief but comprehensive statements in simple, nontechnical language to explain the procedures, remedies, and rights and obligations of both the department and the taxpayer. S.C. Code Ann. § 12-58-60 (Supp. 2009). This codifies the taxpayer's right to receive and rely on forms, statements and written materials from the Department in plain, easy-to-understand language.

C. The Department's Advantage

The ability to assess additional tax with the taxpayer's voluntary consent beyond the legislatively prescribed period is of enormous benefit to the Department. In fiscal year 2005-2006 alone, South Carolina's actual revenue included over \$131.8 million of increased enforced tax collections." S.C. Budget & Control Bd. Historical Analysis, Bd. of Econ. Advisors Rev. Estimate Analysis at 9 (Dec. 7, 2009) (available at <http://www.budget.sc.gov/OSB-historical.phtm>). The Department, therefore, has a compelling reason to induce taxpayers to waive the statute of limitations and extend the time for the Department to assess additional tax. (Of course, perhaps the most common reason why a waiver was executed was to give the Department additional time to complete an audit. Frequently this is a convenience to the taxpayer as well.)

Until now, taxpayers have agreed to cooperate with the Department and extend the time to assess a tax based in part on the understanding that the Department would extend the same courtesy and extend the time to claim a refund. By suddenly denying the Appellant's refund claims on the basis that they are untimely, the Department has attempted to unilaterally construe the waivers as operating solely to the Department's benefit at the taxpayer's expense. Despite the Department's underhanded attempt to negate the clear intent and application of the waivers, the waivers validly extend the time for the Appellant, and other taxpayers, to claim a tax refund.

III. DISCUSSION & ANALYSIS

In the Determination Letter, the Department has denied the Appellant's refund claims and asserted that many of the claims are barred by the statute of limitations. However, by entering into the waivers, the Department should be viewed as validly waiving the statute of limitations and extending the time for Appellant to file the refund claims for the tax years at issue, and the Appellant's refund claims are, therefore, timely.

A. Statute of Limitations

It is well established under South Carolina law that the statute of limitations is not a jurisdictional requirement, and therefore may be waived by either party to an action. *See Langley v. Pierce*, 313 S.C. 401, 438 S.E. 2d 243 (1993); *Case v. Hermitage Cotton Mills*, 236 S.C. 285, 113 S.E. 2d 794 (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, 661 S.E. 2d 73 (2008).

Waiver of the statute of limitations defense may be shown by a party's words or conduct through express agreement, failure to claim the defense, or any action or inaction manifestly inconsistent with an intention to raise the statute as a defense. *Anonymous Taxpayer*, 377 S.C. at 440, 661 S.E.2d at 80. Under the rules of construction, written waivers of the statute of limitations should be construed and interpreted strongly against the drafting party and liberally in favor of the non-drafting party. *S. Atl. Fin. Servs., Inc. v. Middleton*, 356 S.C. 444, 447, 590 S.E. 2d 27, 29 (2003).

B. Analysis

Since the time that the Supreme Court abolished sovereign immunity in 1985, the Department, like any other party, has had the authority to waive the procedural defense of the statute of limitations. *McCall v. Batson*, 285 S.C. 243, 329 S.E. 2d 741 (1985) (abolishing doctrine of sovereign immunity).

Each of the waivers executed by the Appellant and the Department on FS-43 provide that the form "extends the time for mailing the notice of assessment or refund of the above tax" to the time indicated in the agreement. Clearly, the waivers are intended to extend the time to claim a tax refund, as well as to assess the tax.

Moreover, when a taxpayer enters into the FS-43 form waiver, the Department's own position is how to treat the time to file a refund claim as extended to the same extent as the time for assessment. The Department has stated that "[c]onsistent with *its longstanding administrative position*, . . . [i]f the taxpayer agrees to the Department's request that a waiver of the time limitations on assessments be extended, . . . the Department will also consider the time within which a taxpayer may file a claim for refund to be extended until the agreed upon date." S.C. Rev. Procedural Bulletin #00-3 (Emphasis added). While this Revenue Procedural Bulletin was issued after passage of the Revenue Procedures Act, the language of the FS-43 remained almost identical to the FS-43 form which Duke first executed in 1988. See ALC Order at 12. This statement is binding on the Department, and has not been revoked, superseded, or amended in any way by a subsequent agency publication.

