

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Administrative Law Judge

73936

**RECEIVED**

OCT 22 2014

Appellate Case No. 2012-213180

Duke Energy Corporation.....

Appellant, **SC Court of Appeals**

v.

South Carolina Department of Revenue.....

Respondent.

**APPELLANT DUKE ENERGY CORPORATION'S PETITION FOR REHEARING**

**INTRODUCTION**

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Duke Energy Corporation ("Duke Energy") seeks rehearing of the Court's opinion in the above-captioned case filed on October 8, 2014. As explained below, the Court overlooked and misapprehended several things when it ruled that, as a matter of law, (1) Duke Energy is a manufacturer ("Manufacturing Issue"), and (2) Duke Energy is not permitted to include all receipts from its sales of securities in the denominator of its apportionment formula ("Gross Receipts Issue"). Because of those oversights and misapprehensions, the Court should also reconsider Duke Energy's argument that its refund claims for South Carolina corporate income taxes for the period of 1978 to 1993 are timely ("Timeliness Issue").

## ARGUMENT

### **I. Manufacturing Issue**

The Court concluded that the issue of whether Duke Energy was required to apportion its income under the multi-factor apportionment formula set forth in S.C. Code Ann. § 12-6-2252 or the single-factor apportionment formula set forth in § 12-6-2290 was “primarily one of statutory interpretation in which the facts are undisputed.” *Duke Energy Corp. v. S.C. Dep’t of Rev.*, Op. No. 5274 (S.C. Ct. App. filed Oct. 8, 2014, Shearouse Adv. Sh. No. 40 at 50). The Court found that Duke Energy is a manufacturer. In so holding, the Court made a number of critical errors that warrant rehearing of its decision

#### **1. The Court overlooked and did not apply the long-standing principle that in case of doubt, tax statutes must be construed in favor of the taxpayer.**

The Court overlooked and failed to apply the long-standing principle that “[i]n the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt.” *Alltel Commc’ns, Inc. v. S.C. Dep’t of Revenue*, 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012), (citing *S.C. Nat’l Bank v. S.C. Tax Comm’n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989)). “[W]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor.” *Id.*

The Court held that the Manufacturing Issue turns on the meaning of the term “manufacturing” as used in S.C. Code Ann. § 12-6-2252. *Duke Energy Corp.*, Op. No. 5274 at 51. The Court acknowledged that the term is not defined in the tax code, yet, in its view, the term had a “plain and ordinary meaning” based on the term’s definition in the Webster’s New Collegiate Dictionary. *Id.* at 52.

The Court's reasoning overlooks and/or misapprehends both South Carolina precedent and the long-standing policy of the Department of Revenue. As discussed in more detail in Duke Energy's Initial Brief, South Carolina courts and the Department have always viewed manufacturers as persons dealing in tangible personal property. (App. Initial Brief at 34-35.) Moreover, utilities, such as Duke Energy, and manufacturers are two separate and distinct categories for purposes of the North American Industry Classification System, which determines the Principal Business Activity Code that Duke energy must list on its Federal and South Carolina income tax returns. (App. Initial Brief at 4.) During the tax years at issue in this case, Duke Energy included the code for the electric power generation, transmission and distribution utilities category. (*Id.*) Therefore, the use of the term "manufacturing" for South Carolina income apportionment purposes is not "plain and ordinary" and any ambiguity should have been construed in favor of Duke Energy.

Therefore, construing the term "manufacturing" in favor of Duke Energy, and given South Carolina precedent and administrative guidance that manufacturers are persons dealing in tangible personal property, the court erroneously concluded that Duke Energy is a manufacturer.

Additionally, the Court erroneously relied on, and misapplied, S.C. Code § 12-6-2210(B) because the record contains no evidence that apportioning Duke Energy's income to South Carolina based on the single-factor formula does not "reasonably represent the proportion of the trade or business carried on within this State." *Duke Energy Corp.*, Op. No. 5274 at 55. See *CarMax Auto Superstores West Coast, Inc. v. S.C. Dep't of Rev.*, 397 S.C. 604, 611, 725 S.E.2d 711, 714-715 (Ct. App. 2012).

**2. The Court erred in concluding that Duke Energy is engaged in “manufacturing”**

In concluding that Duke Energy is principally engaged in manufacturing, the Court committed a material factual error by overlooking the Department’s concession regarding this issue. The Court erroneously relied on the Administrative Law Court’s determination that Duke Energy “has failed to establish by the preponderance of the evidence that its principal business in South Carolina is not manufacturing.” *Duke Energy Corp.*, Op. No. 5274 at 56. To the contrary, the Department itself has conceded that Duke Energy’s principal business in the State is the provision of Electricity. (Respondent’s Brief at 33.)