Attached hereto as Exhibits A & B are affidavits submitted to the ALC from Robert Anderson and Marvin Davant. Anderson worked at the Department from 1975 until his retirement in 2008 as Senior Administrator. Davant worked at the Department for 37 years until he retired as Director of Field Services Division in 2001. The two men worked at the Department for a total of some 70 years and retired while serving in the very top ranks of the Department. Davant said the Department had used the FS-43 since at least the 1960's. Both men testified via affidavit that the FS-43 went both ways, i.e. allowed the taxpayer to file a refund claim as well as allowing the Department to issue a proposed assessment after the statute of limitations had run. Both men testified this was the Department's practice both before and after the passage of the Revenue Procedures Act.

Specifically, Davant stated:

14. To the best of my knowledge, information and belief, the Department historically intended, believed and

understood that Form FS-43 not only extended the time to assess additional tax, but also authorized or extended the time for a taxpayer to file a claim for refund within the time stated in the Form FS-43.

15. Prior to enactment of the South Carolina Revenue Procedures Act in 1995, the Department believed that after the execution of the FS-43 by the DOR and the taxpayer that it was authorized and permitted to issue refunds of overpaid tax even if a claim for refund by the taxpayer would not otherwise be timely under the applicable statutory limitations period for filing a refund claim and regardless of whether the period of time initially prescribed for filing a claim for refund had expired.

16. Prior to enactment of the South Carolina Revenue Procedures Act, it was my intent, belief and understanding as Director of Field Services that an executed Form FS-43 constituted the Department's agreement to issue a refund – whether resulting from a review of the taxpayer's records commenced by the Department's on its own initiative, upon consideration of a claim for refund filed by the taxpayer prior to the time stated in the Form FS-43, or otherwise – pursuant to its authority to issue refunds of overpaid tax even if a claim for refund would otherwise be untimely.

17. After enactment of the South Carolina Revenue Procedures Act, there was no difference in how Form FS-43 was interpreted by Department, and the content of the form remained the same.

Anderson similarly stated:

10. To encourage a taxpayer's agreement to extend the time to assess additional tax, the Department intended that Form FS-43 similarly extend the time for a taxpayer to file a refund claim with the Department or for the Department to grant a refund.

13. By executing Form FS-43, the Department believed that it was exercising its discretionary authority to grant a refund upon examination of a taxpayer's return or otherwise, including the taxpayer's filing a refund claim with the Department within the period of time stated in the FS-43, in exchange for the taxpayer's consent to extend the period of time to assess additional tax.

It has been stated that “[m]en must turn square corners when they deal with the government.” *Rock Island, A. & L. R. Co. v. United States*, 254 U.S. 141, 143, 41 S. Ct. 55, 56 (1920). This statement equally applies to require the state and its agencies, including the Department, to turn square corners when dealing with taxpayers. *See St. Regis Paper Co. v. United States*, 368 U.S. 208, 229, 82 S. Ct. 289, 301 (1961) (Black, J., dissenting) (“It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their Government.”); *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 387–388, 68 S. Ct. 1, 4 (1947) (Jackson, J., dissenting) (“It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street.”); *Title Ins. Co. of Minn. v. S.B.E.*, 4 Cal. 4th 715, 730, 842 P.d 121 (1992) (“Men must turn square corners when they deal with the government; it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens.”); *W.V. Pangborne & Co. v. N.J. Dept. of Transp.*, 116 N.J. 543, 561, 562 A.2d 222, 231 (1989) (“[W]e we have insisted that in the exercise of statutory responsibilities, government must ‘turn square corners’ rather than exploit litigational or bargaining advantages that might otherwise be available to private citizens.”); *SAIJ Realty Inc. v. Town of Kearny*, 8 N.J. Tax 191, 197 (1986) (“If . . . ‘Men must turn square corners when they deal with the government,’ it behooves government to behave with corresponding rectitude toward its citizens.”).

Even assuming that the Department had not waived the statute of limitations to file a refund claim, justice and equity requires that the Department be barred from raising the statute of limitations defense under the doctrines of equitable estoppel or equitably tolling. For equitable estoppel to apply, there must be conduct by the party to be estopped which amounts to a false

representation or concealment of material facts, the intention that such conduct be acted upon by the other party, and actual or constructive knowledge of the trust facts. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 589, 553 S.E. 2d 110, 114 (2001). A party asserting estoppel against a government agency must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) justifiable reliance on 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).

It is clear that equitable estoppel should apply to prevent the Department from raising the statute of limitations as a defense to the Appellant's refund claims. The Appellant, as well as every other taxpayer that has cooperated with the Department and entered into the waivers, was completely unaware that the Department would later claim that the waivers did not operate to extend the time for filing a refund claim. The Appellant and other taxpayers have justifiably relied on the statements and written agreements of the Department providing that a waiver operated equally to extend the time to assess a tax and to claim a refund. Lastly, the Appellant and other taxpayers have encountered a prejudicial change in position because the Department now says that counter to the plain language of the waivers and its binding, published position, the waivers do not operate to extend the time to claim a tax refund. The facts of this contested case and the actions of the Department clearly show that it should be estopped from claiming the statute of limitations as a defense to the Appellant's refund claims.

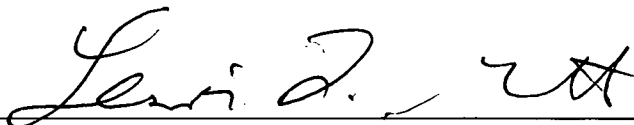
Justice also demands that the statute of limitations also should be equitably tolled. Courts may invoke the doctrine of equitable tolling to suspend or extend the statute of limitations to ensure fundamental practicality and fairness. *Hooper v. Ebenezer Senior Serv. and Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). The Department has repeatedly stated that if a

taxpayer consents to an extension of time to assess a tax, the Department will likewise consider the time to file a refund claim to be similarly extended. S.C. Rev. Procedural Bulletin #00-3; S.C. Rev. Proc. #95-5 (superseded by S.C. Rev. Procedural Bulletin #00-3). The waivers clearly state that the agreement extends the time for the taxpayer to claim a refund, and the Department has never given any indication that it would refuse to honor its agreement to extend limitations period for refund claims. Fundamental practicality and fairness requires that the statute of limitations for filing a refund claim be equitably tolled to prevent the Department from soliciting taxpayer consent to extend the time to assess a tax through false and deceptive conduct indicating that the time to file a refund claim would be similarly extended. Even more to the point in this context is the United States Supreme Court's reminder that "[g]reat nations, like great men, should keep their word." *C.I.A. v. Sims*, 471 U.S. 159, 175, 105 S. Ct. 1881, 1891 n. 20 (1985) (internal quotations omitted).

IV. CONCLUSION

In conclusion, the Department's argument that the Appellant's refund claims are barred in whole or in part by the statute of limitations is without merit and should be denied. The Department validly entered into the waivers to extend the time for the Appellant to file the refund claims at law, and the Department cannot now make a blanket assertion that the waivers only operate in favor of the Department, and against the taxpayer. This is particularly true where the Department, utilizing virtually the identical form, now concedes the waiver goes both directions. Justice and equity demand that the Department be held accountable for its agreements and course of dealing with the taxpayers of this state, and that the waivers extending the time to assess a tax be found equally valid to extend the time to claim a tax refund.

RESPECTFULLY SUBMITTED,

A handwritten signature in cursive script, appearing to read "Lewis F. Gossett", followed by a stylized flourish or mark.