In addition, Duke Energy has never “agree[d]” that its business in South Carolina is the “production of electrical power.” *Id.* at 51. Duke Energy’s primary business in South Carolina is the provision of electric service to its customers. (App. Initial Brief at 4.) The Court was also incorrect in concluding that Duke Energy “creates” an electrical charge, despite expert testimony in the record to the contrary. (App. Initial Brief. at 8.)

**II. Gross Receipts Issue**

The Court held that proceeds from Duke Energy’s sales of securities do not constitute “receipts.” *Id.* at 59. In so holding, the Court, incorrectly applied South Carolina tax statutes and South Carolina’s rules of statutory interpretation. *Id.* at 56-59.

The single-factor apportionment formula is based on “total gross receipts.” *See, e.g.*, S.C. Code Ann. § 12-6-2290 (applicable for tax years beginning after 1995) (emphasis added); former S.C. Code Ann. § 12-7-1190 (applicable for tax years prior to 1996) (emphasis added). The multi-factor formula, which the Court believes applies to Duke Energy, makes no reference to “receipts,” and instead is based on “total sales.” S.C. Code Ann. § 12-6-2280 (for tax years after 1995); former S.C. Code Ann. § 12-7-1170 (for tax years prior to 1996). Neither term is defined.

In either case, however, all proceeds must be included – the total gross receipts under the single-factor method, and the total sales under the multi-factor method. Neither statute suggests that anything less than the total proceeds should be included. *Beach v. Livingston*, 248 S.C. 135, 139, 149 S.E.2d 328, 330 (1996) (“The language of a tax statute must be given its plain ordinary meaning in the absence of an ambiguity therein. . . . [I]f a legislative intent is clearly apparent from the language of the statute there is no occasion for resort to the rule of statutory construction.”); *Duke Power Co. v. S.C. Tax Comm’n*, 292 S.C. 64, 66, 354 S.E.2d 902, 903 (1987) (“The . . . language [of the statute] clearly states that the license fee on power companies, such as Duke, is based on entire gross receipts and not just receipts from customer charges.”); (see also App. Initial Brief at 22-24.)

Even if those terms were deemed ambiguous, the Court must construe them in favor of Duke Energy. *Alltel Commc’ns, Inc. v. S.C. Dep’t of Revenue*, 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012) (“[W]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor.”).

In the Court’s view, Duke Energy’s receipts other than the “return on investment” are not “receipts” because those receipts are Duke Energy’s “own money – not money it received for its products or services.” *Duke Energy Corp., Op. No. 5274* at 59. However, the undisputed evidence in the record demonstrates that Duke Energy’s purchases and sales of short-term securities are sales and not recoveries of principle. (App. Reply Brief at 7.) All receipts from Duke Energy’s sales of securities are business receipts from activities conducted in its ordinary course of business. Therefore, the Court’s finding was erroneous.

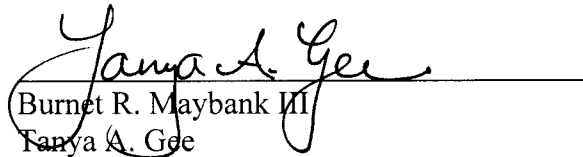
**III. Timeliness Issue**

The Court erred in failing to address the Timeliness Issue because of its rulings on the Manufacturing and Gross Receipts Issues, as discussed above.

**CONCLUSION**

For all of the above reasons, Appellant requests that Duke Energy's Petition for Rehearing be granted and that the Court rehear and amend its decision.

Respectfully submitted this 22nd day of October 2014.



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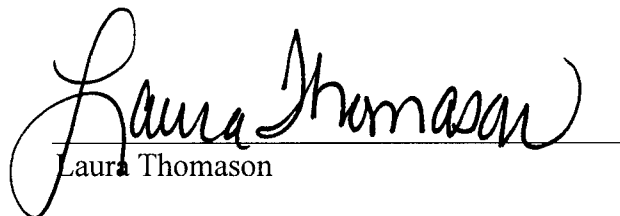
South Carolina Department of Revenue..... Respondent.

**PROOF OF SERVICE**

This is to certify that the foregoing Appellant's Petition for Rehearing was sent via US  
Mail addressed as follows this 22nd day of October 2014:

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October 22, 2014

**VIA HAND DELIVERY**

The Honorable Jenny A. Kitchings  
Clerk of Court, S.C. Court of Appeals  
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**SC Court of Appeals**

**Re: Duke Energy Corp. v. SCDOR  
Case Tracking #: 2012-213180**

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of *Appellant's Petition for Rehearing*, along with a \$25.00 filing fee. Please file the original and return one file-stamped copy to the courier. Also enclosed is a proof of service, showing that opposing counsel have been served with this petition.

Charleston  
Charlotte

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Greensboro  
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Hilton Head

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Raleigh

Very truly yours,

  
Tanya A. Gee

Enclosure

cc: Harry Hancock  
Milton Kimpson  
John M. S. Hoefler  
Tracey C. Green  
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