Lewis F. Gossett, Esquire
President and Attorney for *Amicus Curiae*,
South Carolina Manufacturers Alliance

January 10, 2014
Columbia, South Carolina

EXHIBIT A

AFFIDAVIT OF ROBERT ANDERSON

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Corporation)
)
 Petitioner,)
)
 vs.)
)
 South Carolina Department of Revenue,)
)
 Respondent.)
 _____)

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

**AFFIDAVIT OF
ROBERT K. ANDERSON**

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

PERSONALLY APPEARED BEFORE ME, Robert K. Anderson, who first being duly sworn, deposes and says as follows:

1. I am over the age of eighteen (18) years old.
2. I was employed by the South Carolina Department of Revenue (formerly known as the South Carolina Tax Commission) (hereinafter referred to as the "Department") from 1975 until I retired in 2008.
3. While employed with the Department, I served in various positions beginning with an entry-level position with the Audit Division, then was promoted to Regional Manager, then Manager of Audits, then Administrator of Field and Office Operations, and finally was employed as Senior Administrator until the time of my retirement.
4. Since the time I served as Manager of Audits, I had the primary responsibility and authority for executing Form FS-43, Consent to Extend the Time to Assess Tax.
5. In many cases, the authority to issue and execute Form FS-43 was delegated to the auditors auditing a taxpayer's file.

6. Form FS-43 was regularly and commonly used during my employment with the Department, and the Department typically was the party who requested that the form be executed.

7. Form FS-43 is an official document issued by the Department when agreeing to extend the time to assess additional tax or issue a refund with a taxpayer. I do not know when Form FS-43 was first promulgated, but it was many years, if not decades, ago.

8. The use of Form FS-43 was common knowledge within all levels of the Department. To my knowledge, the Department had a process for approving all forms and I assume the Form FS-43 went through such approval process.

9. The Department issued Form FS-43 to obtain the taxpayer's written consent to extend the time to assess or refund additional tax.

10. To encourage a taxpayer's agreement to extend the time to assess additional tax, the Department intended that Form FS-43 similarly extend the time for a taxpayer to file a refund claim with the Department or for the Department to grant a refund.

11. The Department did not issue any other form document or other writing to obtain a taxpayer's consent to extend the statute of limitations.

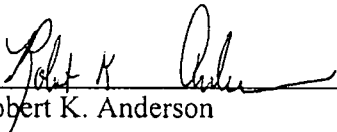
12. The Department had several revised versions of Form FS-43, all of which were intended to extend the time for the taxpayer to file a claim for refund during the waiver period.

13. By executing Form FS-43, the Department believed that it was exercising its discretionary authority to grant a refund upon examination of a taxpayer's return or otherwise, including the taxpayer's filing a refund claim with the Department within the period of time stated in the FS-43, in exchange for the taxpayer's consent to extend the period of time to assess additional tax.

14. I am not aware of any conflicts or controversy either within the Department or with taxpayers regarding the wording of Form FS-43. To my knowledge, the Department has never refused to honor a valid refund claim filed during the time period covered by Form FS-43.

15. The multiple execution of the Form FS-43s in the Duke Energy Corporation Audits over a long period of years was principally requested by the DOR auditor assigned to the file.

FURTHER AFFIANT SAYETH NOT.


Robert K. Anderson

SWORN and subscribed to before me
this 17th day of May, 2012.


 (L.S.)
Notary Public for South Carolina
My Commission Expires: 5/7/22

EXHIBIT B

AFFIDAVIT OF MARTIN DAVANT

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Corporation)
)
 Petitioner,)
)
 vs.)
)
 South Carolina Department of Revenue,)
)
 Respondent.)
_____)

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

**AFFIDAVIT OF
MARVIN N. DAVANT**

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

PERSONALLY APPEARED BEFORE ME, Marvin N. Davant, who first being duly sworn, deposes and says as follows:

1. I am over the age of eighteen (18) years old.
2. I was employed by the South Carolina Department of Revenue (formerly known as the South Carolina Tax Commission) (hereinafter referred to as the "Department") for thirty-seven (37) years beginning in 1964 as an auditor with the Estate & Gift Division, an assistant director of the Estate & Gift Division and then the combined Estate & Gift and Income Tax Divisions, and as Director, Field Services Division, until my retirement in 2001. After I retired, I acted as a consultant to the Director of the Department.
3. The Department authorized the Director of its Field Services Division to fill out, execute and issue Form FS-43 to taxpayers.
4. In the performance of my services as Director, I was authorized to issue and execute, and did routinely issue and execute, the Department's Form FS-43, Consent to Extend the Time to Assess Tax.

5. Form FS-43 was a commonly utilized form, to such extent that I, with approval of the Department, allowed my audit deputy to sign the form in the interests of time.

6. It was common practice for the Department to seek an extension of time to make an assessment and request that taxpayer's sign Form FS-43. For example, if auditors were on a short time frame to audit a file, they would request that the taxpayers sign Form FS-43 as an agreement with the Department to extend the time for both assessments and refunds.

7. The Department promulgated and issued Form FS-43 as an official Department form document. To the best of my knowledge, information and belief, the Department has utilized this form since at least the 1960s, as the form was in use prior to the time I became employed with the Department.

8. Form FS-43 was an official form issued by the Department and provided to the Field Services Division for use in its operations.

9. To the best of my knowledge, information and belief, the Department did not issue forms that had not been properly reviewed or approved.

10. The Department's forms identified which division used the form by including the division's name or initial on the form.

11. To the best of my knowledge, information and belief, no individual division of the Department promulgated its own forms, and every form used by any division was an official form provided to it by the Department.

12. The Field Services Division did not review or question Form FS-43 because it was instructed to use the form by the Department.

13. To the best of my knowledge, information and belief, the use of Form FS-43 by the Department was never questioned.

14. To the best of my knowledge, information and belief, the Department historically intended, believed and understood that Form FS-43 not only extended the time to assess additional tax, but also authorized or extended the time for a taxpayer to file a claim for refund within the time stated in the Form FS-43.

15. Prior to enactment of the South Carolina Revenue Procedures Act in 1995, the Department believed that after the execution of the FS-43 by the DOR and the taxpayer that it was authorized and permitted to issue refunds of overpaid tax even if a claim for refund by the taxpayer would not otherwise be timely under the applicable statutory limitations period for filing a refund claim and regardless of whether the period of time initially prescribed for filing a claim for refund had expired.

16. Prior to enactment of the South Carolina Revenue Procedures Act, it was my intent, belief and understanding as Director of Field Services that an executed Form FS-43 constituted the Department's agreement to issue a refund – whether resulting from a review of the taxpayer's records commenced by the Department's on its own initiative, upon consideration of a claim for refund filed by the taxpayer prior to the time stated in the Form FS-43, or otherwise – pursuant to its authority to issue refunds of overpaid tax even if a claim for refund would otherwise be untimely.

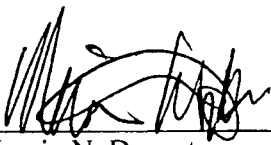
17. After enactment of the South Carolina Revenue Procedures Act, there was no difference in how Form FS-43 was interpreted by Department, and the content of the form remained the same.

18. To the best of my knowledge, information and belief, I had the same authority to sign Form FS-43 before and after enactment of the South Carolina Revenue Procedures Act.

19. Both before and after enactment of the South Carolina Revenue Procedures Act, the purpose of Form FS-43 was to allow the Department and the taxpayer by agreement to extend the time for assessment or refund, whether discovered on audit or a refund claim filed by the taxpayer. The form was specifically used for purposes of recording the agreement to extend the time limitations for both the Department and the taxpayer.

20. It was my intent, belief and understanding as Director of Field Services that a refund claim filed after the statute of limitations had expired would be treated differently than a refund claim filed during the extended period of time agreed to by the Department and the taxpayer by executing Form FS-43. The Department would not consider a refund claim filed in the former situation, but would, in accordance with its agreement, in the latter.

FURTHER AFFIANT SAYETH NOT.



Marvin N. Davant

SWORN and subscribed to before me
this 16th day of May, 2012.

Marajie W. Rish (L.S.)
Notary Public for South Carolina
My Commission Expires: 11-4-2020